IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 105/81

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

REGINA V. CALVIN DOUGLAS

Mr. L. H. McLean for Applicant

Mr. Howard Cooke and Miss Edwards for the Crown.

April 20-22, September 19, 1983

KERR, J.A.:

The applicant was convicted for the murder of Wade Jadusingh on June 17, 1981, in the Circuit Court Division of the Gun Court before Vanderpump, J. and a jury and being under 18 years of age at the date of the offence, was sentenced to be detained during Her Majesty's pleasure.

The hearing of this application for leave to appeal against conviction was treated as the hearing of the appeal, the appeal was dismissed and the conviction affirmed.

On July 13, 1980, about 9:30 a.m. the deceased and his brother Desmond were journeying on foot from the district of Bitu to their father's property at Benim in the hilly rurals of St. Andrew. When about three quarters of a mile from Bitu, according to Desmond Jadusingh, they were set upon and made captives by a group of about eight men armed with firearms - long and short guns; the appellant was in the group and he was armed with a long gun.

Then they were subjected to a terrifying ordeal. They were marched to and fro in that remote area and were brutally beaten with the guns, the appellant in particular striking Desmond in the back. During that time, shots were fired and on reaching the premises of Lucinda Roberts deceased and Desmond were put to lie on their backs. Lucinda Roberts and someone in the crowd had a conversation. The captors then split into two groups; Desmond was in a group of four which included the appellant, who kept prodding him in his back with

a gun moved off towards a precipice and about three quarters of a chain from this precipice he was questioned, beaten and one of the group threatened to shoot him and one wanted to cut out his tongue. He sought safety in flight; dodging and running and actually jumping over the precipice. He fell and broke both arms. After he fell and was at the bottom of the precipice he heard the sounds of shooting coming from where he had left his captors. He walked on for about three miles to the District of Cane River where he met his uncle who took him to the Bull Bay Police Station. He was hospitalized with his injuries for four days.

The appellant is a deaf mute and an albino - a rara avis in any country. In the local vernacular he is a "dumb dundus" and was so described by Desmond Jadusingh, who said he had known him for about four years, having seen him in the Bull Bay area from time to time when on his way to school. He was the only person in that area of that size and colour and a deaf mute.

Lucinda Roberts as crown witness gave evidence of seeing the witness Jadusingh and another lying on the ground and three boys standing over them. One of those boys had a gun. She spoke with them and all five including the two on the ground moved off. She did not see the appellant that morning.

Detective Blanford Davis received certain information from Desmond Jadusingh and about 6:00 a.m. the following morning found the dead body of Wade Jadusingh in a place called Version Gully about five miles from Lucinda Roberts' home. In the area near the body he found nineteen spent M.16 cartridges and one shot-gun cartridge case. He arrested appellant on a warrant on July 17.

Dr. Mariappa Ramu who performed the postmortem examination on the body of Wade Jadusingh, found:

(1) A firearm entry wound in the lumbar region penetrating the intestines and making its exit on the left side of the lower abdomen.

(2) A firearm entry wound over the left back - the bullet penetrating the left lung and its exit was on the side of the chest above the pit of the stomach.

(3) A bullet wound through left shoulder and lung with exit over the front of the chest.

There were also bullet wounds to the right palm and left elbow. Death was due to haemorrhage and shock. Fragments of the bullets were found. The doctor was of opinion that the injuries were caused by high velocity firearm. The Ballistic Expert Supt. Wray was of opinion that cartridges of the M.16 found near the body were all fired from the same firearm.

The defence was an alibi. The appellant through interpreters in his statement from the dock said that he lived his life at Bull Bay, he learned shoe-making from Victor England and he never beat any boy with gun.

In support of the alibi the defence called three witnesses. Phyllis Johnson, his mother, said that appellant, his father, Leonard Douglas, Uroy McFarlane and herself on the morning in question travelled by bus to Kingston leaving Bull Bay, about 9:00 a.m. In Kingston McFarlane left them to seek employment. She is a higgler and appellant spent the day at her stall at the corner of Matthews Lane and West Queen Street. Appellant, his father and herself left Kingston by bus at 4:30 p.m. arriving at Bull Bay at 6:30 p.m. The appellant was born in 1962.

