JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 175 & 176/81

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

REGINA

VS.

CLIFTON VALENTINE

AND

LEROY ANGANOO

Mr. F. M. G. Phipps, Q.C., Miss K. Phipps, Mr. Noel Edwards, and Miss Dorothy Lightbourne for appellants - Mr. Phipps presented the arguments for both appellants.

Mr. F. A. Smith, Deputy Director of Public Prosecutions and Miss H. Walker for Crown.

January 11, 12 & 13; May 9, 1983; April 12, 1984.

KERR, J.A.:

The hearing of these applications for leave to appeal from convictions for murder in the Gun Court Division of the Home Circuit Court before Wright, J. and a jury on December 4, 1981, was treated as the hearing of the appeals. The appeals were dismissed and the convictions and sentences of death were affirmed.

As promised we set out herein the reasons for so deciding.

The appellants were jointly charged and convicted of the murders of Leslie Wallen and his two sons, Milton and Michael.

The Wallens live in a partly finished house at a district known as Grants Level in Portland. On the night of the 24th October, 1980 at home at about eight or nine o'clock were the three deceased and Faithlin a young daughter. A gang of gunmen came there and shot and killed the three deceased. It is the prosecution's case that the appellants were members of that gang.

Evidence to that effect was given in the main by Faithlin and another brother, Gary Wallen. According to Faithlin, that night while her father and deceased brothers and herself were in the bedroom, she heard the sound of a motor van coming from the direction of Port Antonio along the road which passes her gate. Her father spoke to Milton who went outside. Milton called to his father and he armed himself with a fishing lance and went outside. She followed and at the back of the yard she saw appellant Anganoo being confronted with her father and brother Milton. It was a moonlight night. She knew Anganoo before; she had often seen him in his father's yard about half a mile from her home. She saw him but two weeks before. Her father gestured with the lance and Anganoo ran towards the front of the house followed by her father and brother. She followed and saw within the gate-way about twelve men and a blue and white van parked in the road across the gate-way. On seeing the men she turned to the left and went upon a mound. While there she saw a flash of fire, heard the sound of gun fire and saw her father fall. Milton ran to raise him up and two more burst felled him. Her father then rose and ran towards the mound only to be cut down by another burst, Michael then came running towards her and two more shots were fired and he fell at her feet.

When the shooting was going on Anganoo was standing to the rear of the van. After Michael was shot there was a cry of "Rope in" and the men went in the van and drove off. She was with the bleeding Michael then. Shortly after Gary came in the yard. She then went to a neighbour's yard and later she gave a statement to the police. She was able to identify Anganoo as he stood by the van from its tail lights. She was quite sure it was he who came into her yard that night.

Gary Wallen, had left home about 6:30 p.m. and had been to Fellowship and some time after he was at the piazza of the library when, according to his evidence, a green Escort motor car

driven by Anganoo passed him going in the direction of his home. He had seen appellant Anganoo whom he knew for about fifteen years and in recent weeks on several occasions had seen him driving that car. There was one other person sitting beside Anganoo. Shortly after a green and white minibus drove up from the same direction and stopped about ten yards off. The appellant Valentine whom he knew before for about ten years as "Ponga" was the driver. The bus was full of passengers. After about two minutes it drove off in the direction of his home which was about a mile away. He then set out on foot for his home and after passing through the crowd he broke into a run. Half a mile from home he heard the sounds of gun fire coming from the direction of his home; he then left the road and tried to reach home through the bush. When two chains from his house he saw the minibus parked in front of the gate facing Fellowship and four persons coming out his yard. Among them was the appellant Valentine. The four men entered the minibus. There was also on the road in front of the bus the green Escort car. The car drove off followed by the minibus. It was then between 8 - 9 p.m. He turned back to Fellowship where he later got information. He returned to Grants Level, where at a neighbour's yard he spoke to Faithlin.

Ian Wallen, another brother, at about 7:30 - 8 p.m. that night had left home for Fellowship. He had walked about half a mile when he heard and saw two motor vehicles coming from the opposite direction. As he came within their head-lights he took to the bushes and hid himself. They stopped near where he entered. The first vehicle was a Ford Escort. The driver came out and he recognized the appellant Anganoo. The second was a Volkswagen minibus with defective muffler. Its occupants came out and of them he recognized the appellant Valentine whom he knew as "Ponga". He knew both men for years before.

Anganoo said "one gone in there". He lay flat on the ground as shots were fired into the bush. Then at the call of "Rope in" the men returned to the vehicles and they drove on. Later on he heard

bursts of gun fire and he remained in the bushes for a long time. He then went home to find his dead or dying father and brothers.

