JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 217/2001

BEFORE: THE HON MR JUSTICE DOWNER, J.A.
THE HON MR JUSTICE HARRISON, J.A.
THE HON MR JUSTICE WALKER, J.A.

R V KENNETH MYRIE

Charles Williams for the appellant

Lambert Johnson for the Crown

September 29, 2003 & December 20, 2004

HARRISON, J.A:

This is an application for leave to appeal from the conviction of the applicant on October 4, 2001, at the Home Circuit Court in the parish of Kingston of the capital murder of Albert McIntyre on February 2, 1996.

Having heard the arguments in this case, we treated the application for leave to appeal as the appeal. We dismissed the appeal and affirmed the conviction and sentence. These are our reasons in writing.

The relevant facts are that on February 2, 1996, between 5 - 6:00 p.m. the deceased, a taxi driver, was travelling in his motor car with his son Garth along Oakland Road in Kingston. Garth's car had developed some

trouble and he was being transported by the deceased. The appellant and another man signalled the deceased to stop and they entered the motor car along Oakland Road. The deceased continued driving. The deceased eventually dropped off his son and drove off with the appellant and the other man in the car. Thereafter, the deceased was found to be missing.

At about 7:00 to 7:30 p.m. Detective Constable Thompson and Constable Bucknor, whilst at the Cross Roads Police Station, received certain information and spoke to Inspector Boyd. At 9:00 p.m. they left the police station in an unmarked police car and went to the intersection of Chisholm Avenue and Waltham Park Road, in the vicinity of a telephone booth.

At about 9:30 p.m. the police officers saw the appellant and another man in the vicinity of the said intersection enter a blue Cortina motor car. The police officers followed the Cortina motor car with the appellant and others to the intersection of Molynes Road and Brentford Avenue, close to the Trap Club. The appellant came out of the Cortina motor car, took a key from his pocket and both went into the white Toyota motor car of the deceased which was then parked near to the said club. The appellant started the engine of the car. The police officers then took them both from the car and searched them. One of the police officers, Det. Bucknor,took from a sheath in the appellant's waist a dagger

with a tiger's head, exhibit 17, on the blade and handle of which was a film of blood. The other man also had a dagger in his waist. Det. Bucknor also took a wallet from the appellant's pocket, and took the key from the car.

A "smudge" of blood was found on the front section of the deceased's car near to the windshield.

On Sunday the 4th day of February, 1996, the deceased's body was found in a quarry at Tredegar Park in the parish of St Catherine with eight stab wounds to the left chest.

Dr Royston Clifford, forensic pathologist, performed a post-mortem examination on the body of the deceased Albert McIntyre identified by his brother Alphanso and found eight stab wounds to the left anterior chest to a depth of 7 cm, all penetrating the left lung. Two of the wounds penetrated the heart. He said that a sharp instrument such as exhibit 17 could have caused those injuries, noting that its blade was 6" long, and varying to 1" width at its widest point. Dr Clifford also took a sample of the deceased's blood which he handed to Det. Rodgers who took it to Dr Yvonne Cruickshank, a forensic analyst. Dr Cruickshank examined the said sample and found it to be group B blood. In Jamaica, she said, using the research data in relation to the ABO system of classification of blood, the group most common is group O. Group A comprises 36% of the population and group B is represented by 4%.

Dr Cruickshank also said that the blood found near the windscreen of the Toyota Corolla was group B and the blood on the handle and blade of the knife, exhibit 17, was also group B. A pair of white jeans pants being worn by the appellant had human blood on the front and back of it but Dr Cruickshank was unable to group it, because of the denim material. It also had brown and earth marks and green stains thereon, the latter being consistent with contact with green vegetation. In addition, she stated that one foot of the pair of Adidas shoes being worn by the appellant had blood on it, which on examination was also of group B classification.

Prosecution witness Garth McIntyre, the son of the deceased testified that he saw the appellant's face at first when he was standing on the sidewalk on Oakland Road and stopped the deceased's motor car and came to the deceased's side of the motor car and asked the deceased to wait a while and went into a yard. The witness was then sitting in the front passenger's seat and he moved to the back seat. It was then "after 5:00 p.m. going to 6:00 p.m." and it was "still bright." The appellant returned and stood outside and Garth the witness was able to see the appellant's face "... for about ... up to a minute". Another man joined the appellant and the witness observed their faces whilst they stood talking. They thereafter moved to the front of the car. Both the appellant and the other man then came into the motor car. The

appellant was sitting in the front passenger seat and the witness was then able to see the side of the appellant's face. They all drove in the deceased's car for a period of about fifteen minutes to the spot where his, (the witness') car had broken down. There the witness left the said car. The deceased drove off with the appellant and the other man.

