

Anthony Taylor

Appellant

v.

The Queen

Respondent

FROM

**THE COURT OF APPEAL OF
JAMAICA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 13th March 2006

Present at the hearing:-

Lord Rodger of Earlsferry
Lord Woolf
Lord Hutton
Lord Carswell
Lord Mance

[Delivered by Lord Carswell]

1. The appellant Anthony Taylor was tried along with Richard Solomon in the St James Circuit Court in Montego Bay by Panton J and a jury between 21 September and 5 October 1998. The defendants were jointly charged with the murder of Kevin Cummings on a date unknown between 1 and 4 April 1997. At the conclusion of the trial the jury acquitted Solomon but convicted the appellant of murder. The trial judge sentenced him to imprisonment for life with hard labour, with a minimum of 25 years to be

served before he would become eligible for parole. He applied for leave to appeal against conviction and sentence. The Court of Appeal (Forte P, Harrison and Langrin JJA) on 19 November 2001 refused leave to appeal against conviction but allowed the appeal against sentence, varying it by ordering that the minimum term be reduced from 25 to 23 years. The court gave its reasons for this decision in a written judgment given on 11 March 2002. On 17 November 2004 the Board granted the appellant special leave to appeal as a poor person against his conviction.

2. The deceased man Kevin Cummings was a taxi driver in Montego Bay. He was last seen alive at 1.45 pm on 1 April 1997 at a taxi stand in St James. He was due to pick up a neighbour that evening between 10.30 and 10.45, but did not show up. His body was found on 4 April 1997 lying beside his taxi at Spring Farm, an apparently unfrequented spot about 15 or 20 minutes' drive from the Bay West Plaza shopping centre in Montego Bay. It was decomposed, but there was no firm evidence about the time of death. The cause of death was a bullet wound to the head; the entrance wound was in the forehead and there was no exit wound. A bullet fragment was found in the brain matter, which was the subject of forensic examination.

3. On 2 April 1997 the appellant told two separate people that the deceased had arrived at Bay West Plaza the previous day, but that he had told him that the projected trip was cancelled, whereupon the deceased had driven off. That same day 2 April he arranged with his wife's aunt Carol Handy to stay overnight at her house in Kingston. He arrived at 3.25 am with luggage, and explained that he was to leave on a flight to New York later that day. He was unable in fact to leave that day, but on 16 April boarded a flight bound for New York. Police took him off the flight before the aircraft took off, arrested him and took him into custody.

4. On the following day 17 April at 7.30 pm approximately the appellant was interviewed by senior police officers in the presence of his father-in-law Mr Thomas Chambers, whose presence he had requested. He then gave a long statement, which the trial judge admitted into evidence after holding a voir dire, at the conclusion of which he rejected the appellant's allegations of police maltreatment. The body of the statement read as follows:

"I know one Richard Solomon. He is the Manager of Tyre King in Montego Bay. I used to go to his place to get my car

washed. I refer to Teresa's car. While I was visiting this car wash place I came to know Richard. Richard has a girlfriend in West Green. She lives near to my friend Teresa. On Monday the 31st March which was Easter Monday, my wife drove and dropped me off at Tyre King about 10:00 a.m. the morning. I saw Richard when I went there.

Richard told me that he wanted me to do something. He said he wanted me to call my friend that drive the Corolla and ask him to come and pick up Claudine down by Bay West plaza.

He then started doing his paper work. After he was finished he took me in his car and dropped me at my home at Rocket Club. Richard told me he would meet me at Bay West one o'clock the next day which was Tuesday. He said he leaves his office at one o'clock and so I should give him about fifteen minutes. On Tuesday which was the next day, Teresa came to my home at the Rocket Club and picked me up in her car. Wendy was already gone to work.

Teresa then dropped me off at Bay West, close to 12 midday. I went into McDonald's to get something to eat and then I went up to Yours Young World which is Claudine's shop. Claudine was there as also her sister. I told Claudine I was going to call Kevin to carry her out somewhere then called Kevin and went downstairs by myself to see if Kevin reached but he was not there so I went back upstairs to the shop and Claudine's sister said that Claudine went downstairs looking for me. I went back downstairs to check for her and check if Kevin came. I did not see her or Kevin so I started to go back upstairs and I met Claudine coming down. I told her to go back up. I went back to the basement and I saw Richard's car, parked in the parking lot. Richard's car is a volvo. I looked and saw Kevin's car under the basement in a parking lot near the entrance. Kevin called to me and I went over to him. I got into the front seat of Kevin's car and I told him I want to go to Spring Farm to see a piece of land a friend told me about. Kevin drove off under the basement but before we exited I saw Richard. I told Kevin he is a friend of mine he should pick him up. Kevin stopped and

Richard got into the back seat behind him. I told him to drive up to Spring Farm. He already knew because I told him when I got into the car. I put in a cassette when I just entered the car. The cassette had a mixture of American and Jamaican music. This cassette has an artist name Tupac, Shakur, remix, Little Kim and Bounty Killer. When we reached Spring Farm and reached the actual location before Kevin shut off the car, Richard shot him twice in his head. He then came out and took the body out and put it to the side of the road.

