JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 122, 123 & 124/83

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Ross, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

CLOVIS JOHNSON
R. v. WASHINGTON DESQUOTTES
WINSTON BARNES

Mr. Maurice Saunders for applicant Johnson

Dr. Randolph Williams for applicant Desquottes

Mr. H.G. Edwards Q.C., for applicant Barnes

Mr. F.A. Smith & W. Douglas for Crown

December 19, 1985 & February 10, 1986

ROSS J.A.

On 24th November, 1983 the three applicants were convicted in the Home Circuit Court before the late Parnell J., and a jury on an indictment charging them with the murder of Horace Fowler which took place on 3rd December, 1982.

On that day at about 11.30 a.m. the deceased Horace Fowler was driving his Datsun van along Olympic Way to his factory on Spanish Town Road. He had with him one thousand dollars in change which he had obtained from a bank to pay the employees. The applicant Barnes who was in the back of the van asked the deceased to stop at a point on the road. The other two applicants had come up and stopped at the corner of Fourth Street and Olympic Way. The van stopped at the same spot, and as the vehicle came to a stop the applicant Johnson went to the front of the van, shot Fowler,

It is convenient at this point to note that the key witness for the prosecution was one Larkland Green who had given evidence at the preliminary inquiry into the charge before the learned Magistrate, but as he was killed before the trial began, his deposition was admitted in evidence by the learned trial judge and read to the jury.

Leave was granted to each of the attorneys-at-law to argue additional grounds of appeal filed on behalf of the respective applicant.

The Court first heard Mr. Edwards on behalf of the applicant Winston Barnes. The additional grounds of appeal which were filed and argued were:

> "1. The learned trial judge failed to direct the jury on manslaughter in relation to Barnes. He did not direct the jury that:
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> (i) to convict co-defendant of a particular crime that arises from a common design to commit another particular crime there must be satisfactory evidence that the concert extended to each such crime.
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> (ii) Where two or more joint adventurers go out together in joint possession of offensive weapons, if one of the adventurers deliberately fires a revolver and kills the victim the others, if death or serious injury was not intended by them must be acquitted of murder, but will be guilty of manslaughter.
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> 2. The only evidence against Barnes was the deposition of Larkland Green. It is submitted that the learned trial judge should have exercised his discretion and not have allowed it in evidence. The learned trial judge should not have allowed in evidence the deposition of Larkland Green."

The relevant evidence as to the circumstances of the shooting was

the back of the van called out "hold on, driver." The deceased stopped the vehicle; the other two applicants had just come along and stopped at the corner; Johnson went to the front of the van where the driver was seated and pushed a gun through the window. There was an explosion like a gun shot, after which, Johnson was seen running with the gun and a bag which he did not have when he went up to the vehicle. Johnson was closely followed by the other two applicants.

In the light of this evidence, the learned trial judge at pp. 172-174 of the record, directed the jury on common design in these words:

> "Now, where two or more persons are acting together to carry out a common purpose, what is sometimes referred to as common design, you will find then that each would be allotted a certain part, a certain job in executing the job. I will give you a simple example.
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> Whenever you hear about a bank robbery, it is not one man doing it. You may have to have at least three, four or five of them. One may be the man driving the motor car with the engine running outside; another man, the man who walks up and down like a policeman watching; another man would be the man at the entrance guarding the place, and the other two would be the ones who would go in there now to hold up those at the till and take the money. So if while the two of them are inside there holding up the place to take the money or counting the money they should shoot or kill anyone in there, even the man outside with engine ready is guilty of murder too, because that was the part he was to play; and you would think it is common sense. The law says that in a situation like that where two or more persons are acting together in order to effect a common purpose, each allotted a certain task in order to carry out the purpose, then the act of one is the act of all.
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> Now, in this case I have already summarized to you the evidence according to the deposition against each of these accused. The part, according to the prosecution, that "Redman" was to play, he was first of all to take a hop and

> "If that is what you accept, Mr. Foreman and members of the jury, and there is no reasonable doubt about it, you entertain no reasonable doubt about it, then each would have played a part, in law, bringing about the death of Mr. Fowler in circumstances in which it would be murder."