Leonard Douglas' evidence was to the same effect. Victor England, the shoe-maker of Greenvale View, Bull Bay, said in effect appellant was his apprentice. He was regular and attentive to his work and that on July 12, appellant was at work with him. Uroy McFarlane also a mute, gave evidence to the effect that on July 12, he met appellant in Kingston and they both went to his (McFarlane's) work place and spent the day there. In cross-examination he said he did not know Bull Bay nor where the appellant lived.

Of the several grounds of appeal we propose to deal only with those which were pursued and merited careful consideration. It was contended by Defence Counsel Mr. McLean that the learned trial judge so forcefully projected the case for the prosecution in his summary while as it were he kept watering down the appellant's case that the jury in all likelihood viewed the summary in its entirety as a direction to them to return a verdict of guilty.

As illustrative, he referred to the comments made by the trial judge concerning defence attorney's cross-examination as to the geography of the area when in reviewing the evidence of Desmond Jadusingh, he said:

> "He was cross-examined about a lot of geography. Mr. McLaren didn't address on any geography, so I don't know what all the geography was about. The distances. He said, "Nine miles from Taylor Land to Version Gully, and from Nine Miles around seven miles up in a hilly area. When I jumped, I was about seven miles from Nine Miles, nine miles from Version Gully. Nine Mile district from Version Gully is a matter of chains." He says, "By road, where I jumped, it is about six and three quarter miles by road from Version Gully to Taylor Land, but by track it's nearer."

and in relation to the evidence of Lucinda Roberts who was recalled by the Defence:

> "Later on, that day, she was called back again to give some more geography. "From Bull Bay to West Street, ten-and-a-quarter ten-and-a-half miles. Bull Bay to Matthews Lane approximately just the same distance. Taylor Lands, I know those two spots, about ten miles. Version Gully about 10¼ miles." I don't know what all this is for. Perhaps you know - I don't know, Mr. Foreman and members of the jury."

Counsel submitted that the distance between the various places were inportant on the question of common design and that having regard to where the body was found and its distance from Lucinda Roberts' home, the question whether or not it was the same group at Lucinda Roberts who killed Wade Judasingh arose for the determination of the jury. However, in this regard, we note that later in his summation, the learned trial judge said:

> "The evidence of this lady, Lucinda Roberts, is capable of two interpretations: One of them as to the common design persisting after Desmond jumped over the cliff, the other aspect of it, as to the circumstantial evidence upon which the crown relies to prove the killing of this deceased by the accused man, of someone acting in consort with him; but it is only if you believe that the accused man was present when the group of boys ran through the yard after Desmond jumped over the cliff. You will remember, the learned Deputy Director of Public Prosecutions submitted to you that the accused was there, but because he and others turned away their faces, the lady Roberts could not see him. If you accept that evidence that he was there, then it is open to you to find that the inference that the common

> "design persisted after Desmond jumped over the precipice."

Secondly, that the learned trial judge misinterpreted the evidence to the prejudice of the defence:

> "If you accept Mrs. Roberts that the dec sed was seen running along in the direction of where his body was afterwards found....."

Appellant's attorney contends that this is not an accurate interpretation of Mrs. Roberts' evidence because when she was recalled by the defence she said that she last saw the group with Desmond Jadusingh returning from the direction of Version Gully and not going towards Version Gully.

In our view the evidence of Mrs. Roberts when recalled by defence did no more than create uncertainties. If there was a misinterpretation, it is of no moment because the reasonable inference is that it was after Desmond ran away that the deceased was killed and Mrs. Roberts' interest in the group waned to the extent that she was not sure whether or not the deceased was in the returning group and the trial judge assessed the importance of this evidence thus:

> "You remember that she said that they were walking along and that the deceased was running before them, and, that they were heading along the short-cut that led to Taylor Land, Version Gully, where the body of the deceased was found some hours afterwards. That, Mr. Foreman and members of the jury, is one of the links in the chain of circumstantial evidence; and it is said that a chain is as strong as its weakest link, and you might think that that is the weakest link, because if you find that the accused as the lady told you the accused was not there, she didn't see him - if you find that the accused was not there, although he had been there before, and after Desmond took his exit over the precipice, into the gully and you for some reason have said to yourselves, from the common design, and from the scene, then, Mr. Foreman and members of the jury, you do not take the case any further, because at that stage you find him not guilty because he wasn't there he couldn't have common design, he wasn't there; then there would be no linking him and the others to his killing. Please bear that in mind."

