C.A. CRIMINAL LAW — Murder — Mens rea — whether judge misdirected jury on mens rea for murder in that he left intention as an objective test — whether failure to couple with an common design was inadequate and misleading — whether failure to leave manslaughter to jury a misdirection.

(Held) Directions of judge on mens rea a misdirection — but no substantive miscarriage of justice — proviso to Sec 14 of Appellate Jurisdiction Act applied. Appeal dismissed.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 209/87

Cases referred to:
R v Lockley Griffiths SCCA 31/82 (unreported)
R v Roy Thomas SCCA 105/86 (unreported)

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

R. v. CLIVE JOHNSON

Delroy Chuck for Applicant

Canute Brown for Crown

July 26 & November 15, 1988

CAMPBELL, J.A.

The applicant Clive Johnson was convicted of murder by a jury and sentenced accordingly by Bingham, J., on November 13, 1987. The deceased is Clive Beckford who died on October 11, 1985.

The sole eyewitness of the incident Constable Rupert Hutchinson testified that at about 7.30 p.m., on October 11, 1985 he, together with a young daughter of his and Clive Beckford, then a 17 year old student attending Mico Evening College, were walking on a back road in the industrial area leading to Seaview Gardens where he resided. He heard running footsteps behind him. He stopped looked and saw four men approaching. The men on reaching him, his daughter and the deceased, encircled them. The men brandished daggers and icepicks and attacked them. The applicant Clive Johnson was one of the four men. He had an icepick about 12 inches long with which he stabbed at this witness and broke a gold chain which he was wearing around his neck. The deceased, in the course of the attack on him by two of the men, ran off towards Seaview Gardens. He was pursued by

these two men one of whom was armed with an icepick similar in length to that which Johnson had; while the other was armed with a very big knife more like a cutlass. Within less than a minute these two men returned from their pursuit and joined the other two in the continuing attack on Hutchinson. His young daughter was seized by the men and threatened with injuries. The witness, ran off but stopped after a short distance, looked around and saw that the men had released his daughter and were running away. He waited for his daughter and continued on his way home. About 2 chains from where he had been under attack, he saw Clive Beckford folded up in the pathway with a gaping stab wound in the region of the chest. He tried to lift Beckford. The latter gasped, went limp and passed away. The witness was able to observe Johnson for about 6 to 7 minutes with the aid of electric lighting which shone on the back road from the yard of a nearby factory building. Two days later, on October 13, at about 8 p.m., he saw Johnson on a pathway nearby to Seaview Gardens. Johnson pulled a knife and stabbed at him. He was then armed with a submachine gun. He fired one shot therefrom which felled Johnson who was then seized and taken into police custody.

The applicant in his unsworn statement from the dock said he knew nothing of the incident in which the deceased was killed. But on a night in October he was shot by Constable Hutchinson who wrongly accused him of being one of the men who killed his friend.

Before us Mr. Chuck has submitted that:

(a) The learned trial judge misdirected the jury on the mens rea for murder in that he left intention as an objective test;

(b) the direction of the learned trial judge on common design was inadequate and misleading;

(c) the failure of the learned trial judge to leave manslaughter to the jury amounted to a misdirection.

Ground 'b' above is crucial to an appreciation of the submissions on grounds 'b' and 'c' and accordingly is considered first.

The learned trial judge in directing the jury on common design said this:

> "The crown relies on a doctrine known in law as the doctrine of common design. It operates in this way:
>
> where two or more persons join together, agree together to carry out some common purpose, some common plan, in this case the plan is as obvious as the night follows the day on the facts, the plan was to rob those two persons, Constable Hutchinson and Clive Beckford, the act of one becomes the act of the other in so far as these persons present actively assisting in the furtherance of this common purpose. Here, as I said, there was clearly a division of labour, two concentrating on Constable Hutchinson two concentrating on Clive Beckford; they would be equally responsible for any act which is a natural consequence of what their agreement was. In this case the matter even goes further, because not only were they all present and all actively participating in this concerted attack on these three persons including Constable Hutchinson and the deceased, but each of them, if you accept Constable Hutchinson's evidence was armed and when that situation occurs, if you accept Constable Hutchinson's evidence that each of them was armed, then it is to be expected in those circumstances that they went there armed, armed to overcome any resistance that may be put up by these persons who they were robbing by force, if necessary. So, the fact that two ran off after Clive Beckford, you would have to ask yourselves if what happened to Beckford was therefore in the circumstances not a natural

> " consequence of what was taking place. Because the only way you could absolve or remove blame from these two accused is if what happened two chains down the road from where Constable Hutchinson still was being attacked by these two, was outside the scope of the common agreement, common plan. Once you find that there was this agreement to rob, they were all armed, there is this division of labour, then you may well say that the subsequent chase and killing of Beckford was a natural and probable consequence of this whole attack. It is not remote to say on the facts in this case or for you to ask yourselves the question, well, was Beckford set upon and killed to at least prevent him from subsequently identifying anyone? Or was he set upon and killed because he wasn't quite willing to hand over to his attackers what they thought he had as far as his property was concerned, bearing in mind that they all went there to rob."

Mr. Chuck's complaint is that the learned trial judge having directed the jury that the common purpose was to rob should have gone on to give a direction which would have assisted them in determining whether the two accomplices who pursued and killed the deceased had departed from the common design which was to rob. He further complained that the learned trial judge's illustration of the practical operation of common design which we do not consider necessary to state, was remote, misleading and prejudicial to the defence.

