CA - CRIMINAL LAW — Murder - Trial - Common design ... whether judge failed to direct jury adequately and properly on issue of common design — whether in fact... Can judge failed to instruct jury that if they were in any reasonable doubt whether or not appellant was part of the common design they should acquit.

APPEAL dismissed Case referred to R. v. Saunders and Archer (1573) 2 Plowd 473 Fors 371

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 33 of 1991

Evidence Criminal Practice ✓ comf

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA vs. MICHAEL ADAMS

Mr. Delroy Chuck and Mr. Carrington Mahfood for the applicant

Mrs. Lorna Errar-Gayle for the Crown

February 17 and 24, 1992

MORGAN, J.A.:

The applicant was tried on an indictment charging him that he on the 3rd day of May, 1990, murdered Alvin Scarlett. He was convicted in the Home Circuit Court, Kingston on the 7th March, 1991, sentenced to death and now applies for leave to appeal.

The incident from which this charge arose occurred about 8:00 a.m. of the material day at the Desnoes and Gedues compound which adjoins the dump at Spanish Town Road, Kingston. At the rear of this compound is a gate, where a security guard is posted to control trucks moving from the Desnoes and Geddes compound to the dump to deposit rubbish and other things. The guard who was armed with a gun which is kept in a holster by his side, opens and closes this gate to Desnoes and Geddes trucks.

That morning the guard observed two men, one of whom he identified as the applicant, sitting on a concrete pavement in the dump area near to the gate where he stood. About 8:00 a.m. he opened the gate for two trucks going to the dump and, as they entered the dump, the applicant leapt onto the body of one of

them. About fifteen minutes later the applicant returned on it to the gate where the truck stopped and the applicant and the sideman threw out some pallets and deposited them at the gate. When that was done, the guard then opened the gate and the truck entered. As the guard was about to close the gate, he saw before him the other man, who had been sitting on the pavement, with a gun pointed at him. It was fired hitting his hand. The guard was unable to get his own gun from his holster then, because the injured hand had become weak. The applicant then said to the armed man, "Shoot the guard boy mek we get him gun." The guard then ran off with both the applicant and the other man chasing him. Three shots were fired at him and one of these shots caught the deceased, a sideman, who was then standing in the back of the truck in the compound.

Another witness, Mr. Carlton McKie, the deceased's colleague on the back of the truck, who was then on the truck, saw when the applicant had jumped on to the truck, returned on it, and jumped off at the gate. There he saw another man standing at the gate. This man took a gun from inside his shirt and fired four shots and one of these shots caught the deceased, who was standing in the truck, and he fell. This gunman and the applicant pursued the guard for some distance, then turned back and ran into a gully.

Dr. Royston Clifford, a consultant pathologist, performed a post-mortem examination and found a gunshot entrance wound on the left parietal scalp just above the left ear, which travelled through the scalp through the brain and exited on the right occipital scalp just below the top of the head. He found no gunpowder deposits and gave as his opinion that the gun must have been discharged at a distance of twenty-four inches or more. Cause of death, he said, was due to a gunshot wound to the head.

The applicant gave sworn evidence and admitted that he was present on the truck but he was not there at any time before that, as he came along simultaneously with the truck. The

deceased and himself, he said, threw out the pallets and the proceeds of their sale were to be shared between them as friends. He said he was alighting from the truck when he heard the gunshot explosion. This caused him to run, and he heard other explosions while running against the fence which was the route he took to get out of the dump. He spoke to no one because everybody was running; he never ran with the gunman and he returned about one hour later to take away the pallets at the gate.

Mr. Chuck filed and argued one ground of appeal:

> "1. That the learned trial judge failed to adequately and properly direct the jury on the issue of common design thereby depriving the applicant of a possible acquittal or conviction on a lesser count.
>
> In particular the learned trial judge failed to instruct the jury that if they were left in reasonable doubt whether or not the applicant was a part of the common design then they should acquit."

He submitted that the summing-up was inadequate in that the directions on common design ought to have been more circumscribed. The matter, he said, being one of transferred malice the jury should have been invited to consider whether or not the gunman had departed from the common purpose, which was to recover the guard's gun. The question of whether the applicant contemplated or foresaw that in pursuing the guard another would be killed was not left to the jury. He further said that if the applicant did not contemplate serious injury or death to another person he would not be guilty, for only if he had foreseen that serious bodily injury or death would occur that he could be guilty of murder. He relied on **R. v. Saunders and Archer** (1573) 2 Plowd, 473 Fost 371.

The brief facts in that case are that Saunders intended to kill his wife. Archer bought the poison and advised him to give her. He gave her the poison in an apple. She bit it and gave it to her daughter who ate it and died. He was charged for murder. It was held that he was properly convicted of murder even though

he being present at the time, endeavoured to dissuade his wife from giving the apple to the child.

