JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 86/81

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. HOWARD LEWIS

Mr. Horace Edwards, Q.C. for the Applicant

Mrs. McCalla for the Crown

October 1, 1982 & June 6, 1983

ROSS J.A.

This is an application for leave to appeal from a conviction of murder in the Home Circuit Court before Bingham J., and a jury, the applicant having been convicted on the 26th May, 1981, for the murder of Police Constable Jonathan Edwards on the 11th September, 1980.

About 10:00 o'clock on the night of 5th September, 1980, Constable Jonathan Edwards left the Central Village Police Station along with his friend Ezekiel Cooper, and went to a shop on Zion Lane in Central Village to have something to eat; on their way back to the station the Constable accosted a man along Zion Lane and was taking him to the station. Very shortly after, while still on Zion Lane, the applicant and another man came up from the opposite direction and passed close to them. As soon as they had passed Cooper looked back and saw the two men about four yards away, heard many explosions and saw "fire" coming from the direction where they were; Cooper then saw the Constable hold his left side with one hand and with the other pull his service revolver and return the fire, after which the two men ran off. Both the Constable and Cooper suffered gun shot injuries and later that night they were admitted to hospital where, on the 11th September, 1980, six days later the Constable succumbed to his injuries. The cause of his death, as given by Dr. Ramu, a pathologist, was peritonitis as a result of gun shot injury to the abdomen.

There was only one eye-witness, Ezekiel Cooper, and he testified, inter alia, that Zion Lane was lit by street lights, that the two men passed about a yard away from him, and that he recognized the applicant with whom he had attended the White Marl All Age School as one of the two men. There was no evidence as to whether each of the two men had a firearm or whether there was only one firearm or who fired the weapon. For the defence the applicant gave evidence and set up an alibi, in addition to which he suggested that he was implicated by Cooper because at school he had been friendly with Cooper's girl-friend.

The following grounds of appeal were argued:

> "1. The learned trial judge wrongly over-ruled the submission of no case on the applicant's behalf.
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> 2. The learned trial judge misdirected the jury as to the law relating to common design in that he failed to tell the jury that, if on the evidence the accused was acting in concert with another the Crown would have to show that the act of the other was not authorised and did not go beyond the scope of the enterprise.
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> 3. The learned trial judge failed to deal with the discrepancies on the most material particular, that is, the different accounts given by the sole witness Cooper, firstly, to another witness Wallace, on the 5th September, 1980 (sic) that day of the incident, and secondly, on the 16th December, 1980, to the preliminary examining magistrate.
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> 4. The verdict, having especial regard to the internal and external inconsistencies of the sole witness, was unreasonable and cannot on the evidence be supported.
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> 5. The learned trial judge's summing-up was unbalanced and unfair."

In regard to ground 1 above, Mr. Macaulay who appeared below at the end of the prosecution's case had submitted that there was no evidence that the applicant shot the deceased, nor was there evidence that the applicant was acting in concert with whoever shot him.

In this Court, Mr. Edwards submitted that on the evidence it is uncertain who had the gun or who fired the shots, and further, that there is no evidence of the applicant's purpose in being on Zion Lane, or of applicant's knowledge that the other man had a gun.

Looking at the evidence, it is true that Cooper did not say that he saw the applicant with a gun; what he said was that he heard explosions and saw fire coming from the spot where the applicant and the other man were; both Cooper and Constable Edwards suffered gun shots injuries and the jury could have had no difficulty in drawing the clear inference that the explosions and fire were the result of the discharge of a firearm or firearms by the applicant or the other man or both. There was evidence of the two men arriving at the scene together, of their being together when they passed Constable Edwards and Cooper, of them stopping together about four yards away, of at least one firearm being discharged by one or other of them, and of their remaining together at the scene until Constable Edwards drew his service revolver and discharged it, at which stage they ran off. This was evidence from which it was open to the jury to draw the inference that the men were acting in concert, and the question of whether or not they were so acting was a question of fact for the jury.

In R. v. Anderson & Morris (1966) 50 C.A.R. 216, to which reference was made both by Mr. Macaulay below and Mr. Edwards it was stated by Parker, L. C. J. at p. 221 that it is correct that:

> "Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise; but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act ..... It is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it, and was in fact an act unauthorised by that joint enterprise."

The other case to which reference was made was R. v. Lovesey & Peterson (1969) 2 All E.R. 1077. Here the appellants were charged with robbery with violence and murder arising out of an incident in which a jeweller was found handcuffed to a railing in the basement of his shop suffering from severe head injuries from which he died. Blood was found on the stairs and ground floor of the shop which was in disorder, and valuables were found to have been stolen. There was no direct evidence of

how many men had been involved in the crime or of their individual roles. The appellants denied all knowledge of the crime, but there was certain circumstantial evidence connecting them to it. The jury were correctly directed on the ingredients of both offences and on the guilt of participants in a common purpose, but they were told that the two offences stood or fell together. The appellants were convicted on both counts. On appeal it was held that the appeals would be allowed because the offence did not necessarily stand together.

In the course of his judgment, Widgery L.J. said (at p. 1078G - 1079A):-

> "The learned judge gave the jury an impeccable direction on the ingredients of the offence of robbery with violence and on the guilt of individuals who join in a common purpose to rob."

