[2012] JMCA Crim 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 147/2008

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

RICHARD DALEY v R

Chumu Paris for the applicant

Mrs Ann-Marie Feurtado-Richards for the Crown

6 October 2010 and 28 September 2012

DUKHARAN JA

[1] The applicant was convicted by a jury on 6 November 2008 of the offence of murder in the Home Circuit Court in Kingston. The presiding judge, Straw J, sentenced him to imprisonment for life, with a specification that he not be eligible for parole until he has served 18 years.

[2] An application for leave to appeal against conviction and sentence was considered on 18 August 2009 by a single judge of this court, who refused leave. The application has now been renewed before us. The delay in the delivery of the judgment is regretted.

[3] The deceased Novelette Johnson otherwise called "Sandy" was shot and killed on 29 November 2005 in Central Village, St Catherine. The prosecution called no eyewitnesses. The facts of the case are contained in a caution statement made by the applicant, and answers to questions given by the applicant to the police. The caution statement, which was exhibited at the trial (exhibit one), reads as follows:

> "My name is Richard Daley. I am, 22 years old. On the day, Tuesday, I remember I was coming … from Portmore in the car coming up to compound to Elbow and when de car Reach Elbow, I see a man goh 'cross de road. And before the car reached de sleeping policeman, the man step out with 'round two more man and start shooting and me duck and when me look Up back, me see seh de other man in the car was dead. And the car drive off and goh up a square up a de top of the Central Village. Same time, me jump out de car and run down de hill and check 'Clapper' and tell him what was going on. Him seh de girl, Sandy, did mek a speech soh we haffe goh back up there. So, two of us goh back up there. And 'Clapper' start to shoot de girl, Sandy. After 'Clapper' shoot Sandy, Me see her lay down pon de ground, so I get scared and cut to Kingston. And after that, me get to find out seh dem Seh ah me and 'Clapper' did de shooting.
> While, I was in town, me see on TV news that murder happen in Central Village and dem ah look for two men, Richard Daley, alias, 'Weedie', and 'Clapper' and I was still in Kingston scared of St. Catherine 'cause me nuh born and grow over there. So, me de in Kingston wid mi family dem."

[4] The questions asked by the police and the answers given thereto by the applicant are as follows (exhibit two):

"QUESTION NUMBER 1:	What is your name?
ANSWER:	Richard Robert Daley.
QUESTION NUMBER 2:	Are you called by any other names?
ANSWER:	Richie and 'Weedie' innah Central Village, St. Catherine.
QUESTION 3:	How old are you? Twenty-two years old.
QUESTION 4:	What's your date of birth?
ANSWER:	December 22, 1983.
QUESTION 5:	Where were you born?
ANSWER:	Jubilee Hospital in Kingston, North Street.
QUESTION 6:	Where do you live now? Pardon.
	Where do you live?
ANSWER:	Now me live Rose Town, off Spanish Town Road.
QUESTION 7:	Who do you live with?
ANSWER:	Me and mi girl, Isheka, mi family live 'round de place.
QUESTION 8:	Have you ever lived in Windsor Heights, Central Village, St. Catherine?
ANSWER:	Yes, miss, wid mi mother and breddah, Kevin not Kevin is Tevin."

Question 9: How long have you lived in Windsor Heights, Central Village, St. Catherine?

ANSWER: Over – two years over by Washington Drive, now over by Windsor Heights.

QUESTION 10: Do you know 'Clapper'?

ANSWER: Yes, ah over Central Village me know him.

QUESTION 11: How long have you known 'Clapper'?

ANSWER: Over a year now.

QUESTION 12: Do you know 'Clapper's' right name?

ANSWER: No, miss.

QUESTION 13: Do you know the name of the man who was shot and killed in the car?

ANSWER: Him alias name is 'Links'. Me nuh know his right name.

QUESTION 14: Where does 'Links' live?

ANSWER: Up ah Windsor Heights, Central Village.

QUESTION 15: Are you related to 'Links'?

ANSWER: No, Miss.

QUESTION 16: When you went and checked 'Clapper', what do you mean?

ANSWER: Me goh tell him seh 'Links' dead.

QUESTION 17: Did you assist in the killing of Novelette Johnson, o/c Sandy?

ANSWER: Yes, mi goh wid him.

QUESTION 18: Did you know what 'Clapper' was going to …."
Sorry.

Did you know that 'Clapper' was going to kill Novelette?

ANSWER: Yes, miss, because him seh she mek a speech seh me nuh like dem boy deh. A long time him fe dead.

QUESTION 19: What did you do when you saw 'Clapper' shot [sic] Novelette?

ANSWER: Me just stand up and look.