The cross-examination of the three Wallens was aimed at testing the opportunity for identification and the reliability of their evidence generally. It was suggested to Gary Wallen that that night he was in Fuller's Bar at Fellowship.

Dr. Ramu who performed the post-mortem examination said all three Wallens died from the shock and haemorrhage from gun shot wounds to vital organs of the body. The father had two penetrating bullet wounds, Milton had three and Michael had one. Both father and Milton had bullet entry wounds in their backs.

The Crown tendered without objection a caution statement given to the police by appellant Anganoo on November 26, 1980. It was to the effect that on the 24th October, 1980 at the date and time of the murders he was driving an Escort motor car for Mr. Tony Abrahams, and as instructed he was driving the car to Fellowship and at about 9 p.m. he was by Grants Level. At West Hill a Volkswagen van drove in front of him and forced him to stop. Two men with long guns came out the van and entered the car and sat in the back. The van drove on and the men ordered him to follow. When he reached his father's gate the van stopped. The two men came out his car and re-entered the van which he drove off. He drove after them but when he reached the raft-stand they started to curse and at their orders he parked the car. They went further down the road from where he heard several gun shots in the area of the Wallens home. After that they drove back past him and he drove following them to Port Antonio Cross Roads. He then went to the J.L.P. meeting and then back to Fellowship. Later he heard that he was to stay at Boston as several people were shot in the area. This he did until the following morning. He did not shoot anybody neither did he have any gun. In his unsworn statement from the dock which is set out below, Anganoo in effect repeated the theme of this statement.

In addition to the challenges to the credit of the prosecution witnesses by way of cross-examination the appellant Valentine in his short unsworn statement from the dock said that he was the driver of Mr. Tony Abrahams. He drove him all day until late at night. Two witnesses were called on his behalf.

Sonia Fuller:

She is a proprietor of a bar at Fellowship and stated that Gary Wallen came to the bar at 8:30 on the night of October 24, 1980. He enquired for a friend and then went across to the library where he remained until 9:15 to 9:30. It was while there he got news from his brother that his father and brothers were killed. In short her evidence was that at the material time Gary Wallen could not have been at home to witness the shooting of his family.

In cross-examination she said she had no one assisting her in the bar. After 8:30 she had no customers so she was out on the verandah and saw Gary Wallen at the library. She knew Valentine but did not see him that evening. She had never seen him drive a minibus. She never saw Anganoo driving an Escort car. Earlier before giving evidence she had been talking to Valentine's wife but not about the case.

Eric Anthony Abrahams gave evidence to the effect that he was a candidate for the then coming elections in October 1980 and Clifton Valentine was a driver employed to him. He had known him from 1976.

On October 24, 1980, he was touring the constituency of Eastern Portland ending with a meeting at Hector's River which ended about 11 p.m. Valentine was his driver that day. He drove him back from Hector's River which was about thirty miles from Port Antonio. From 7 - 8 a.m. until after 11 p.m. Valentine was with him or in his presence save for a brief period in the afternoon when he walked through the town of Hector's River. Valentine followed in the car. In cross-examination he said the appellant Anganoo also drove for him. He never drove an Escort for him. He had a green and white

minibus. The meeting at Hector's River commenced at 7 p.m. and ended at 11 p.m. During the meeting he was on the platform. He did not have Valentine in his view for the whole four hours. He did not get to the meeting until about 8:30 p.m. Valentine drove him in his Mazda.

In his unsworn statement from the dock Anganoo said:

> "I was asked to take a car to Kingston for repairs. I bring the car to Kingston and back home in Port Antonio. From Port Antonio to my house; on the way I was accosted by two men who forced me to drive in the direction that I didn't want to go. While forced I had to drive for I didn't have anything to defend myself, neither a machete or knife or no weapon to defend myself. When I reached the square of Fellowship I tried to overturn the car but the men had two things at my head back.
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> Two things behind me, a gun or something. I don't know what it was. They used indecent language to me. If I tried to do that they would kill me. I drove to my father's home. There the men get out of the vehicle and I escaped from them with the vehicle. After they go their way I returned back to Port Antonio, to Hector's River."

He called no witnesses.

In short Anganoo denied he was present at the scene of the shooting, but admitted that under duress he drove some of the participants near to the scene.

The first ground argued was concerned with complaints of misdirection by the learned trial judge in that he failed to direct them on certain important aspects of law which arose in the trial.

