JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 55/90

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA

vs.

MORRIS TAYLOR

Mr. C. J. Mitchell for the applicant

Miss Cheryl Richards for the Crown

April 11, 12 and 22, 1991

WRIGHT, J.A.:

This is an application for leave to appeal against conviction and sentence of death for the murder of Ian McMorris on September 29, 1983, when he succumbed to a bullet fired by one of three armed robbers who held up and robbed passengers on a mini-bus travelling from Havendale to Kingston. The record of the trial does not disclose the reasons for a retrial nor when it was ordered but this was a retrial before Clarke, J. and a jury in the Home Circuit Court from March 22 to 26, 1990. It was not the applicant who fired the fatal bullet but on the prosecution case he was one of the group of three involved in the unlawful enterprise.

As told by the sole eye-witness, Special Constable Othneil Scott, the prosecution case was that the witness, dressed in plain clothes, boarded a number 35 bus at 50 Half

Way Tree Road at about 9:30 p.m. on the fateful night and sat at the back on a seat on which there were already three passengers. To his immediate left was seated the applicant, whom the witness had known for about five years by the name "Randy". The applicant began observing the witness, who queried his reason for so doing and received the reply that it was a record which the witness had in his hand at which the applicant was looking.

After travelling for some twenty minutes the bus stopped along Orange Street in the vicinity of the Nubel Laundry when suddenly Dermot Harris (also known to the witness), who was standing at the door of the bus with a gun in his hand, announced "This is a hold-up, nobody move". Another man who was sitting beside the driver also presented a gun while the applicant, with a long knife in his hand, went into action. He took a bill-fold from a passenger's pocket and threatened to stab his victim. While he was thus engaged Dermot Harris said that "he musn't bother make no mistake". The witness heard an explosion from the middle of the bus where Dermot Harris was and a passenger, who turned out to be Ian McMorris, fell to the floor of the bus. His life had pre-emptorily been brought to a cruel end.

Harris' gun next turned to the witness who received a bullet in his right arm and the gunman beside the driver started shooting as well. The witness ducked behind a seat and returned the fire with his service revolver. Harris appeared to have been shot and that signalled departure time. The witness at first said the three robbers then fled through the windows of the bus but later admitted that he really did not see when the applicant left the bus. This admission was to give rise to the five grounds of appeal on which this application was based. Apart from the witness, other

passengers were wounded as well. The bus was driven to the Admiral Town Police Station not far away and then to the Kingston Public Hospital where the witness was admitted and McMorris pronounced dead.

Othneil Osbourne, then Detective Acting Corporal of Police stationed at Admiral Town Police Station, saw and spoke with the witness in the hospital and saw the body of Ian McMorris. On October 10, 1983, he took the applicant into custody from the Red Hills Police Station. The applicant had a swollen leg with what appeared to be a gun shot wound. Told of the charge being investigated involving him, he responded "Me sar?".

Dr. Venu Gopaul, the pathologist who performed the post-mortem examination, was not available and the only other witness called by the prosecution was Kenneth McMorris, the father of the deceased, who identified the body of the deceased to the pathologist.

The issue of visual identification is a live one, bearing in mind that the defence raised was an alibi. Critical to the resolution of this issue are the answers to two questions -

(a) How well did the witness know the applicant, and

(b) How good was the opportunity to observe him in the bus.

As to the first question, the witness testified that for some years he did guard duty at the Jones Town Post Office and at regular intervals - every other day - he would see the applicant pass in company with Dermot Harris and he would call to the witness. In addition the witness testified that he had seen the applicant at betting shops in the Cross Roads area.

The applicant, who gave sworn testimony, denied any involvement in the crime but admitted that his parents' home

was behind the post office; he would pass the post office several times in the day and on those occasions he would see a special constable on guard at the post office. However, he denied knowing Special Constable Scott whom he claimed he never saw until Scott was brought to him while he was in custody. Jones Town, he said, was his community.

Regarding the opportunity to recognize the applicant, the witness said the rear of the bus was lighted up and there was a light in the middle of the bus. He said it was a Nissan mini-bus. If it were accepted that the applicant was seated beside the witness, the question of obstruction would not affect the opportunity to observe the applicant. Such persons as were standing in the bus were towards the front of the bus.

