C.A. CRIMINAL LAW — Murder → Circumstantial evidence — whether trial judge should have stopped case at end of Crown's case — whether judge's direction on circumstantial evidence inadequate — whether jurors direction might have led jury to believe that mere presence of accused at scene of crime enough to make him party to common design. — whether verdict "unsafe" "unsatisfactory" — S 14(1) Judicature (Appellate Jurisdiction) Act as to grounds of appeal on facts.

JAMAICA [Appeals dismissed — Convictions affirmed]

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 15 & 16/84

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

R v Clarkson & Carrol 55 Cr App Rep 445
R v Coney (1882) 8 Q.B.D 534
R v Nugent & Hughes (1974) 21 W I R 400

R. v. GLENFORD HEWITT
HERBERT HEWITT

Delroy Chuck & Tracey Barnes for the Appellants

Heather Dawn Hylton for the Crown

December 8 - 9, 1986 & April 10, 1987

DOWNER J.A. (AG.)

The Hewitt brothers, Glenford and Herbert were tried before Patterson J. and a jury in the St. James Circuit Court on 23rd to 26th January and 3rd February, 1984 at the end of which the jury found both guilty of the murder of Calvin Samuels. Glenford was sentenced to suffer death in the manner authorized by law. With respect to Herbert he was found to be under 18 years at the time of the commission of the offence and ordered to be detained at Her Majesty's pleasure. The following passage from the transcript showed the learned judge was generous in so finding:

"Q: Mr. Hewitt, you don't know the ages of these two?

A: I don't really know right now the age of them.

Q: What happened to the Birth Certificates?

A: It destroy in the school days, sir, and I never found it back as yet.

Mr. Holyn: The dates that they gave me in their unsworn statements were the dates they were told by their mother, namely April of '63 for Glenford and July of 1965 for Herbert Hewitt?"

SENTENCE

"His Lordship: Herbert Hewitt, I accept that your age at the time of this offence you were under 18 years of age, you having been born in July of 1965. I accept that as your birth date, and the sentence of the court is that you will be detained at Her Majesty's pleasure.

The usual course however is for the Court to direct the police to make investigations with a view to the tendering of evidence in proof of the age of the accused. Such evidence would usually be sworn testimony by a parent or relative and supported by the Registrar General's Certificate of the registration of his birth.

The Crown's case against the brothers was based on common design and the evidence implicating them was circumstantial. The principal witness for the crown was Delroy Stennett who told the court that on the night of August 5, 1982 the Hewitt brothers and himself were at a shop and shortly after 7 o'clock all three left together. They knew Calvin Samuels the deceased and as they reached a track which Samuels used when returning from where he burnt coal the brothers lessened their pace and Herbert announced that he wanted to see (Cally) Samuels. Delroy Stennett told the court that he enquired of Herbert as to why he wanted to see Cally and the reply was to the effect that it was not his business.

Delroy Stennett further stated that he continued his journey and that shortly after the brothers had left him he heard two explosions. The brothers then ran towards him and caught up with him. Stennett asked the brothers about the explosions and they said that they had no knowledge of it. Whereupon Stennett expressed surprise as the brothers came

from the direction of the explosions. They all proceeded to the cross roads and at a point the brothers went behind an old wooden shop. After they came back from the shop the brothers walked behind Stennett.

Orlan Allen provides another link in the chain of circumstances relevant to this case. He stated that on that night while riding his motor cycle towards the cross-roads, he passed Stennett. Of importance is the fact that he also heard two explosions shortly after passing Stennett and he reported that Stennett was alone when he passed him. This is in marked contrast to the version given by the brothers that they were together with Stennett when Orlan Allen passed. Further, Orlan Allen gave evidence that he saw both accused standing together about a chain below the track looking over the gully where the track was. Of some significance, is that fact that he also saw one Clemston Hines by the track opposite the Hewitt brothers and the Court was also told that Hines was at Coleen's home that night but Hines was not called as a witness. Coleen is the sister of the Hewitts and Stennett was going to meet her at the cross-roads that night.

