C.A "CRIMINAL LAW" — Murder — Common design — whether judge's direction on common design adequate — whether common design related to two unlawful incidents — whether judge failed to direct jury on possibility of deceased having received from self-inflicted wound.

Appeal dismissed

Cases referred to
R v Becerra & Cooper (1976) 62 CAR 212
R v Anderson & Morris (1966) 2 W.L.R. 1195

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 34 & 35/88

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

R. v. THEOPHILUS NUNES
ALFRED MINOTT

H. Edwards, Q.C., & D. Chuck for applicants

Lancelot Clarke Jnr., for Crown

July 6 & 28, 1988

CAMPBELL, J.A.

The applicants were tried before Gordon, J., and a jury and found guilty in the Home Circuit Court of the murder of Pamela Reid. On January 29, 1988 they being under the age of 18 years at the date of the offence were sentenced to be detained until the pleasure of the Governor General was known. At the time of the tragic incident the applicants and the deceased were students of Tivoli Gardens Comprehensive High School. The deceased was in Grade 8C and the applicants were in a higher grade and were each aged about 15 years. The series of events out of which Pamela met her death commenced about 10 a.m., on October 30, 1986 on the school campus and ended about 11.15 a.m..

The sole eye witness account was given by Tanya Williams herself a grade 8A student of the school. She said she had occasion to enter Pamela's classroom about 10.00 a.m., to borrow something. This classroom was not her own. Pamela, Sophia, Cordella and some others were in the classroom. While in this classroom, she observed the two applicants

approaching from the tenth grade block of the school towards the classroom. One Charmaine, a fellow student, emerged from a bathroom adjacent to the classroom attired in a miniskirt for physical education. She proceeded towards the classroom. The applicants caught up with Charmaine and the applicant Minott indecently touched Charmaine on her buttocks. She remonstrated. Minott responded by threatening to box her. Charmaine entered the classroom followed by Minott who engaged her in an argument. Nunes, the other applicant, who had remained outside the classroom, incited Minott by deriding him in these words "How you meck the gal a handle you suh"? Sophia told Minott to leave Charmaine alone, his reaction was to direct his venom on her. He took up a small booktable and with it attempted to hit Sophia. She was however more than a match for him. She wrested the table from him and pushed him outside the classroom. She proceeded outside and engaged him in a fight. In the course of this fight, Nunes called to Minott saying "See a knife here, stab the gal." Nunes then passed a small pocket knife to Minott. Sophia hurriedly retreated to the security of the classroom and apparently secured the grille-door thereto. Minott challenged her to come out. She responded that she would not, so long as he had the knife. She however challenged him to put down the knife and she would continue the fighting "fist-to-fist". At this juncture, Mr. Spence a Vice Principal was seen coming into view. In consequence of this, both Minott and Nunes ran towards a nearby hall. Tayna returned to her class. It appears that Pamela had during the earlier encounter incurred the displeasure of the applicants because while she, Sophia and Cordella shortly thereafter were in the canteen, the applicants came up to them and Minott pointed his hand in the face of Pamela and said "Hey gal, yuh have me down nuh." Pamela replied "me done say what me have fi say already." One of the applicants then said "mek we get some stick and beat the gal." Thereupon the applicants ran from the canteen but soon returned each armed with a piece of iron pipe about 14 to 15 inches long and 1 inch in diameter. Nunes stood at the canteen door while Minott went up to Pamela and pointed the iron pipe in her face. Pamela held on to the iron pipe and a fight ensued between her and Minott during which they shifted outside to about 5 feet from the door. In

the course of this fight Minott raised his right hand in which he was clasping something other than the iron pipe which he had in his left hand and struck Pamela in the left chest. He then ran with the iron pipe pursued by Pamela with Nunes following behind. One Mr. Walker, a teacher had observed the fight and had ordered Minott and Pamela to stop just prior to Minott striking Pamela in the chest. He, Mr. Walker ordered Tanya, Sophia and Cordelia to bring back Pamela. They ran towards where Pamela was pursuing Minott and Tanya saw Pamela fall in front of the playing field clasping her left breast from which blood was streaming. A compass was removed from Pamela's hand. On this latter bit of evidence hinged a ground of appeal namely that Pamela's wound could have been self-inflicted.

Detective Sergeant Boreland's evidence is here relevant in rebuttal of the theory of a self-inflicted injury. He said he went to the school on investigation. He observed drops of blood from across the playing field area going back towards the entrance to the school block. He observed bloodstains on the left breast of the deceased and he also saw a wound under her left breast. From this evidence it can be inferred that Pamela was injured at the entrance of the school block and the trail of blood ending in the area of the playing field was the result of her pursuit of Minott. The only person seen to have struck at Pamela in the region of her left breast was Minott and this was near the canteen of the school block.