It was plain on the evidence to which we have adverted, that each of the applicants had a designated role in achieving their common purpose of robbing Mr. Fowler and using such force as was necessary. There was a clear inference which the jury was at liberty to draw that Barnes had arranged to be in the victim's van and seek to have it come to a halt at a pre-arranged location where the other two applicants would be waiting to use the necessary force to relieve Mr. Fowler of his employees' wages. That necessary force involved the use of a firearm which was discharged the moment the vehicle was stationary. There was no evidence that the victim had offered any resistance, the action was well timed and co-ordinated. In our judgment, there was not a scintilla of evidence, on which the learned trial judge could properly have left a verdict of manslaughter in respect of Barnes, for the jury's consideration.

The defence of Barnes was an alibi: it was not that he was present but had not agreed to the use of a firearm, or that he was unaware that his co-adventurer, although armed, would have discharged the weapon. We think, therefore, that the learned trial judge's directions were adequate and apt in the circumstances of this case for on the facts, the clear intention was to shoot the victim no matter what.

In regard to ground 2 Mr. Edwards submitted that the learned trial judge should have exercised his discretion and should not have admitted in evidence the deposition of Larkland Green as the prejudicial effect of this evidence outweighed its probative value. In support of his submission he

provided for the admission in evidence at a trial of depositions taken at a preliminary inquiry where it is proved that the deponent is dead or so ill as not to be able to travel or is absent from the Island or insane. In this review of the law and practice on the admissibility of depositions at trials, Carberry J.A. traced the development of the law through a large number of cases decided both here and in the United Kingdom. In the course of the submissions, the case of R. v. Donald White (1975) 24 W.I.R. 305 13 J.L.R. 217 a decision of this court was cited. There the appellant was charged with the murder of the proprietor of a night club who was shot by one of five armed men who staged a holdup on the night in question. The accused was alleged to be one of the men. The club had two gatemen. One gave evidence in which he was unable to recognize the accused as one of the gunmen. The other purported to identify the accused as one of the gunmen, and gave evidence to that effect at the preliminary inquiry. The witness was therefore the only person who purported to identify the accused. The witness was shot dead before the trial of the accused and the prosecution tendered his deposition under the provisions of section 34 of the Justices of the Peace Jurisdiction Act. The learned trial judge admitted the deposition.

On appeal, in a judgment written by Graham-Perkins, J.A. the appeal was allowed. Of this judgment Carberry J.A. said in part at p. 40:

> "In Donald White it was argued that on the construction of the statute the trial judge had a discretion, and that it was wrongly exercised when he admitted the deposition. It is an unfortunate feature of the judgment that it sets out only a portion of section 34 of the Act, and more particularly that it left out the proviso, which as we have seen expressly gives the trial judge a discretion in the case of absence of the witness from the jurisdiction and insanity. It also records dissent from the previous

Further at p. 42, Carberry J.A. went on to say:

> "With respect, it would appear that in Donald White the court was really concerned not with admissibility but with the quality and content of the deposition so admitted and its relation to the other evidence in the case, and that as in the earlier case of Hamilton (1963: supra) the effect of the evidence was to lead the court to conclude that it was unsafe to convict in those circumstances. It would, we think have been safer to rest the decision on that ground than to rule that 'the trial judge, in the proper exercise of his discretion ought not to have allowed Brown's deposition to be placed before the jury'."

In R. v. Scott & Walters (supra) the accused were convicted of the murder of Abraham Roberts on 25th September, 1980; Roberts was a member of the Island Special Constabulary Force and carried a revolver. While having a drink in a bar with a lady two men entered the bar, one of them snatched the revolver from Roberts' waist, shot him, and both fled. What connected the accused to the incident was the deposition of one Cecil Gordon given at the preliminary inquiry held before the learned Resident Magistrate at the Gun Court. Cecil Gordon did not give evidence at the trial of the two accused. There was evidence that he died between the time of his giving evidence at the preliminary inquiry and the trial.

