JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 133 and 136 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, President (Ag.).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

R. v. GEORGE SCOTT
R. v. MANLEY DAVIS

Mr. S.C. Morris for Manley Davis.
Mr. E. DeLisser for George Scott.
Mr. P.T. Harrison with Mr. Sang for the Crown.

28th, 29th March; 11th May 1973

EDUN J.A.:

On July 14, 1972 both applicants, Scott and Davis were convicted of the murder of Watson Lowe on 8th or 9th September 1971 and sentenced to death at the Westmoreland Circuit Court. Against these convictions they have applied for leave to appeal.

Case for the prosecution.

Watson Lowe, the deceased, was the owner of a business in Ricketts River, Westmoreland. He resided on the same premises. On September 9, 1971 his mutilated body was found lying in front of a white Rover car in the garage at his premises in a pool of blood. The surrounding area was heavily blood-stained and there were splashes of blood in front of the car. There was a large bunch of keys on the ground in front of an adjoining store-room. There was a broken coca-cola bottle near to the body and the lower denture and spectacles of the deceased were found near the body. The deceased's shop had been broken into and ransacked. The safe was tampered with and personal papers were strewn over the floor.

Dr. Lionel Clare on September 10, examined the body of the deceased in the position in which it was found in the garage. The legs were swollen, one arm was above the head. The doctor found the following injuries:

1 bruises with swellings over both maxillary areas and upper lip;

2 bruises around the left shoulder and left chest, anteriorly;

3 multiple cuts on the head and neck -

(i) centre of forehead 3" long running vertically;

(ii) left forehead 3" long running diagonally;

(iii) left zygoma 2" long running horizontally;

(iv) left parieto-occipito area two cuts 3½" long and 1" long running horizontally;

(v) left pre-auricular area ½" running diagonally;

(vi) cut through left earlobe extending below the left angle of the jaw 2" long diagonally through the tissues including the left jugular vein. There was extensive swelling in the surrounding area through the muscle;

(vii) cut to the left side of the neck 1½" long running diagonally, through the muscle;

(viii) cut through the right parietal area of scalp 2" long running horizontally;

(ix) cut on the right parietal area on the scalp 3" long running horizontally.

(x) There was also a punctured wound over the right zygoma.

In his opinion the bruises could have been caused by a blunt instrument with some degree of force and the cuts could have been caused by a sharp knife or razor. The victim must have succumbed to the injuries within a short time as one of the cuts went very deep through the jugular vein. The bruises could have been caused by blows with a bottle not yet broken but the cuts could not have been caused by the prongs of a broken bottle as the incisions were clean cuts. A piece of pipe could have caused the bruises which did not result in external bleeding and the only injuries which bled were the incised wounds. Death was caused by haemorrhagic shock resulting from blood loss.

Doris Hutchinson, a neighbour of the deceased, said that about 8 or 9 p.m., on September 8, she was awakened by barking of dogs and she heard a groaning coming from the direction of the wall of the deceased's premises.

Dylotter Gayle, a store clerk employed to the deceased, said she closed the store at about 12.30 p.m. on September 8 and up to that time the deceased was hale and hearty. When she returned to work on September 9, at about 8 o'clock, she was surprised not to find the store opened. She then proceeded to the garage wherein she found the body of her employer.

From the evidence of these two ladies, death must have occurred anytime between 12.30 p.m., on September 8, and 8 a.m., on September 9.

Charles Scott, an electrician and cousin of the applicant Scott, said he saw Scott somewhere in the vicinity of the deceased's premises at about 10 p.m., on the night of September 8. Trevor Williams also said he saw both applicants Scott and Davis in the vicinity of somewhere near to the deceased's premises about 10 to 10.30 p.m., on night of September 8.

The police alleged that the applicant Scott on September 14, made a free and voluntary statement. At the trial the statement was admitted in evidence. In it, Scott said:-

