JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 234/2001

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.(Ag.)**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.(Ag.)

DALTON RUSSELL V. REGINA

Dennis Morrison, Q.C. for the appellant

Miss Paula Llewellyn, Senior Deputy Director of Public Prosecutions, and Ms. Stephanie Jackson, Crown Counsel for the Crown

June 3 , 4, and October 29, 2003

PANTON, J.A.

1. On June 4, 2003, we dismissed this appeal and affirmed the conviction and sentence with an order that the sentence was to commence as of January 25, 2002.

2. The appellant was convicted on October 18, 2001, of the murder of one Devon Smith and was sentenced on October 25, 2001, to imprisonment for life at hard labour. The trial took place at the Manchester Circuit Court, Mandeville, presided over by Mr. Justice Donald McIntosh.

3. The deceased and his wife Mary, both vendors, lived in Farm district, Manchester. On the morning of May 19, 2000, the deceased left home on his

bicycle to sell cigarettes which he had with him. He did not return home. The following morning, a report was made to the police. On the third day, an alarm was raised and a search commenced in earnest. Soon thereafter, the body of the deceased was found buried under a bridge on the Barrack Hall main road, Manchester. The throat of the deceased had been cut, and there was a large wound on the left forearm. His trousers had been torn down the centre of the back and the left side pocket turned out and cut off. His shoes and belt were missing. The bicycle was in the bushes not far away from the body, but there was no sign of any cigarettes or money.

4. A post mortem examination was conducted on the body by Dr. Derrick Ledford on May 27, 2000. He found that there had been partial decomposition of the body, and that there was a six inch deep chop to the left forearm, a battered four inch mark to the forehead and a four inch cut to the anterior neck cutting through the trachea and major blood vessels. Death was due to shock, due to haemorrhage, due to the cut to the anterior neck. The cut to the forearm was described by Dr. Ledford as a defensive wound.

5. The prosecution's case consisted of a cautioned statement given by the appellant to the police. This statement was recorded on May 24, 2000, in the presence of Mr. Eric Sanderman, a Justice of the Peace for the parish of Manchester. There was no dispute in relation to the contents of the statement or the manner of its taking, so it was admitted into evidence without demur.

6. The statement reads thus:

"Friday the 19th of May, 2000, 'bout 2 o'clock in the evening mi did deh down a Lisa yard a cook fish tea. Mi did a help Lisa hold her baby because mi just love the little baby. Same time two boy, Wayne Hunter, whey the people call 'Wicked Man' and the next boy name Kevin who call Blacks, come down deh and a talk to themselves. Dem come in a the room. Wicked Man build a spliff and gi mi a draw. Mi never did waan tek it. Him force mi to tek it and mi tek it and tek two draw. Mi eye get red and a run water and mi feel a way, and mi seh mi a go up a mi yard. As mi reach up deh, a dem mi see come and seh dem a go up a di hill, mi must carry dem go up deh. Wicked Man have one something wrap up in a one shirt. Mi follow dem go up a the road. When mi reach up a the road, Wicked Man tek out the something out a the shirt. Mi see seh a one gun. Him tek out one wig out a him pocket and put it on and put on a darkers. Blacks did have on a black hat and him put on a darkers. Wicked Man put on two gloves. One is a whitish colour gloves with some black black dots pon it, and the other is a full white. The white one with the dots dem a fi mi. Him did borrow it from mi. Mi stand up a eat a mango. Mi and Blacks deh pon one side a the road and Wicked Man deh pon the other. Blacks seh, "see the boy yah a come". Same time mi see the cigarette man a push him bicycle a come. Wicked Man run out pon him with the gun and seh, "hey boy, don't move". The man seh, "yuh can kill mi. Wicked Man seh "hey pussy hole you nuh hear mi seh yuh nuh fi move". The man a walk same way. Wicked Man hold the man from back way and put the gun in a him side and the man a wrestle with him same way. Wicked Man seh "Blacks come hold the boy nuh". The man wrastle with dem and him lick the man in a him head with the gun. The man call out, Rally, Rally two times. Blacks then hold the man and Wicked Man seh to mi , "hey boy yuh nah come hold the man to". Mi hold the man hand and Wicked Man run to tek up a piece of wood an put down the gun and come back and lick the man in a him head 'bout five times. We let go the man and him drop a ground. Blacks tek up the bicycle and run go down in a one piece a bush. The bicycle did have on