Accordingly, we found no merit in these submissions in relation to common design and the judges directions on this aspect of the evidence of Lucinda Roberts.

With respect to the general complaint that the trial judge kept watering down the defence, we are of the view that notwithstanding the inexplicable discrepancies between the evidence of the witnesses called in support of the alibi, the learned trial judge fairly and adequately advised the jury:-

> "If you are not sure whether what the accused man says is true or not, then you must also say not guilty. Any doubt that you have, resolve in his favour. And if you reject what he says, that he wasn't there, then you have to look at the whole of the case, and if you are not sure, you say he is not guilty. Equally, if you reject these three different alibis, if you do accept that one of the witnesses is speaking the truth and that he was with one of them, he couldn't possibly be with the three of them at the same time. So, if you reject what these witnesses say, then again, you have to look at the whole of the case, the whole of it, and if you are not sure, please find him not guilty. And if you are not sure whether to say guilty or not guilty, do please say, not guilty. If you are satisfied on the totality of the evidence so that you feel sure, then, it is open to you to return a verdict of guilty of murder against this accused person."

On such a note he concluded his full and careful summation. We find no merit in this ground of appeal.

Another ground of appeal was to the effect that counsel for the crown was permitted by the judge to put what is in effect to the jury a false theory that may have influenced them in determining the vital question of the appellant's presence in the group and that such an assertion unexplained to the jury was likely to deal a fatal blow to the defence while conversely promoting the case for the prosecution.

Counsel for the crown in the course of her address said:

> "He [Defence Counsel] said the gun was held behind his [Desmond Jadusingh's] back by the accused man. There were eight other persons there making the accused man nine and he and his brother and then a curious thing happened during the cross-examination of Desmond Jadusingh. Counsel said to him, " of the ten or eleven persons who held you up that day, what..." and I objected at that point. I said, "He didn't say ten or eleven, he said nine" and then it transpired later that after they had got to the home of Lucinda Roberts three more persons had come along and I ask you, although I do not expect to get an answer, who could know that it was more than nine persons who apprehended them that day and he could tell you the persons, who could know? Desmond Jadusingh would know that it was more than nine persons, Wade Jadusingh would know that it was more than nine persons and

> "the accused himself would know. So, I say to you, when counsel asked that question from whence did he get it? From Wade? And you must answer no. Wade is dead. From Desmond? And you must answer no. I am not going to ask from whence else, it is a matter entirely for you. I say, who else would know that it was more than nine who apprehended them? Only Desmond, Wade or the accused. Mr. Foreman and members of the jury, it is a matter entirely for you."

Crown counsel's theory is clearly a non sequitur. Indeed as Mr. McLean pointed out that information could be obtained from the preliminary examination. The very fact that there were nine or ten others and Desmond Jadusingh would negate the probability of the accused being the only source of such information or instructions.

The learned trial judge early in his summing up in directing the jury on their functions advised them inter alia:

> "But you must discard any view of the facts which I express, which I will express in this, my charge to you, and you must discard any view of the facts advanced by learned counsel in this case with which you do not agree because remember that it is your verdict that is required, not my verdict or their verdict. It is your responsibility, not anybody else's."

In relation to the bases on which the case for the crown rested he told them:

> "The crown's case consists of both direct evidence and circumstantial evidence. There is no one who saw the actual shooting of the deceased. The crown depends for that on circumstantial evidence, but for the evidence of common design, that rests on the evidence of Desmond Jadusingh, it is for you, in due course, having satisfied yourselves of the identity of the accused man to come to the conclusion whether there is a common design or there was a common design in the period of time subsisting between all these men, all these boys, including the accused person. Desmond having taken his exit over the precipice, the crown's case is that they then shepherded the deceased back through the premises of Mrs. Roberts to a point on a track, a place called, on the Version Gully, Taylor Land, Version Gully, where one of them either the accused man or one of them acting in concert with him, and with all of them shot the deceased through his back, three bullets through his back, presumably as he was still in front of them, and where his body was subsequently found. So, if you find that common design subsisted between all these men to kill both these brothers, you have to ask yourselves whether the common design persisted after Desmond took his exit or whether the deceased man was killed in pursuance of that common design."

