JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 99/91

COR: THE HON. MR. JUSTICE CAREY, P.(AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. V. WALFORD WALLACE

Randolph Williams for appellant

Miss Diana Harrison, Deputy Director of Public Prosecutions for Crown

December 1, 2, 3, 4, 8, 1992 & January 18, 1993

CAREY P.(AG.)

In the Circuit Court Division of the Gun Court before Wolfe J. and a jury in Kingston after a trial between 16th to 23rd July 1991, this appellant was convicted of the murder of one Carol Walker, and sentenced to death. He was tried with two other men but the jury failed to agree on a verdict and they were ordered to be retried. He now applies for leave to appeal that conviction.

We propose to treat this application for leave as the hearing of the appeal in view of the fact that the grounds argued before us, were of law. The three grounds of appeal filed challenged the manner in which the trial judge dealt with common design, in that he neglected to direct the jury that in the event they found that the appellant was present at the scene of the crime, his mere presence could not implicate him. He complained as well that the trial judge did not assist the jury by relating the evidence to the law concerning participants in a common criminal activity. Finally, he took the position that the cautioned statement dictated by the appellant showed neither that he was party to any prior agreement to kill or inflict serious

injury to the victim or that he was present aiding in or abetting the killing of the victim.

The conviction in this case depended wholly on a cautioned statement which the learned trial judge admitted upon the voir dire. There was some evidence however from a Crown witness, Oswald Walker, which placed the appellant in the company of another co-defendant in the area of the murder. In the early morning of 12th June 1967 two armed men (neither of whom was the appellant) posing as policemen gained entry into the house of the victim Carol Walker who lived with his wife and five children in Dallas Castle in St. Andrew. They bound Mr. Walker with his wife's panty hose, robbed his wife of her wedding-ring and marched him out of the house "so that he could show them where the bad men were." That was the last time his wife saw him alive. When his body was later recovered, it was plain he had been butchered. Some eleven chops had been administered in the area of the head, involving scalp, cheek, right ear, neck and shoulder. His hands were still bound.

The cautioned statement of this accused fills in the missing links. In it, he said that in June he and some five other men went to Dallas Castle by night. The purpose of that nocturnal journey was to execute Walker because a politician was in the habit of passing him money to purchase guns but instead he had converted the same to his own use. Two of the men were attired in military dress and carried M16 and M14 rifles. While he and another of these persons were left by a bridge, the others went to fetch the doomed man from his house. When they returned with him, his hands were tied behind him. He was marched up the hill escorted by the men, including himself. At the spot chosen for execution, the victim was ordered to lie on the ground. His shirt (a ganzie) was stuffed into his mouth and one of the men dispatched him by chopping him several times in his head with a machete. They all departed to the home of one of their number.

Subsequently, he was arrested by the police. While in the cells, he became converted and this influenced him to make a clean breast. He was very relieved which explains the reason for this revelation.

In his defence, the appellant remained in the dock, as is the practice, to deny the charge. He admitted that he gave the police a statement but he had regurgitated the words, "Mr. Benjie" (Det. Sgt. Benjamin) had read to him, to Senior Supt. Hibbert of C.I.B. Headquarters. He had been induced to do this because he had been "intimidated" by the threat of being beaten with a baton and as a result of a promise that he would be released if he reported what he had been told to say. Prior to this, he had been tortured and questioned about the killing. It was quite untrue that he had seen any vision or been converted. He was totally unacquainted with the co-defendants and had neither worn police uniform nor military uniform.

Before dealing with Mr. Williams' challenge, we wish to point out that the Crown did adduce evidence from a witness Oswald Walker, placing the appellant in the vicinity of the victim's home at the material time and in the company of a co-defendant. The trial judge having analysed the visual identification evidence given by this witness, concluded it was unreliable and withdrew it from the jury's consideration. It was for this reason that we stated that the Crown's case depended wholly on the appellant's cautioned statement.

Wolfe J. gave directions on common design between pp. 496 and 500. He said this:

> "... Now, common design is a common sense doctrine. What it says is that if two or more persons embark upon a joint enterprise, then every individual who participates actively in the execution of that joint enterprise becomes liable for the commission of the offence. So once you are a party to the joint enterprise, if it is committed and once you actively participated in it, you are liable."

