JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 80 &81/2000

BEFORE: **THE HON. MR. JUSTICE BINGHAM J.A..**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (Ag.)

KIRK WILLIAMS
DONOVAN HAMILTON
v
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Ravil Golding for Kirk Williams
Mrs. Pamela Shoucair –Gayle for Donovan Hamilton
Miss Janet Scotland for the Crown

May 8, 9 and July 5, 2002

CLARKE, J.A. (Ag.):

At their retrial in the Home Circuit Court before McCalla J and a jury, the applicant, Kirk Williams and the appellant, Donovan Hamilton, were on April 14, 2000 convicted of the murder of Caven Robinson otherwise called "Shabba". They were sentenced to life imprisonment with this specification: that they must serve twenty and eighteen years respectively before becoming eligible for parole.

At the conclusion of the arguments we refused Kirk Williams' renewed application for leave to appeal against conviction and sentence. We also dismissed the appeal of Donovan Hamilton to whom

leave to appeal against conviction and sentence had been granted by the single judge. We now keep our promise to put our reasons into writing.

Shabba lived in Treadways, Linstead in the parish of St. Catherine. He was last seen alive on April 12, 1996. Ten days later his decomposed body was found in the bushes of the district of Ty-Dixon located in the hills of Lluidas Vale, St. Catherine. The next day a post mortem examination conducted on his body revealed that he had died from a gunshot wound to the head. The bullet was recovered from under the parietal scalp and handed over to the police. The bullet was subsequently handed over to the government ballistics expert together with a firearm recovered during the course of the investigations. At the retrial the ballistic expert opined that on the basis of his findings from tests and examinations conducted by him the said bullet had been fired from the said firearm.

Based on out of court confessional statements in writing and on oral admissions, one of which led to the finding of the body and another to the finding of the murder weapon, the Crown's case was that both Kirk Williams and Donovan Hamilton had engaged in a joint enterprise: they committed the murder together. Each played a different part but both were acting together as part of a joint plan or agreement to commit the offence.

This was how the facts unfolded: On the early afternoon of April 22, 1996, Kirk Williams attended the Linstead Police Station and told Det. Sgt. Lynden Harvey that one Patrick Robinson had come to his home in Treadways that morning and accused him of being responsible for the disappearance of his, Robinson's brother, Shabba. The Sergeant cautioned Williams and told him that Robinson had come to the station earlier that day. Williams thereupon replied: "Yes Mr. Harvey, a mi kill him because mi beg him fe buy gun and he come back with some man and teck whey the gun". Later that afternoon Williams dictated a caution statement to the police which he signed. The following day Donovan Hamilton dictated a caution statement to the police which he too signed. Those statements were subsequently admitted into evidence (each against the maker only) on the basis that they were voluntary.

Kirk Williams disclosed in his caution statement that he had purchased a gun for $15,000 from some men through the instrumentality of Shabba the deceased. He said that some time afterwards the men along with the deceased came to his home and took back the gun from him. He thereupon resolved to kill Shabba. He told a youth, one Dan of his intention to do so and to that end invited Dan to accompany him. One Sunday morning after Easter, April 14, 1996 along with Dan he got Shabba to travel with him in his car under the pretext that he was going "pon a ganja move". He drove straight to a bushy area and no sooner

had all of them alighted from the car than he shot Shabba in his head. Shabba fell to the ground and they left him there. He was subsequently questioned by Shabba's brother and others about Shabba's disappearance. Unable to take it anymore he said he relented and went to the Police Station and told the police everything.

Before completing his caution statement he led the police to the spot where he had shot Shabba. Shabba's body was then still there. He returned with the police to the station and completed his caution statement.

Early next morning Donovan Hamilton was accosted by the police at his home at Banbury in Linstead. He was cautioned and told that it was alleged that he and Kirk Williams had taken Shabba into the hills of Ty-Dixon and killed him. He replied as follows:

> "Yes Mr. Harvey, mi know Kirkie and mi sell along the highway and him come fi me and tell me say him beg him cousin, Shabba, fi buy a gun and him cousin Shabba come back wid some man and tek way back di gun and mi a go kill him."

Donovan Hamilton was taken to the Linstead Police Station. He was again cautioned and asked for the gun that was used to kill Shabba. He said he had taken it to one "Chris" down in the town of Linstead, South Avenue. Hamilton then led the police to Chris' home at South Avenue where he pointed out Chris. In the presence of Hamilton Chris said he knew Hamilton but denied that he was given a gun by Hamilton.

Chris was then told by the police that the gun was involved in a murder case and that the police would love to recover it.

Sgt. Harvey and his party returned with Hamilton to the Linstead Police Station and about five minutes later he received a telephone call. Sgt. Harvey thereupon returned to South Avenue and about two chains from Chris' house he picked up a .38 revolver off the ground to the side of a lane which runs off South Avenue. It contained four live rounds of ammunition. He returned to the station, showed the gun to Hamilton and asked him if that was the firearm he had been talking about. Hamilton replied in the affirmative.

