JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 284/77 & 285/77

BEFORE: The Hon. Mr. Justice Robinson, P.
The Hon. Mr. Justice Melville, J. A.
The Hon. Mr. Justice Carberry, J. A.

R. v. ELIJAH KERR
LOUIS COOPER

Mr. Howard Hamilton for Kerr

Mr. Lloyd McFarlane for Cooper

Mr. Donald McIntosh for the Crown

February 6, 1980

MELVILLE J. A.

On the 8th of December, 1977 the applicants were convicted in the St. James Circuit Court for the murder of Sydney Whittingham on the 4th of September 1975.

Mr. Whittingham had been posted as a security guard at 328 Charles Avenue in the Ironshore Estate Montego Bay at 8 p.m. on the 3rd September 1975. He had been issued with a shot gun and 4 cartridges, no doubt as part of his duties. Between 3 and 4.00 o'clock of the early morning of the 4th of September he was found dead on the patio of 328 Charles Avenue. Up to 1.30 a.m. he had been seen alive and well. He had been shot, no doubt more than once, from shot gun blasts! Some 5 shotgun shells were found in the vicinity of his body and the shotgun and ammunition issued to Mr. Whittingham were missing.

A Mr. Peterkin who was employed as a gardener at the Charles Avenue premises said that between 3 and 4.00 o'clock on the morning of the 4th of September he got awake, and feeling thirsty, he went to the refrigeraior in the dining room to get

a drink of water. This dining room faces the patio on which Mr. Whittingham's body was found and beyond the patio was a swimming pool. Glass doors separated the dining room from the patio. Drapes were hung over these doors and were of such material that unless the drapes were removed one could not see unto the patio from the dining room. After having his drink, Mr. Peterkin said he pulled the drapes aside and looked out unto the patio. There he saw the applicant Cooper some 4 to 5 yards away from him and the applicant Kerr nearby by some steps. Kerr had two 'long guns' one strung over his back with the other in his hands. Cooper who was also armed with a 'long gun' fired at Mr. Peterkin, shattering the glass door and injuring Mr. Peterkin in his abdomen. Whereupon Mr. Peterkin took to his heels. It was some twenty minutes after this incident that Mr. Whittingham's body was discovered on the patio. At different identification parades held subsequently Mr. Peterkin identified both applicants.

Prior to this incident that is at about 10.00 o'clock on the same night, another security guard Mr. Haughton was on duty at another cottage at Sugar Mill Road in the same Ironshore Estate and some one mile away from the Charles Avenue Cottage when he was shot and his shotgun and four cartridges stolen from him. Mr. Haughton subsequently identified the applicant Cooper, as the person who has shot him. There was no evidence of any other person being involved with Cooper in this incident, at least at this trial, there having been two previous trials.

To complete the picture, although no evidence of this incident was given at the trial, it seems that some three weeks later both applicants and others were seen travelling in

a motor car at Ramble. The men apparently made their escape, but not before Kerr was seen with a shotgun. Mr. Haughton's shotgun was recovered from that car.

This last incident (the Ramble incident) was not given in evidence at the trial as a preliminary objection was taken, before the trial commenced and in the absence of the jury, that the facts of this incident and also those relating to Mr. Haughton (the Sugar Mill Road incident) should not be put before the jury. In the exercise of his discretion the learned trial judge allowed evidence of the Sugar Mill Road incident, but not that of the Ramble incident to be put before the jury.

What was argued before us was that the evidence of the Sugar Mill Road incident also was in admissible. Alternatively if it was admissible as against Cooper it was so prejudicial to the applicant Kerr, that the learned trial judge erred in law in allowing that evidence to be put before the jury. In the farther alternative it was said, the applicant Kerr should at least have been ordered to be tried separately from the applicant Cooper.