At p. 55 Carberry J.A. said:

> "The section (i.e. section 34 referred to above) in our judgment makes the deposition of witnesses who have died or are too ill to travel to court admissible without the consent of the judge, whereas his consent is needed when it is a case of the witness being absent from the Island or affected by insanity. In the former case the Crown need only tender the deposition, and the onus of successfully appealing to the judge to exercise his residual discretion to exclude it lies on the accused and his counsel. It is for the defence to establish the facts or factors that make it

> "will be important differences in the onus of proof and on its application depending upon which particular cause for admitting the deposition is being advanced.
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> While Donald White's case shows the discretion being applied to the admissibility of depositions under the Justices of the Peace Act, section 34, it does not draw the distinction indicated above as to the onus of proof, or the onus of moving the court. The discretion basically is to exclude for cause to be shown, and the onus of showing that evidence otherwise admissible ought to be excluded is not a light one; it was not in fact discharged in either Selvey's case or Sang's case. As to review of the exercise of such a discretion it is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. We have therefore come to the conclusion that the deposition of the deceased witness Cecil Gordon was properly admitted under the provisions of section 34 of the Justices of the Peace Jurisdiction Act, and the consent of the trial judge was not required under that Act for its admission."

The decision in R. v. Donald White has therefore been overruled by R. v. Scott & Walters which clearly lays down the law relating to the admission of depositions. In the instant case, the facts are similar to those in R. v. Scott & Walters: evidence had been adduced that the deponent was dead and the other requirements under the Act satisfied. The learned trial judge quite rightly therefore admitted the deposition of Larkland Green in evidence. This ground therefore fails.

It was further argued that the learned trial judge should have exercised his discretion and excluded the deposition of Larkland Green, although it was legally admissible in evidence, on the ground that the prejudicial effect of this evidence outweighed its probative value. Before we deal with the discretion of the judge to exclude evidence it should be said that the cogency and the weight of this evidence could hardly have been

The discretion of a trial judge to exclude admissible evidence from a trial was dealt with in the leading case of R. v. Sang (1979) 3 W.L.R. 263 by the House of Lords, in which it was held dismissing the appeal, that:

> "(1) a judge in a criminal trial always had a discretion to refuse to admit evidence if, in his opinion, its prejudicial effect out weighed its probative value,
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> (2) that, save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, the judge had no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means, the court not being concerned with how it was obtained,....."

In the instant case, as already pointed out, there was no question of the prejudicial effect of the evidence outweighing its probative value, the evidence had not been obtained from any of the applicants, and since the evidence was relevant and admissible the learned trial judge had no discretion to exclude it from the trial. The submission is therefore without any merit.

Supplementary grounds of appeal were filed and argued on behalf of the applicant Washington Desquottes by Dr. Williams. They are:

> "1. In his summing up the trial judge misdirected the jury in that he failed to tell them if they found the first accused had shot the deceased they could only find the second accused guilty of murder if the only reasonable inference that could be drawn from his association with the first accused before, during and after the shooting was that he was present, aiding and abetting the first accused or he was part of a pre-arranged plan to rob the deceased and to use whatever force was necessary to achieve that object.
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> 2. In his summing up the trial judge did not adequately direct the jury how to deal with inconsistencies found in the deposition of the deceased Larkland Green and between the deposition and other prosecution evidence.
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> 3. The trial of the applicant Washington Desquottes was unfair in that:

"4. The directions of the trial judge on the crucial issue of identification were inadequate; there was no warring of the danger of a mistake, the limited opportunity of the sole eyewitness to recognize the applicant was not pointed out to the jury, nor were the inconsistencies in the deposition of the sole eyewitness.

5. In all the circumstances of the case the verdict was unreasonable and cannot be supported having regard to the evidence and/or there was a miscarriage of justice."

Ground 1 related to common design and ground 3 related to the failure of the learned trial judge to exercise his discretion and exclude the deposition of Larkland Green. Those points have already been considered and no further comment is called for.

Dr. Williams' main argument was directed to the issue of identification, the basis of his complaint in ground 4. He submitted that although the eyewitness Green had known the applicant Desquottes for more than a year the opportunity to recognize him was limited; he said that no warning was given in the summing up in regard to the dangers of identification evidence, or the possibility of mistake, particularly, as in this case, the witness giving the evidence had died prior to the trial and the jury were therefore unable to assess his credibility and reliability. In support of his submissions, he referred to R. v. Junior Reid (S.C.C.A. 8/81 dated 20/7/83) and asked the court to say that the witness here had only a fleeting glimpse, as in that case, of observing his assailant.