On February 19, 1996, seventeen days after, the appellant was identified by the witness Garth McIntyre, at an identification parade conducted by one Sgt. McIntosh at the Half Way Tree Police Station, as the person who had stopped the deceased's car on Oakland Road with the other man and whom he (the witness) left in the said car, along with the deceased.

The additional evidence which linked the appellant to the deceased was the wallet which was taken from the pocket of the appellant by the police. The wallet was identified by the witness Garth McIntyre as that of the deceased which he would carry in his pocket. He also identified therein pieces of paper with his father's handwriting, and business cards of his father's taxi, which read:

"G & H Taxi Service Number Four."

Also in the said wallet were some photographs, two of which the appellant admitted were photographs of his relatives.

Witness Vincent Garrick attended the Half Way Tree Police Station and identified himself as the owner of the said white Toyota Corolla which

he assigned to the deceased to drive, as "taxi service number 4" written on the side of the car.

The evidence of D.S.P. Roy Boyd revealed that having gone with the other policeman to the intersection of Chisholm Avenue and Waltham Park Road close to Oakland Road and seen the appellant and two other men enter the blue Cortina motor car, they followed the said car to the intersection of Brentford Avenue and Molynes Road. He saw the appellant open the door of the deceased's car after which the appellant was apprehended. On February 4 1996, Floyd Myrie a co-accused at the trial of the appellant took the police to an area of a marl quarry in Tredegar Park in the parish of St Catherine, where among some rocks they saw the partially nude body of the deceased. Present also were Dep. Supt Kelso Small and other police officers. Floyd Myrie started to cry and said:

> "I told X not to kill the old man just tie him up and leave him."

He was taken to the Central Village Police Station. On February 19, 1996 both the appellant and Floyd Myrie were arrested and charged for the murder of Albert McIntyre. After caution Floyd Myrie, said in the absence of the appellant:

> "A nuh me stab-up the man, I told X not to kill him."

Floyd Myrie was acquitted by the jury.

Counsel for the appellant was granted leave to argue the supplementary grounds following:

> "1. That the summing up of the learned trial judge on circumstantial evidence was inadequate, as he wrongly told the jury that guilt could be established from the only realistic conclusion to be drawn from the evidence. See page 960 of transcript. On page 1018 of the transcript the learned trial judge further went on to explain that when considering circumstantial evidence, as reasonable persons you should find that your judgment is compelled to one conclusion. However his later statement that "all the circumstances relied on must point in one direction and one direction only", served only to confuse the jury.
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> 2. Comments made by the learned trial judge were prejudicial and unfair and amounted to a mis-direction in law particularly when:
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> > (a) In his summing up he accidentally indicated that Kenneth was Mr X. See pages 1032, 1033 and 1041 of transcript.
> >
> > (b) When he told the jury that blood from the deceased was found on the dagger, exhibit 17, which was taken from the appellant. See pages 842 and 1017 of transcript.
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> 3. That the learned trial judge should have upheld the no case submission at the end of the crown's case. In support thereof, the crown relied only on circumstantial evidence, which was unreliable and weak. There was no direct evidence to indicate who inflicted the wounds on the deceased. The crown relied on the alleged statement of the co-accused Floyd Myrie which was not evidence against Kenneth Myrie. See page 526 of transcript. That the

> evidence adduced by the crown was, at best, merely suspicion against Kenneth Myrie."

In advancing his arguments on ground 2 counsel for the appellant agreed that the learned trial judge "went to great pains to protect Kenneth Myrie from Floyd Myrie" by correctly editing Kenneth's name from the written statement which Floyd Myrie gave to the police, substituting therefor "Mr. X." However, he argued that the admitted accidental slip by the learned trial judge indicating that the appellant was "Mr X." was prejudicial and amounted to a misdirection rendering his trial unfair.

The extra judicial statement of one co-accused is not evidence against his co-accused, at a trial. However, an accused has an undoubted right to have a statement containing both incriminating and exculpatory material, a "mixed" statement, put in its entirety to the jury: ***R v Colin Sharp*** [1988] 1 WLR 7. Consequently, there is no general discretion in a trial judge in every case to edit a statement of an accused removing all reference to a co-accused. Where such a statement is put in by an accused, no discretion resides in the learned trial judge to exclude any aspect of it. A statement by one accused relied on by the prosecution and which implicates a co-accused may be edited by the learned trial judge in order to ensure a fair trial to the latter. In ***Lobban v R*** (1995) 46 WIR 291, the complaint was that the statement of a co-accused, tendered by the prosecution and which implicated by name another co-

accused should have been edited removing the name of the latter. In dismissing the appeal, their Lordships of the Judicial Committee of the Privy Council, on that point, at page 303 said inter alia:

> "The discretionary power to exclude relevant evidence applies only to evidence on which the prosecution proposes to rely. It exists to ensure a fair trial to the defendant, or, in a joint trial, to each defendant without seeking to differentiate between the quality of justice afforded to each defendant. It does not extend to the exculpatory part of a "mixed statement" on which a co-defendant wishes to rely."

