JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 3 & 5/89

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

R v DENNIE CHAPLIN
HOWARD MALCOLM
PETER GRANT

Delroy Chuck for Chaplin

Dennis Daley for Grant

Chester Stamp for Malcolm

Kent Pantry for Crown

May 16, 17 & July 16, 1990

FORTE, J.A.

The appellants were convicted of the murder of Vincent Myrie in the Saint James Circuit Court on the 15th December, 1988 before Wolfe J and a jury and sentenced to suffer death in the manner authorised by law.

On the 17th May, 1990, we granted the applicants leave to appeal and treated the applications as the hearing of the appeals. We dismissed the appeals and promised to put our reasons in writing. This we now do.

Myrie had been found dead on the 18th June, 1986 on a property on Childermuss adjoining the Lethe main road in the parish of Hanover. From the road to where the body was lying, the grass was scorched forming a path. At the side of the road, there was a burnt area, in which was found the remains of a burnt plastic container and a piece of steel. A post mortem examination done on the body 29 days later, revealed the following -

1. The body was badly charred;

2. two penetrated stab wounds at the posterior left neck;

3. two parallel gaping lacerations at the back of the skull appearing like consecutive chops;

4. a stab wound to the posterior left shoulder;

In the doctor's opinion either the lacerations or the burning was sufficient to cause death. An instrument such as a knife could have caused the wounds to the posterior neck and shoulder and an object like a piece of iron (tendered as Exhibit 1) used with a great deal of force could have caused the injury to the skull. Because of the deterioration of the body and the burning no internal dissection was done.

The tale, which ended with the death of Myrie, began on the morning of the 18th June, 1967, when at about 7.00 a.m. the appellants Grant and Chaplin went to the home of one Vincent Mattison at Cascade in Hanover. Both men were known to Mattison before that morning. While Grant (Mattison's nephew) was in the kitchen, Chaplin enquired of Mattison whether he could hire Mattison's red pick-up on the following day, Friday. Mattison told him that he could not do so, as the pick-up would be used by the deceased to transport market people on that day. The appellant Chaplin, offered to pay $300 if Mattison would take the vehicle from the deceased and hire it to him on that day, but this offer was also refused, because, as Mattison told Chaplin, the deceased was the regular driver of the pick-up and if he took it from him on that day he (the deceased) would lose money and might never want to drive it again. Chaplin, however left with Grant saying that he would "put it to Shorty" (the deceased). Later that morning, Sharon Wedderburn, on her way to Hopewell to sell mangoes, was given a "drive" in this red

pick-up which she boarded at Johnson Town in Hanover. At this time the deceased was driving the pick-up with two men sitting in front whom she could not identify. In the back was the appellant Malcolm, whom she knew for 17 years. She went in the back of the van, where, during the journey to Hopewell where she was let-off, she noticed a box with a piece of steel protruding from it.

The next time the pick-up was seen was at about 11.00 a.m. that same day on the Lethe main road. It was seen by a school girl, Shawnette Campbell, who first saw a plastic jug burning in the road and then saw the pick-up going in the direction of Lethe; it then turned and headed towards the Anchovy main road. At about 1.30 p.m., the pick-up was again seen at a gas station in Ramble with three men in it.

On the following day, the 19th June, 1987 at about 3.30 p.m., the appellant Chaplin arrived at his aunt's house at Dunrobin in Mandeville in the company of the appellant Grant. They arrived there in the red pick-up owned by Mr. Mattison. In Grant's presence, Chaplin told her that he had got himself "mix up in a little trouble." Asked what trouble, he told her that he had bought the pick-up and "they inform on him over here," and he came to find out if she could put it up for him. He then introduced Grant to his aunt as a policeman, and it turned out she had to lend them money to get back to St. James. Asked when he would return for the van, Chaplin told her he would do so in three weeks. She then agreed to keep the van on her premises until he returned for it.

On the 3rd July, 1987 the applicant Chaplin was accosted and searched by Detective Trail who found on him the papers connected to the van. Chaplin thereafter took the detective to Mandeville in Manchester where the pick-up was recovered from the home of his aunt.

On their arrest each applicant gave a statement. All admitted their presence at the time the deceased came to his death.

As the contents of each statement is relevant to the submissions by counsel for the applicants, reference will be made thereto in dealing with these arguments where necessary.

1. **Dennie Chaplin**

> Except for one minor point which was void of merit and which Mr. Chuck for this appellant eventually conceded, he quite correctly indicated that there was no argument which he could advance in his favour.
> We agree entirely with counsel's approach, as there was an abundance of evidence upon which the jury could have come to its conclusion and no complaint could successfully be made in respect of the learned trial judge's summation. This appeal was accordingly dismissed.

