J A M A I C A

IN THE COURT OF APPEAL

CRIMINAL APPEAL Nos. 129 and 130 of 1972

BEFORE: The Honourable Mr. Justice Luckhoo, J.A.
The Honourable Mr. Justice Robinson, Ag. J.A.
The Honourable Mr. Justice Grannum, Ag. J.A.

R. v. Errol Gardner
Kenneth Burke

Mr. P. Atkinson for the applicant Burke
Mr. H. Hamilton for the applicant Gardner
Mr. L. Tomlinson for the Crown

July 2, 27, 1973

GRANNUN, J.A. (Ag.):

On July 2, 1973, we refused both these applications and indicated that we would put our reason into writing. This we now do.

On July 14, 1972, the applicants Errol Gardner and Kenneth Burke were convicted by a jury before Zacca, J. in the Home Circuit Court for the murder of Vincent Leiba on August 15, 1971. Kenneth Burke, who was 17 years of age at the date of his conviction, was sentenced to be detained at Her Majesty's pleasure and Errol Gardner who was just over 18 years of age, was sentenced to death. They have both applied for leave to appeal against their convictions.

On August 13, 1971, Hilda Bennett, an accounting clerk, employed by Leiba's Block and Stone Co. Ltd. situated at Cane River Road, in St. Andrew was sitting at her desk in the office about 2.30 in the afternoon. The deceased, Mr. Vincent Leiba was at the time in another office on the same premises. Hilda Bennett saw two young men walk on to the verandah where there was a

/water cooler -

water cooler. She then saw Mr. Leiba come into her office, and after using the telephone he walked towards the door leading out to the verandah. At this point she saw a man, whom she described as "the darker of the fellows", come through the door with a gun in his hand. The man pointed the gun at Mr. Leiba, who was still inside the office going towards the same door, and said to Mr. Leiba, "This is a hold-up, bredda!" Mr. Leiba who was a man with only one arm (his right arm had been amputated from below the shoulder a long time before this incident) and the man who came into the office were then about a foot away from each other and Leiba said to the man, "Me no have no money bredda". He continued walking towards the door. As Mr. Leiba was about to walk past the man, Hilda Bennett saw another man who she described as "a clear fellow", come through the door into the office. This second man took a gun from his pocket and pointed it at Mr. Leiba who was then about 3-4 feet away. According to Hilda Bennett the two men were at this time inside the office on either side of Mr. Leiba, one on his right and the other on his left, each with a gun in his hand and each pointing the gun at Mr. Leiba who still continued to make his way towards the door which led outside. The man she described as the darker one jumped in front of him blocking his way. Mr. Leiba turned round and hit this man on his head with his left hand and as Mr. Leiba hit the man she heard an explosion and then saw Mr. Leiba hold his right side with his left hand and fall. Whilst he was falling she heard another explosion. Mr. Leiba fell to the floor bleeding but succeeded in using his feet to close the door and told Hilda Bennett to call the police. The two men, who were at that time still inside the office pulled the door open and ran outside. Help was summoned and Mr. Leiba was taken to hospital where he died on August 15, 1971.

Another witness, Vincent Taylor, testified that he was at the premises of Leiba's Block and Stone Co. on August 13, 1971. At about 2.00 p.m. on that day he was walking in the

/direction -

direction away from the office towards Mr. Leiba's house when he saw two young fellows coming in the opposite direction. These two men had a conversation with him about what he understood to be the water cooler on the verandah and he continued on his way towards Mr.Leiba's house. After speaking to someone at the house, he started back in the direction of the office and looked and saw the same two fellows who had spoken to him running from the direction of the office. The two men ran through the gate and up towards a hill and he then saw Hilda Bennett come out of the office shouting for help. He rushed to the office and saw Mr. Leiba lying by the doorway.

Although there was evidence of there having been two explosions, it appears that when the police arrived at the scene, only one spent bullet was recovered. This bullet was flattened out and there was also evidence of an impression on the concrete wall in the office. There was no evidence of any bullet having been recovered from the body of Mr. Leiba at the subsequent post mortem examination performed on August 17, 1971.