> the cigarette bag pon the handle tie down. Blacks run come back up and hold the man hand an Wicked Man hold him foot and carry him over the gully. Wicked Man tek out him knife, one ratchet knife, and mi see him a cut but mi never know what him a cut. Mi kind a walk weh and Wicked Man seh, "hey boy how you a move so". Wicked Man first come out a the gully with the knife in a him hand with pure blood pon it. Him have a piece a pocket in a him other hand. Then Blacks come out behind him. Wicked man tek up the gun and seh, "hey boy, you a move like informer". Mi said you shouldn't kill the man, an him seh, "mind yuh end up like him". The three a wi walk in a the little track down weh the bicycle deh and Wicked Man pull out him money out a the pocket and the two a dem count it. Wicked Man burn some of the money with one blue 'kerchief. After that the three a wi left and mi go down a mi yard. Dem go through one next lady yard and go weh. Mi could not tek it. The Saturday mi go dung a mi mother yard at Ebony Park, a place name Decoy, and tell her and mi step-father, who is a District Constable, an him tell mi fi go dung a Porus Police Station. Mi come back a Harmond Tuesday evening and Wednesday morning mi tell one old man name Mr. Reid and beg him carry mi go down a the station. Mr. Reid carry mi go dung deh. A so it go".

7. The appellant, in making an unsworn statement, a practice which is so common among defendants in this jurisdiction, repeated in substance the contents of the cautioned statement. He said in part:

> "When the man reach up where we was, Wayne jump out upon him with the gun and put the gun on him. Same time 'Blacks' come out too and the man say, "oonoo cyan do mi nutten". Wayne gi him two lick wid the gun an the man call two name two time, him say "Rally oh, Rally oh". And same time 'Blacks' hold him an him lick di man again. Both a dem a wrassling. Same time him curse a bad word and say,

> "hey boy, help me hold di man you move like informer".

The judge then interjected:

> "What you say?"

The appellant continued:

> "Him say, "hey boy, you naw hold di man, you a move like informer. And mi hold upon him. Same time him lick di man again an him drop."

The learned judge asked:

> "Him lick him again"?

The appellant replied:

> "Yes, Wayne lick him again".

He continued:

> "Him take up the bicycle and push it go down in a gully and then both of them take up the man an bring him over a gully. Dem a say you a move like informer an mi say don't kill di man.....Same time mi see Wayne come up wid di knife in a him hand wid pure blood on it an piece a pocket, a piece a clath in him hand wid his pant foot blood up an him shoes an him hand. Both a dem come up, dem start rough me up an mi start cry. Same time mi say oonoo shouldn't kill di man an dem say, "hey man, mind you end up like him, you a move like informer".

8. Leave was granted to the appellant to argue two supplementary grounds of appeal that were framed thus by Mr. Dennis Morrison, Q.C.:

> "1. That the learned trial judge failed to give the jury any or any adequate directions on common design, in particular on the relevant matter for their consideration in determining whether, on the evidence, the appellant might be said to have withdrawn from the common design.

> 2. That the learned trial judge left the appellant's unsworn statement to the jury in terms and in a manner which were unfair and highly prejudicial to the appellant (see pages 119 – 126 of the transcript)".

9. ***Withdrawal from the common design***

The prosecution and the defence are agreed that no directions were given by the learned trial judge in respect of whether the appellant had withdrawn from the common design alleged by the prosecution. Mr. Morrison submitted that seeing that the question of withdrawal was an issue for the jury to decide, it should have been left to them "fairly and squarely". In other words, there should have been a specific direction thereon. The judge's failure to so do, according to Mr. Morrison, deprived the appellant of a chance of acquittal. In this regard, he placed reliance on the cases **R. v. Becerra and Cooper** (1976) 62 Cr. App. R. 212 and **Whitefield v. R.** (1984) 79 Cr. App. R. 36.

The law in relation to withdrawal from a common design is stated at page 218 of **Becerra and Cooper**, where Roskill, L.J. quotes from the judgment of Sloan, J.A. in **Whitehouse (alias Savage)** (1941) 1 W.W.R.112, a decision of the Court of Appeal of British Columbia, Canada. The passage reads thus:

> "Can it be said.....that a mere change of mental intention and a quitting of the scene of the crime just immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his companions' change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be,

> in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences".