Verna Beckford and her brother Winston were also relied on by the Crown to establish a case against the Hewitt brothers. The evidence of Verna was that a few days before the murder she witnessed an incident which showed the bad blood between Glenford Hewitt and another of his brothers, Dennis Stewart, on the one hand and the deceased Cally. She reported that they had quarrelled and that Cally had put down a bag of coal he had on his head and menaced Glenford with a machete She further stated that in those circumstances Dennis Stewart pulled a short double barrelled gun from his waist and warned Cally to withdraw. Furthermore, she repeated that Dennis suggested to Glenford that they should follow Cally over to the bushes and shoot him but Glenford thought it inexpedient that such a

course should be followed at that time as people were still on the road. Also she said she overheard Glenford threatening to shoot up the area some evening in the future and that Glenford had remarked that the gun had stuck when Dennis had pointed it at Cally. It was in those circumstances that she ran away from the scene and the crown relied on this evidence to show motive.

So far as Winston Beckford was concerned he gave evidence of Glenford's conduct which was capable of linking him with the murder. He went to the spot where the deceased lay and he reported that Glenford made a gesture to him by covering his mouth with his hand. The inference which the Crown asked the jury to draw from this conduct was that Beckford should seal his lips concerning Glenford. This witness said on 5th August he saw Cally the deceased lying on the ground with a bag of coal, his shirt and a machete. The words and the gestures used in court are best understood if we quote directly from the transcript.

"Q: Did he speak to you or just action?

A: Action

Q: Did he use the words, or just action?

A: He just put his hand like this. Is me used the words.

Q: You use the words you interpret what he said?

A: Me see him do so, is just me. Him don't use the word. Him do so to me, after him held on to me, him do so to me.

Q: Let's get this clear. He put his finger to his lips?

A. Yes, Sir.

HIS LORDSHIP: Just one finger? Yes

A. Over his lip. Yes, Sir.

"HIS LORDSHIP: And do what with it?

A: (indicates)

HIS LORDSHIP: Moving it?

A: Yes, Sir.

HIS LORDSHIP: Several times?

A: Yes, Sir.

Later in his narrative Winston Beckford told the court that on the 2nd August, 1982 he was alone with Glenford and that Glenford showed him a .38 (revolver) and a live round of cartridge. He further explained that there was a picture bible printed on the handle of the gun.

The formal witnesses were the doctor who gave his opinion that the deceased died from a gun shot wound to the skull, the father who identified the body and the arresting officer Actg. Cpl. Junior Smallhorn who reported that on investigating the matter Glenford told him that:

> "Me nuh know ....? 'utten bout it: me en out a cross-roads when it happen'."

Herbert's version was:

> "Me never leave me yard; me did a watch television when it happen."

These accounts were repeated when they were cautioned and arrested.

At the close of the Crown's case, no submissions were made on behalf of either accused by counsel and both accused gave unsworn statements. Herbert told the court that he was 19 and that he was 17 in 1982. Regarding August 5, 1982 he related that Delroy Stennett, Glenford and himself were walking towards the cross-roads to meet his sister Coleen eventually and that whilst so doing he heard two explosions. They did meet Coleen and walked with her, Delroy Stennett and Coleen were in front while his brother and himself were in the rear. When they reached home they watched television and he stated that there was a noise from the road and he heard that some one was dead. Subsequently, he was charged for murder.

Glenford Hewitt told the court that on August 1, 'Cally' the deceased attacked him with a machete. Dennis Stewart and others were with him and they all ran. His was a rambling account but in relation to the night of the 5th August he reported that he told Actg. Cpl. Smallhorn that his brother, Stennett and himself were on a walk when they heard two explosions behind them and that he was detained by the officer at the lock up. He further stated that Winston Beckford had lied on him.

The submissions on appeal were made by Mr. Chuck who appeared with Miss Tracey Barnes both of whom did not appear below. It was argued as a second ground of appeal that the learned trial judge should have stopped the case at the end of the crown's case as there was no evidence to go to the jury. Be it noted that the experienced counsel who appeared at the trial did not make a no case submission, and we find no merit in this ground of appeal.

