

JAMAICA

IN THE COURT OF APPEAL

PRIVY COUNCIL REFERRAL

SUPREME COURT CRIMINAL APPEAL NO. 102/98

**BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)**

**ANTHONY TAYLOR
v
REGINA**

Dennis Morrison, Q.C., for the Appellant.

**Miss Paula Llewellyn, Senior Deputy Director of Public
Prosecutions and Miss Dahlia Findlay for the Crown.**

July 30 & October 26 2007

HARRISON, J.A:

1. On October 5, 1998 the Appellant was convicted of the offence of murder in the St. James Circuit Court held at Montego Bay. Subsequently he appealed to this Court and on November 19, 2001 his appeal was dismissed.
2. On a further appeal to the Judicial Committee of the Privy Council, the Appellant succeeded to the extent that his appeal was allowed, the conviction

and sentence quashed and his case remitted to this Court to determine whether there ought to be a re-trial of the case.

3. We considered the referral on July 30, 2007; ordered a new trial and recommended that it should take place at the earliest possible time. We considered it desirable to place on record the reasons for our decision.

4. Mr. Dennis Morrison, Q.C., for the appellant submitted:

"1. That when all of the factors are considered the interest of justice does not require that a new trial be ordered.

2. That the appellant has been in custody since April 1997 and it seems likely that any re-trial ordered by this court will not take place until more than a full ten years after the killing.

3. That the case against the appellant rests almost entirely on his confession and he has already faced trial on the basis of very slender evidence.

4. That there could be a possibility that the police who took statements from witnesses might be unavailable should there be a re-trial".

5. Miss Llewellyn, Senior Deputy Director of Public Prosecutions, submitted

however:

(a) That the Crown's case rested on an abundance of evidence in the cautioned statement given by the appellant;

(b) That the appellant ought to have contemplated that force would be used against the deceased yet he did not withdraw from the common design;

(c) That the police witnesses were available for the re-trial; and

(d) That in the interest of justice the final verdict should be by a jury.

6. It is always a difficult question to determine whether there should be a re-trial of a criminal case after the lapse of a long period of time since the date of the offence. We do not hesitate to say that a re-trial in such circumstances is undesirable and ought not to be ordered lightly.

7. In ordering a new trial we were guided by the wisdom of the Privy Council in *Reid v R* (1978) 27 W.I.R. 254. Their Lordships' Board was careful to point out that the guidelines set out in that case are by no means exhaustive. Some of the factors which this Court have to bear in mind are:

"(a) the seriousness and prevalence of the offence;

(b) the expense and length of time involved in a fresh hearing;

(c) the ordeal suffered by an accused person on trial;

(d) the length of time that will have elapsed between the offence and the new trial;

(e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;

(f) the strength of the case presented by the prosecution".

8. In summary, the facts of this case reveal that the deceased man Kevin Cummings who was a taxi driver in Montego Bay, St. James was last seen alive at a taxi stand in Montego Bay on April 1, 1997. His body was found on April 4, 1997 lying beside his taxi at Spring Farm, St. James. 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, and this was the subject of forensic examination.

9. The appellant and one Richard Solomon were both charged with the murder of Cummings and were tried together in the St. James Circuit Court. The case against both men centred mainly on their respective caution statements given to the police in the course of investigations.

10. Their Lordships' Board recognized that 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. He admitted being present when the deceased was killed and claimed that it was Solomon who had shot him. His testimony at trial was a complete denial of his presence at or any connection with the killing. At the end of the trial, he was convicted of the offence of murder and Solomon was acquitted of the charge.

11. The foundation of the Crown's case rested on the caution statement given by the appellant so I turn now to it. The body of the statement reads 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".

12. Their Lordships in the Privy Council stated that it was imperative that the learned trial judge should have kept the case against the appellant and Solomon carefully distinct and that the jury should have been given sufficient directions on

the drawing of inferences from the contents of his statement and on the liability of participants in a joint enterprise. Lord Carswell who delivered the judgment of the Court stated inter alia at paragraphs 18 and 19:

“18 ... 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".

13. We feel justified in observing first, that the irregularities which their Lordships' Board found did not constrain them to direct an outright acquittal which it was in their power to do. Secondly, it is because they themselves could not say whether a jury would inevitably have convicted that they were loath to invoke the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

14. We recognized that the appellant was charged with a very serious and brutal crime and that there was a high incidence of crimes of violence involving very often the use of firearms.

15. We also considered the evidence which emerged from the appellant's cautioned statement and we could not agree with Mr. Morrison, Q. C., when he submitted that it could be classified as "slender evidence" or for that matter weak.

16. We were informed by Miss Llewellyn that the prosecution is still in a position to present its case even though there has been a lapse of time. She

has assured this Court that the police witnesses have been located and are available to testify at a re-trial.

17. It is abundantly clear that the Crown had had a difficult task in the first trial presenting the case against both the appellant and co-accused Solomon. At this point in time however, a re-trial would only involve the appellant but this does not mean that the Crown's task in proving the case against him would be made easier. In our view, the jury will require careful directions from the trial judge on the role played by the appellant in the joint enterprise.

18. It was therefore our belief that there was merit in the submissions made by Miss Llewellyn. Murder is indeed, a serious and prevalent offence in this country and as Lord Diplock said in *Reid v the Queen* (supra) at p.905d:

"...it is the interest of the public of Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing-up to the jury ..."

19. It was for these reasons why we made the order referred to above.