For evidence of this nature to be admissible it must be based on Lord Herschell's Classic statement in Makin v. Attorney General for New South Wales (1894) A.C. 57 at p. 65:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury and it may be

> so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

As judicially interpreted, to be admissible, the evidence must fall within what has been compendiously referred to as the "similar facts" rule, and it cannot be doubted at this stage that evidence which goes to the identity of an accused person comes with the rule. R. v. Robinson (1953) 37 Cr. App. R. 95: R. v. Davis & Murphy (1972) 56 Cr. App. R. 249. The difficulty has always been to correctly apply the rule to the circumstances of a particular case. In this regard D.P.P. v. Boardman (1974) 60 Cr. App. R. 165 offers invaluable assistance. A part of the headnote states:-

> "There are circumstances in which, contrary to the general rule, evidence of certain acts of the defendant other than those charged is admissible because of their similarity to the acts being investigated and by reason of their probative force. It is for the judge to rule whether such evidence is admissible and in his discretion to decide whether in the circumstances such evidence should be admitted."

Lord Cross of Chelsea puts the test this way at p. 185:

> "As Viscount Simon said in Harris v. D.P.P. (1952) 36 Cr. App. R. at p. 51 (1952) A.C. 694, 705, it is not possible to compile an exhaustive list of the sort of cases in which "similar fact" evidence-to use a compendious phrase-is admissible. The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it. In the end although the admissibility of such evidence is a question of law not of discretion the question as I see it must be one of degree."

Applying that test to the circumstances of this case what are the similarities between the Sugar Mill Road incident and the Charles Avenue incident? In both instances a security guard is shot by a shotgun and his shotgun and cartridges stolen, empty shotgun cartridge shells are discarded at the respective scenes; both are shot in the same area of the respective houses and for good measure the incident are occurring a mere five hours apart on the same night approximatley one mile apart in the same housing estate. The applicant Cooper was identified as the person who discharged the firearm at Sugar Mill Road and also at Mr. Peterkin at Charles Avenue. In the circumstances the evidence of the Sugar Mill Road incident was relevant evidence which could support the identification of Mr. Peterkin of the applicant Cooper at the Charles Avenue incident.

On the question of prejudice to the applicant Kerr, it cannot be doubted thqt the case that the Crown was putting forward was that both these men were engaged on a joint enterprise. Before the trial judge great emphasis was laid on the prejudicial nature of the Sugar Mill Road incident in so far as Kerr was concerned as also the Ramble incident. Having listened to the rival contentions the learned trial judge excluded evidence of the Ramble incident but allowed evidence of the Sugar Mill Road incident. It was a matter for the discretion of the trial judge and it has been said time and time again that this court will not lightly interfere with the exercise of such a discretion.

As to whether there should have been separate trials, Mr. Hamilton tried valiantly to show that such an application had been made at the trial. We are unable to accept that. Mention of the possibility of a Separate trial was made only in the context of the difficulty in which the Crown would be placed, in furthering the argument that evidence of the

Sugar Mill Road and Ramble incidents should be excluded. At all events it was much too late in the day for us to entertain such an application in the circumstances, and if an application had been made and refused one would have seen no reason to interfere.

Mr. Hamilton's other complaint was that the jury had been misdirected in that by the repeated use of the phrase "the two accused or either one of them who killed the deceased," the trial judge failed sufficiently to bring home to the minds of the jury the importance of distinguishing the case of each applicant. In particular, the passage:

> "And, if you accept the evidence of identification given by Haughton and Peterkin, then you will ask yourself what were Cooper and Kerr doing on that patio at three o'clock that morning, armed with shot guns; what happened to Whittingham's shot gun; who shot Whittingham?"

would lead the jury to use the evidence of the Sugar Mill Road incident to link the applicant Kerr with what happened at Charles Avenue thereby creating grave prejudice against Kerr. With Mr. Hamilton we have been through the summing up very carefully and we find this ground untenable. In the passages immediately preceding that complained of, it was made abundantly clear to the jury that the evidence of the Sugar Mill Road incident affected only the applicant Cooper. We are satisfied that on the summing up as a whole there was no room for doubt that the case of each applicant was separately left for the jury's consideration, so there is no merit in this ground.

Mr. McFarlane who adopted the arguments of Mr. Hamilton added one other ground and it was, "that the learned trial judge failed to properly direct the jury as to the weight which

was to be attached to the fact that the witness Peterkin had admitted that he could have said that it was Whittingham who has shot him." We find no substance in this ground. In the first place there was no evidence before the jury that he had in fact said so, and secondly at all events the learned trial judge adequately left the matter to be considered by the jury as affecting the credibility of the witness Mr. Peterkin. Accordingly, the hearing was treated as the hearing of the appeal and the appeals of both applicants dismissed.