We agree that the illustration of a bank robbery given by the learned trial judge to show how common design operates in practice was not altogether relevant to the facts before him, nonetheless, the direction given was not misleading, nor inadequate because he explicitly directed the jury that the facts of the case

before them, if accepted, depicted an armed robbery on three persons by four men each of whom was armed with a lethal weapon. He directed them that each, on the facts, could be said to have been aiding and abetting the others in the implementation of a pre-arranged plan because they all came up together, they encircled and selected their victim. They simultaneously attacked their victims in a manner designed to prevent any of them from escaping. They explicitly showed their readiness to use lethal weapons by actually using them. Therefore the only further question of fact left to be determined by the jury was whether the two accomplices who pursued and killed their selected victim namely Beckford a few chains away from the initial scene of the attack, were so far removed therefrom as to constitute their attack a separate and distinct armed robbery, from the ongoing one in which they were earlier engaged, which was still being pursued against Constable Hutchinson and to which these same accomplices immediately returned and in which they joined forces with the other two men including the applicant. On this aspect of the matter the learned trial judge directed the jury in these words "the only way you could absolve or remove blame from these two accused is if what happened two chains down the road from where Constable Hutchinson still was being attacked by these two was outside the scope of the common agreement, common plan." In our view this direction was clear and would have brought home to the jury the need to determine as a fact whether it was one continuing armed robbery in which all four men, armed with lethal weapons, were actually using them to overcome resistance from their victims in the course of which Beckford died for which consequence each was equally liable. We do not find any merit in this ground of complaint.

Ground 'c' is inextricably linked with ground 'b'. What Mr. Chuck is in effect saying is that since the learned trial judge directed the jury that the common design was to rob, it would have been open to the jury to find the appellant guilty of manslaughter on the basis that though he could be said to have joined in the common design to do the unlawful act of robbery which need not involve serious bodily harm, the killing of Clive Beckford was so much outside the scope of this common design that the appellant ought not to be held liable for a murder which he did not actually commit. The learned trial judge was therefore wrong in directing the jury that on the facts manslaughter could not be accommodated.

We think that the basis on which Mr. Chuck structured his submission is factually incorrect. The learned trial judge did not direct the jury that the common design was robbery simpliciter. It is true that he began his direction on common design by saying "in this case the plan is as obvious as the night follows the day, on the facts, the plan was to rob these two persons Constable Hutchinson and Clive Beckford," however, he thereafter elaborated on the nature of the robbery by characterising it as armed robbery with each participant armed with a lethal weapon. He directed the jury that if they accepted the evidence of Hutchinson that the men were each armed with a lethal weapon then in such a situation they could infer that the men went armed "to overcome any resistance that may be put up ..... by force if necessary." He concluded by inviting the jury to consider whether the killing of Beckford was not in furtherance of the plan of all four men to use force where necessary to overcome any resistance to being relieved of property which they thought Beckford had.

On the state of the evidence, bearing in mind that each of the men was armed with a lethal weapon which was capable of inflicting serious bodily harm at the least, it would be wrong for the learned trial judge to leave the issue of manslaughter to the jury because it must have been in the contemplation of all of them that the use of either of these, lethal weapons could cause death or at least serious bodily injury. This ground of complaint accordingly fails.

Ground 'a' complains of misdirection of the jury on the mens rea of murder in that the learned trial judge directed the jury that an objective instead of a subjective test should be applied. The learned trial judge in concluding his directions on intention said thus:

> "A person is taken to intend the natural and probable consequence of whatever he or she does and that is the sort of objective standard which you apply to the facts in this case in determining this question of intention."

The above, as conceded by learned crown counsel constitutes a misdirection. It is clearly in conflict with the decision of this court in R. v. Loxley-Griffiths S.C.C.A. 31/80 (unreported) which was expressly approved in R. v. Roy Thomas S.C.C.A. 105/86 (unreported) that the test of intention is always a subjective one. Learned crown counsel has however submitted that since on the facts, no circumstance exists from which an intention other than to kill or cause serious bodily injury could reasonably be inferred, the misdirection did not deprive the appellant of a fair opportunity of having a verdict of manslaughter brought in by the jury because on a correct direction, the jury would inevitably have arrived at the same verdict.

The learned trial judge referred to the evidence of Constable Hutchinson that he saw Clive Beckford lying in the road suffering from a gaping wound in the region of his chest. He then directed the jury thus:

> " ..... if you were to conclude that it was one of these two men who ran after Clive Beckford, plunge this big knife resembling a cutlass into his chest, and that his death resulted from that act then you could safely conclude, if you find that this would be a reasonable infererence to draw, that that person must have intended either death or serious bodily harm which is serious bodily injury to Clive Beckford."

In our view, in the absence of evidence to the contrary disputing the nature of the wound and the weapon used, a jury left with a direction as in the paragraph above would inevitably conclude that death or serious bodily injury was intended. Once the jury further concluded that the common design was armed robbery having a scope embracing the use of lethal weapons and that the appellant was a full participant therein, it was inevitable that their verdict would be murder. As no substantial miscarriage of justice has actually occurred by the misdirection we will treat the application for leave to appeal as the hearing of the appeal and apply the proviso to section 14 of the Appellate Jurisdiction Act to dismiss the appeal which is accordingly dismissed.