2. **Peter Grant - Ground 1**

> Mr. Daley for the appellant attacked the admission of the statement made by this appellant on the basis that at the time the statement was given, he had been detained for seven days without being told that he was charged for murder. This, however was a contention being made for the first time, before us, and was never put forward by the appellant at the trial as the reason why he gave the statement. In fact his objection to its admissibility was founded on his allegation that he was taken from lock-ups by the police officers, taken in a car to a lonely road and beaten, after which, they fired a shot and forced him to swallow the spent shell or else be killed. In those circumstances he signed a statement which had already been written. In the face of a denial by the police officers of these allegations and their own testimony alleging the fairness and the voluntariness of the statement, the learned trial judge considered those opposing versions, and obviously rejecting the applicants account and accepting that of the police officers, admitted it. There was then never any contention by the appellant that his prior detention had any influence at all in his giving the statement, or signing a previously written statement.

We did not think in any event that his detention for 7 days without being told of the charge, could by itself constitute oppressive conduct.

In the circumstances we found no merit in this ground of appeal.

Ground 2

For convenience this ground of appeal is set out hereunder -

> "That the Learned Trial Judge erred in fact and in law in inviting the jury to find that even if they rejected the caution statement of the applicant there was sufficient circumstantial evidence on the strength of which they could convict the applicant."

This complaint is based on the following passage in the learned trial judge's summation -

> "First of all, let me in summary form put before you what the contending versions are in this case. The prosecution presents its case on two limbs. It says to you that these men have made confessions, and on the basis of these confessions, if you believe them, they are guilty of this offence. This is what the prosecution is saying, even if you reject all the caution statements we rely upon circumstantial evidence to convict these men."

The learned trial judge then proceded to give a brief summary of the circumstantial evidence upon which the prosecution was relying and then he ended as follows -

> "That is what the prosecution is saying; the caution statements alone, the prosecution says, is enough. In the event of your rejecting the caution statements then, the prosecution says, we fall back on the circumstances of the case; and the prosecution says in the event that you believe both the caution statements and the circumstances of the case, and you put these two together, the prosecution says the evidence is overwhelming. So that is one contention."

Then he went on to give summaries of the contentions of the appellants and in particular of the appellant Grant he said -

> "Mr. Grant says this is all a mystery to me, I know nothing at all about it. I dont even know the two men who are sitting here with me; I dont know them; I have nothing to do with this business. The policemen force me to give the statement, threaten me, they force me to swallow a spent shell, and threaten me. So that statement isn't true."

Mr. Daley in developing this ground submitted that the learned trial judge was incorrect in directing the jury that the evidence outside of the caution statement was sufficient upon which the jury could convict the appellant. The directions however, related only to the contention of the prosecution, and nowhere in the summation did the learned trial judge give as his directions that the jury could convict on the circumstantial evidence alone.

He did however give satisfactory directions on the law relating to circumstantial evidence and assisted the jury by indicating the evidence upon which they could determine the guilt or not of the appellant. We are unable to find any merit in this ground of appeal.

The evidence against Grant, placed him in the company of Chaplin at the time when there was expressed, an urgent desire to have the use of the pick-up on the Friday. The request for the hireage of the van having been refused both left asserting that they were going to speak with Shorty. Later that day "Shorty" was seen driving the van with two men in the front with him and the appellant, Malcolm, in the back. On that same ~~day~~, "Shorty" is found dead in an area where the pick-up had been seen. On the following day, the same pick-up which "Shorty" had been seen driving was taken to Mandeville to

Mrs. Dawkins by the appellants Grant and Chaplin, who induced her to keep the pick-up, giving her as a reason for so doing, a story which was false and which alleged that Chaplin had bought the vehicle, and had got himself "mix in a little trouble". Chaplin then introduced Grant to Mrs. Dawkins as a police officer and Grant acquiesced in the introduction. In addition, when told of the report of the murder of the deceased, by the investigating officer, the appellant Grant said:

"Me sah? A no me alone do it."

That was certainly sufficient evidence which, if believed, could lead the jury to come to a conclusion adverse to the appellant.

However the appellant's statement given under caution and admitted in evidence, confirmed his involvement and in our view, resulted in a strong case against him. He admitted therein the following:

1. His visit with the appellant Chaplin to the home of Mr. Mattison and the request for the hireage of the bus on the Friday which was refused by Mr. Mattison.

2. That he was told by Chaplin that he (Chaplin) knew of a lonely place where they could go and take away the van. Asked by him how they could take it, Chaplin told him that the only way they could get it was by killing 'Shorty' (the deceased).

3. That he induced the deceased to take them in the van, by offering to 'charter' it for $80.00, to make a trip to Montego Bay. He and Chaplin went into the front and 'Tweetie' (appellant Malcolm) in the back.

4. That the witness Wedderburn was picked up in the van and driven to Hopewell.

5. That on the instructions of Chaplin, the deceased drove the van on a 'lonely road'.

6. That before they had left for Montego Bay, Chaplin had told Malcolm and himself that when he reached a certain spot, he (Grant) should put up his hand and Malcolm would call out to the deceased to stop the van.

7. That this (as stated in paragraph 6) was done, and they all came out of the van, and then called the deceased to check if he saw anything wrong under the van.

8. That while the deceased was looking under the van, he used the piece of steel which was in the box in the van and hit the deceased across his back, causing him to stagger and fall.