Consequent on the finding of the firearm on April 23, Hamilton indicated that he wished to give a statement in writing. In the caution statement he gave thereafter, he repeated what he had told the police when accosted at his home earlier that day, that Kirkie had told him that he was going to kill Shabba for having taken back the gun he had bought from him and some men. He added that the following Sunday morning Kirkie came and told him that all three of them, Shabba, Kirkie and himself, would go up to "Vale". Kirkie told him to bring the "tool" he, Hamilton had and that he, Kirkie, would bring his own. When they reached Vale, Kirkie said that he was going to pick up some "weed". They had drinks at a bar and after dinner they went to Clarendon as Kirkie said he wanted some hours to pass by. On their return from

Clarendon Kirkie said he would then go and pick up the weed. It was getting dark. Kirkie took them to a woodland atop a hill. Kirkie parked the car. Thereupon, with Shabba positioned in front of Kirkie, and he Hamilton, at the back, Kirkie said "all right me a go shoot him now". Kirkie then fired the shot. It was dark. He, Hamilton "got coward" and ran off with a flashlight he had.

Both men made unsworn statements from the dock. Each said he was elsewhere at the time of the commission of the offence and knew nothing about it. Each denied making any confession or admission of guilt. Each asserted that the particular caution statement that he admittedly signed was a contrivance on the part of the police who beat him into signing the statement.

The evidence presented by the prosecution against both men was, in our opinion, powerful. After a careful and thorough summing up by the learned judge in which she enjoined the jury to consider the case for and against each man separately the jury convicted both men.

Mrs. Shoucair-Gayle, on behalf of the appellant Hamilton, relied on two grounds one of which was common to the only ground relied on by Mr. Golding on behalf of the applicant, Williams.

The ground relied on by Mrs. Shoucair-Gayle alone, concerned the question of the role of the appellant in the circumstances surrounding Shabba's death as to whether there was evidence to go to the jury that

the appellant shared with the applicant a common intention to commit the offence of murder and played any part in it so as to achieve that aim. She submitted that Hamilton had been merely present on the scene of the crime. There was no evidence that he committed the offence jointly with Williams. He had not been party to a plan or agreement to kill Shabba. His role had been limited to accompanying Williams on a ganja mission.

With those submissions we were and remain unable to agree. Plainly, on the evidence the issue of common design by both men to commit the offence arose for the jury to determine. On that issue the learned trial judge directed the jury in these terms:

> "In this case, Mr. Foreman and members of the jury, the prosecution is relying on the well known doctrine of acting in concert. The doctrine referred to as common design. And the law on this is that where two or more persons embark upon a joint unlawful enterprise and going for example to assault or rob someone, each is liable for the consequences of such act of the other as done in pursuance of that joint enterprise and also for the unusual consequences of such acts if they arise from the execution of the agreed joint enterprise. Well, you heard crown counsel give you an example of that for example persons going to burglar a house. Two persons going inside while a third remains outside for example to look out. In such a situation all three persons would be guilty of robbery because they would have had a common intention. But the participation by each would be different. It means therefore, Mr. Foreman and members of the jury, that it is not only the person who inflicted the fatal blow or in

this case who fired a shot as the prosecution is saying who would be criminally responsible because the law says that if two or more persons reach an understanding or an arrangement that they will commit a crime and whilst that arrangement is still in progress, they are both present and one or other of them does or between them they do in accordance with their arrangements all the things necessary to constitute the crime, then they are all equally guilty of it providing the crime does not go beyond their understanding or arrangement.

It is not necessary that the arrangement or understanding be expressed, it could be tacit. It can be arrived at by means of action or words because it is said that people who go out to do something wrong do not go to attorneys office and draw up a contract which is signed and sealed because they do not want to advise what it is that they are going to do. So, the prosecution may establish the charge of murder against the two accused by providing that they were present and that the deceased was killed in accordance with the understanding or arrangement to which they were parties and that understanding or arrangement which included the intent charged that that is either to kill or to cause serious bodily harm.

The accused persons, Mr. Foreman and members of the jury, would also be guilty if they lent themselves to a criminal enterprise knowing that a potential illegal weapon was being carried by one of their companions and in the event that it is in fact used by one of the partners with an intent sufficient for murder then they would be guilty of that offence. If you are sure you have no doubt that the accused contemplated that in the carrying out of the common unlawful purpose, one person in that enterprise might use a lethal weapon with intention of at least causing really serious bodily harm. It is what the accused contemplated that matters."