The evidence of identification contained in the deposition of Larkland Green is disclosed at p. 80 of the record as follows:

"I heard the accused Winston Barnes who lying on the floor of the van called out 'Hold on, driver' and the driver Mr. Fowler stopped the van. I then saw the men who had come along Sixth Street stopped at the corner. They

> "I saw Clovis Johnson went to the front of the van where the driver Mr. Fowler was sitting and pushed a gun through the window. I heard an explosion like a gun shot and saw the accused Clovis Johnson with the gun in his hand running down Sixth Street, followed by the other two men. Clovis Johnson had a bag in hand which he did not have when he went up to van."

In his deposition Green further deposed that he was standing about eight feet from the van when it stopped and that he had known the three applicants for some time; he had known Clovis Johnson for more than twenty years, Washington Desquottes for more than a year, and Winston Barnes for about two or three years. It is also in evidence that the incident took place at about mid-day or soon after.

This incident happened then, in broad daylight and the deponent Green had ample opportunity to see and identify the three accused all of whom he had known for some time prior to the incident. He was very close to the deceased's van and therefore to the applicants at the time when the deceased was shot. Accordingly, this was not a case where it could be said that the witness had merely a fleeting glimpse.

The learned trial judge, at p. 174 of the record, after reminding the jury of the burden of proof as well as the standard of proof, said:

> "The alibi which each accused has raised in this case must be destroyed by the prosecution as part of the general burden of proving guilt. Even if you reject out of hand the alibi which has been raised, that is, that he was elsewhere, you would still have to examine carefully the evidence, the deposition of the deceased witness and in particular you take into account the fact that he could'nt be here, because he is dead, for you to see him to evaluate his demeanour. If on the totality of the evidence the prosecution satisfies you to the extent that you feel sure, then your duty will be to do your duty and to return a verdict of murder against all of them. The

While it is desirable and indeed expected that judges in the court below should loyally follow the guidelines suggested in R. v. Whylie 25 W.I.R. 430 (1977) 15 J.L.R. 163 it must also be realized that there is no invariable incantation or shibboleth that must be invoked. The circumstances of each case must be examined, for it is the cogency and quality of evidence which is of paramount importance. A failure to warn the jury of dangers inherent in visual identification cases, it must be borne in mind, is but one of the factors to be taken into consideration in determining the fairness and adequacy of a summing up. We think that in this case the quality of the identification evidence was good and there is nothing we could see, to detract from its reliability. The learned trial judge, as was his duty, left the jury to determine whether or not they accepted as true, the contents of the deposition, mindful of the absence of the deponent which prevented their seeing and hearing him. This ground of appeal also fails.

We turn now to the grounds of appeal filed by Mr. Saunders on behalf of Clovis Johnson. There were nine grounds of appeal filed which we do not propose to set out as they cover more than six pages. Much of these grounds and the main arguments were directed to the admissibility of the deposition of Larkland Green and Mr. Saunders made submissions supporting those already made by the other counsel.

In ground 6, complaint was made that the learned trial judge failed to assist the jury in respect of the "substantial discrepancies" between the evidence of the witness Percival Brown and the deposition of Larkland Green. The only discrepancy which merits any comment relates to the name of the street at the corner where the deceased's van stopped. In his deposition, Larkland Green stated that the van stopped at the corner of Olympic Way (along which it was travelling) and Sixth Street; he also said that the accused Johnson and Desquottes came along Sixth Street and stopped

spot was about eight feet from where the van stopped. There was evidence from Miss Sterling, a witness for the defence that Mr. Austin's bar was situate at the junction of Fourth Street and Olympic Way. In his summing-up, the learned trial judge referred to this discrepancy and suggested that it was not particularly important because Green had also placed the van near Austin's gate. It is clear that they were all referring to the same spot, and that the reference to Sixth Street was most likely an error for Fourth Street. We are of the view that the learned trial judge gave adequate assistance to the jury in respect of discrepancies in the case and the complaint in this regard is without merit.

For the reasons set out above the applications for leave to appeal were refused.