On September 8, 1971, Hilda Bennett attended two separate identification parades held at the Half-Way-Tree Police Station. At the first parade the applicant, Errol Gardner, was the suspect and Hilda Bennett failed to identify him. She pointed out a man who was not the applicant Errol Gardner as one of the two men who came into Mr. Leiba's office on August 13, 1971. In the course of her evidence she said that she was nervous on the first parade and in fact she said that she was six months pregnant at the time. The second parade was held in respect of the applicant Kenneth Burke and Hilda Bennett pointed him out as one of the men she saw in Mr. Leiba's office on August 13, 1971. Vincent Taylor also attended two separate identification parades held in September, 1971 at the Half-Way-Tree Police Station. He too failed to identify the applicant Gardner on the parade and, in fact, pointed out some other person as being one of the men

/he

he saw at Mr. Leiba's business premises on August 13, 1971. At the other parade he identified the applicant, Kenneth Burke, as being one of the men he saw at Mr. Leiba's business place on August 13, 1971. At the trial this witness, Vincent Taylor, pointed to the applicant Gardner in the dock and testified that he, the applicant Gardner, was one of the men.

A post mortem examination was performed on the body of Vincent Leiba on August 17, 1971 some 54 hours after death. The examination revealed an exit bullet wound on the right side of the back at the level of the tenth rib. Internally there was extensive damage to the liver and the cause of death was stated to be pulmonary oedema secondary to the passage of a bullet through the abdomen.

Detective Assistant Supt. Clinton Harvey of the Kingston C.I.D. who was carrying out investigations into the killing of Vincent Leiba testified that on September 5, 1971, the applicant Gardner accompanied by his mother Mercedes Turton, came to see him at the C.I.D. Headquarters. The mother told him that she understood that the police were looking for the applicant Gardner and she had brought him there. He cautioned Gardner and told him that he had information that he, Gardner, was mixed up in the fatal shooting of Vincent Leiba on August 13, 1971. Gardner said to him, "A no me shoot him sir, me can tell you how it go." The applicant Gardner then gave a written statement to Supt. Harvey in the presence of a Justice of the Peace which was admitted in evidence. The statement is as follows:

> "Friday the 13th August, this year me and Kenneth Burke who used to go to school at Rennock Lodge take the bus near the Baptist Church at East Queen Street and come off at the second bridge after passing Shooters Hill. We turn back and walk a little distance from the bus stop and turn up a side road off the main road. Kenneth say must mek we go a the block factory since it was pay day and mek we lik it. I said, "Alright mek we tek it nuh." We go up and Kenneth drink water from the cooler. After him drink it done him say, "Mek we mek we move." We walk round where some black pack up and go a the office doorway. Kenneth turn him back to the office doorway and tek out him gun and turn back round. We go into the office.

/Kenneth -

"Kenneth was in front. We see a brown man with one hand and Kenneth stick him up; same time him say to the man:"Don't move". The man make fe hold up him good hand but him didn't go right up with it. As him have him hand half raise him said to us, "Alright just tek the money don't shoot." Kenneth told me to give an eye outside. I look outside and see a man coming. I turn around and said to Kenneth, "It look like a man a come". Kenneth said, "Look see if is a man in a white shirt." Kenneth turned his head sideways to look at this man that was coming and as he did so the one hand man box the gun from Kenneth hand. It drop from his hand. The one hand man mek fe tek it up and Kenneth stamp him foot. I moved a little way and Kenneth pick up the gun. As a mek fe run off a hear the explosion. A look round and see Kenneth a run off with the gun in a him right hand. A run like lightening fe the bush and later a go back pon the road and tek a bus come a town. Later in the evening a go a the club fe go play foot ball and Kenneth come and beg a game. After the game finish a ask him if the man get shot and him say yes. A ask him which part him run and him say him run fe the river bed. In a de Monday after me hear over the radio say the man dead. It was Ken who told me that him dead. After me hear say him dead me go a Tower Hill a me mother uncle go keep low. Saturday night last night me mother come fe me and Sunday morning she carry me go a police station. That is all sah.