I shifted over to the drivers seat and tried to start the car after shutting it off. The car didn't start. Richard and I look under the bonnett and went back to start the car but it still wouldn't start. We left the area, walked down to the main road and took a taxi back to Bay West. I went back up to Claudine's shop and Richard went to fix a puncture when I went up to the shop I called Conrad and told him to come pick me up and take me to West Green which he did.

I was there for a while but Teresa wasn't there. I came out and was talking to some boys and girls. I stayed there for a while and then I called Conrad to come pick me back up and carry me to a restaurant. We came back and took me to the restaurant. I was at the restaurant for about fifteen minutes and I called Teresa to come and pick me up later that evening at my house. Conrad took me to my house and later that evening Teresa picked me up and I went down to West Green. Richard came to West Green and I went with him to his house at Kempshot there he put the gun back in his fathers house. This was a point .22 revolver. Richard then burnt his clothes in front of a garage. These were a blue jeans and a green T-shirt they had blood on them. Richard's mother was in the house but his father was not there. His father and mother are separated. So they live in two different houses on the said premises.

It was Richard's father's house in which he put the gun but I did not see where in the house. Richard then came out and took me back home to the Rocket Club. When Richard first told me

how he wanted me to call Kevin to Bay West he told me that he wanted to get Kevin's car to sell it in parts.

The following day I told my wife Wendy that we have to leave the Rocket Club. I told her of the situation that Richard had put me in. That same Wednesday, Wendy moved to her parents house and I went to Teresa's place in West Green. In the evening of that day at about 9:30 p.m. I saw Teresa and told her I wanted to stay for about a week and she said okay. Earlier that day I saw Richard at West Green and told me what to tell Claudine.

That said evening at about 9:30 p.m. I told Teresa that people are looking for me so I needed a place to stay. I also told her that I am in trouble and the police may be looking for me.

On Wednesday the 2nd of April, while I was staying at West Green, Teresa took me to Kingston to my aunt-in-laws house where I spent a night. I was trying to get a letter as I did not have my passport or birth certificate. I went to the U.S. embassy the Thursday but I never got a letter so I couldn't travel. I called my wife and told her to come pick me up to bring me back down. She came for me Thursday night and took me back down and left me at West Green. Teresa was there. It was after that I went to Lilliput. I was at Lilliput until two days ago whilst I had purchased a ticket in order to leave the country.

At the airport I was detained on the plane. This is done I just want to add something. I just want you to understand that the only reason I was leaving was because I was in fear that Richard was looking for me to hurt me. This was the reason I was trying to leave on both occasions."

5. On 18 April 1997 police officers went to the business premises of the appellant's co-defendant Richard Solomon and thence accompanied him to the house of his father Barry Solomon at Kempshot in St James. In that safe they found a weapon in a cloth bag inside a portable safe, which Mr Barry

Solomon opened for them. The weapon was a rather unusual double-barrelled .22 calibre derringer pistol, loaded with two rounds of ammunition. Three rounds of .22 ammunition, suitable for use in that weapon, were found with it. Forensic evidence was given at trial that the striations on the fragment of bullet found in the brain of the deceased matched those on bullets test-fired in the pistol. The witness drew the conclusion that the fragment had been discharged from that pistol.

6. Richard Solomon was arrested and taken into custody. On 19 April 1997 he made a statement under caution. As edited for the trial the body of the statement read as follows:

"I met Tony Taylor at Tyre King Jarret Street, Montego Bay through a friend of mine name Alex who came there to get his car washed. They both left. Tony came back to Tyre King a couple days later to get a friend ever his car wash Theresa. He uses her car all the time. We became friends shortly after as he passed ever other day to get the car cleaned. We spent a couple of evenings together in West Green through Cornwall Beach. Over a one month period or so Tony became like a best friend overnight as I have not many friends who has as much time off as Tony. I work from 8:00 a.m. to 1:30 p.m. so we spent time together, two to three days a week. Tony and I had many discussions. On one occasion he told me someone had money for him he didn't tell me over what. So he wanted a gun to borrow to go and let the person see he was serious. I told him I have a gun and I would lend him as I thought he was only going to scare the person and get his money or give the person time to give him his money. I ask him on several occasion who the person was he told me I did not know the person.