The three judges in **Becerra** expressed the view (through Roskill, L.J.) that they could not improve upon this passage from Sloan, J.A., so they ventured to adopt it. In this jurisdiction, we too have adopted and applied the principles stated above. For example, in **R. v. Wayne Spence** (1990) 27 J.L.R. 223, the prosecution's case was that the appellant was one of four armed men who boarded a public passenger bus on the night of December 7, 1987, in the Caymanas area of Saint Catherine. They robbed the bus crew and several

passengers thereon, raped a policewoman, and then shot and killed her and another passenger. The prosecution alleged that the appellant was about to act on the order of the gang leader to cut off the head of the bus driver, when the appellant released the driver and joined the other criminals in the middle of the bus where the policewoman was located, they having then discovered her identity. In an unsworn statement at the trial, the appellant confirmed that he had been ordered to cut off the driver's head but said that he was outside the bus when the policewoman was raped and killed. He said he heard the threat to kill the policewoman and the other passenger who was thought to be a prison warder. As a result, he said that he had started to say,

> "O god, noh kill nobody, man. Oonoo noh get the money from the people dem already? 'Low the people dem",

when the gang leader instructed him to be quiet, and sent him outside to be look-out man. Rowe, P., in delivering the judgment of the Court, said at page 234 I – 235 A:

> "The remarks which the appellant attributes to himself as imploring the other men not to kill anyone as they had got the money for which they had come and to 'Low the lady' which phrase when expanded would mean 'give the lady a chance' can be seen at best as a reluctance on his part to complete the plan rather than as evidence of withdrawal. From the demonstration of the appellant in the dock as to the manner in which the police-woman was raped, the trial judge was moved to express disgust and to comment that even with the passage of time the appellant seemed to be re-living an event in which he participated fully rather than something at which he was a passive bystander".

Also, in the unreported case, **Regina v. Trevor Bennett**, SCCA 64/89 (delivered on July 15, 1991), the applicant, who was convicted of the murder of His Honour Mr. Derrick Hugh, a Resident Magistrate, who was then acting as Registrar of the Supreme Court, sought to establish that he had withdrawn from the common design when he said in his cautioned statement "I was astonished of the actions which was going on". However, this Court did not regard that as evidence amounting to a withdrawal or dissociation "or anything which indicated a timely communication of the applicant's intention to abandon or remove himself from the plan".

10. In the instant case, Miss Llewellyn, in answer to the submission of Mr. Morrison, Q.C., said that there was no evidence which would have warranted any direction on the question of withdrawal from the common design to rob and kill the deceased. We agree with that submission. The cautioned statement showed clear preparation for the robbery and murder. The appellant was with two men one of whom he knew had a gun. That man, at the scene of the crime, bedecked himself in gloves (one of which belonged to the appellant) and dark glasses. The other man also put on dark glasses. These two men pounced on the deceased as he pushed his bicycle along the road. The gun was used to hit the deceased in his head while he wrestled with his attackers. In the midst of this uneven bout, the appellant was called on to make the contest more uneven. He obliged by holding the hand of the deceased thereby enabling the continuation of the attack on the deceased who was hit about five times with a piece of wood. The

deceased then fell. One of the men then used a knife to cut the deceased. It is at that stage that the appellant said, "you shouldn't kill the man". In the unsworn statement, the appellant confirmed that he assisted in holding the deceased while he was being beaten by the two men, and that the deceased fell. He said further that the men took up the deceased and his bicycle and "bring him over a gully". At that stage, he said , "don't kill the man". He then saw one of the men with blood on the knife, and said to him, "oonoo shouldn't kill the man".

11. The circumstances of this case indicate quite clearly that there had been no withdrawal by the appellant from the common enterprise. It matters not which of his statements is being considered. In both situations, he has admitted to participation in the beating up to the moment the deceased fell. It is at that stage that he is saying that the deceased should not be killed. It is very instructive that after the killing the appellant left in the company of the other killers. He watched them count and share the spoils, and it took him five days to report this matter to the police. As mentioned earlier, the law is that before a jury may find that there had been a prior abandonment of the common enterprise, there must be "something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime". There was no "timely communication" by the appellant which would have "serve(d) unequivocal notice" on the other parties that from that moment on they would

have been on their own. There being no evidence of any such matters, the learned trial judge cannot be faulted for not having directed the jury thereon.