He then relates how, the appellant Malcolm stabbed the deceased several times in his neck; after which Chaplin threw gas on him.
On his part he also admitted:

9. That he struck a match and lit a piece of paper which Malcolm had and that the paper was thrown on the deceased and 'it explode and Shorty catch a fire'.

10. After this, with Chaplin driving the van, they all went in the van to Santa Cruz, where a friend agreed to keep the van in his garage.

11. On the following Friday, he and Chaplin took the van to Chaplin's aunt (Mrs. Dawkins) in Mandeville, and that Chaplin told her that he (Chaplin) had bought the van and asked her if he could leave it there and that she agreed.

This statement clearly indicates an active involvement of the appellant Grant in the use of violence towards the deceased and in circumstances where he had been told that the purpose was to kill the deceased so that the van could be obtained. In addition, it substantiates the prosecution's witnesses in almost every detail in particular (i) Mr. Mattison re the visit to his home by Chaplin and Grant (ii) Miss Wedderburn having been in the pick-up that day (iii) the van being seen at a gas station at 1.30 p.m., that day and (iv) Mrs. Dawkins re the taking of the vehicle to her home in Mandeville.

In conclusion, we repeat that this was a strong case against the appellant and one in which the learned trial judge directed the jury fairly and correctly on the law and on the issues raised and consequently we found no merit in this appeal.

Mr. Daley argued two other grounds of appeal which did not meet with our favour and which in our view need not be dealt with.

HOWARD MALCOLM

The main thrust of the submissions of counsel for this appellant, was that there was not sufficient evidence, circumstantial or otherwise upon which the jury could properly convict the appellant. That the evidence at its highest placed the appellant at the scene of the crime, but that mere presence was insufficient to establish that the appellant was a party to a common design to murder the deceased or to cause him serious injury.

What then was the evidence against the appellant Malcolm?

1. He was positively identified as being in the pick-up on the day that the deceased was killed and at a time it was being driven by the deceased.

2. His caution statement.

The content of his statement as far as is relevant is set out hereunder:

> "Dennie and Peter put the cardboard box in the van back and him and Peter go in the front beside the driver.
>
> The driver drive off and when we reach Johnson Town the driver stop and pick up a lady with some box of mangoes. I assist the lady to put the box them with the mangoes in the van back and also assist her to come in the vehicle.
>
> Peter and Dennie in front and me and the lady in the back, and there we drive off and go to Hopewell. When we reach in Hopewell square at Hopewell the lady stop the van and I help her out with the boxes and then she paid the driver. We continue on

"our way. We reach Long Hill and turn up the hill. We drive for a long distance and then we turn in a one lane. A believe one shop deh pon de left hand side in front of the lane. We travel up the lane fi bout .....about 15 minutes and then the van come to a stop along right beside the fence side and I saw the van door open up and I saw all of them come out at the front. All of them come to the left side and were looking on the left back wheel and then Peter push him hand into the box beside him and draw out a piece of steel iron and started to use it to hit Shorty in his head. After Shorty get couple lick well he drop in the street. Then Dennie take up a plastic bottle in the back of the van. Gas was in the bottle and Dennie throw the gas on Shorty and Peter used his matches to light him, and Dennie and Peter get in the front of the van and Dennie drive the van, turn the van in a little narrow road with a house on top of the hill. We drive back down the hill and pass back where Shorty was. We never go back down Long Hill. We drive up Anchovy road and drive down Sav-la-mar and then Black River and go to Santa Cruz where they drive the van in a garage and talk to a man. Them reason, then we go out the square and catch a transit van to /Sav-la-mar and another one to Grange Hill where them hire a taxi from there to Lucea, and then drop me out at Seaview Drive in front of the playfield, and me walk through the playfield and go round a mi yard a Old Road.

The next day me go work same way, and Peter and Dennie told me say not even me best friend me should tell anything, and if I tell anybody they would shoot me. This is all me know."

His statement alleges then, that he stood and watched what can only be described as a most heinous murder committed by his companions without attempting to arrest their actions or without sounding an alarm. After the act was committed, he continued in their company, while they drove away from the scene and sought and found a hiding place for the pick-up. He

then travelled with them on public transportation back to his home-town, and even then, when he parted company with them, failed to make any report concerning this dastardly crime.

The following passage from **Coney** (1882) 8 Q.B.D. 534, referred to in **R. v. Clarkson & Carrol** (1971) 55 Cr. App. Rep. 445 at page 450 cited with approval by this Court in S.C.C.A. 15 & 16/84 **R. v. Glenford Hewitt and Herbert Hewitt** (unreported) delivered on the 10th April, 1987, is most relevant to the contention of the appellant -

> "Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

In our view, the evidence demonstrated that the appellant, far from being accidentally present, was in fact voluntarily and purposely present at the scene, and his conduct during and after the commission of the murder, is sufficient evidence upon which the jury could correctly find that he was present aiding and abetting the others in the act and therefore a participant in the common design to the murder.

It is for those reasons, that we dismissed the appeals and affirmed the convictions.