A couple of days later I loan him the gun which I got out of my father's combination safe. We left Kempshot I drop him off at Rocket Club this was at night Saturday, I saw him the next afternoon I ask him for it he said he did not see the person yet so I allowed him to keep it (Sunday). Monday I did not see him as I went to Dover Race way early with two friends of mine and got back home (Kempshot) Exhausted from the sun all day that I did not go out that night I went to work early the

Tuesday morning and had a normal day at work. I left him the afternoon and went to West Green to hang out. I saw Tony there after about two hours. We hang out for a while till I ask him where the gun was. He said it was inside Theresa's house. I then ask him if he saw the person he said yes. Did you get your money I ask he said no. Well what happen I said. He said he shot the person. I told him to get the gun I wanted to return it. It was cold coming out of the freezer where he had it. We went to Kempshot and cleaned the gun and put it back in the safe. He told me he wanted to burn his clothes especially his shorts he showed me blood on the back of it. We did so and I handed him a green long sleeve shirt and a pair of jeans. We left Kempshot and went to a Fashion Show at Wyndam on the way there we stopped in Coral Gardens and pickup Alex. We all went to the show. We were there for a couple of hours then left for Montego Bay, we left Alex at Wyndarn we drop Tony home ...

I have not seen him since he only called me over the phone to ask me to change a cheque for his wife because she needed to get to Kingston where he was going. I told him I did not have the money to cash the cheque. We hung up. He called me back later that day and told me they have his name at both airports he could not leave. We hang up the phone again ...

I went to work 8:00 a.m. it was later that morning the police came to my work place took me to Kempshot where a search was conducted and the gun which I loaned Tony found. I am giving this statement free although my lawyer told me not to answer any question unless he is present it makes me feel better and I would not like my father to become implicated because of my actions."

7. On 21 April 1997 police officers accompanied the two defendants again to Kempshot. Solomon pointed out a manhole in front of his mother's garage, where he said he had burnt the clothes. The officers observed blackening in the area of the manhole. Taylor at once denied that his clothes had been burnt and said that Solomon had burnt only his own jeans and shirt. A Crown witness also gave evidence that the deceased's taxi had a special

security device, preventing the engine from being started unless a particular and unusual procedure was followed.

8. The appellant gave evidence on oath in his own defence. His account was a complete denial of the contents of his police statement. He averred that his only contact with the deceased on 1 April 1997 was that he spoke to him when he arrived to pick up the appellant's friend Claudine Tenfa. According to his account, Miss Tenfa had asked the deceased to call at Bay West Plaza, where her shop was situated, to take her to a beauty salon, but she had changed her mind. When the deceased arrived, the appellant told him that he was no longer required and he drove off. He did not see the deceased again. The next morning he began to receive threatening telephone calls and heard that the police were looking for him. He became very afraid because of the reputation of the Jamaican police and decided that his best course was to fly back to New York until the matter was cleared up. He went to Kingston to get a flight, but there was a delay in his obtaining the necessary papers, so he came back to Montego Bay. He boarded a flight for New York on 19 April, but was taken off it by police officers and taken into custody.

9. He claimed that in the course of interview Superintendent Morris refused to accept his account, which he said was a lie and was not what he wanted to hear. He was hit in the face by an officer and his glasses were wilfully destroyed, before Mr Chambers arrived to join him. The police told him that they wanted him to give a statement implicating Solomon and wrote it for him to sign. He signed it, but it was all untrue.

10. Solomon gave an unsworn statement from the dock, in which he stated that the contents of his police statement were true. He added that he had unloaded the gun before he gave it to Taylor and that he thought that at worst it would only be used to frighten someone. When he returned the gun Taylor told him that he shot somebody. Solomon asked him if he killed him, to which Taylor replied that he shot him in the leg and he ran off into the bushes. The clothes which were burnt were Taylor's, not Solomon's. Solomon said that he had nothing to do with the killing and did not even know the deceased.

11. At the close of the prosecution case the trial judge received submissions from the defendants' counsel that neither had a case to answer. He did not rule on them at that stage, but proceeded with the defence case,

then early in his summing-up to the jury (Record, p 474) instructed them that they would be required to return a verdict of not guilty of murder in respect of Solomon, but were to “consider in his case the question of manslaughter”.

