JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL Nos. 38 and 39 of 1972

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Robinson, Ag. J.A.

R. V. WILLIAMS AND HECTOR

W.K. Chin See for the applicant Williams.
R. Taylor for the applicant Hector.
H. Downer for the Crown.

Heard: April 30, May 1,2,3,4, June 11, 1973

LUCKHOO, J.A.:

On February 25, 1972, the applicants Winston Williams and Mario Hector were convicted by a jury before Rowe, J. in the Home Circuit Court for the murder of Nicholas Miller on November 6, 1970 and were sentenced to death. They have applied for leave to appeal against their convictions.

The deceased Nicholas Miller was employed to Protections and Securities Ltd. as a security guard. At about 3.30 p.m. on Friday November 6, 1970 he was on duty at a branch of the First National City Bank situate at Marcus Garvey Drive and Seventh Street, Newport West. He was in the uniform of a security guard and was armed with a revolver which was in a holster at his side. The bank was open for business. The deceased was standing on the landing at the bank's entrance on Seventh Street when he was shot and fatally injured. A bullet had entered his chest and passed through the left lung, the heart, the right lung, the muscle on the right side of the chest and the right shoulder blade. It came to rest under the skin about 6" from the top of the right shoulder. The deceased's body was shortly after found on the sidewalk across the roadway from the bank a distance of some 60' - 70' from where he had been shot. A trail of blood led from the landing at the bank's entrance to where the body was found. The deceased's revolver was missing but his holster was found in the roadway at the foot of the flight of steps leading from the landing at the bank's entrance to the roadway and about a yard from the landing. Four spent bullets were found inside the

bank. They or some of them had in their passage into the bank pierced the glass door. The attention of the assistant manager of the bank Vickers Hollingsworth and of other members of the bank staff as well as of some four customers who were then in the bank had been attracted by the sound of gun shots coming from the entrance to the bank. Audrey Moore one of the bank's tellers was in her cage. She testified that she saw the deceased and another man, whom she identified as the applicant Hector, stumbling down the flight of steps which led from the landing outside the bank's entrance to the roadway. Hector then entered the bank while another man armed with a gun, stood at the entrance to the bank. Hector pointed a gun at Hollingsworth and a bank clerk Harris who held up their hands. Hector who was then on the customer's side of the counter jumped over the counter, spoke to Harris and then came towards her cage. He ordered her to open up her drawer containing money. In trying to comply with his order she locked the drawer instead whereupon Hector asked her if she wanted a shot. The other man urged Hector to leave as the police were coming and Hector replied that he could not do so as he had not got the "bread" yet. Hector opened the drawer and took out the money he found therein. Thereafter he jumped over the counter and then left the bank with the money. Hollingsworth substantially corroborated the evidence of Audrey Moore. He also identified Hector as the man who came into the bank. He said that Hector was armed with two guns, that he held him up, spoke to Harris and then robbed Audrey Moore of money she had in her cage. He had a glance of another man who appeared to be armed with a shotgun standing at the entrance to the bank. That man had urged Hector to leave as the police were coming and Hector had replied that he could not leave yet as he did not "get the bread yet". Hector left the bank with the money he had taken from Moore's cage and with the other armed man ran towards a car parked nearby in Seventh Street. They both entered the car which was then driven off.

Harris while supporting Hollingsworth and Audrey Moore as to the events which took place in the bank was unable to identify the man who came into the bank.

In the meanwhile at a branch of the Bank of Nova Scotia, Jamaica Ltd. on the opposite side of Seventh Street the manager of that bank Charles Cooper was in conference with Dr. K. McNeill. He was attracted by sounds coming from outside his bank and on looking across towards the First National City

Bank he saw a man holding a shotgun and facing in the direction of his bank. The man was standing on the steps of the other bank. He watched the man for a minute or two and then telephoned the police. Later, at an identification parade he picked out the applicant Williams as the armed man whom he had seen outside the First National City Bank. Dr. McNeill testified that he was in Mr. Cooper's bank when he observed a man, whom he was unable to identify, armed with a shotgun standing on the pavement on the opposite side of the road pointing the gun towards the First National City Bank moving from side to side covering the area and occasionally looking across at the Bank of Nova Scotia.