The five grounds of appeal complained:

1. That the witness' testimony that he did not know where Randy was when the shooting started represented a contradiction on which the jury had not been properly directed.

2. That the jury must have been confused by such direction as was given them.

3. That the Judge failed to direct the jury to make a specific finding on the question posed by the witness' ignorance of Randy's whereabouts when the shooting started because that would affect the operation of the doctrine of common design or unlawful joint enterprise.

4. That such being the evidence the applicant may well have been guilty of robbery but not of murder.

5. That by the failure to deal properly with the piece of evidence in issue the applicant had been deprived of having a proper assessment of all the evidence.

The first observation to be made of these grounds of appeal, quite apart from the fact that they are repetitive, is that they neither challenge the identification of the applicant as a person seen on the bus nor do they seek to promote the defence of alibi pursued at the trial. Rather, the contention is that, unless the applicant is identified as being present at a particular stage of the unlawful enterprise, he cannot be held liable for any act which took place then. No authority was cited for such an odd proposition but the Court adverted to the case of **R. v. Antonio Becerra and John David Cooper** (1976) 62 Cr. App. R. 212, the headnote to which reads:

> "After a crime has been committed and before a prior abandonment of the common enterprise may be found by the jury, there must be, in absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant on their willing assistance up to the actual commission of that crime. In order to break the chain of causation and responsibility, there must, where practicable and reasonable, be a timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequence.

Dictum of Sloan J.A. in **Whitehouse** (1941) W.W.R. 112, 115, 116 applied.

> The appellant, B, broke into the house with two other men C and one G. Their intention was to steal from the householder. While in the house, the tenant of a flat on the first floor surprised them and B calling 'let's go' climbed out of a window followed by G and ran away. C, meanwhile, who had been handed a knife by B, stabbed and killed the tenant. B and C were charged, inter alia, with the tenant's murder, and at their trial the prosecution case was that B and C were acting in concert in pursuance of a common agreement to kill or inflict bodily harm should the need arise. B contended that he had withdrawn from the joint adventure before the attack on the tenant and, therefore, was not liable to be convicted of murder. The jury were directed that the words 'let's go' and the appellant B's departure through the window were insufficient to constitute a withdrawal. Both B and C were convicted of murder. On an application, inter alia, by B for leave to appeal against his conviction of murder
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> Held, that on the law set out above and on the facts, that which was urged by B as amounting to a withdrawal from the common design was not capable of amounting to such withdrawal: thus B remained responsible, in the eyes of the law, for everything that C did and continued to do after B's disappearance through the window as much as if he had done them himself; thus the application would be refused."

But the case against this applicant is even stronger than the cited case. In his evidence-in-chief, the witness said that the applicant became involved in the robbery of the passengers after the hold-up was announced and before Ian McMorris was shot. Taxed in cross-examination on his testimony that the three robbers escaped through the windows, he recanted and said, "I did not see when he escaped". Encouraged by this concession, Mr. Mitchell pursued:

"Q: Did you see when this man leave the bus?

A: No, sir.

Q: You didn't. Well, tell me then, when was exactly the last time you saw this man on the bus? What was he doing when you last saw him on the bus?

A: On the bus?

Q: Yes. It is a bus we are talking about, nuh bus we talking about?

A: After the shooting I didn't see him again.

Q: I didn't ask you that, you know, I am coming to that, don't anticipate me. Listen to what I am saying, the last time you saw this man on the bus--you have told us you know, that you saw him on the bus, so I want to find out from you the last time you saw him on the bus, what was he doing?

A: Held on to the passenger.

HIS LORDSHIP: Doing what?

A: The last time I saw him was when he held on to the passenger.

Mr. Mitchell: And at the time he was armed? I mean you say he had a knife?

A: He had the knife in his hand.

Q: Did he have anything else in his hands at that time when you saw him holding on to the passenger?

A: The bill-fold that he took from the passenger pants.

Q: So he held the bill-fold, what was in one hand? The knife in the other?

A: Yes, sir.

Q: When you saw him -- let me get this right, after you saw him holding on to the

" man, knife in hand, bill-fold in the other, was that before the man fell or after the explosion and the man fell?

A: It was before.

HIS LORDSHIP: That was before what?