12. The Crown had had a difficult task in presenting the case against the two accused. The only evidence directly linking the appellant with the murder was his police statement, in which he admitted being present when the deceased was killed and claimed that it was Solomon who shot him. The appellant’s statement was not admissible evidence against Solomon and the case made by the appellant in his testimony at trial was a complete denial of his presence at or any connection with the killing. Accordingly the case against Solomon had to depend on his own police statement, in which the most to which he admitted was lending the gun (which he claimed was unloaded) to the appellant to frighten a debtor into payment. The Crown were constrained to present the case on the basis that Solomon was not a direct participant in the killing, notwithstanding the allegation in the appellant’s statement, and that his only connection was supplying the gun to the appellant. Before the Court of Appeal it was contended on behalf of the appellant that the jury’s verdicts on the two defendants were inconsistent and demonstrated confusion. This point was argued in the appellant’s printed case on appeal to the Board, but at the outset of the hearing his counsel Mr Owen QC informed the Board that in the light of the submissions contained in the respondent’s printed case he did not propose to rely on this ground. The grounds of appeal which he did argue were that (a) the judge’s directions on joint enterprise were insufficient (b) the failure to adduce evidence of his good character resulted in unfairness to the appellant (c) the judge prejudiced him by referring in the presence of the jury to the fact that he had admitted the appellant’s police statement in evidence. Only the first of these contentions was advanced in the Court of Appeal. In order to consider them it is necessary to rehearse the material parts of the judge’s summing-up.

13. It was imperative that the judge should keep the case against each defendant carefully distinct and that the jury should receive sufficient direction on the drawing of inferences from the contents of the statement and on the liability of participants in a joint enterprise. At an early stage in his summing-up the judge gave the jury directions on the content of the crime of murder. He then stated (Record, p 468) that the prosecution was relying on common design, which he defined in the following terms:

"Now, the prosecution has indicated that it is relying on common design in its attempt to prove this charge of murder. What is meant by common design is this, Mr. Foreman and members of the jury, if two or more persons agree or join together to commit an offence and that agreement is carried out and the offence is committed then each person who takes an active part in the commission of the offence is guilty of that offence.

Now, such a person cannot be convicted of the full offence unless he is present at the commission of the offence and actively aids, abets and assist in its commission. Now, it is not necessary that each person accused should be actually present and see the offence committed. It is sufficient with the intention of giving assistance he is near enough to afford such assistance should the occasion rise".

The judge defined the offence of manslaughter and instructed the jury to consider the case against each accused separately. He outlined the case being made by the Crown against each and warned the jury that the content of one defendant's police statement or an unsworn statement from the dock was not admissible evidence against the other.

14. The judge returned to the subject later in his summing-up, when after considering the contents of the appellant's statement he gave the jury the following instructions (Record, pp 516-8):

"It is a question for you, Mr Foreman and members of the jury, when you look at all the circumstances set out in the statement and the evidence surrounding it. The evidence in relation to it whether you find that it was a freely and voluntarily made statement and whether you accept the contents that the accused man Taylor chartered the car to go to Spring Farm, that another person was in the car with him and that the deceased was killed by that other person and that he attempted to take over the driving role. It is for you to determine whether he was in a joint enterprise with this other individual in the vehicle with the intention to kill or to cause serious bodily harm to Mr. Cummings.

He cannot be convicted of murder unless you find that there was this joint enterprise between him and another person to kill Mr. Cummings and he was present in the car aiding and abetting and also to give assistance to achieve that end. That is the only way the accused man Taylor may be convicted of the offence of murder”.

He then gave further directions on what was required for proof of manslaughter, twice referring to the violence “contemplated” by the common design. Finally he stated at page 519:

“Now, you have to be sure on this question of intention to kill or cause grievous bodily harm, sure of this common design with that intention before you can find the accused man Taylor guilty of murder. Wherever there are doubts you resolve those doubts, in favour of the accused. If for example you were to find that he made this statement and that he was with someone and there was an intention, a joint intention to use force but not to kill or cause grievous bodily harm and Mr. Cummings have died as result of that force it is for you to return a verdict of guilty of manslaughter. If you are not sure of anything you resolve it in favour of the accused.”

15. The judge gave a full good character direction in favour of Solomon, on the twin aspects of likely truthfulness and propensity. He did not give any such direction in favour of the appellant, for no evidence of good character had been adduced on his behalf. Evidence was given to the court after receipt of the verdict that he had no previous convictions. Counsel who appeared for the appellant has died since the trial and it has not been possible to establish why no such evidence was called and no application for a good character direction was made during the course of the trial.