and inter:

> "It is a question for you. If you accept Mrs. Roberts when she gave evidence for the Crown that she didn't see the accused as one of these chaps, then that would be a discrepancy, a difference in the evidence of Desmond and the evidence of Mrs. Roberts and if Mrs. Roberts didn't see him, then that would bear out Mr. McLean's contention that the accused wasn't there at all, he was elsewhere. So this raises a serious situation as to whether Mrs. Roberts saw the accused there or not. If she didn't see him, then that would lend weight to what Mr. McLean is saying that the accused wasn't there at all, but elsewhere."

Further, in the course of his summing-up the judge made it quite clear to the jury that theories put forward by defence counsel pertaining to the actual killing or the incidental circumstances were not to be taken as in any way implying that the appellant was present or in any way affecting the contention that the appellant was elsewhere at the material time - thus:-

> "Mr.McLean says "They took him up to the hills and killed him and throw his body away." Anyway, you remember that when Mr. McLean says that, he didn't mean that the accused was there, because he says that the accused was not there. Mr. McLean's defence was that the accused was not there, he was elsewhere at the material time."

After reviewing all the evidence the learned trial judge said:

> "First of all remember the identity that is crucial, that is the first thing you must think of."

Accordingly, although the learned trial judge did not specifically deal with this abstruse and illogical theory of counsel for the crown, yet by his identification of the important issues and his collation of the evidence relating to such issues, the jury would have been in no doubt that the crown's case rested upon an acceptance of the evidence of Desmond Jadusingh. In the circumstances, the infelicitous remarks of counsel for the crown would not in our view carry any weight with the jury or affect their consideration of the vital issue namely whether or not the appellant was among the captors and of the brothers Jadusingh at the material time.

In a final omnibus submission Mr. McLean urged that the Court should consider the cumulative effect of the complaints which he argued as separate grounds together with a number of inaccuracies

and inconsistencies in determining whether or not the verdict is unreasonable. He listed among others the following:

(1) The inexplicable attitude of the police in searching houses in the area other than the appellant's and not arresting the appellant until 17th July since according to Detective Blanford Davis the witness Desmond Jadusingh had given a description of the appellant.

In our view Davis' explanation namely that at the time they were planning a raid and since they knew where he was he could be picked up at any time, was a reasonable one and this was fairly brought to the attention of the jury.

(2) The learned trial judge erred in not taking steps to ensure that the evidence at the trial was properly understood or could have been properly understood by the appellant, having regard to his disability. He based his complaint on the following incident in the trial during the cross-examination of Jadusingh on the second day of the trial:

"Mr. McLean: Yes, M'Lord, but before we get on with the substantive aspect of the case, I would just like to make one observation and to make an announcement, that I have been informed by the interpreters that they might be running into some difficulty.

.....

Mr. McLean: No, M'Lord. It's a matter of communicating with him in certain circunstances.

His Lordship: So what is it?

Miss McKnight: (Interpreter) I observed that in yesterday's questioning a lot of place names were used. Now, the deaf people don't know things unless they are taught; so they see places, but never know the different names for all. May be they know their own address at home and a few other places, but we can't be sure that they know these many different places these names for example Version Gully etc. etc.

His Lordship: But I don't think that matter.

Miss McKnight: I just thought I would inform you from the point of view of questioning him in particular, and at the same time, distances - any kind of measurement - again he may have difficulty.

His Lordship: "That's all right. I don't think this will create any difficulty."

The judge's observation was accepted without demur. In the light of the nature of the defence - an alibi - it was a reasonable observation. If experienced Counsel, Mr. McLean, had any difficulty in conducting the defence it would be expected of him to so indicate.

Notwithstanding his disability, the transcript does not show any lack of intelligence in the appellant. He is an apprentice shoemaker, he plays dominoes, he had been going to school for about nine years. Nor has it been shown that the presentation of the defence was in any way impeded.

Cumulatively or otherwise, these grounds of appeal failed to move us to interfere with the verdict of the jury.

For these reasons the appeal was dismissed.