The first ground of appeal was critical of the learned judge's summing-up in that as regards the directions on circumstantial evidence they were inadequate and not sufficiently related to the facts of the case. The learned trial judge gave a good description of the nature of circumstantial evidence and impressed on the jury that the totality of that evidence must when taken together lead to one inevitable conclusion of guilt, if the onus of proof placed on the crown was to be discharged. Thus at page 228 he said:

> "If the circumstantial evidence falls short of that standard, if it does not satisfy that test and it leaves gaps, then it is of no use at all. Circumstances may point to one conclusion but if one circumstance is not constant (consistent) with guilt it breaks the whole thing down. You may have all the circumstances constant (consistent) with guilt, but equally constant (consistent) with something else too. That is not good

> "enough. What you want is an array of circumstances which point only to one conclusion, and to all reasonable minds that conclusion only, namely the guilt of the accused."

As for the stricture that the directions were not sufficiently related to the facts the learned judge in a passage summarizing the crown's case at p. 243 put the specific directions thus:

> "What the prosecution is saying is that insofar as these accused men are concerned, you must consider all the circumstances, put them together and they will lead to one and only one conclusion, that they are the ones, acting together who killed the deceased; the circumstances I have related to you already, Mr. Foreman and members of the jury, that they were together all along coming up to Mr. Lightbody's gate; that they dropped back, they were left there, they were seen just below looking over the track, then they ran. That is what the prosecution is saying, they ran, caught up with Mr. Stennett, told Mr. Stennett they didn't know what the explosion was about. All these circumstances that I have already outlined to you, Mr. Foreman and members of the jury. That is what the prosecution is asking you to rely on to say that it was these two accused men."

We find that these two passages directed the jury in simple language on the scope of circumstantial evidence and to the application of that evidence to the particular circumstances of this case.

The most sustained criticism of the learned judge's summing up was that it was defective in that it might have led the jury to believe that once the accused were present at the scene of the crime they could convict them. Specifically it was contended that as against Herbert Hewitt the only evidence against him was the inference that could be drawn that he was present on the scene of the crime and that the trial judge's direction was such that the jury were led to believe that his mere presence was enough to make him a party to the common

design to murder the deceased. It was further submitted that as that inference was not sufficient to bring Herbert within the scope of the common design to murder, a verdict of acquittal must be returned against him and in this regard the authority of R. v. Clarkson & Carrol 55 Cr. App. Report 445 was cited. That case was based on R. v. Coney (1882) 8 Q.B.D. 534 which decided that non-accidental presence on the scene was not conclusive of aiding and abetting. The passage referred to in Coney at page 449 of R. v. Clarkson runs thus:

> "What has to be proved is stated by Hawkins J. in a well known passage in his judgment in Coney at p. 557 of the report. What he said was this: 'In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime even of a murder. 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 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'."

The specific passage which it was contended was defective at p. 261 ran thus:

> "It is a question of fact whether in all the circumstances the watchers by their mere presence or demeanour aid and abet the actors. Now, where presence may be entirely accidentally, nearly accidentally, it is not evidence of aiding and abetting. But where presence is prima facie not accidental, where on the face of it the presence is not accidental, it is evidence. But no more than mere evidence for you to consider whether that person was there aiding and abeting."

The learned judge was at pains to emphasize to the jury that their verdict was dependent on how they assessed the facts and inferences they drew. Here is how he put this aspect of the case at p. 263:

> "Now, as far as Herbert is concerned, what learned counsel for the defence seem to have been saying is even if you find these things against "Lammie' because you have to consider the evidence separately - there is no more than mere presence in the case of Herbert. What she was telling you, Mr. Foreman and members of the jury is that mere presence -- well, I don't think she said without more -- she said mere presence would not entitle you to return a verdict of guilty, but my direction to you on the law, as I understand it, as I have just told you, if you think that his presence was just accidental, having regard to what I told you about 'Lammie', if you should so find, if you think that Herbert's presence was just merely accidental, then, Mr. Foreman and members of the jury, you will have to return a verdict of not guilty against him.
>
> On the other hand, if you think that it was not accidental at all, and although he didn't fire the bullet he was there as part of a common design, both of them had decided in their minds to go and kill this man, Herbert did nothing at all, he didn't pull any gun, he did'nt fire any gun, he didn't pull any trigger, so long as he was present aiding and abetting the other one, or ready to help him if the necessity arises, and it was part of their joint enterprise, then he also could be guilty of murder."

