Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 177/87

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. AINSWORTH JOHNSON
CHESTER FUNG

A.J. Nicholson for Johnson

F.M.G. Phipps, Q.C., for Fung

Miss Donaree Banton for Crown

February 11 & March 7, 1988

FORTE, J.A.

These appeals came before us on 11th February, 1988 as applications for leave to appeal. The applications were treated as the hearing of the appeals which were allowed. In respect to the appellant Ainsworth Johnson, a verdict of manslaughter was substituted and a sentence of ten years imprisonment with hard labour, imposed. The conviction of the appellant, Chester Fung was quashed and the sentence set aside, and a verdict and judgment of acquittal entered. We set out below our reasons as promised.

Both appellants were convicted for the offence of murder in the Home Circuit Court on the 24th September, 1987.

The incident out of which these convictions arose, had its beginning at about mid-day on the 26th of December, 1985, when the deceased Anthony Myers and Alfredo Collins who gave evidence for the prosecution were travelling on a mini-bus commonly called a "Quarter Million" going towards Kingston from Spanish Town. They had boarded the bus at Central Village, St. Catherine. The bus stopped at Ferry

and the appellant Ainsworth Johnson and a Chinese lady, later identified as Diana Chin boarded the bus. They had come onto the bus, having just come out of a white pick-up, parked at a crossing which joins the two highways. There was no dispute at the trial that Ms. Chin had a proprietary interest in the mini-bus and had come onto the bus to collect money from the conductor. This appellant and the deceased subsequently became engaged in an argument, which apparently arose out of their respective positions on the bus. They were both on the step of the bus, each insisting that the other move up inside the bus. During this argument, the bus stopped "at the other end of Ferry." When it stopped, this appellant came off and picked up a stone, but as he turned around, the bus began to move, and the deceased rushed off the step and went further into the bus. After the bus moved off, this appellant went back to the white pick-up which, was driven by the appellant Fung who then followed the bus. Diana Chin remained on the bus, and was engaged in an argument with the deceased and Mr. Alfredo Collins, but that argument is not of any assistance in determining the issues raised in this appeal. The bus next stopped at Asphalt Paving, and the white pick-up, which was following, drove onto the soft-shoulder - alongside the bus and stopped. The appellant Johnson left the pick-up, as it stopped, went to the door of the bus, and using a knife, which was seen in his hand, approached and stabbed Anthony Myers in his side, accompanying this action with the words "Bwoy, a who yuh a run up you b.... c.... mouth pon." The deceased then said to the witness Collins, "George the boy stab me you know, me a go dead." He then moved towards Collins who is called George, who held him and put him to sit inside the bus. In the meantime, this appellant returned to the pick-up which the appellant Fung then drove away. The prosecution also alleged that when the pick-up drove onto the soft-shoulder, the appellant Fung, also came out of it and stood leaning on it, with a springblade in his hand, but he did not do anything.

The post mortem examination on the body of the deceased revealed that the deceased died from a stab wound located in the lateral aspect of the left chest which is located nineteen inches below the top of the head and seven-and-a-half inches to the left of the anterior mid-line. The pathologist testified at page 82 of the record that:

> "The track of the wound, which is somewhat oblique, or slanted to the side, perforates the skin, sub-cutaneous tissues, that is the underlying tissue under the skin, and enters the left chest cavity by partially severing the sixth rib, which is located just about here, then it penetrates the lower lobe of the left lung. The injured lung collapsed and there was blood inside the left chest cavity. The total depth of penetration is approximately five inches. That means it goes - the weapon was inflicted five inches deep inside the body."