/Sgd./ ERROL GARDNER.
5-9-71 "

Detective Inspector Wilbert Walker was also concerned with the investigation into the killing of Vincent Leiba. He went to the office of Leiba's Block and Stone Co. on August 13, 1971. He saw blood stains on the floor inside the office and found one spent bullet (flattened) which is Exhibit 1 in the case. He also observed what appeared to be a recent impression in the wall. On September 6, 1971, he received from another police officer the written statement made by the applicant Gardner and having received that statement Inspector Walker went to the Half-Way-Tree lock-up where he saw the applicant Kenneth Burke. He told him he was making enquiries into the murder of Vincent Leiba and that he was informed that he, the applicant Burke, had something to do with this murder and that an identification parade would be held in connection with it. He cautioned Burke who then said, "I hear the Michi talk say I know about it but he will find out." It is interesting to notice on this

/aspect -

aspect of the case, that there was evidence from one of the police witnesses to the effect that the applicant Errol Gardner was known by the name of "Michi". On September 8, 1971, Inspector Walker arrested both applicants on charges of murder. He saw them both together at the time of the arrest and cautioned them in the presence and hearing of each other. The applicant Gardner said, "I tell Mr. Hanson everything already." (Inspector Hanson was the police officer who took down the applicant Gardner's statement). The applicant Burke said, "I shoot nobody." According to Inspector Walker, Burke then pointed to the applicant Gardner and said, "I follow him go out there and him shoot the man."

The case for the prosecution was that these two men went to Leiba's office on August 13, 1971, both with the intention of carrying out a robbery there; that each of them was armed with a gun and that they had gone there with the common design to use whatever force was necessary to achieve their purpose and to deal with any resistance which they might encounter during the course of their joint enterprice, or to permit their escape by the use of force, even if it entailed killing or causing grievous bodily harm.

Both applicants by way of defence made unsworn statements from the dock. In each case the defence raised was an alibi.

Several grounds of appeal were filed on the part of the applicant Kenneth Burke some of which were abandoned at the commencement of the hearing and during the course of the argument.

The first ground advanced by Mr. Atkinson was that the learned trial judge had misdirected the jury in that he failed to give them adequate instructions as to the defence of accident which arose from the prosecution's case.

As we understand it, he submits that the learned trial judge did not alert the minds of the jury to the fact that in /the -

the circumstances in which the deceased struck the man who fired the first shot the injuries suffered by the deceased may have been caused by the accidental discharge of a gun. He contends that the learned trial judge failed to relate his directions to the burden on the Crown to negative the accidental discharge of the gun.

We can find no merit whatever in this ground. In our view the issue of accident did not arise in the circumstances of this case.

However, on any view of the matter even though the question of accidental discharge of the gun was never raised or suggested by the defence at the trial, the learned trial judge was abundantly careful to tell the jury at page 166 of the summing-up:

> "the killing.....must be the conscious, voluntary act on the part of the persons charged.....You must be satisfied too that the killing was not done accidentally, because of course, if the killing is as a result of an accident then no one would be held liable for such a killing. It is a matter for you whether on the facts presented to you, you consider that the question of accident arises at all in this case. This, of course, has not been raised by the defence, and of course, while there is no duty on the defence to prove anything.....it would still be a matter for you to consider the evidence and for you to say whether on the facts of the matter you consider whether accident arises at all in this case."

This ground therefore fails.

The next ground argued by Mr. Atkinson was that the evidence as to identity was manifestly unsatisfactory. He put particular stress on the aspect that, having regard to the fact that the witness Hilda Bennett was admittedly in a state of shock at the time of the incident and afterwards and that she made a mistake as to identification, there was a real danger in accepting her evidence as to identification.