In considering the exercise of the discretion of the learned trial judge in circumstances where an accused, is implicated by the statement of his co-accused their Lordships at page 304, said:

> "The judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other."

In the instant case the learned trial judge edited the statement of Floyd Myrie to substitute for any reference to the appellant the name "Mr X" prior to the admission of the said statement in evidence.

In his directions to the jury in respect of the said statement, the learned trial judge at page 1031, said:

> "You will remember the piece of evidence adduced by the prosecution that Floyd told the police on pointing out the body, that he told Kenneth not to kill the man; not to stab, stab up the man; to tie him up and leave him."
>
> (Emphasis added)

On being reminded by crown counsel of the editing and the substitution of "X", the learned trial judge in correction, at page 1032, said to the jury:

> "I beg your pardon. Members of the jury, members of the jury, my apologies, not to tell – please disabuse that entirely from your minds – not to tell X to stab up the man. Now, the word Kenneth that just came out of my mouth, that was a mere slip. And in any event if you analyse the evidence, including what the police alleged Floyd said, what Floyd said, that which Floyd said, is alleged to have said, first of all you have to determine whether it was said. Was it said? If it was said, it has no bearing on Kenneth because Floyd can't give evidence for Kenneth. The evidence is that Kenneth wasn't then present. It is a statement not given on oath. Kenneth didn't have the opportunity to cross-examine Floyd on such a statement. It has no bearing on Kenneth. It is no evidence whatsoever against Kenneth. Do you understand? You can't use that statement against Kenneth in any way. As I say, you first of all have to determine whether or not that statement was made. If it was made, it only has bearing on Floyd and only Floyd. Is that understood? Very well?
>
> So, the question, therefore, is that if you find that Floyd used those words, "I told X not to kill the old man, just to tie him up and leave him," did that indicate or demonstrate a change of mind on the part of Floyd? And also if he made that statement and it showed a change of mind, did he make it quite clear to Kenneth his

> intention of withdrawing from the joint plan before Kenneth had time to do what he did as alleged by the prosecution."
> (Emphasis added)

The learned trial judge having corrected himself, referred again incorrectly to the name "Kenneth" instead of "X" in explaining how the jury should consider the statement of Floyd, as indicating a withdrawal from the joint enterprise which was alleged by the prosecution.

Again, in his directions to the jury, on the manner of consideration of the co-accused Floyd Myrie's case, the learned trial judge at page 1041, said:

> "Because if you, after analyzing all the evidence you conclude that he did say that, "Don't kill him, just tie him up", then you cannot convict him, even if the other ingredients that I have pointed out and repeated to you this morning have been proved, if you are not sure that he did not withdraw, had not had a change of heart and made quite clear to Kenneth his intention of withdrawing from the joint plan."
> (Emphasis added)

In so far as the learned trial judge in dealing with the edited statement referred to the name "Kenneth" instead of "X" he was in error.

In respect of the blood on the dagger, exhibit 17, the learned trial judge at page 1016 told the jury:

> "Remember that Kenneth himself told you that he was going to Trap Club about 9:30 there about. That the prosecution said that both men, along with another man and both defendants went into the white Toyota Corolla, said to be Albert McIntyre's taxi where they were taken out

> of that vehicle and where daggers were taken from them. One from each and was blood group B, that being the group of Albert McIntyre taken from the waist of Kenneth?"
>
> "So, is there a basis for saying, quite apart from the blood taken – said to have been taken from the body of Albert McIntyre, is there a basis for saying that there is clear evidence that Albert McIntyre's blood group was B and that blood of group B was found on the dagger knife three police witnesses say were taken from Kenneth?"

In addition in the cross-examination of the appellant Kenneth Myrie, crown counsel suggested to him that he (the appellant) stabbed the deceased with the dagger, exhibit 17 and that:

> "... the blood which is on the knife, according to Dr Cruickshank's evidence, is his blood."

The appellant disagreed with both suggestions. Counsel for the appellant thereafter objected to the suggestions that the deceased's blood was found on some of the exhibits tendered. The learned trial judge on page 842 of the transcript, said:

> "I am saying that the prosecuting counsel is entitled to put as part of her case that blood from the deceased was found on the knife, dagger, exhibit 17."