The defence differed in several material particulars from the prosecution's case. Though admitting the argument on the bus between the appellant Johnson and the deceased - the defence alleged that when the bus stopped at Ferry the deceased had come at the appellant with a knife, necessitating his coming off the bus, and arming himself with a stone. After the bus moved off the pick-up followed in furtherance of normal procedure to collect Ms. Chin whenever she would have completed her mission on the bus. The defence alleged, contrary to the prosecution's case, that the pick-up stopped behind the bus and not beside it on the soft-shoulder. Both appellants maintained that the deceased then left the bus, came to where the pick-up was parked, and attacked the appellant Johnson with a knife, and it was in defending himself from that attack that Johnson inflicted the fatal injury to the deceased. The appellant Fung, denied any participation in the incident and in an unsworn statement, supported the account of his co-accused Johnson. He denied having a springblade in his hand at anytime, and that he had any knowledge that the appellant Johnson had a knife, until he saw him using it after being attacked by the deceased. He maintained, that he did not

drive away with Johnson after the stabbing, and in fact did not see where Johnson, whom he called "Rumpel," went, after the incident. He subsequently looked for Johnson, did not find him, then tried to follow the bus but lost it. After checking at several hospitals, he went to the Half-way-tree Police Station, to enquire about the bus, and there he was arrested and charged for "conspiracy to murder."

Before us, Mr. Nicholson for the appellant Johnson, argued strongly that the learned trial judge erred in withdrawing from the jury's consideration the issue of provocation.

It is not in issue that the learned trial judge did in fact direct the jury that it was not open to them to consider provocation on the facts of the case. He did so at page 128 of the transcript as follows:

> "And also - it doesn't arise in this case - there must be provocation - there must be acts of provocation. Provocation doesn't arise in this case."

And again at page 167 he said:

> "In this case it is murder or nothing, nothing else; either murder or nothing."

Mr. Nicholson argued before us that there was evidence both on the account given by the prosecution and that given by the defence which could amount in law to provocation, and the learned trial judge having withdrawn that issue from the jury, deprived the appellant Johnson of the opportunity of being acquitted of murder and being convicted of manslaughter. With this submission, we agreed. On the prosecution's case, there was admittedly an altercation between the deceased and the appellant which resulted in the appellant coming from the bus and arming himself with a stone. The altercation began, when the deceased told the appellant Johnson to step up into the bus, so that he (deceased) could come up because he did not want the police to take him off the bus and take him to jail on a holiday. The appellant objected and an argument commenced, resulting in the appellant coming off at the next stop

and picking up the stone. On the defence case, it was alleged by the appellant Johnson and the witness Diana Chin that there was an altercation in which the deceased drew a knife from a holster attached to his waist, and that was the reason for the appellant Johnson jumping from the bus and picking up the stone.

In the words of the appellant Johnson in his unsworn statement:

> "I went on a bus, with a Chiny lady by the name of Diana Chin to collect some money and when I went on the bus I saw three man on the step, I said to him, 'Go up inside of the bus for you is a passenger,' and he looked round and said to me, who me talking and mi say 'is you a talking to,' and I saw him friend round at the back, said, 'How you mek the bwoy a deal with you so?' and I say, 'Mi not dealing with him any way, I just tell him the truth to go up inside the bus for him is a passenger and I see him pull a knife from his waist and stab at me and I run out of the bus and took up two stone and I see him run inside of the bus and the bus drive away."

The appellant Johnson was supported by the testimony of the witness Diana Chin who stated thus (pp 100 - 101):

> "I went straight to the bus and held on to the grab-rail and Rumpel came and stood on the step, and there was another man on the step and Rumpel said to him to go up in the bus. And he said to Rumpel, 'You go up', and Rumpel say, 'No, you go up because I soon come off.' Then the man started cursing him and threatening him ..... that he would cut him and lick him down and all sorts of things. ..... Then the man took out a knife that was in a little case at his waist and the bus stopped to pick up a lady, two children and another man ..... and Rumpel and the other gentleman stood down, they came out of the bus and stood down. The man went after Rumpel with the knife, I don't know what they said to each other and Rumpel ran a little way and picked up two stones. The conductress send off the bus and the man hop on the bus, Rumpel did not come on the bus."