Shortly after the men made their escape the police arrived on the scene. Examination of the floor area of the First National City Bank disclosed blood spots and impressions as if someone had walked in blood from the entrance of the bank to the counter. There was blood on rails in the bank, on chairs and on the floor of the teller's cage. On the rail and on the chairs there were smudged finger impressions in blood. These finger impressions were not suitable for the purpose of finger print identification.

About a quarter of a mile away from the First National City Bank Detective Inspector of Police D'Aguilar who was on mobile patrol along Marcus Garvey Drive observed a car on that road. It was stationary and faced towards Spanish Town. Four men were seen by D'Aguilar to get out of the car and run away. One of the men was armed with a shotgun. The men made good their escape on foot. The car which had been stolen from its owner by two armed men on the previous night was examined by D'Aguilar. There appeared to be bloodstains on both the back and front seats. The car was later examined for fingerprints and a fingerprint found on the right hand front door glass of the car was compared with fingerprints taken from the applicant Williams by order of the resident magistrate under the provisions of the Fingerprint Law upon request by the police and the opinion of a fingerprint expert Sgt. Linton who made the comparison indicated that the fingerprint found on the right hand front door of the car was that of the applicant Williams.

There was admitted in evidence a statement in writing alleged to have been made by the applicant Hector to the police which the Crown relied on as implicating Hector in the deceased's death. Objection to the

admissibility of the statement was taken at the trial on the ground that it was not made by Hector and that Hector had signed it as a result of being beaten by the police. The statement is as follows -

"Me, Max, Devon and Quitty are friends and we rest at Tivoli Gardens. Max open an account at the First National City Bank, at New Port West.

Fe bout three weeks Max go at the bank and make some lodgement and tell us that it is an easy bank fe lick. All four a we plan fe lick the bank the first day rain fall, which is any day the rain fall.

Well, the rain start fall Friday morning 6th. November, 1970, when the rain start fall Friday morning everyone say well it a go make today.

We did have a red Mustang but something did happen to the engine and we hear say Morgan did have a car. Well we get the car, a ashes colour Wolsey car and all four a we get up the arms them and move to the bank at around 2 o'clock. We leave Tivoli Gardens and drive come out pon Four Shore Road. Max drive the car. We did have a little black thing tear gas in deh and when you spray it in a someone face it just knock them out, and we did plan fe take it and tear gas the guard at the bank. Well, when we reach the bank we see him on the step outside, on the step of the bank walking from left to right. Me had the shot gun wrap up in a crocus bag. Max had a .38 Smith and Wesson revolver. Quitty had one to sah. Devon who name Morgan, Manger Ray had a automatic 45. The plan was, I was to take the money, Devon hold the guard and Quitty was to hold the manager.

Well when we see the guard on the step, we had to change the plan to Quitty and Devon to hold up the guard and disarm him and me was to just open the door and go in with the shot gun and take away the money. Well after them came out of the car all four never come out one time. Devon and Quitty came out first. The guard draw him gun and four shots fire. The guard fire one shot and it catch Quitty on him hand and Quitty and Devon fire and the guard fell. I come out a the car with the shot gun which a never take out a the crocus bag and run in a the bank. When a reach in a the bank a never see anyone standing up, everyone lie down. One of the woman teller them was in front of drawer and the drawer was locked. A point the gun at her and threaten her and tell her to open the draw with the money. She would not open it and a tell her she want a shot and she give me the key and me open it and take out the money. Well after a take out the money and was coming outside I hear Devon say, "Police like dirt coming."

I ran out side. I was the last man to go in a the car. Well we drive west along Foreshore Road. When we reach the train line the car turn over and come back on the four wheel and we run out a the car. We was running along the train line and I throw away the shot gun. Devon had the money after a give it to him and him give it to Quitty. A see say Quitty get shot in a him hand.

Through we did hear some sirene and we know say a police after we stop in the bush and deside to split up. Quitty wrap up the money in a white thing as everyone split up. A come up through Back-To on a road and walk back to Spanish Town Road where a take bus back to Tivoli Gardens. When I reach Tivoli Gardens, I see Max then Devon then Quitty come. Well when Quitty come back him have him hand out up and say some Rasta man cut him up and take away the money from him. No one never believe him and did want shoot him. Well, Max ride a bike and go out there and when him come back him say a true them really take away the money from him.