We have given careful consideration to this argument. It was not in dispute that the evidence disclosed that the witness Hilda Bennett not only failed to identify the applicant Errol Gardner when she attended an identification

/parade -

parade held in respect of him but she made the further mistake of pointing out another man on the parade as being one of the men who came into the office of the deceased and attacked him on August 13, 1971. We have also taken into account in our consideration of Mr. Atkinson's complaint on this ground that the other eye-witness to the incidents surrounding the killing of Mr. Leiba, Vincent Taylor, also failed to identify the applicant Gardner on the identification parade and made a similar mistake in pointing out another man, even though he subsequently at the trial testified that the applicant Gardner was one of the men he saw at the premises on August 13, 1971. However, when one looks at the summing-up of the learned trial judge, two points emerge quite clearly. Firstly, this is not a case of the type where the prosecution depended wholly on the visual identification of the applicant Burke by one or more witnesses. The prosecution adduced evidence inthe form of statements made by the applicant Burke to police witnesses from which the jury could find as a fact not only that the applicant was at the scene of the crime at the relevant time but evidence from which they could draw the strong inference that the applicant Burke was involved in the incidents leading up to the killing of the deceased. Secondly, the learned trial judge in his charge to the jury dealt fully and fairly with all the evidence relating to identification. They were carefully reminded of the evidence of the witnesses who were called as to identification and the summing-up dealt very specifically with all the points which concerned the question of identification. In addition to this, the attention of the jury was repeatedly drawn to the possibilities of making a mistake in identification and of the need to be sure that no such mistake was in fact made. Having thus invited the jury to give due consideration to the special issues which were presented by the evidence in the case, the question of identification was ultimately for the jury to decide and we see no reason for

/interfering -

interfering with their finding. This ground also fails.

The final ground argued by Mr. Atkinson was with regard to the statement made by the applicant Gardner after caution and which was admitted in evidence. The contention is that this statement contained several references to the applicant Burke, (16 in all) and that these references were fatally and irrevocably prejudicial to the case of the applicant Burke. Mr. Atkinson maintained that this was so despite the fact that the learned trial judge in his summing-up directed the jury to disregard all such references. Any such warnings he says would have been futile as far as the applicant Burke was concerned. His submissions on this ground contained the suggestion that the statement should have been excluded from the evidence by the learned trial judge and if this was not done then the statement should have been edited to remove the prejudicial references to the applicant Burke.

The real solution, according to Mr. Atkinson, even though no application to this effect was made at the trial would have been for the judge to order Separate trials.

The authorities are clear that all these matters are within the discretion of the trial judge on the particular facts of the case and this court will not lightly interfere with the exercise of that discretion.

Reference was made in the case of George Weaver and John Henry Weaver (1967) 51 C.A.R. 77 to the current practice of editing a statement made by a defendant, to avoid prejudicing him and in an effort to eliminate matters which are part of the evidence, but which it is thought best that the jury should not know. Sachs L.J. suggested that the best way for this to be done is for the evidence to appear unvarnished in the depositions taken before the magistrate; then at the trial counsel can confer and the judge can if necessary take his part in ensuring that any "editing" is done, if it is done at all, in the right way and to the right degree."

/In the -

In the instant case, none of this appears to have happened. The learned trial judge had to deal with the particular facts of this case. He had to consider the nature of what had been admitted into evidence, the circumstances in which it had been admitted and what in the light of those circumstances taken as a whole was the correct course.

When one looks carefully at the summing-up to the jury in this case, it can be seen that what the learned trial judge did was to repeat and emphasise to the jury, over and over again a warning that in the case of each applicant they were not to regard as evidence against him anything said by the other applicant.

It will suffice if we refer specifically to one such passage only in the summing-up to illustrate the manner in which the learned trial judge dealt with this aspect of the case.

At pages 210-211 he said:

> "You will remember the warning that I gave you with respect to this statement (the statement which is alleged to have been given by the accused Gardner). I propose to repeat this warning to you, Mr. Foreman and members of the jury. You will remember that I told you that in this statement given by the accused Gardner reference was made to Kenneth Burke. Of course you will remember that I told you that any reference made to the accused Burke in this statement is not evidence against Burke. That is, what is contained in this statement is not evidence against the accused Burke so you cannot use anything which is contained in this statement against Burke. What is contained in this statement can only be used as evidence against the maker of the statement. Please do not allow it to interfere with your good judgment. Please do not allow it to influence you or prejudice you in any way in so far as the accused Burke is concerned. We know that as I said earlier, you will approach this matter with an open mind and good judgment of reasonable intelligent persons and that if you approach it in this way, then I am sure you will be able to, in considering this statement, discard it completely from your minds, put it out of your minds when you come to consider the case against the accused Burke."