He continued:

> "Then comes the second and the more important charge, namely, murder, and that arised in this particular case and on this evidence in this way; if a man is attacked with the intention of causing him really serious physical injury and as a result of that injury he dies, he or any who became party to that attack, if they joined in for the purpose that he should suffer serious physical injury, are guilty of murder. Again, the same observation applies: if one is keeping watch outside or sitting in the car, once you are satisfied that the offence has taken place, and they are all acting with that common purpose and it resulted in death and that there was in the mind of all of them an intention to do really serious physical harm, then there is the offence of murder."

Widgery L.J., then went on to say that the above direction was not open to objection up to that point. The judgment of Widgery L.J., then went on thus (at p. 1079A):

> "In fact, the two offences did not necessarily stand or fall together as neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification) even if

> "this involved killing, or the infliction of grievous bodily harm on the victim. If the scope of the common design had been left to the jury in this way they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome."

In the instant case, there was before the jury evidence from which they could find that there was a joint enterprise by the men to shoot at Constable Edwards in order, no doubt, to rescue the man who had been held by Constable Edwards and was being taken to the police station. The fact that the rescue effort was carried out by an attack launched from about four yards away and not when they were passing would suggest that the weapon or weapons to be used were weapons which were effective from a distance, and that the weapon was already to hand.

It may be useful to observe here that there is no rule of law or practice that the attorney for the defence should in every criminal case make a submission of no case to answer at the end of the case for the prosecution - as many attorneys appear to think. Such a submission should be made only when at the end of the case for the prosecution there is no evidence to go to the jury in support of the charge against the accused, or such evidence is so tenuous or has been so discredited in cross-examination that no reasonable jury, properly directed, would convict on it.

As the cases referred to above show, the question of whether what was done was part of a joint enterprise was a question of fact for the jury and in the light of the evidence adduced the learned trial judge quite rightly ruled that there was a case to answer. It is desirable that grounds of appeal should be clearly stated, Grounds 2 and 4 lack clarity. Attorneys should always ensure that each ground of appeal is set out clearly and precisely.

The nature of the misdirection referred to in ground 2 is not clear but it seems that the applicant complains of a misdirection on the law relating to common design. After dealing with the question of intent, the learned trial judge went on to say this (at p. 63):

> "The Crown must go further and satisfy you to the standard I have already told you of, that these two persons, if you can draw that inference, and if you do draw that inference, were acting as part of a common design. The doctrine operates in this way: Where two or more persons acting together in furtherance of a common purpose, a common plan, then those who are present, actively assisting or engaged in carrying out this common plan, this common enterprise, are equally guilty of it in the eyes of the law. The act of one becomes the act of the other and it doesn't matter in that case who inflicted, who fired the fatal shot. The shot which turned out to be fatal. The mere presence is not sufficient in law. You must be satisfied so that you feel sure that both these men were actually engaged in carrying out this common enterprise which the Crown asks you to say, in this case, was the shooting at these persons, one of whom got fatally shot. If you entertain a reasonable doubt as to whether the men were acting in common design, you must acquit the accused man, because there is no evidence before you based on the Crown's case as to who actually did the shooting. The Crown is asking you to infer that both men were involved in the shooting from the whole circumstances."

In the light of the authorities referred to above this was an adequate direction on the law relating to common design and a reminder that they should be satisfied beyond a reasonable doubt that the men were acting in concert before they could convict. Further at p. 66, he tells the jury that they must be satisfied that "he was not only present but actively partook in the events of this shooting," and elsewhere in the summing-up he repeats that they must be satisfied as to common design.

In regard to the third and fourth grounds of appeal the learned trial judge reminded the jury of the inconsistencies in the evidence of the witness Cooper and directed the jury fully as to how they should deal with them. We therefore find no merit in these grounds of appeal.

In the fifth and final ground of appeal the applicant complains that the summing-up was unbalanced and unfair. Here Mr. Edwards suggested that the direction on common design was inadequate and that the jury were not given sufficient assistance on this important aspect of the case. Again,

we would say that on a careful reading of the summing-up there is no merit in this ground of appeal. It seems to us that not only was the summing-up quite adequate but at times it was overly favourable to the applicant. Thus at p. 67 of the record the learned trial judge in dealing with the question of identification said this:

> "So as I said, you need to approach the evidence on the question of identification with caution, extreme caution. Now, it is also my duty to warn you because this is a case where Cooper's evidence on this question of identity is not supported, that it is dangerous to convict an accused man on the unsupported evidence of a sole eye-witness for the reason I have already outlined to you, but if on examining the evidence of the witness you believe the witness as having spoken the truth and you are also satisfied on this question of common design, then it is open to you to find the accused man guilty."

There is no requirement in law or in practice that in a case such as this the evidence of a sole witness should be supported or corroborated before a jury can find an accused guilty because it would be dangerous to convict on the evidence of a single witness. Such a direction is required to be given only in cases where corroboration is required in law or in practice, as for example, in the case of sexual offences.

We treated the application for leave to appeal against his conviction for murder as the hearing of the appeal and for the reasons set out above the appeal is dismissed and the conviction affirmed.