Well from Max come back and say that the argument just done."

A search of the area where the four men were seen by D'Aguilar to make their escape from the stolen car resulted in the police finding a shotgun in a rusted condition. A witness Mullings testified that he had seen a car being driven along Marcus Garvey Drive at about 3.40 p.m. on November 6, 1970 when it ran onto a traffic island on that road. He then saw four men come out of the car and run away. One of those men, whom he later identified as the applicant Hector, was carrying a shotgun.

The case for the prosecution was to the effect that the applicants with others went to the First National City Bank each carrying a loaded firearm with the common purpose not only of committing robbery but also of overcoming and disarming the deceased whom they knew to be a security guard on duty at the bank and to be armed for that purpose; that it was within their contemplation that the deceased might violently resist any attempt to disarm him and that in effecting their purpose those who attempted to disarm the deceased might use their guns thereby killing the deceased or causing him serious bodily harm.

The defence in the case of each applicant was an alibi.

A number of grounds of appeal were filed on the part of each applicant, some of which were abandoned at the commencement of the hearing and during the course of the argument. The arguments advanced on behalf of the applicant Hector may conveniently be dealt with first. At the outset Mr. Taylor abandoned grounds 2 and 4 (a) and (b) of the supplementary grounds of appeal filed on April 18, 1973 as well as all of the original grounds filed. In the course of the argument he abandoned ground 6 of the supplementary grounds of appeal filed on April 18, 1973. He conceded that in view of the verdict returned against Hector it is clear that the jury found that Hector was present at the First National City Bank at the time when the deceased was shot and that having regard to what is contained in the statement Ex.9 made by Hector to the police the applicant can at the most only expect, should his conviction be quashed, a verdict of manslaughter to be substituted for the verdict of murder returned by the jury.

Mr. Taylor in arguing ground 1 submitted that certain passages in the trial judge's summing-up tended to suggest to the jury that all that was necessary to warrant a verdict of guilty of murder against the applicant Hector was a finding that he was present at the scene of the robbery and participated therein. As we indicated to Mr. Taylor during the course of the argument the directions to which he attracted our attention when read in the context in which they were given could have left no doubt in the minds of the jury that in order to convict of the offence of murder it was necessary for the Crown to prove not only presence at the scene of the robbery and participation in the crime of robbery but additionally that the common design included the use of firearms and "the use of whatever force was necessary to achieve the robbers' object or to permit escape without much fear of subsequent identification even if this involved the killing or infliction of grievous bodily harm on the armed guard."

In respect of ground 3 Mr. Taylor submitted that the learned trial judge failed adequately to relate relevant aspects of the evidence to his directions in law respecting common design and in particular he failed to point out to the jury the impact on this question of the evidence contained in Exhibit 9 the statement made by the applicant Hector to the police. In arguing this point Mr. Taylor submitted that the trial judge erred in not leaving the verdict of manslaughter for the consideration of the jury.

That latter submission formed the basis of ground 5. It is true that the learned trial judge did not leave manslaughter as a possible verdict. Such a verdict would have to be left to the jury if there is any evidence upon which it can fairly be said that the issue arises. See Bullard (1957) 42 Cr. App. R. 1. In this case no such issue can fairly be said to have arisen dehors the applicant's statement to the police Exhibit 9. Can it be said that such an issue arose upon a consideration of that statement? In his directions to the jury the learned trial judge dealt with the applicant's statement in this way -

> "Then, what does it say the plan was? According to the statement at one time the plan was to tear gas the guard, but according to the statement when they actually got to the scene, if you accept the statement is true, the accused Hector is saying that he was on the scene too. When they actually got to the scene they saw the guard on the step; they had to change the plan. What was the plan, he said, which had been changed. The plan was for Quitty and Devon to hold up the guard and disarm him and 'me was just to open the door and go in with the shotgun and take away the money. Well when we came out of the car .....' and so on. If you accept that this was the plan you will have to ask yourselves if men going with armed, with loaded firearms to disarm a person like a security guard, who is armed, what do they intend to do to disarm him? Do they intend to use their guns? How else could they disarm him? And you will refer back to what I told you as to the scope of the common design, what was the plan, what is the common design that you infer from the circumstances of this case?"