> "Well sir I was at Kingston and my clothes was dirty and a guy name Roberts him test water at the Power House was mouthing me how my clothes dirty. I came over the Monday evening and stop at Paul Marles.
>
> I walk from Paul Marles to Frome. I knew that the police at Frome was looking for me for riding a bike without licence. I sleep in a old car Monday night. In the morning I went to Sports Ground and sit down.
>
> Tuesday night I sleep same place and Wednesday in the day I went to Sports Ground again. Wednesday night now, last week, I was over my yard sitting on a tree stump and Fred came and call me. Him say me and him should walk go down the road. I get up and follow him. Him walk down and we see Manley standing out at Frome gate station, the three of us walk down the road.
>
> Manley and Fred walk in a little shop beside the Betting shop. Them say I must stay at the front part. I go round there with them and Manley and Fred climb a coconut tree beside the wall and jump over into Mr. Lowe place.
>
> Fred did put a old window against the wall but him couldn't go over and then them go on the coconut tree. I came round the back to the front, is them tell me to go round the front. I stand up round there in front of the garage. I walk up the road and come back.
>
> I see Mr. Lowe car drive up and go inside. Him come out and shut back the door. Before him finish shutting the door I see Manley hold Mr. Lowe from behind and put one of his hand over his mouth.
>
> Manley have him round to the front of the car. Mr. Lowe was struggling with him. Fred take a piece of pipe and lick Mr. Lowe in his head one time. Mr. Lowe get weak and Manley let him go. Blood was coming from Lowe head. Him take him hand and wipe the blood and flash it off and some catch on my trousers and my shirt.

I still stood up in the garage. Mr. Lowe drop on the ground in front of the car and look like him dead. I was trembling. Fred push him hand in Mr. Lowe's pocket and took out the keys. Him and Manley leave me and go upstairs.

I stay in the garage. Them stay about half-hour up there and come down back. I see Fred shirt (shirt) puff up when him come down. Them go inside the shop and I hear them licking something, sounding like a vault or a chest. Them stay in there long enough.

Them came out and the three of us come out through the garage door. I first come out. I see them pocket full up but I can't tell what them had. Them go in the lane and say them will see me, and I went up my yard.

When I go up my yard I bathe and take off my trousers before I go in the bathroom. I went in the toilet and put my trousers on the toilet seat and kotch it on the edge. I don't know the toilet was open and the trousers drop in there with the belt and everything. After I finish bathe and take off my trousers on a line, around two or three of them, and I take one of them, I think is a blue one and put it on. I came out on the road and I stop a truck (a truck) and asked them if them going Kingston. The truck came from Hanover. I go up on the truck. When I katch in Town two of the side guys draw machets fi chop me and the driver come round and say is him give me a drive. I came off a Coronation Market and go wash my face.

I walk over park and sit down. On Sunday the Police came for me up at Race Course and took me to Headquarters. I done sir."

Harold Garriqnes, Chief Forensic officer at the Forensic Science Laboratory examined a pair of blue pants and a shirt belonging to Scott. He found human blood insufficient for grouping present in very pale brown stains on the pants; and human blood in droplets insufficient for grouping on the shirt. With respect to the shirt, however, Egbert Edwards, (a witness for the Crown) claimed that Scott gave it to him about two weeks before September 11, whereas, the police claimed Edwards handed it over on September 24, when it was possible for Scott to have worn it on the night of September 8. Mr. Garriqnes also examined pants and shoes which were traced as being worn by Davis on September 8. He found on them human blood in brown droplets but which were insufficiont for grouping.

The police alleged that the applicant Davis made a free and voluntary stetement on September 15 and at the trial the statement was admitted in evidence. In it, Davis said:-

" About 9 p.m. Wednesday night 8th of September 1971 Fred Ruddock come fi me at my yard at Grange in the Parish of Westmoreland him ride a Honda 50 motor cycle, him say him going down Frome and me must come with him.

When him reach Frome near the Police Station Fred stop and me come off the Honda. Him ride the Honda go out a a boy by name of Scottie yard. He towe down back Scottie on the Honda.

Fred parked the Honda below the Station on the street and both of them went down to Mr. Watson Lowe shop.

Me see Fred and Scottie climb the cocoanut tree and jump over the wall.

Me see Mr. Lowe drive in him car, as him drive in me hear a stumbling the gate never shut good and me look in and see Fred and Scottie wrestling the chinese man Mr. Lowe. Fred lick Mr. Lowe with a piece of iron in his head, He started to bleed, when him lick him, him drop a ground.

Fred take out the keys from Mr. Lowe trousers pocket, Fred and Scottie open the shop door down stairs and both of them went inside.

Me hear them hitting something inside the shop, me no know what it was. Them stay in the shop for about half an hour and then go upstairs and stay for about 15 minutes.

Them come down and walk through the same gate and come outside. Scottie go over a him yard and me go on the Honda and Fred drop me back home.

When him was carrying me back home him no say anything to me. Me say to Fred "Is that you carry me down here fi do". He said "A not that but a me and Scottie meck up fi do it."

Case for the defence.

George Scott gave an unsworn statement from the dock, he said "I know nothing about this murder. I didn't make any confession." He led no witnesses on his behalf.