Learned Counsel for the Crown, conceded quite correctly for the defence during the course of her arguments that the evidence in respect of the events which the learned trial judge described as phase one of the incident and which in our view was merely a part of the whole incident, was evidence which could amount to provocation. Miss Banton nevertheless argued that those events were separate and apart from the subsequent stabbing of the deceased which could be said to have taken place when the appellant would have had sufficient time for passion to cool.

With this we disagree. A view of the ~~total~~ picture leaves it abundantly clear that the jury would have been entitled to consider all the events of that fateful day as comprising one incident. In any event the question of 'cooling time' is really a matter for the jury to decide, and not one which falls within the province of the learned trial judge.

In the case of Lee Chun-Chenn v. R (1963) 1 All E.R., 73 Lord Devlin adumbrated the test to be applied in determining the question of provocation. The three elements that must exist are, the act of provocation, the loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. This test was approved by this Court in R. v. Pennant S.C.C.A. 126/84 (unreported). In our view there was evidence, in the instant case, upon which the jury should have been asked to determine whether those elements existed, and we therefore came to the conclusion that the learned trial judge erred by specifically withdrawing the issue of provocation from the jury. That being so, the conviction for murder could not stand.

Mr. Nicholson, sought, and was given leave to argue the following ground of appeal:

> "That as far as 'Phase One' of the incident as his Lordship put it in his summation to the jury - is concerned, it is submitted that the learned trial judge failed adequately or at all, to guide and assist the jury in determining whether or not your appellant had a genuine belief that a knife had been brandished by the deceased, directing the jury's attention to those features of the evidence that could have made such belief more or less probable."

The Court gave a patient hearing to Mr. Nicholson during his valiant effort to develop this argument but nevertheless concluded that there was really no merit in this ground. At the end of the summing-up, the issue of self-defence had been clearly left with the jury.

As the complaint relates to a failure of the learned trial judge to adequately guide and assist the jury in determining whether or not the appellant had a genuine belief that a knife had been brandished by the deceased, it should be stated that the facts of this case did not relate to a mistake of fact and therefore the question of 'genuine belief' did not arise for consideration. This was a case in which the issues were well defined - the appellant alleging that he was in fact attacked with a knife by the deceased, and that he stabbed the deceased in order to defend himself from death or serious injury - and the prosecution maintaining that the appellant delivered the fatal injury in circumstances where he was not being attacked and at a time when the deceased was unarmed. In our view the learned trial judge dealt adequately and correctly with those issues, and gave sufficient assistance to the jury.

We turn now to the appeal of the appellant Chester Fung. This appellant was convicted on the basis of the doctrine of common design, the allegation being that he acted in concert with the appellant Johnson in the commission of the offence. The facts upon which the prosecution relied were as follows:

The appellant would have seen when Johnson armed himself with stones and the bus having moved off, drove Johnson in the white pick-up following the bus and at the next stop of the bus, parked the pick-up alongside it. It was alleged that he came out of the pick-up at the same time with Johnson, and at that time he was armed with a spring-blade. Apart from that, there was no evidence that he did anything else at the time of the stabbing. Indeed, what is revealed in the evidence, is that he stood leaning on the pick-up when Johnson stabbed the deceased. It was further alleged that after the stabbing, Johnson jumped back on the pick-up and the appellant Fung drove him away.

In our view, the learned trial judge in his directions, put the case for the prosecution in a very favourable light and by contrast, omitted to give the jury any assistance in understanding the case for the defence. In presenting the case for the prosecution, he spoke thus:

> "I am still on the prosecution's case, and the evidence that the prosecution has shown which they say should satisfy you against Fung in this common-design is (1) the prosecution tells you that you must draw the inference, or you can draw the inference that Johnson must have told Fung, the son of Miss Chin, the driver of the pick-up that something happened in phase one when he took up the stone. The prosecution is saying that Fung knew that something happened on the bus and that is why he drove up to the bus at Asphalt Paving, drove up with the enforcer to discipline the deceased man on the bus. Beat him up, the prosecution is saying. He is a bad man. That is why Fung drove the pick-up up there.
>
> The prosecution is saying another piece of evidence that you can look at to say Fung was there actively to give assistance is the fact that he came out with the spring blade and stood there. True enough he didn't say, "stab him", or whatever it was, but he came out with the spring blade, he stood there; that is what the prosecution is saying.
>
> Lastly, the prosecution is saying that the participation in this common-design to cause death or to cause serious bodily harm from which death resulted was grounded when Mr. Fung drove away Johnson in the pick-up. In other words, the prosecution is saying you are not to believe what