When the trial judge asked the jury to refer back to what he had told them as to the scope of the common design he was obviously referring to the directions which he had given in relation to the matters five in number which must be proved by the prosecution before a verdict of guilty of murder could be returned -

> "Now, Mr. Foreman and members of the jury, the doctrine of common design goes this way; where two or more persons embark upon a joint enterprise or where two or more persons agree together to commit a criminal offence, each is liable for the acts done in pursuance of that joint enterprise including liability to unusual consequences if they arose from the agreed joint enterprise, but if one of the adventurers goes beyond what has been tacitly agreed as part of the common design, his co-adventurers would not be liable for his

unauthorised act. In every case it is a matter for you, the jury, to determine whether what was done was part of the joint enterprise or went beyond it and was an act unauthorised by that joint enterprise. In this case you will have to determine, firstly, whether there was a common design to rob the First National City Bank: secondly, having regard to what you accept as true of the evidence which you have heard, whether one or other or both of these accused men was or were party to that common design; thirdly, having regard to what you accept of the evidence as being true, whether one or other or both of the accused was present at the First National City Bank on the 6th of November, 1970 in the furtherance of that common design and participating in that common design: fourthly, whether the common design included the use of loaded firearms: fifthly, whether the common design included the use of whatever force was necessary to achieve the robbers' object or to permit escape without much fear of subsequent identification even if this involved the killing or infliction of grievous bodily harm on the armed guard. You the jury must determine the scope of the common design and it is for you to determine whether the plan was to use a loaded firearm to dispose of the bank guard; whether it was to render him incapable of protecting the property of the bank or to subdue him. You must bear in mind on this aspect of the case the evidence of the witness for the prosecution that the bank guard was armed."

After referring to the fact that four bullets were found in the bank and one in the deceased's body and to the fact that the raid was made at a time when the bank was open for business the learned trial judge continued -

"from this and all the other circumstances of the case, you will have to determine whether these robbers were desperate men who knew that they had to act and intended to act quickly for their purpose. In the circumstances would you expect them to make agreement to form a pact to treat the armed guard gently and to take their time to subdue him, however long that would be and whatever opportunity it would present for those in the bank to summon the police. It is a matter for you the jury to determine whether you are driven to the conclusion that the raiders' common design extended to every single thing that in fact occurred in the course of the raid ...."

These directions appear to be based on the judgments delivered in the Court of Criminal Appeal in England in R. v. Anderson & Morris (1966) 2 All E.R.644 and in the Court of Appeal (Criminal Division) in R. v. Lovesey and anor (1970) 1 Q.B. 356. We are unable to see how a reasonable jury, once they

accepted that the applicant Hector did in fact make the statement Ex. 9 and that its contents were true, could possibly conclude that the deceased's death was the result of an unauthorised act in the carrying out of the common design as set out in the statement Exhibit 9. According to that statement the men had gone to the bank each armed with a loaded firearm. Each man intended when they reached the bank and saw the armed guard standing outside that measures should be taken to subdue and disarm the guard so that he would be unable to impede their plan of robbery. It must have been within the contemplation of each of the men that the deceased armed as he was might offer serious resistance to the efforts of those who sought to overcome and disarm him to the extent of defending himself by the use of his own firearm and that the former might use their firearms either in anticipation of the deceased's resistance or as a result of it. There is no room for the view urged by Mr. Taylor that the deceased might have been shot otherwise than deliberately with the intention of killing him or causing him serious bodily harm. Nor is there room for the view that if the common purpose extended beyond the purpose of robbery (and this question was left by the trial judge for the determination of the jury) it was not within the contemplation of the applicant that whomsoever sought to subdue or disarm the deceased might use their firearms to kill the deceased or cause him serious bodily harm. For these reasons we hold that Mr. Taylor's submissions on grounds 3 and 5 fail. It would follow from what we have said in respect of the applicant Hector's statement to the police Exhibit 9 that that statement could not be said to amount to an admission of complicity in the offence of robbery only and a denial of complicity in the killing of the deceased. We are therefore of the opinion that ground 4(d) is without substance. Lastly, in respect of the applicant Hector it was urged that the learned trial judge erred in failing to direct the jury that a finding that the applicant had lied about not having made the statement Exhibit 9 was not a basis for convicting him. This ground - ground 4 (c) - is without substance for the summing-up taken as a whole clearly brought home to the jury that they could not convict the applicant on such a basis.