The prosecution's case was grounded on circumstantial evidence. The identification evidence of the witness Garth McIntyre, placed the appellant and Floyd Myrie both in the car of the deceased in which he himself was a passenger, for about 15 minutes from Oakland Road until he the witness left, leaving both the appellant and Floyd to drive off with the

deceased. Both the appellant and Floyd were seen by Det. Bucknor and other police officers to enter the deceased's car later that day, the appellant being in possession of the ignition key therefor. Along with the forensic evidence of the group B blood on the knife, exhibit 17, found in the appellant's possession and the wallet, business cards and paper writing in deceased's handwritings, the prosecution's case was a strong one. The learned trial judge properly directed the jury that the prosecution's case was that the appellants were acting together, but that the case against each appellant should be considered by the jury separately. He also reminded the jury repeatedly that the extra-judicial statement of Floyd was not evidence against the appellant.

In all the circumstances, the error by the learned trial judge in mentioning the name "Kenneth" instead of "X" in the said statement created no prejudice to the appellant.

Equally, when the learned trial judge commented that the prosecuting counsel was entitled to suggest that the appellant stabbed the deceased and as a consequence the deceased's blood was on the knife, and told the jury to consider whether there is:

> "... a basis for saying that there is clear evidence that Albert McIntyre's blood group was B and that blood of group B was found on the dagger knife ... taken from Kenneth."

the learned trial judge was merely reciting to the jury the nature of the case being put forward by the prosecution. Neither comment by the

learned trial judge was inappropriate. There was no misdirection by the learned trial judge in any respect. Ground two therefore fails.

Counsel for the appellant while stating in grounds 1 and 3, that the directions of the learned trial judge in respect of circumstantial evidence were inadequate and confusing and that he should have upheld the no case submissions at the close of the Crown's case respectively, did not advance any arguments in support of these grounds.

It is sufficient to state that there was no eyewitness account of the killing. The learned trial judge explained to the jury how the circumstantial evidence should be treated by them in coming to their decision. The learned trial judge directed the jury properly on the burden and standard of proof and at page 960 of the transcript, he said:

> "... the prosecution is relying upon evidence of various circumstances relating to the crime and to the defendants in order to demonstrate that some or all of the circumstances when taken together, not singly, taken together, establish the guilt of each defendant; that is because the only realistic conclusion to be drawn from the evidence – and this would be entirely a matter for you, whether it is the only realistic conclusion to be drawn from the evidence – if that is the case, the only realistic conclusion to be drawn from the evidence is that it was each defendant who committed the crime with which each is charged.
>
> It is not necessary, members of the jury, for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case, indeed, in which a jury can say, "We know everything there is to

> know about this case." But the evidence must lead you to the sure conclusion that the charge which each defendant faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt in respect of Kenneth or Floyd or both of them. Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case."

and at page 1018:

> Does all the evidence as adduced by the prosecution demonstrate an array of circumstances that can lead to only one conclusion and only one conclusion against each defendant that he is guilty?
>
> I was telling you earlier before the adjournment about circumstantial evidence and I think it is not out of order to continue by saying that by way of further explanation that circumstantial evidence consist of this, that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that as reasonable persons you find your judgment is compelled to one conclusion. Remember that you bear in mind that circumstantial evidence must be thoroughly construed and examined because such evidence may be fabricated to cast suspicion on another or others.
>
> All the circumstances relied on must point in one direction and one direction only. If the circumstantial evidence falls short of that standard, if it doesn't satisfy that test, then if it leaves gaps, it is of no use at all."

In ***McGreevy v D.P.P.*** [1973] 1 All ER 503, their Lordships in the House of Lords (per Lord Morris), the final authority on the English common law (see ***Tai Hing Cotton Mill Ltd v Lin Chong Hing Bank Ltd*** [1986] AC 80, 108) examined the dicta of Alderson B in ***Hodge's*** case [1838] 2 Lewin 22 CC 227 concerning circumstantial evidence, and held that there is no rule of law that a special direction should be given by trial judges, failing which the trial would be unfair. Downer, J.A. in ***Bernal and Moore v R*** [1996] 50 WIR 296, in the Court of Appeal, in considering the proper direction concerning circumstantial evidence referred to ***Lejzor Teper v R*** [1952] AC 480, 489, in which Lord Norman said:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Downer, J.A. further observed that their Lordships' Board in ***Ramlochan v R*** [1956] A.C. 475, 487, approved of the dictum in ***Teper*** (supra), and that this Court ought to be guided by the approach in the Privy Council and the House of Lords. We share that view. The Privy Council will follow the House of Lords in its views on the English common law: see ***Tai Hing*** (supra).

In the instant case, the direction on circumstantial evidence was adequate and helpful. No special direction was necessary. We agree with counsel for the Crown that the appellant's case was put fully to the jury. We agree that there were no arguments that could be advanced in support of the latter grounds. For all the above reasons we dismissed the appeal.