> "Mr. Fung is saying that he didn't see "Rumpel" when he looked around after the stabbing. The prosecution is saying that the common-design was completed when he drove away the accused man, Johnson, in the pick-up."

These directions were obviously based on the prosecution's interpretation of the evidence, and are, in our opinion, inconsistent with another equally reasonable interpretation of the evidence, which the jury should have been directed to bring to their deliberations. Instead, at the end of the summing-up, the prosecution's case was presented as possessing much greater strength than it did, in reality.

Firstly, the prosecution's invitation as described by the learned trial judge to infer that the appellant Johnson told the appellant Fung what happened in 'phase one' of the incident, was an invitation to draw an inference from no proven facts and at the very highest could only amount to suspicion that such a conversation took place between the appellants. In any events, there was no evidence upon which the jury could come to a conclusion either as to (i) whether any such conversation took place and (ii) if it did, what exactly would be the account given to Fung by the appellant Johnson.

Secondly, the proposition that 'Fung knew that something happened in the bus and that is why he drove up to the bus at Asphalt Paving is, in our opinion, only one of two interpretations that could be given to that evidence. These were circumstances where the mother of the appellant, Fung, was on the bus carrying out her usual function of collecting money from the conductor, and the appellant would, in the normal course of his responsibilities, be required to follow behind the bus in order to transport her, after she had completed her duties thereon. There was therefore, a completely innocent reason for the appellant to drive the pick-up alongside the bus, a reason which the learned trial judge could have invited the jury to consider in determining whether that act supported the allegation that the appellant Fung was participating in a concerted plan with Johnson.

Thirdly, the fact that Fung, came out with a springblade does not per se, particularly in the circumstances that existed, prove any activity which could be inferred to be a part of a common design. The jury ought to have been invited to assess this evidence against the background of the appellant's mother being in the bus, and the appellant having earlier seen Johnson pick-up a stone, obviously indicating that something was amiss on the bus, which might have placed his mother in some personal danger. In any event, the evidence revealed that he did nothing more than stand there with the springblade in his hand an action which would be equally consistent with his preparing to defend his mother or himself if the occasion arose.

Fourthly, the learned trial judge fell into error when he left the following directions to the jury:

> "Lastly the prosecution is saying that the participation in this common design to cause death or to cause serious bodily harm for which death resulted was grounded when Mr. Fung drove away Johnson in the pick-up."

Indeed, on another occasion at page 150 of the record he pronounced thus:

> "The prosecution says Fung was there, he aided and abetted the stabbing and he was there to give assistance and in fact according to the prosecution he did give assistance because after the stabbing he drove away Johnson therefore he is responsible."

From these two passages, it is clear that the jury were left with the impression that if they found that the appellant Fung, drove Johnson away after the stabbing, then that by itself would be 'ground' or 'reason' for concluding that he acted in concert with Johnson in furtherance of a common design to kill the deceased or cause him serious bodily harm. This in the view of this Court is incorrect, and though the act of driving away a person known to have committed an offence, could amount to an offence, it is not evidence which by itself could achieve the degree of proof necessary to incriminate the appellant Fung as a participant in the murder allegedly committed by Johnson.

We found great merit in the complaint on behalf of the appellant Fung, that the learned trial judge deprived him of a real chance of acquittal by his misdirections on common design and we came to the conclusion as well that in any event, the evidence adduced by the prosecution did not discharge the burden placed on it. This must result in the quashing of this conviction.