Manley Davis gave evidence on oath. He said that on the evening of September 8 his boss carried him near to his home in a truck and he spent the whole night at home with his common-law wife and his five children. He was arrested by the police on September 14 and that was the first time he had heard of the death of Watson Lowe. He knew Fred Ruddock long before that day but they were not on speaking terms. The first time he had met

Scott was on the day he was arrested. The police brought a paper for him to sign telling him: "sign this I am going to give you bail." He signed it. He never signed any statement as the police claimed and Mr. Marzouca, the Justice of the Peace who claimed that he freely and voluntarily and in whose presence, he signed a statement was telling lies on him. The witness Trevor Williams also lied on him because Williams was relieved of his job at the Western Meat Packers on a report made by him to their employers that Williams had stolen meat. Williams was thus 'getting even' with him by giving false evidence. He never told the police that the blood on his pants or shoes was hog blood.

Learned attorneys for both applicants argued several grounds of appeal and in the main submitted that:

1 The statement of each applicant to the police should have been edited. The mention in each statement that the other with Fred Ruddock was involved with the robbery and killing was highly prejudicial and no warning by the trial judge could have prevented the jury from acting on inadmissible evidence.

2 The verdicts against each applicant was unreasonable and could not be supported having regard to the evidence, in particular -

(i) there was an insufficiency of evidence to warrant convictions for murder,

(ii) there was no evidence capable of showing common design which would warrant convictions of murder.

3 The learned trial judge should have left the issue of manslaughter to the jury.

In reply, learned attorneys for the Crown dealt with the evidence and the inferences to be drawn therefrom and submitted that there was sufficient evidence to justify the jury in returning the verdicts of murder and that the learned trial judge correctly summed up the case to the jury.

Point 1.

In R. v. Gunewardene (1951) 35 C.A.R. p.80 a co-prisoner, Mrs. Hanson, made a statement which not only admitted her part in the crime but also set out in detail, Gunewardene's part in it. The whole of the statement was admitted in evidence at the trial of both prisoners. The learned trial judge warned the jury not to regard it as evidence against the appellant. On appeal against the appellant's conviction, counsel for the appellant

contended that it was wrong for the whole of Mrs. Hanson's statement to be read to the jury. The portions which implicated the appellant should have been excluded and it was extremely difficult for the jury in such a case to put the statement wholly out of their minds when considering the appellant's case. The appellant must have been gravely prejudiced. In rejecting that argument, Lord Goddard at p.92 said:-

> "If we were to lay down that the statement of one co-prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case the prisoner would have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the learned judge gave adequate and emphatic directions to the jury on the subject."

In the instant case, however, the applicant Scott made an unsworn statement and Davis had no opportunity of cross-examining him on that out-of-court statement to establish to the jury that it was false. On the other hand, the applicant Davis gave evidence on oath but claimed that he made no statement and if ever he signed any document, it was an application for bail. Attorney for Scott did not question Davis on his out-of-court statement. However, it cannot be doubted that each statement in so far as the respective applicant was concerned, was of considerable probative value to the case for the prosecution,

> 1 Scott in his statement said "... Before him (deceased) finished shutting the door I see <u>Manley</u> hold Lowe from behind and put one of his hand over his mouth.

Manley have him round to the front part of the car. Mr. Lowe struggling with him. Fred take a big piece of pipe and lick Mr. Lowe in his head one time. Mr. Lowe get weak and Manley let him go."

2 Davis in his statement said " ..... as him (deceased) drive in me hear a stumbling the gate never shut good and me look and see Fred and Scottie wrestling with the Chinese man Mr. Lowe. Fred lick Mr. Lowe with a piece of iron in his head ... Fred take out the keys from Mr. Lowe trousers pocket. Fred and Scottie open the shop door downstairs and both of them went inside."

Learned attorneys urged strongly that, if at all, the statements were to be read to the jury, the names of the other applicant (as underlined in the above excerpts) should have been expunged and the jury would nevertheless have understood the full meaning of the evidence in the statement against each maker.

There was no application for separate trials. There was a trial within a trial on the issue whether the applicants made the out-of-court statements and if so, whether they were freely and voluntarily given. The trial judge ruled in favour of their admission and he gave adequate and emphatic directions to the jury to disregard each statement as evidence against the other applicant. We fail to see what more in the circumstances could have been done to secure a fair trial and to promote the interests of justice than to assume the jury to be reasonable and to be trusted to consider the evidence according to the directions of the trial judge.

Point 2.