First, that the learned trial judge omitted to direct the jury to look for evidence direct or circumstantial which could show that the applicant was a party to common design to kill and that in the absence of such evidence the verdict should be one of not guilty and further that if one of the parties had gone beyond the common design and formed an intention to kill, the applicant was not guilty. Mr. Phipps submitted that there was no evidence

as to who fired the shots and no evidence that the applicants were were armed, therefore it was necessary for clear directions that the applicants had the necessary intention to kill in common with the person who fired the shots. He referred to the cases of R. v. Porter and Williams, 9 J.L.R. p. 141 and R. v. Anderson and Morris, (1966) 2 A.E.R. p. 644.

Further there was no direction to the jury that the onus was on the prosecution to show that the applicant was a party to the common design; instead, the summing-up presented the case as if it was for the applicant to establish that his presence at the scene was innocent. In that regard he adverted to the following amongst other passages in the summing-up:

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> "So far as Valentine is concerned Gary said he saw him drive this green and white V.W. minibus behind the car driven by Anganoo at Fellowship, and Ian also said that he identified Valentine as Pongo, the driver of the van, when they stopped and were searching for him. So those are the witnesses whose evidence you will scrutinise to see if the evidence meets the test to satisfy you so that you feel sure that the persons they claim to identify were in fact there. Then after you are satisifed about that now you have got to examine the evidence to see how they are involved in the killings if at all."
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> Pages 265-266 -
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> "So then now the very important issues of identification and common design: aspects you bear in mind are, that in dealing with common design the persons who are involved do not individually have to do everything that needs to be done. If the part assigned to you is to convey the people, the actual ones who are going to actually do the dastardly act, if the part assigned to you is to take them there, and you do that, well, can it be said that you are not involved? You see, if you just take them along, not knowing what they are going about, then you are taken by surprise that they have an intention to kill.
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> From the statement, Anganoo told you that these men had two long guns. Of course from the dock he said "two things" in his neck back. He didn't know whether they were guns or not. But when you bear in mind the number of bullets that were fired, you have not heard any evidence or any question put which would elicit an answer that after the first bullet I heard somebody say, No, no, don't shoot them, don't

"shoot them. If you are involved in the commission of a crime and you desire to break away from it after the whole thing is set in motion, you cannot just go and probably lean up on a van or move away from the crowd. That would not take you out of the common design aspect of it, you would have to make it quite clear that you are no party to it any more, so that anything done thereafter does not involve you. We don't have any such evidence at all. And from the evidence of Faithlin, if you accept it, when Anganoo ran back, if you find that he was the person who ran from the back of the house, he went to the crowd and apparently either passed by or through the crowd and went just a matter of four feet or so behind them, to the back of the van. So merely standing a few feet away from a crowd of which you were a part would not be sufficient to make you be not in any way responsible for what they are doing. I say, from the first shot, if you were not a party to any killing you should call out, and there is no evidence that anybody called out saying, no, no, me didn't drive you here for that; me don't want you to kill anybody at all; stop, stop, me not in it. You never heard that. Not one voice, not two voices, not any voice at all. So that nobody who was there, from the evidence, did anything to exclude himself from what was happening."

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"It's for you to say whether you have evidence that is satisfactory and makes you feel sure that the accused were there and it is for you to say from the evidence whether you find that they were party to the killing; because it is possible, if you find that they were there and it is possible that they were just innocent bystanders, then they can't be guilty of anything. Apart from that you ask yourselves if you see any role that could be played by anybody there having regard to the way they had journeyed there, if you accept Gary's evidence, who saw the driving and Ian's, who was on the road, and the fact that nobody, when the first shot was fired down there, nobody from the evidence, didn't say, "No, we didn't come here for that; leave the man alone. We didn't come here for that.

So that there was no withdrawal from what was going on by anybody who was there, and if you accept the evidence then that would lead you to conclude that they were there and that they did not say anything that indicated that they did not agree with what was going on. What was their role?

So then, that was the case for the crown, and I have already put before you, I hope quite clearly, what Anganoo is saying. From his statement, he was kidnapped and made to drive to as far as his father's gate. The men came out, went back into the van and he had nothing to do with them again. And in his statement from the dock, he said, after they came out of the car he was able to make his

> "escape. So he is saying I was not there. So that in his submission about duress it would only be relevant to a charge of driving without the owner's consent which is not the charge here. So as far as the murders is concerned you don't have duress to consider. The crown must satisfy you so that you feel sure that each of them was there."

Now a summing-up is conditioned by the nature of the case for the prosecution and the defence and the issues raised. It is not a scholarly dissertation on general principles. It is an endeavour by the learned trial judge to give the jury of laymen a working knowledge of the law applicable to the particular case and how they should apply that law to the facts they find from the evidence.