In the result all of the grounds argued in respect of the applicant Hector fail. In respect of the applicant Williams it was firstly submitted that the learned trial judge erred

(a) in leaving to the jury the evidence given by Sgt. of Police Linton who sought to link a fingerprint found in the car abandoned by the robbers with that of the applicant Williams taken by order of a resident magistrate after his arrest in respect of this offence;

(b) in failing to direct the jury of the evidence as to dissimilarities in those prints and the significance of those dissimilarities.

Mr. Chin See contended that as identity was the crucial matter in respect of the applicant Williams the learned trial judge in failing specifically to focus the jury's attention on what the defence considered to be dissimilarities between the prints was guilty of non-direction which caused a miscarriage of justice. We examined along with Mr. Chin See what he considered to be dissimilarities between the prints but are unable to agree, having regard to the answers given on these matters by Sgt. Linton during the course of his testimony, that there are indeed dissimilarities between the prints.

Next, it was submitted that the learned trial judge was wrong in his interpretation of the Fingerprint Law (Cap.128) and thus failed to exercise a judicial discretion as to the admissibility of the evidence relating to the fingerprints taken from the applicant Williams based on the order of the learned resident magistrate. At the trial objection had been taken to the admissibility in evidence of the applicant's fingerprints for the purpose of comparison with the fingerprint found in the car abandoned by the robbers. It was the contention before the learned trial judge that the clear intention of the Fingerprint Law Cap. 128 as amended by the Fingerprint (Amendment) Law, 1960 (No. 62 of 1960), which enables a court to order that the fingerprints of a person charged before a Circuit Court, the Traffic Court or a Resident Magistrate's Court with any offence specified in the schedule to that Law, is to facilitate the proof of a previous conviction of that person -

(a) where proof of a previous conviction is an essential part of an offence;

(b) for the purposes of sentence.

If that be so, it was argued, it would be wrong for fingerprints of a person taken under that provision of the Fingerprint Law to be used as a basis for comparison with a suspect print. The learned trial judge in overruling the objection made on behalf of the applicant to the admissibility of the applicant's prints taken by order of the resident magistrate held that one of

the purposes of the Fingerprint Law is to assist in the scientific investigation of crime and that as such a purpose was the object of the evidence in this case the print to which objection had been taken was admissible for the purpose of comparison with the suspect print. It was contended before us that not only did the trial judge fail to exercise his discretion in admitting the applicant's print taken by order of the resident magistrate but that there was in fact no evidence upon which he could exercise a judicial discretion to admit that print. In our view no question of the exercise of a judicial discretion against the admission of such evidence arose in the circumstances of this case. The applicant's fingerprints were lawfully taken by the police and were lawfully in existence in the custody of the police at all material times. Its admission in evidence could not be said to operate unfairly against the applicant Williams. In this connection reference may be made to Callis v. Gunn (1964) 1 Q.B. 495. We are therefore of the view that this ground of appeal fails.

It was further submitted that the learned trial judge failed to appreciate and therefore to assist the jury on the scope of the common design based on an acceptance of the statement made by the applicant Hector to the police and that as a result he failed to leave for the jury's consideration the issue of manslaughter.

We have already in dealing with the application of Hector stated our reasons for holding that the issue of manslaughter did not arise for the jury's consideration on the statement made by Hector to the police. Having regard to our conclusion in that respect we are of the view that this ground of appeal fails.

Ground 8 which made complaint of the direction given by the learned trial judge as to how to treat the statement Exhibit 9 given by Hector to the police in relation to the applicant Williams was abandoned during the course of the hearing of this application.

Those grounds of appeal which related to the question of Cooper's identification of the applicant Williams were abandoned during the course of the argument.

Lastly it was argued that the verdict was unreasonable and could not be supported having regard to the evidence or alternatively the verdict was unsafe. We see no merit in that ground.

In the result the applications of both Hector and Williams which we have treated as appeals are refused.