In R. v. Lovesey and Patterson (1969) 2 AER 1077, the appellants were charged with robbery with violence and murder arising out of an incident in which a jeweller was found handcuffed to a railing in the basement of his shop suffering from severe head injuries from which he died. Blood was found on the stairs and ground floor of the shop which was in disorder, and valuables were found to have been stolen. There was no direct evidence of how many men had been involved in the crime or of their individual roles. The appellants denied all knowledge of the crime, but the prosecution sought to implicate them in a number of ways. Witnesses were called to prove a connection between the two appellants and a Jaguar car which was thought to have been used in the raid, and the victim's daughter gave evidence that the appellant Lovesey had visited the shop with a woman three months before.

Evidence was also given that when the appellants were arrested the two halves of a torn envelope, which had come from the shop, were found in their respective pockets.

The learned judge gave the jury an impeccable direction on the ingredients of the offence of robbery with violence and on the guilt of individuals who join in a common purpose to rob. He continued:

> "Then comes the second and more important charge, namely, murder, and that arises in this particular case and on this evidence in this way: if a man is attacked with the intention of causing him really serious physical injury and as a result of that injury he dies, he or any who became party to that attack, if they joined in for the purpose that he should suffer serious physical injury, are guilty of murder. Again, the same observation applies: if one is keeping watch outside or sitting in the car, once you are satisfied that the offence has taken place, and they are all acting with that common purpose and it resulted in death and that there was in the mind of all of them an intention to do really serious physical harm, then there is the offence of murder."

Widgery L.J. (as he then was) delivering the judgment of the Court of Appeal said that the direction so far was not open to objection. The convictions of the appellants were, however, quashed on the sole ground that the judge went on to direct the jury that the two offences of robbery with violence and murder stood or fell together. He said at p.1079:-

> "In fact, the two offences did not necessarily stand or fall together. As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim. If the scope of the common design had been left to the jury in this way they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome."

Learned attorney for Davis cited R. v. Lovesey and Patterson and submitted that in the instant case, the evidence which placed the applicants at the scene of the crime was their statements-out-of-court. When those

statements were analysed, only an intention to rob could have correctly been submitted to the jury as the common design. He also argued that the effect of the statement each applicant made against himself amounted to proof of his innocence. In R. v. Jones (1827) 2 C & P 629, Serjeant Bosanquet ruled in that case as follows -

> "There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another .... and if there be either no evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true."

In R. v. McGregor (1967) 2 AER 267, the Court of Criminal Appeal was of the opinion that the case of R. v. Jones (supra) was no longer authority. It held that the whole statement, both the admission of possession of stolen goods and explanation that he did not know they were stolen, should be left to the jury to say whether the facts asserted by the appellant in his favour be true, but the jury were not obliged to accept the explanation as true even if there were no other evidence incompatible with it.

From the applicant Scott's statement the jury might conclude that -

(i) Scott met Fred and the applicant Davis a short time before the robbery,

(ii) Scott knew or ought to have known of the plan to rob the deceased,

(iii) Scott saw the deceased drive up and he was present in the garage,

(iv) Scott's statement that he saw "Blood was coming from Lowe head. Him take him hand and wipe the blood and flash it off and some catch on my trousers and my shirt" was true,

(v) Scott was in the garage.

From the applicant Davis' statement the jury might conclude that -

(i) Davis met Fred and the applicant Scott shortly before the robbery,

(ii) Davis knew or ought to have known of the plan to rob the deceased,

(iii) Davis saw the deceased drive up and was present when the deceased was beaten, saw when he started to bleed and drop on the ground, and that

(iv) the bunch of keys was taken from the deceased.

There was evidence of traces of human blood in droplets upon the clothing of both applicants. The medical evidence was to the effect that the abrasions could have been caused by a blunt instrument. There was no external bleeding from the abrasions. The only injuries which bled were the incised wounds inflicted by some sharp cutting instrument such as a sharp knife or razor. It was for the jury to decide what was the common design, who were the ones participating, whether merely to rob, or whether the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim. We have examined the summing-up carefully and find that the learned trial judge correctly directed the jury on the law and gave the jury the necessary assistance on the facts, including the value each statement had, for and against the prosecution, and for and against the defence.

Point 3.

In R. v. Lovesey and Patterson (supra) Counsel for the appellants asked the Court to consider the substitution of a verdict of manslaughter. In that case, the convictions for murder were quashed only because the trial judge directed the jury that the two offences of robbery with violence and murder stood or fell together and that was wrong in law, since, as the part of neither appellant in the attack could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. In the instant case, there is no direct evidence of the individual role played by either applicant Scott or Davis. The case for the prosecution could only be put to the jury on the basis of a common design to rob which included the use of force to kill or to inflict grievous bodily harm or in the case of non-acceptance or reasonable doubt to acquit both applicants. In other words, there was no evidence that the killing was the unauthorised act of Scott for which Davis was not responsible at all and vice-versa.