He intended to kill a person and in giving it he intended that death should follow and although death followed in another person other than the person intended, it was murder for he was the original cause of the death.

The Crown relied on common design and at page 81 of the transcript the passages which Mr. Chuck challenged in the learned trial judge's summing-up, were as follows:

> "Now, where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of the joint enterprise. Even if unusual consequences arise from the execution of the agreed joint enterprise both are liable for these consequences.
>
> Now the prosecution does not have to prove that this accused man inflicted the final blow. Indeed, the defence is that he did not, but you may convict this accused man of murder if you come to the conclusion that his companion inflicted that fatal wound and that this accused man in the dock contemplated that his companion might use a weapon to cause serious bodily injury on anyone who was present at the entrance to the premises that fatal morning.
>
> Now a person acting in concert, that is participating with the principal offender may become a part of the crime whether or not present at its commission by activities described as aiding and abetting, counselling, inciting or procuring that crime.
>
> Now, the state of a person's mind may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time including of course, any explanation that he gives in evidence or in his statement put in evidence by the prosecution. Now the prosecution must prove the necessary contemplation beyond reasonable doubt although that may be done by inference.
>
> If at the end of the day whether as a result of hearing evidence from the accused or for some other reason you conclude that there is reasonable possibility that the accused did not even contemplate the risk, he is in this type of case not guilty of murder. But you may ask yourselves this question: Did the accuse contemplate

> "that in carrying out an unlawful purpose the partner in the enterprise might use a loaded gun with the intention of causing really serious bodily harm? If you accept that the statement was made by the accused, it was given in evidence by Charles Wilson, the security guard, that statement being "Shoot the guard boy make we tek the gun," plus the other evidence of the accused being sitting with another man and later running away along with this man behind the Security Guard, then you will have no doubt in your mind as to his intention."

This was a very comprehensive review of the applicable law and there is no distinction between what the learned trial judge has said and what Mr. Chuck has urged should have been said.

In **Archbold's Criminal Pleading Evidence & Practice** (43rd Edition) Vol. 2 Chapter 29-24 under the rubric "Commission of crime different from the one commanded", the learned author states:

> "If the counsellor and procurer orders or advises one crime, and the principal intentionally commits another; as for instance, if he was ordered or advised to burn a house, and instead thereof committed theft, the counsellor and procurer would not be liable. If, however, the counsellor and procurer ordered the principal to commit a crime against A, and instead of so doing the principal by mistake committed the same against B, it seems that the counsellor and procurer would be liable: Post. 270 et seq.; but see 1 Hale 617; 3 Co.Inst. 51; 1 Russ.Cr., 12th ed., r. 160. If, however, the principal deliberately committed the crime which had been counselled and procured against B, instead of A, Hale's view is that the counsellor and procurer would not be liable: 1 Hale 617. But it is clear that the counsellor and procurer would still be liable for all that ensued upon the execution of the unlawful act commanded: as, for instance, if A commands B to beat C, and he beats him so that he dies, A is liable for the murder: 4 Bl.Comm. 37; 1 Hale 617. Or if A commands B to burn the house of C, and in doing so the house of D is also burnt, A is liable for the burning of D's house: R. v. Saunders and Archer (1573) Plowd. 473. So, if the offence commanded is in fact committed, although by different means from those commanded: as for instance,

> "if J W hires J S to poison A, and instead of poisoning him, he shoots him, J W is, nevertheless, liable: Post. 369, 370."

We accept this as a correct statement of the law as to transferred malice as it stands today. The case of **R. v. Saunders and Archer** (supra) does not, in our view, assist the applicant.

Applying the above principle, however, the next question would be: Was the crime counselled committed? And if so, would it fall under this general principle to constitute murder?

To commit a murder, transferred malice is sufficient in proof. In this case the crime actually agreed upon was murder and robbery with a gun. A weapon was in the hands of one who received encouragement by words, used by the applicant, "Shoot the guard boy mek we get him gun," which clearly showed an intention to shoot and kill the guard. However, in the instant case, in complying with the words of encouragement, he fired and in doing so he was fulfilling the agreed purpose and the clear common intention to kill was effected with full knowledge by the applicant of the nature of the enterprise. If then, whether unintended, by mistake or negligence someone else is killed, both would be equally liable for whatever ensued. The fact of mistake by his principal in joint pursuance of an unlawful act, cannot absolve the applicant from the crime.

This approach is entirely in keeping with the trial judge's directions. To circumnavigate the law and spell out to a jury unnecessary directions would only widen a summing-up and invite confusion in the minds of the jurors.

For these reasons we agree that the application for leave be treated as the hearing of the appeal. The appeal is dismissed and the conviction affirmed.