When these passages are considered against the background of the passage cited from R. v. Coney it must be evident that the learned judge directed the jury that it was for them to consider whether Herbert's voluntary presence at the commission of the crime in all the circumstances was sufficiently cogent evidence that he was an aider and abettor.

In regards to Glenford the evidence was stronger and the evidence against him was either of individual participation or on the basis of common design. The directions here were equally sound. Here is the learned judge's direction at pp. 261-262 on this aspect of the case:

> "But Mr. Foreman and Members of the Jury, the law as I understand it is this. Where there is an attack on a person following a show of violence or something like that, or where violence is being executed by some persons in the presence of others, the mere presence of others, the mere presence of those watching the spectacle, if unexplained, is some evidence of encouragement to those engaged in the combat or the attack.
> It is a question of fact whether in all the circumstances the watchers by their mere presence or demeanour aid and abet the actors. Now, where presence may be entirely accidentally, nearly accidentally, it is not evidence of aiding and abeting. But, where presence is prima facie not accidental, where on the face of it the presence is not accidental, it is evidence. But no more than mere evidence for you to consider whether that person was there aiding and abetting.
> Mr. Foreman and Members of the Jury, I am going to expand on that just one little bit more because you see there is some evidence that if you accept it, that Glenford had a gun a few days before. There is some evidence that it was he who said he wanted to see Cally. There is evidence that the deceased was shot. Then there is evidence that both accused were running afterwards, running towards Delroy Stennett. If you accept it .....
> There is evidence that 'Lammie' had a motive."

We find that the trial judge directed the jury correctly in the case of Glenford and also with regard to Herbert. In this regard it is enough to cite another passage from the judges summing up at page 263 which demonstrates the accuracy of the judge's directions on Herbert's participation. It reads:

> "I hope I have made myself quite clear on this point, Mr. Foreman and members of the jury. So the verdicts opened to you are both accused men guilty of murder. That is if you find that there was a common design, that they acted in concert. On the other hand, if you find that they were not acting in concert, it would seem to me that there is no evidence whereby you could convict Herbert Hewitt. You would have to acquit him. You would have to consider the other evidence against 'Lammie,' that is Glenford Hewitt, and see whether it has satisfied you to the extent where you can say you feel sure it was he who fired the shot, that he intended to kill, and did kill Samuels, then and only then, when you feel sure, it will be opened to you to convict him."

Therefore it is manifest in the instant case that in the light of the learned trial judge's directions, the jury returned a verdict against both accused on the basis of common design between the Hewitt brothers although there were directions which made it open to them to acquit Herbert and convict Glenford. We have no hesitation in finding that this ground of appeal also failed.

There was yet another ground of appeal alleging that the conviction was unsafe and unsatisfactory and would amount to a miscarriage of justice. Of this ground we desire to draw attention to the grounds of appeal on facts which are expressly recognized in Section 14 (1) of the Judicature (Appellate Jurisdiction) Act "that the verdict of the jury should be set aside on the ground, it is unreasonable or cannot be supported having regard to the evidence" and another is that "On any ground

there was a miscarriage of justice." In R. v. Nugent & Hughes (1974) 21 W.I.R. 400 at 404 Edun J.A. said:

> "This court cannot re-try cases on paper. Though the words 'unsafe' and/or 'unsatisfactory' have been interpreted to mean the reaction produced by the general feel of the case in R. v. Sean Cooper (1969)1 All E.R. 32, and though the criminal divisions of Courts of Appeal in the West Indies have, without legislative sanction, quashed convictions, and, in their conclusions, used the words 'unsafe' and/or 'unsatisfactory', it is too dangerous a precedent to allow an appeal against conviction merely by the general feel of the case as experienced by the courts. Such a precedent would in effect substitute a trial by three judges for a trial by jury and encourage frivolous appeals."

In any event this ground was not pursued.

In the light of these circumstances we treated the hearing of the applications as of appeals and dismissed the appeals and affirmed the convictions and sentences.