Later at p. 497 he directed the jury thus:

> "Now, in this case, was there an agreement? What was the scope of the agreement? In relation to Wallace, Wallace tells you what was the agreement if you believe that statement is true. He said the scope of the agreement was to go and hold up Marvin because him get money from Miss Gordon to spend and him not spending it and the scope of the agreement was to get rid of him."

Finally at p. 500:

> " So what is the case in relation to Mr. Wallace. I have told you that it rests squarely on the statement which he made, a statement which he said he was induced to give by Sergeant Benjamin. I have already told you how you are to approach that statement, and if you are satisfied that he gave that statement, and when you look at all the circumstances under which it was given you say, we believe it is true - because you are the persons who must attach what weight you will to it - if you say, we believe it is true that he was there, that he had been there because they had set out on a common purpose, because if you believe the statement the man said, I am going to get rid of the man, nevertheless he went there with them and he was present when it was happening, it would be open to you to find that he was always a part of what transpired that day and in those circumstances it would be open to you to find him guilty as charged."

In her reply to Mr. Williams' submission, Miss Harrison argued that it was wholly unnecessary for the trial judge to direct the jury that if they found that the appellant was present at the material time, his mere presence was not enough. The cautioned statement, she maintained, showed that the circumstances of his presence, were by pre-concert and he participated in the arrangement to commit the crime. He was in the company of other actors in that early morning and was well aware they were going to liquidate the victim. His presence i.e. waiting on the bridge until his companions returned with the intended victim, could only be interpreted as an act to protect his companions, the actual perpetrators, from being interrupted while carrying out their abduction and kidnapping of their victim from Dallas Castle.

She noted that after the confederates returned with the victim, the appellant showed no disapproval, nor did he oppose the completed crime. Indeed, he did absolutely nothing to detach himself from the criminal enterprise after the event of the murder and continued thereafter to remain in the company of his confederates. His conduct, she stated, evidenced not only wilful encouragement but a pre-concert of intent to aid and abet the actual perpetrators and showed that the appellant was committed to the common cause. He had, in the event, made no effort whatever to prevent the crime.

There is, we think, much force in the submissions made on behalf of the Crown. We agree that the facts stated in the cautioned statement and as identified by Miss Harrison did not exemplify mere presence and nothing more. It would demand the highest degree of gullibility to accept that a person who had knowledge of the planned murder, who had waited in the company of a colleague while the intended victim was fetched from his home, bound, marched to a place of execution, and there executed, could be heard to say that he was no different from the drunken voyeur in R. v. Clarkson & Ors. 71 Cr. App. R. 445. There was also evidence that some of the men were in military dress and were armed with assault rifles. The exercise took place in the early hours of the morning. The appellant formed part of the execution party. The headnote of Clarkson (supra) is helpful and with respect, correctly represents the law in this area of criminal liability:

> " To establish aiding and abetting on the ground of encouragement it must be proved that the defendant intended to encourage, and wilfully encouraged the crime committed. Mere continued voluntary presence at the scene of the commission of a crime, even though non-accidental, does not of itself necessarily amount to encouragement; 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 so to do, or at

> "least to express his dissent, might in 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 or not."

That case followed and approved the dictum of Hawkins J. in **R. v. Coney** [1882] Q.B.D. 534 at p. 557. There were therefore facts fit to be left to the jury to consider whether this appellant was present aiding and abetting the crime committed.

The learned trial judge never dealt with the question of presence, simpliciter. He did not think that directions in terms with respect to mere presence was called for. He however made it clear at p. 496 as appears above, that common design required the undertaking of a joint enterprise and the active participation in the execution of the undertaking. He followed up with an example (pp. 496 - 497):

> "... If you and I agree that we are going to hold up somebody's house tonight, we arm ourselves with guns, and if the contemplation is that if anybody at all come in our way we are going to use the guns, and if when we get to this house, five of us go in and two remain outside and the two remaining outside all they are doing is watching to see if the police is going to come or if somebody belonging to the house is going to come there, and if five go inside, hold up the people in the house, rob them and the people resist and the guns are used to shoot anybody inside there and kill them, although the two didn't come in they would be as guilty as the five who were inside - that is the doctrine - because it was all a part of the joint enterprise."