Learned attorney for Davis cited R. v. Burns and Holgate (1968) 11 W.I.R. 110 where the trial judge upon almost similar facts of robbery and killing, left to the jury, the issue of Burns killing and Holgate being a party only for use of unlawful violence short of the infliction of grievous bodily harm, and vice versa. It was, however, pointed out to learned attorney that there was circumstantial evidence in that case by which it could

reasonably be inferred what role each appellant played. In the instant case, the jury must have accepted what was the extent of the common design and that the nature of the attack, as undoubtedly established by the medical evidence, was such that the common design extended to the use of extreme violence which could only result in death and nothing else. Learned attorney also cited R. v. Betty (1964) 48 C.A.R. 6 in support of his argument that the trial judge in the instant case should have left the issue of manslaughter to the jury. In that case, it was held that where two prisoners are jointly charged with manslaughter arising out of a fight, and the evidence showed that the concerted attack started without any intention of killing or causing grievous bodily harm in the mind of either of them, but that, as the fight developed, one of them conceived in his mind an intention to kill or to cause grievous bodily harm or did some act outside the concerted scope and the death of the victim was caused thereby, the fact that that prisoner was in law guilty of murder does not absolve the prisoner who did not act outside the concerted scope of the attack from liability to be convicted of manslaughter.

Betty's Case must be distinguished from the instant case, in that there was in Betty's case

1 a concerted attack which in the initial stages was without an intention to kill or cause really serious bodily harm; and
2 it was known that it was Brown and not Betty who killed Taylor with a knife.

In the instant case, however, as already pointed out, the individual role of either applicant could not be identified and if the extent of the common design of the robbery included the use of extreme force necessary to achieve the robbers' object, there was no justification for the issue of manslaughter to be left to the jury. If learned attorney meant that in Scott's statement, Manley is said to have held Lowe (deceased) from behind, put one of his hand over his mouth, had the deceased round to the front of the car, Manley struggled with him and that was all Manley was identified as doing, then the learned judge would have committed the error of telling the jury to accept Scott's out-of-court statement as evidence against the co-accused Davis. Further, Davis gave evidence on oath denying any involvement in the killing of Lowe. He denied the facts contained in his statement and said that the first time he ever met Scott was on the day he was arrested.

If learned attorney for Davis was submitting also that as the jury were entitled to reject the defence then in considering the case for the prosecution, Davis's out-of-court statement can only amount to an admission that he was present. A reasonable inference thus possible was that the killing of the deceased was outside the scope of the common design but which, however, would not absolve Davis from liability to be convicted of manslaughter. He urged that it was thus a duty of the learned trial judge to leave the issue of manslaughter to the jury. If such a submission in the circumstances of the instant case is correct, then -

1 the statement of one applicant would be used to identify the role played by the other applicant in the attack on the victim; and

2 the jury would have to speculate as to the role played by each applicant in the attack on the victim.

If the jury accepted, as they were entitled to do upon the evidence, that the common design was clearly not only to rob but to include the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim, then it is quite clear on the law that the correct verdict was murder. "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case:" per Lord Goddard C.J. in R. v. Abbott (1955) 2 A.E.R. p.899 at p.901.

In Ghosh v. The King-Emperor (1924) 41 T.L.R. p.27, the appellant was charged with murder and the trial judge directed the jury in terms of sections 34 and 302 of the Indian Criminal Code, that if the victim was killed in furtherance of the common intention of all, then the prisoner was guilty of murder whether he fired the fatal shot or not. It was contended on behalf of the appellant that those sections meant that "where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done, as if he had done it by himself." In other words, if the appellant was a party to a common design to kill but it was not proved that he fired the shot which resulted in the victim's death he could not be guilty of murder but of attempted murder. The Judicial Committee

of the Privy Council upheld the direction of the trial judge as correct. They held that ".... the doing to death of one person at the hands of several in circumstances in which it could never be known by which hand life was actually extinguished amounted to murder ...."

See also R. v. Salmon (1880) 6 Q.B.D. 79. C.C.R.

In the instant case, the learned trial judge directed the jury correctly. In the course of their submissions, learned attorneys referred to various other points which we consider are without merit. For the above reasons, we refuse both applications for leave to appeal.