Then in relating those directions specifically to the evidence in respect of the appellant Hamilton including the evidence of Hamilton's admission that he handed over the gun that had been used to kill Shabba and that the gun recovered was the self same gun, the learned trial judge directed the jury thus:

> "...[If] you accept the evidence [of Harvey] that what became of him and that he went in order to recover it and if you accept that it's the same gun, if you accept and feel sure about the evidence of Mr. Harvey, that [Hamilton] said that it's the gun; that of the evidence if you accept the other evidence of the crown, the Expert, in relation to the bullet that was recovered from the body of Mr. Robinson if you accept that evidence, Mr. Foreman and members of the jury, then you would go on to ask yourself what does the caution statement of Mr. Hamilton mean. It's matter for you to construe it. If you accept that all it means, Mr. Foreman and members of the jury, is that Mr. Hamilton, Mr. Williams having said certain thing to him, that he just went along and played no part, then in those circumstances, or if your are in doubt, in those circumstances, you have to acquit him. But if you accept the evidence of Detective Harvey as to what [Hamilton] he told him in respect of the weapon, by virtue of the doctrine of common design on which I have directed you, if you feel sure that Mr. Hamilton was told by Mr. Williams what he intended to do to Shabba, if you feel sure that he went along, knowing what Mr. Williams intended and that when he speaks of word tool, it refers to a weapon, if you believe he shared that common intention with Mr. Williams and that he did in all of circumstances, contemplate that a weapon would be used in the manner indicated by Mr. Williams, if he had that in his contemplation that this is the mission

> that they were going on, then Mr. Foreman and members of the jury, if you feel sure of those matters, you do construe the caution statement, in that way, if you accept that he did dictate it, if you feel sure of that you are free to convict the accused Hamilton for the offence of murder. If you are in doubt in respect to anything on the two accused in each case you must acquit them."

Those were helpful and correct directions on common design tailored to the circumstances of the particular case. Indeed, having considered the summing up as a whole we are satisfied that it was full, fair and accurate.

However, the matter does not end with the quality of summing up. The common ground relied on by Mr. Golding and Mrs. Shoucair – Gayle and the submission based on it must be examined. It was formulated thus:

> "The learned trial judge ought to have urged/directed defence counsel that there was a real risk of a conflict of interest in him representing both accused persons especially having regard to the fact that the prosecution was relying on caution statements given by both accused persons in which statements they implicated each other".

Mr. Golding submitted that although the learned trial judge was astute to impress on the jury that the caution statement of each as well as the oral admissions of each was not evidence against the other but only against the maker, the conduct of the defence of each by one counsel might

have been hampered had one defendant or both of them elected to go into the witness box.

This submission we consider speculative, at the very least. The fact of the matter is that both men elected to make unsworn statements in which they raised alibis and denied making any admissions or confessions of guilt. Neither man dictated any caution statement and each was beaten into signing the caution statement attributed to him. And, be it noted, that was precisely their position at the trial within a trial held earlier in the proceedings .

Therefore, as Miss Scotland submitted, so far from the defences being "cut-throat" defences, the defence of each was similar and mutually consistent. It is not surprising therefore, that Mr. Kitchen, their experienced counsel at the retrial, gave no indication that he was unable, on the basis of his instructions or otherwise, to properly discharge his duty to each of his clients. So it was manifest that in the conduct and projection of the defence of each no conflict of interest of his respective clients or conflict of duty on his part arose or was likely to arise.

While it is the duty of trial judges to ensure that accused persons are given a fair trial according to law, this was plainly not a case which called for the trial judge to enjoin sole defending counsel about the need to terminate his brief on behalf of both men or for separate representation to be provided for them. Accordingly, this ground of appeal also failed.

Nevertheless, before parting with this case we think it appropriate to emphasize the fiduciary nature of the client/attorney relationship and how it ought to affect the question of representation of multiple clients by one attorney in criminal proceedings. Of course, the fiduciary nature of the relationship has been given recognition and detailed expression in the Legal Profession (Canons of Professional Ethics) Rules made pursuant to section 12(7) of the Legal Profession Act, 1971: see especially Canon IV. We therefore offer guidance in so far as criminal proceedings are concerned, as a complement to those Rules and not in derogation of them.

An attorney acting for the defence in a criminal trial, if briefed to represent more than one defendant, faces a potential conflict of duty/interest. Such an attorney should therefore satisfy himself or herself that no conflict of interest or duty is likely to arise.

In cases where the interests of two or more defendants are likely to conflict or in fact conflict or the attorney's independent professional judgment is likely to be impaired, the attorney should terminate the retainer or employment on behalf of both or all of them, as the case may be.

Finally, it would be wholly improper, whatever the circumstances, for an attorney who has acted for one defendant to then act for a co-defendant where there is a cut-throat defence between them. In this

connection we endorse the following remarks of Lord Donaldson of Lymington MR contained in the Note to the case of ***Saminadhen v Khan*** [1992] 1 All ER 963:

> "...I can conceive of no circumstances in which it would be proper for [an attorney] who has acted for a defendant in criminal proceedings, the retainer having been terminated, to then act for a co-defendant where there is a cut-throat defence between the two defendants, I think it is desirable that that should be known."

In those circumstances, a trial judge may intervene, not on the basis of any conflict of interest, for there would be none, the fiduciary relationship having come to an end, but on the basis of the continuing duty of the attorney to preserve the confidentiality of information imparted during the subsistence of the fiduciary relationship.