We think the example relevant to the situation in this case. The man on guard to warn his companions of the approach of danger, is implicated, by his mere presence. The facts in the present case make it however, a fortiori. The trial judge's directions, which we earlier set out, made the position altogether clear to the jury. In some circumstances, it will be necessary for a judge to deal with non-accidental presence and to point out what could amount to

encouragement so as to assist them to make a determination whether the accused aided and abetted the commission of the offence. For the reasons we have endeavoured to set out, we do not think that in the circumstances, his directions were in any way deficient.

In the extracts from the directions, it must be clear that there is nothing in the point that he failed to relate the evidence to the law. The submission that the statement did not show the appellant to be a party to a prior agreement to kill or was present aiding and abetting the crime of murder also fails. We have already analysed the statement and need not repeat that process.

The appeal is accordingly dismissed.

We must now deal with the effect of the Offences Against the Person (Amendment) Act which came into force on 14th October 1992. Section 7 (1) provides:

> "7.—(1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date, may be pending in respect of those persons or any right of those persons to appeal."

This appellant at that date was under sentence of death. As this Amendment Act was not in force then, we must determine whether the conviction is for capital or non-capital murder. The provision in the Act which we incline to think applicable to these circumstances is section 2 (1) (f):

> 2.—(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say -
>
> ...
>
> (f) any murder committed by a person in the course or furtherance of an act of terrorism, that is to say an act involving the use of violence by that

> " person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

We sought the assistance of both counsel who appeared before us. Mr. Williams submitted that this provision was inapplicable, essentially because there was not a sufficiently public element. The kidnapping and the abduction of the husband of the household while it affected his wife and their children, did not, he argued, bring the violence within the section. That violence must, he said, be calculated to cause fear in the public or any section of it. A family was not sufficiently public.

Miss Harrison for her part, took the view that the facts fell squarely within the provision. The totality of the acts of violence was directed at the Walker family which was a section of the public. The provision was an adaptation of provisions in the Prevention of Terrorism (Temporary Provisions) Act 1989 (U.K.). In that provision however, an ideological motive is essential. The provision in our Act omits altogether any need for proof of political motives. The entire manner and scope of the planned execution was calculated to create a state of fear in a section of the public, viz. the Walker family.

In determining whether the use of violence is calculated to create fear, all the circumstances must be considered. The timing of the abduction, the method of entry, the dress of the participants, their armoury of weapons, the robbery, the article stolen, viz. the wife's wedding ring, the abduction of the victim, the long march to the place of execution, the method of execution - the sheer brutality of it all, and the motive suggesting political overtures; all these factors, we think, would be calculated to create a state of fear in the public or a section of it.

First, we do not think that the words - "state of fear in the public or any section of the public" must be interpreted to mean that the fear can only be created in those who witness the

violence. That would be too restrictive a meaning. The section brings within its ambit those persons who by the excessive use of violence create extreme fear in the minds of the citizenry whether near or far. The force used is expected to have the widest impact by reason of its brutality or apparent senselessness. It is not expected that any member of the public would be called to give evidence. It would be for the jury to take a commonsense approach as right-thinking members of the public and say whether the public in its widest sense or a part of it, i.e. a community or even a family unit in that community would be affected thereby. The test is not whether viewers or witnesses to the violence are put in fear, but whether the impact of that violence is calculated to serve as a warning to the public in general or a section of it. In the present case, the victim was executed because it was said that he had been given funds for a specific purpose by a politician and had the temerity to default on his obligations. We are satisfied therefore that the facts came within section 2 (1) (f) of the Act and accordingly, the conviction is classified as capital murder.

But even if we were wrong regarding the conclusion at which we have arrived as to the classification of this murder as capital, sentence of death must however be confirmed. Evidence has been adduced before us that at a trial of this applicant with two other men Joel Andrews and Michael Fuller between 13th and 21st February, 1989 before Walker J, on an indictment charging two counts of murder in respect of the deaths of Lennox Francis and Fitzalbert Hall, all three were convicted and sentenced to death. Section 3 (b) provides:

> "(b) by inserting next after sub-section (1) the following as sub-section (1A)—
>
> (1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has—

(a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act, 1992, been convicted in Jamaica of another murder done on on a different occasion; or

(b) been convicted of another murder done on the same occasion."

The applicant having previously been convicted of murder comes within the ambit of section 3(1A) (a) of the principal Act as amended.

For this additional reason, the sentence of death is confirmed.