Earlier in his summing-up the learned trial judge had told the jury:

> "Now first, you have to decide whether each one was there and if so in what capacity, because the mere onlooker at the most serious crime cannot be charged for the commission of a crime, the mere onlooker, the spectator. But you may be standing there, not delivering any blow but you are a party to the delivering of the blow, and that is what the Crown is saying, that these accused, they have no evidence that they fired any shots but that they were there and they were a party, each of them, party to the firing of the shots. The law of common design ordains that if two or more persons agree to the carrying out of any criminal activity, then whatever is done by one in pursuance of that agreement is in law attributed to each.....
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> So the Crown is saying that grant - we have no evidence that these men fired any bullet - but they are saying that they were there not as innocent spectators, not as captive witnesses, not as captive escorts in the case of Anganoo, but as little participants in a crime about which they well knew and to which they had given agreement. Of course, you would not find any document saying, 'We, the undersigned, go to the Wallens house and wipe them out." So here you have to draw the inference from the evidence that you accept that there was this general agreement among the people who went there because you ask yourselves, well, from Faithlyn, a group of twelve men with a few feet inside on their yard premises and you ask yourselves, are you saying that all these people would be party if they were caught?"

and later:

> "If you are merely an innocent standby or you are forced to watch to see what is going to happen you can't be guilty. It must be intentional. Your mind must go with what is going on, free, deliberate involvement in what is going on, not that you yourself as a prisoner wanting to get away.
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> Mrs. Brice addressed you on behalf of the accused, Anganoo, that here is a matter where it was said that the car drove off before the van but by that time the people were in their homes, so that, to my mind, would not be an indication of his being there as an unwilling escort. You have to say if in fact he was there what was he doing there and how did he come to be there. Of course, in order to settle upon that question, the all important question of identification has got to be resolved. After you decide the matter of identification, then you will come to the question of common design as to whether these people who we identify from the evidence were in fact there and were parties to this macabre event."

There could be no challenge to the inescapable inference that the band of men who entered the yard of the Wallens were of "equal temper" with the intent to murder. To suggest, as Mr. Phipps did, that the possible original intent may have been to frighten is highly fanciful. To raise the issue, that a person in that party was not of the party in that he did not share the common intent, worthy of the jury's consideration there must be some evidence. In the instant case this issue was clearly never raised at the trial. The defence by each appellant was an alibi and the vital issue for the jury's determination was whether or not the appellants were members of that murderous gang. Notwithstanding, the learned trial judge prudently and favourably left for the jury's consideration whether Anganoo's presence could have been innocent.

It is enough to say that we have examined the full and careful summing-up and are of the view that the criticisms are unjustified. The judge's directions on common design were impeccable and he dealt with the issues in the case in an easily comprehensible manner.

The other complaint concerned the learned trial judge's endeavours to define an inference in the following passage:

> "In any trial it becomes necessary at some point for you as judges of the facts in the case to draw inferences. Inferences are really assumptions to link up proved facts. You know, like you are outside, and you had come in here, left your briefcase in here, the place is locked up, that door is not locked. Nobody else is in here, and when you look you see a man walking down the corridor with your briefcase. You say to him, 'You stole my briefcase'. The inference you have drawn that since you left it in there, nobody was there, the door was open then he must have gone inside and come out though you never saw him in there. In the same way that Faithlyn said that the bus came, the minibus came and reversed, she was assuming because it passed and came back, she never thought of it turning around, but then when next it was seen it really had turned around. Sometimes our assumptions are not right.
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> In drawing an inference it must be a reasonable inference that bears true relation to the facts that are proved, whether the inference you are drawing is in favour of the prosecution or in favour of the defence, it must be a reasonable inference, because if you are out there - to go back to the briefcase situation - if you are out there and you see people pass you, but the one person who you eventually see with your briefcase, it would not be a reasonable inference to draw that, well, the Chief Justice must have come somehow or some judge or some police who you never saw and give it to him. The reasonable thing is the person you have seen with it was the one that took it up since there was an opportunity."

Mr. Phipps submitted that the learned trial judge misdirected the jury when he told them "inferences are really assumptions to link up proved facts."

Now to say that an inference is an assumption is to speak loosely. As assumption being a minor premise, it may be argued that as between an assumption and inference it may ultimately be a matter of degree. However, we are of the view that as an assumption may be no more than a conjecture while for a conclusion to be

an inference it must be a rational result from established facts; therefore, it is technically incorrect to equate an assumption to an inference. However, in the instant case the learned judge elaborated by giving the jury helpful illustrations to indicate in a practical way that an inference must be the reasonable product of established facts. In the circumstances, we are of the view that the directions to the jury as to the drawing of inferences taken as a whole were fair and clear.

The last ground mildly argued was that the verdict was unreasonable having regard to the evidence.

It is enough to say that we found no merit in this ground.

For these reasons the appeals were dismissed and the convictions affirmed.