A: Before the explosion.

Mr. Mitchell: Before the explosion and the man fell?

A: Yes.

HIS LORDSHIP: That was, you say, before the explosion?

A: Yes, sir.

Mr. Mitchell: I want to be very specific with you, you know, because on the basis of your evidence, you said you heard a certain explosion there, so I want to be very fair to you. At the time you saw the accused man holding on to the bill-fold in one hand and knife in the other, that was before the explosion and the man fell?

A: Yes, sir.

Q: So now, explosion, man falls. Did you see this man after the explosion and the man fell?

A: Yes, sir.

Q: You saw him after the explosion and the man fell?

A: Yes, sir."

It is abundantly clear from the line of cross-examination that to Mr. Mitchell the point of departure was crucial to the applicant's case. However, after he had been afforded the opportunity to acquaint himself with the law as stated in **Becerra** (supra) he returned to Court next day to announce his capitulation since he could not distinguish that case.

Applicable also to this case is the principle stated by the Privy Council in **Chan Wing-siu and others v. The Queen** (1984) 3 All E.R. 877, which was followed by this Court in S.C.C.A. No. 202/88 **R. v. Wayne Spence** dated 18th June, 1990 (unreported). The headnote to **Chan Wing-siu** (supra) reads:

> "The three accused, armed with knives, entered the deceased's flat, and while one guarded the deceased's wife, the other two stabbed the deceased. They then slashed the deceased's wife. The deceased died as a result of his wounds. The accused were charged with murder contrary to common law and with wounding with intent contrary to s 17(a) of the Hong Kong Offences against the Person Ordinance, in that they had unlawfully and maliciously wounded the deceased's wife with intent to do her grievous bodily harm. The jury unanimously found all three accused guilty on both counts. The accused appealed to the Hong Kong Court of Appeal, which dismissed their appeal. They appealed to the Privy Council, contending that the judge had misdirected the jury by stating that they could convict each of the accused on both counts if he was proved to have had in contemplation that a knife might be used by one of his co-aventurers with the intention of inflicting serious bodily injury.
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> **Held** - A secondary party was criminally liable for an act committed by the primary offender which the secondary party foresaw but did not intend, if he took part in an unlawful joint enterprise and it was proved beyond reasonable doubt that he contemplated and foresaw that the primary offender's act was a possible incident of the execution of the planned joint enterprise. Whether a secondary party contemplated and foresaw the primary offender's act could be inferred from the secondary party's conduct and any other

> "evidence which explained what he foresaw at the time. Since the Crown had shown beyond reasonable doubt that each of the accused had contemplated that serious bodily harm might be a consequence of their common unlawful enterprise and since there were no grounds for holding that the possible risk of serious injury was so remote that it could be disregarded, the jury had been properly directed. The appeal would accordingly be dismissed (see p 879j to p 880a and j to p 881a and j to p 882b e f and p 883c g, post)."

Although no other complaint was levelled at the judge's handling of the case, we have carefully perused the records and are satisfied that proper directions were given on such issues as the burden of proof, the drawing of inferences, the credit of the sole eye-witness, contradictions, visual identification. With the need for special caution, at page 110 he directed the jury thus:

> "I must tell you, Members of the Jury, that even if you conclude that the sole eye-witness, Special Constable Othneil Scott, is an honest witness, you could not without more accept his evidence that the accused was one of the persons on the bus participating in the incident. It is essential to distinguish between honesty and accuracy and not to assume that the identification evidence is accurate merely because you believe that the witness is honest. Let me stress that honesty as such provides no guarantee against a false impression so imprinted on the mind as to convince an honest witness that the identification is wholly reliable.
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> As the question as to the correctness of the identification of the accused is a live and substantial issue, I must, therefore, warn you of the special need for caution before acting in reliance on the correctness of the identification."

He dealt adequately with the opportunity to recognize the applicant, identifying such weaknesses as tended to affect that evidence, that is,the fact that it was night and also that at some stage during the proceedings the witness said he took cover and so would not be seeing the applicant continuously. Finally, he dealt in appropriate terms with the question of joint enterprise.

Accordingly, on the basis of the relevant law, as set out herein, we are satisfied that there is no merit in the application which is, therefore, refused.