12. ***The treatment of the unsworn statement***

It was submitted that the judge's treatment of the unsworn statement was unfair and unbalanced; consequently, it was said, the defence was not fairly and fully put to the jury. In this regard, reliance was placed on the decisions in **Mears v. R.** (1993) 42WIR 284 and **The State v. Singh** (1995) 51 WIR 128.

In **Mears,** a case from this jurisdiction, the prosecution's case was that the appellant had murdered a young man named Adrian Brown by shooting him in the ears and then burning the body. The sole witness was a woman who had borne the appellant a child, and to whom the appellant had confessed the killing. According to the pathologist, there was no evidence of any gunshot injury to the skull of the deceased, whether in the area of the ears or elsewhere. The cause of death was said to be head injury with skull fracture, extensive body burns with a possibility of strangulation. Clearly, the appellant would have been concerned that the evidence of the pathologist would have been presented in a fair light to the jury along with the evidence of the alleged admission that the appellant had shot the deceased. The learned trial judge, however, in summing up the case to the jury, said:

> "He says she is not to be believed, because she fabricated this whole thing, and this is a comment I make again. I recoil to think that any human being could be so degenerate, so wicked that they would concoct a story like this, especially a woman who

> has borne from her womb a child for a man. I am not saying, but to me it is inconceivable that a human being could do this, just to settle a score".

The Privy Council considered that the judge's comments in the just quoted passage and elsewhere in the summing-up,

> "went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting".

In the circumstances, the appeal was allowed.

In **The State v. Singh**, the headnote reads:

> "The appellant was charged with causing grievous bodily harm to both M (his estranged wife) and A by intentionally throwing acid at them in 1983. In his defence (as set out in a statement to the police and in his unsworn testimony in court at his trial in 1990) the appellant maintained that (being upset that their child had died and been buried without him having been informed) he had hit M, and that A had then threatened to throw acid at him if he did not desist from hitting M; and that he had kicked the bottle of acid out of A's hand, it hit the flooring of the house, broke and splattered both M and A with acid. The appellant's version of the events in effect denied the version related by M and A. In his summing-up the trial judge made no mention of the defence of accident and gave no direction on such defence; but after discussing the appellant's version of the events the judge referred to the motive for the commission of the offence and added that the appellant did not have the right to take the law into his hands (without explaining to what he was referring). The judge did not assist the jury by drawing attention to the implications raised by the difference between the versions of events presented by the prosecution evidence and by the statements made by the appellant as to how the injuries to M and to A were

> sustained. The appellant was convicted of the offence and appealed against conviction.
>
> **Held,** allowing the appeal (1) that mischance or accident was more than a mere fanciful explanation of the events and the failure of the trial judge to deal with the defence of accident in his summing-up constituted a misdirection.
> (2)...
> (3) That evidence adduced by the prosecution had made the contents of the statements of the appellant to the police and to the court a live issue; the failure of the trial judge to discuss and analyse the evidence in his summing-up also constituted a misdirection and had deprived the appellant of a fair trial".

Mr. Morrison made special mention of a passage at page 135 b-c of the judgment of Persaud, acting J.A. It reads thus:

> "Paramount in the consideration of our criminal law, if a trial by jury is to be regarded as fair, is the principle that "the trial judge in his summation must put the defence fairly and fully to the jury", per Massiah, JA in **Price v. The State** (1982) 37 WIR 222 at page 237. A defence, however weak it may appear to be, ought to be fairly and adequately put to the jury, the trial judge directing them on its nature and at the same time reminding them what the evidence was: see **David and Watkins v . R** (1966) 11 WIR 37. So cardinal is this principle that the trial judge is required to look for any possible defence arising from the evidence and refer to it even though that defence may not have been relied upon by the accused (see **R. v. Proffitt** (1961) 45 Cr. App. Rep. 348".

13. We have combed the summing-up in the instant case and are satisfied that the learned trial judge adequately and fairly put the defence to the jury for their consideration. He at no time tried to usurp their functions. He took care to refer to all that the appellant had said in not only the cautioned statement but

also the unsworn statement made from the dock. The defence was one of being present but not participating in the crime. The judge, while pointing out the dilemma the appellant's statements had put him in, clearly left the matter for the determination of the jury.

14. The case against the appellant was a strong one. This was conceded by Mr. Morrison. We are of the view that there was no basis for the challenge that was mounted against the conviction. Accordingly, for the foregoing reasons, we affirmed the conviction and sentence.