Dr. Gail Codrington gave evidence that from her post mortem examination conducted on November 4, 1986, she concluded that "death was due to blood loss, haemorrhage, secondary to stab wound to the heart." She said such a stab wound was consistent with being inflicted with a pocket knife. She was however unable to rule out the possibility that the wound could have been inflicted with a compass because the external entry wound had been surgically treated.

Before us, Mr. Horace Edwards on behalf of Nunes complained that the learned trial judge was in error in failing to direct the jury that the evidence disclosed two separate and unrelated incidents in the latter of which the doctrine of common design did not extend even if the said doctrine had been applicable to the first incident in which Nunes allegedly passed a pocket knife to Minott. Accordingly, he said Nunes could not be found guilty on the basis of common design because he took no part in the latter incident in which the deceased was inferentially stabbed with a pocket knife. Mr. Edwards further complained that the learned trial judge exacerbated the position by his remarks purporting to link up what in fact were two separate incidents ignoring in this regard the difference in place, time, and persons involved in the incidents. Finally Mr. Edwards submitted that even if Nunes had been in common design with Minott in the fight with Sophia, that common design had been abandoned by Nunes.

He cited and relied on R. v. Becerra & Cooper (1976) 62 C.A.R. 212 and R. v. Anderson & Morris (1966) 2 W.L.R. 1195 in support of his submissions. We do not find the above cases helpful. R. v. Becerra & Cooper is concerned with the question of whether one co-adventurer can be said to have abandoned a common design of burglary in which the use of a knife was undoubtedly contemplated, he having prior to escaping from the scene passed the knife to the other co-adventurer for use by the latter, if the necessity arose.

No issue of abandonment is raised in this case. The issues here raised, which were for the jury to determine, were firstly, was there a common design relative to Sophia namely to attack her in circumstances where serious bodily injury at the least was contemplated. Secondly, was this common design, if it existed, transferred from Sophia to Pamela whom the applicants had reason to believe had reported their attack on Sophia; thirdly and in the alternative, if the two incidents were both separate and unconnected, was there nonetheless a common design in each incident to attack in circumstances where serious bodily injury at the least was

contemplated and lastly was Nunes a party to the common design in the series of continuing events or if they were separate unconnected incidents was he a party to the common design in each.

R. v. Anderson & Morris (supra) is not apposite because it was concerned with misdirection on the question whether one co-adventurer can be liable for the consequences of acts done by the other which are so fundamentally alien to the scope of the common design as to be incapable of being accommodated therein. In this case, if the evidence of Tanya is accepted, what was in contemplation was the use of a pocket knife and or a piece of iron pipe 14 to 15 inches long and one inch in diameter. Either could kill or inflict serious bodily injury at the least. The knife was used as contended by the crown. No issue of exceeding the scope of the common design can here arise. The question as earlier stated is whether there was merely a continuation of one incident in which Nunes participated or if there were two separate incidents, whether they were characterised by similar common design with Nunes participating in both.

The learned trial judge properly directed the jury on the doctrine of common design and its scope relative to the use of violence. He said thus:

> "If the degree of violence which was contemplated was one which was serious bodily harm or death, then both parties will be liable if that is what they agreed on."

He then, having summarised the evidence, directed the jury thus:

> "The evidence indicates that in the first incident there was some communication between Minott and Nunes or the other way, Nunes and Minott, take this knife and stab the girl, but nobody was stabbed in that first incident. Whereas there might have been a common design to do something in that first incident, is there that common design for the two of them to have done something in the second incident? This calls for a careful examination of the evidence because that is the prosecution's case. What does the evidence prove? Some one to two hours later both men return,

> "they return together. At the time they return, Minott approached Pamela Reid, who you recall had made some statement about, leave the boy, come inside. He dared her to use her mouth again; an altercation developed. The witness said one of them, she cannot say which one, said 'come let us get stick and beat the girl'. Both left and each returned with metal; iron. It may be argued that iron pipe used in an efficient manner may cause injury that leads to death. Both were armed with iron pipes. Alfred Minott approached the girl Pamela with the iron pipe and push it upon her and said 'talk now' and she held on to it. And then they started the tussle, in the course of which the witness ..... allege that the instrument or the movement towards the chest of the deceased was made by the accused. It is a question of fact for you to say whether the original intention continued by both men up to that point, or whether there was a break and that the accused Nunes was not at all involved in that second incident. If you find that he was not associated with the second incident that the common design did not continue up to that point, then you must find him not guilty of anything at all. You can only find a verdict adverse to him if you find that he was associated with Minott in a design to do violence to the deceased, Pamela Reid."

We are of the view that the learned trial judge's direction to the jury was clear, adequate and tailored to the circumstances of the case and cannot be faulted.

Mr. Edwards complained that the learned trial judge had failed to direct the jury on the likelihood of Pamela having died from self-inflicted wound executed with the compass which on the evidence was in her hand. As earlier stated, in considering the evidence of Detective Sergeant Boreland, we found no merit in this submission.

It was for these reasons that we, having treated the application as the hearing of the appeals, dismissed the same on July 6, 1988.