

NMIS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos. 161 & 162/2005

**BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

**SELVIN ROBINSON V. REGINA
ALBERT KEEN**

Miss Althea McBean for the Applicants.

Kenneth Ferguson, on Fiat for the Crown

2nd & 5th June, 2008

Oral Judgment

COOKE, J.A.

1. The applicants Selvin Robinson and Albert Keen were on the 4th November, 2005 each convicted of the offence of murder in the Circuit Court Division of the Gun Court held in Kingston. The conviction was before Mr. Justice Wesley James, who presided with a jury. Their applications for leave to appeal against conviction were considered by a single judge of this court and leave to appeal was refused. Today there is a renewal of this application to appeal before this court.

2. The court will first give a synopsis of the factual circumstances in this case. Mrs. Jenny Adjmul operated a modest jewellery store called Derrick's Jewellery Store in Derrick's Plaza at 121 Hagley Park Road, Kingston 11. She employed three workers, two of whom were jewelers, and the third, the deceased Phillip Blair otherwise known as "Apple Man", in the capacity of a general handy man or messenger.

3. It was on the 23rd July, 2004 approaching the noon hour when the applicants Keen and Robinson went to Derrick's Jewellery Store. They were let in. Keen was well known to Mrs. Adjmul for some ten (10) years as she knew him as "Burro" and only that. Her initial acquaintance was through her long deceased husband. She regarded "Burro" as a fellow jeweller and from time to time she would extend to him the usual courtesies of one jeweller to another and in particular providing source materials. There were times when he was permitted to use her equipment.

4. The purpose of Keen's visit there was to utilize the equipment in the workshop as apparently he had some work to do on some rings. He was accompanied by Robinson who was allowed to sit in the waiting area of the jewellery shop.

5. There were separate discrete areas in the shop structure demarcated by grills and padlocks. There was a waiting area where the customers would stay and from that vantage point they would be able to see what was being offered in

the showcase which was behind a grill. There seemed to be in that area also the office of Mrs. Adjmul and then to the back there was a workshop.

6. Sometime later, Mrs. Adjmul had to shut her business place because she had some errands to perform. At this time Keen was in the workshop. She did not wish to leave Robinson in the waiting area so she enquired of Keen what would become of him and Keen's response was "a me prento . A mi a bring him, an him can stay with me round here suh," and so Robinson was allowed to join Keen in the workshop when Mrs. Adjmul left.

7. Mrs. Adjmul left and returned at about 2 o'clock. At this time her three (3) workers were still there as were Keen and Robinson. At closing time, she went around to the back and informed Keen and Robinson that it was time to leave. She turned to re-enter the other part to her office when she felt a pat on her shoulder. She looked around and there was Keen with a firearm in her ear and she was marched to the workshop. As was said before, the three (3) workers were there and in particular "Apple Man".

8. "Apple Man" was tied up. His hands and feet were bound. He was told to lie on the flooring. Keen demanded of Mrs. Adjmul the keys for the showcase where the jewellery was kept. She told him where to find it in her office and he left soon after. "Apple Man" disengaged himself. He grabbed a long silver ingot (described also as a long piece of iron). He is a big tall 6 feet 3 inches man and evidence suggested that Robinson would have reached him below his chest.

9. Robinson now had the gun which had been handed to him by Keen. "Apple man" raised the iron in an attacking mode at which point the other two workers ran. So did Mrs. Adjmul and as she went towards her office she heard five or six explosions. She saw Keen making his escape through a small grill. The police were summoned. There was a prompt response.

10. Cpl. Evan Blake saw Robinson on the building. There is some uncertainty as to exactly where he had seen him. Robinson raised his hand in submission. He pointed out to Cpl. Blake where the fatal weapon was to be found and he said he (Robinson) killed the man but it was because he was frightened.

11. The lifeless body of "Apple Man" was seen lying on the floor of the workshop. He had received three (3) gun shot wounds, one to the upper anterior chest, another to the lower anterior chest and another to the left lower forearm. There were also lacerations on him which are consistent with the evidence that while he was on the floor he was being kicked about.

12. Keen was arrested about a month after. The defence of Robinson was that he happened to have been at the wrong place at the wrong time because he was legitimately at the jewellery store wishing to purchase jewellery for his young daughter and while he was there two gunmen burst in.

13. The defence of Keen was that he was innocent. He had never been involved as a jeweller and he did not know Mrs. Adjmul. Mrs. Adjmul never went to his wedding as stated by her. His defence was a defence of alibi. He was elsewhere at the time of the murder.

14. A legal issue which arose in this case pertained to the issue of common design. The judge's direction on this issue was adequate. Indeed, that is not the subject of any ground of appeal in the application for leave to appeal. Then there is the question of identification in respect of Keen and the evidence there was substantial.

15. The court will now deal with the supplemental grounds of appeal filed on behalf of Robinson. The first ground states:

Ground 1

"That the learned judge erred in failing to discharge the jury after behaviour amounting to improper conduct was brought to his attention in respect of the investigating officer, eye witness and foreman of the jury."

We are of the view that this ground is without merit. The complaint was that Mrs. Adjmul was seen talking to the foreman of the jury. Counsel brought this to the court's attention. The learned judge conducted a hearing in respect of this complaint. Adjmul and the foreman of the jury both denied that any conversation took place between them. There was no evidence to substantiate the complaint. The evidence was to the contrary. Therefore there was no basis

upon which the learned trial judge could have exercised his discretion to discharge the jury. This ground fails.

16. The second ground states:

Ground 2

"The learned trial judge failed to deal adequately with the discrepancies arising in the trial and this adversely affected the Applicants' chances of acquittal."

It was pointed out by the bench that discrepancies are relevant only when such discrepancies tend to undermine the credibility of a particular witness or in fact the structure of the case which is being put forward by the Crown. In this case the discrepancy which has been brought to our attention pertained to where Robinson was apprehended. The evidence of Mrs. Adjmul was that she had locked him in the workshop and according to the evidence of Evan Blake, he may have been found elsewhere. This discrepancy does not in any way undermine the structure of the case presented by the Crown which was that Robinson did the shooting. He showed the police where the gun was. Also, he made the statement that he shot the deceased, albeit that he was frightened. For those reasons expressed ground 2 fails.

17. In respect of Mr. Albert Keen the ground was that the learned trial judge erred in suggesting to the jury that the applicant had not withdrawn from the common design. We could start a discussion in respect of this ground by asking whether or not there was evidence worthy of consideration with respect to the

issue of withdrawal. The case of **Russell v. The Queen** SCCA 234/2001 (delivered on October 29, 2003) provides guidance as to the applicability of withdrawal in general terms which is that there must be a timely communication of the applicant's intention to abandon the common purpose and that communication should be unequivocal.

19. In this case, there is not even an iota of evidence which could suggest that Mr. Keen withdrew. He was the one who initially had the gun. It was he who handed the gun to Robinson and left Robinson with the firearm over the tied up body of "Apple Man". Accordingly, it is the view of this court that there was no evidence capable of raising the issue of withdrawal and the approach of the learned trial judge in this regard cannot be faulted.

20. So it is only left for the court to pronounce as follows: in respect of each applicant, leave to appeal is refused. Sentences are to commence on the 4th February, 2006.