16. It is possible, as counsel for the appellant and the respondent both acknowledged, to draw different inferences from the appellant’s police statement. Mr Knox contended on behalf of the Crown that the facts contained in the statement, allied to the surrounding facts, pointed irresistibly to a conspiracy to lure the deceased to Spring Farm and there hijack his taxi, either marooning or killing him. He emphasised the deserted

nature of the destination chosen, the lies told by the appellant to the witnesses Wellington and Willie and the appellant's attempt to flee to New York as indicia of his guilt. He suggested that the summons to the deceased to pick up Claudine Tenfa was a pretext to get hold of the deceased and his taxi, that picking up Solomon was not adventitious and that the plan had all along been to pick him up and for the pair to take the taxi to Spring Farm. He pointed out that the appellant made no expression of surprise in his statement at the sudden shooting of the deceased and that his main preoccupation appeared to be to drive off the car. As against that, Mr Owen, while accepting that it was open to the jury to draw an inference of guilt from the statement and other facts, submitted cogently that it was far from being the only inference which could be drawn. The statement at no point contains any admission of prior knowledge or foresight that the taxi driver might be shot or knowledge of any fact, such as that the other passenger was carrying a gun, which might have fixed him with knowledge from which such foresight might be inferred. All of the averments in it are capable of an interpretation consistent with the appellant's innocence. In these circumstances it was vital that the judge should give the jury careful directions about the possible inferences which could be drawn and firm instructions that they must rule out all possible inferences consistent with innocence before they could be satisfied beyond reasonable doubt that the inference of guilt has been established.

17. The Court of Appeal did not deal in terms with this issue, as the thrust of the argument advanced to it was that the contents of the statement were insufficient to found a case of common design to kill or cause grievous bodily harm to the deceased. The court held (Record, p 570) that it was open to the jury to conclude that the appellant was in a plot to go with the deceased in his taxi and commit the offence.

18. That, however, is not the real issue. Their Lordships agree with the submission made on behalf of the appellant that in the circumstances of this case it was essential that the judge (a) give the jury sufficiently clear and accurate directions on the law relating to joint enterprise (b) in addition, spell out the possible inferences to be drawn from the statement and instruct them that they must rule out all inferences consistent with innocence before they could be satisfied that the inference of guilt has been proved correct.

19. The judge's directions on common design were correct as far as they went, but he did not explain how intention might be proved and the

relevance of a participant's foresight that in the course of the enterprise another actor in it might kill or inflict grievous bodily harm on the victim: see *R v Powell* [1999] 1AC 1 and the authorities there discussed. More particularly, he did not in his summing-up enter into any discussion of the possible inferences which might be drawn from the appellant's statement and the need for the jury to be satisfied beyond reasonable doubt that they should draw the inference of his guilt, ruling out any others in the process. While this may not always be necessary in cases of joint enterprise, their Lordships consider that it was essential in the present case. Failing that, the jury did not have sufficient guidance on how they should approach the assessment of the appellant's complicity in the offence. Moreover, the contradictory nature of the case made by the Crown, with its ambiguity about the part played by each defendant in the offence, was a potential source of confusion for the jury. The judge rightly warned the jury that they must not take into account against one accused the contents of a statement made outside the courtroom by another accused. The warning could have borne repetition at the point when the judge was directing the jury on the elements of a joint enterprise, as there was a risk that they might have regard to the contents of Solomon's statement when assessing Taylor's state of knowledge and intention. Taking these matters together, their Lordships are compelled to conclude that the appellant's conviction was unsafe and cannot be upheld. Although they were invited by Mr Knox to apply the proviso and hold that there was no substantial miscarriage of justice, they do not find it possible to do so, as they do not consider that a jury properly directed would inevitably have reached the same conclusion.

20. This conclusion makes it unnecessary to consider the other grounds advanced in support of the appeal and their Lordships do not propose to rehearse the facts or arguments in respect of either. They would simply observe that it is unlikely that the reference by the judge to his having admitted the appellant's statement caused any significant prejudice to him, for the facts were very different from those in *Mitchell v The Queen* [1998] AC 695. They would, however, remind trial judges of the observations of the Board at page 704C-E in the report of that case on the procedure which should be adopted in cases where there is or may be a challenge to the admissibility of a statement made by an accused.

21. The issue of the lack of a good character direction was not raised in the court below and their Lordships would have been slow to overturn a conviction on an issue raised for the first time before the Board: cf *Bethel*

The State (1998) 55 WIR 394,397; *Teeluck v Trinidad and Tobago* [2005] 1 WLR 2421, 2432 at para 38. Nor do they have sufficient material before them to determine why evidence of the appellant's good character was not put before the court before conviction and they would repeat the salutary warning against speculation on such matters contained in *Rhamdanie v The State* [2005] UKPC 47, para 15.

22. Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal of Jamaica for it to determine whether there should be a new trial.