This type of warning was, as I have said, repeatedly given to the jury. Looking at the matter as a whole, we do not think on any view that it can be denied that the

/learned -

learned trial judge gave a fair and full direction to the jury as to how they should consider the case as it affected the applicant Burke.

This ground therefore also fails. In the result all the grounds argued in respect of the applicant Burke fail.

Mr. Hamilton for the applicant Gardner conceded at the outset that the supplementary ground of appeal filed in respect of the applicant Gardner was misconceived in view of what actually took place during the trial. He advanced only one contention which, by leave of the Court, was incorporated in the ground originally filed by the applicant Gardner. This ground dealt with the question of identification. Mr. Hamilton submitted that the learned trial judge should have directed the jury that they would have to accept the statement alleged to be made by Gardner in the terms in which it was given i.e. as being the truth of what happened.

As we understand it, although conceding that the directions of the learned trial judge on the issue of a common design was correct and adequate, Mr. Hamilton complained that the learned trial judge failed sufficiently to direct the jury as to how they should treat the statement alleged to have been made by Gardner in the event of their finding that there was in fact no evidence to implicate the applicant Gardner except that of his own written statement.

As we have already indicated in dealing with the grounds advanced on the part of the other applicant Kenneth Burke, the learned trial judge in our view dealt with the aspect of identification fully and correctly with regard to each of the applicants. His directions on the issue of common design followed the lines laid down in the judgments delivered in the court of Criminal Appeal in England in the cases of R. v Anderson and Morris (1966) 2 A.E.R. p. 644 and in the Court of Appeal (Criminal Division) in R. v. Lovesey and anor (1970) 1 Q.B. p. 356. We are unable to see how a reasonable jury, once they accepted that the applicant

/Gardner -

Gardner did in fact make the statement which he is alleged to have made and which was put in evidence, and that its contents were true, could possibly conclude that the deceased's death was the result of an unauthorised act in the carrying out of a common design to use whatever force was necessary to achieve their object of robbing Leiba or to permit their escape without fear of subsequent identification even if this involved killing or the infliction of grievous bodily harm.

We have examined with the aid of Mr. Hamilton the passages in the summing-up which he sought to criticise but we are unable to agree with his cintention. In the result we refused both applications.

Before finally disposing of these applications it should be mentioned that Mr. Hamilton drew our attention to the respective ages of the two applicants at the time of the commission of the offence and at the date of their convictions. He pointed out that because of the fact that the applicant Gardner had reached the age of 18 years at the date of his conviction his offence attracted the sentence of death even though he was under 18 years of age at the date of the commission of the offence which was August 13, 1971. On the other hand, the applicant Burke who was under 18 at the date of his conviction received a sentence of detention during Her Majesty's pleasure. He has invited this Court to express its concern as to the existing state of the law in this regard.

In the appeal of R. v. Martin Wright Criminal Appeal No. 56 of 1971 (unreported), where the applicant had attained the age of 17 years between the date of the commission of the offence and the date of conviction and was sentenced to a term of imprisonment because he was no longer a juvenile at the date of conviction, this court sitting en banc in delivering judgment dismissing the appellant's appeal against sentence said -

> " Before parting with this case, we would like to express the hope that urgent consideration will be given to the question whether those provisions which govern the sentencing of persons who were juveniles /at the -

> "at the time of the commission of criminal offences but have ceased to be juveniles at the date of their conviction and sentence should not be revised in the light of present day circumstances."

We wish to adopt and incorporate this expression in our judgment herein.

We can do no more than reiterate the same expression of hope as was uttered by the Court in the case of R. v. Martin Wright.