Question 20: Did you tell anybody that 'Clapper' shot Novelette o/c Sandy?

ANSWER: No, ma'am.

QUESTION 21: Did you know that 'Clapper' killing Novelette was wrong?

ANSWER: Yes, miss.

QUESTION 22: Why you did not make a report to the police?

ANSWER: (Refused to answer)

QUESTION 23: What type of gun was used to shoot and kill Novelette?

ANSWER: a Glock, miss.

QUESTION 24: What have you done with the gun?"

He refused to answer.

QUESTION 25: When you heard your name on television, what – why you did not go into – go into to [sic] the police?

ANSWER: Miss, me scared, miss, because me hear did news call mi name.

QUESTION 26: Were you treated fairly by the police?

ANSWER: Yes, miss.

QUESTION 27: Was any threat made to you throughout the interview?

ANSWER: No, ma'am.

QUESTION 28: Are the answers you gave to these questions truthful?

ANSWER: Yes, miss.

'the answers given by Mr. Richard Daley. I was told of my rights, that I can add, alter, change anything of the answers given. The answers are true. I gave them of [sic] own freewill'. "

[5] Dr Kadiyala Prasad, a consultant forensic pathologist who conducted the post-mortem examination of the deceased, testified that the deceased received four gunshot injuries resulting in death.

[6] The applicant gave an unsworn statement denying any involvement in the killing of the deceased. He said as follows:

> "My name is Richard Daley. I live at 63 Spanish Town Road. I am innocent and I never go with a gun an kill nobody and the lawyer say if I give the police … if I tell the police what he want he would let me go …. What he want to hear he would let me go … Give the statement to the police and he will let me go."

Original ground of appeal C is as follows:

> "That the prosecution failed to present to the Court any form of concrete evidence to link me to the alleged crime."

Mr Paris for the applicant, abandoned original grounds A, B and D.

[7] He sought and was granted leave to argue supplemental grounds which are as follows:

> "1. That there was no evidential foundation beyond a reasonable doubt that the Appellant [sic] had knowledge or the requisite foresight that 'Clapper' possessed a firearm and that he might use the firearm to kill or inflict grievous bodily harm to the deceased.
>
> 2. Her Ladyship's management of the issue relating to highly prejudicial evidence were [sic] wholly unsatisfactory and this failure amounted to a misdirection in that the jury were insufficiently guided on how to assess the impact of the highly prejudicial evidence."

Mr Paris requested that ground C be combined with supplemental ground one and be argued together as grounds 1a and 1b.

Grounds 1a and 1b

[8] Mr Paris submitted that the crux of the prosecution's case was its reliance on exhibits one and two. He argued that although the learned trial judge quite correctly, directed the jury to examine what was said and done by the applicant, the circumstances of the case required more guidance to assess the applicant's complicity in the offence, if any. He further submitted that on an examination of exhibits one and two there was no basis for reasonable foresight to be inferred from what was said or done by the applicant. It was argued by counsel that there was insufficient evidential basis to infer beyond a reasonable doubt that the applicant knew or ought to have known that "Clapper" possessed a firearm and that he intended to use the firearm to shoot the deceased.

[9] Mr Paris further submitted that the issues of presence and encouragement were necessary elements in cases of common design. Although admitting to the presence of the applicant at the scene, he submitted that proof of encouragement by the applicant went to the root of the Crown's case and that this element was not proven. He argued that greater guidance was required by the learned trial judge as to what amounts to encouragement. He referred to the cases of ***Regina v Allan and Others*** [1965] 1 QB 131 and ***Chan Wing Sui and Others v The Queen*** (PC) [1985] 1 AC 168.

[10] In response, Mrs Feurtado-Richards for the Crown submitted in grounds 1a and 1b that the learned trial judge's summation should be looked at in its totality. Although there was nothing in the caution statement to link the applicant with common

design, one had to look at both exhibits one and two in tandem. She further submitted that the learned trial judge gave a full direction on common design and how to treat the words of exhibits one and two. In addition to being present, there was proof of encouragement by the applicant, and based on what was said in the exhibits, there was the inference that he had a common intention along with the actual shooter to kill the deceased. Mrs Feurtado-Richards referred to the cases of ***R v Glenford Hewitt*** SCCA Nos 15 & 16/1984, delivered on 10 April 1987 and ***R v Dennie Chaplin and Others*** SCCA Nos 3 & 5/1989 delivered on 16 July 1990.

Ground 2

[11] This ground concerns the evidence of Detective Sergeant Sandra Morris Taylor under cross-examination, on the point regarding questions not put to the applicant during the question and answer interview. Prior to being cautioned, the applicant began to tell the officer a story about the incident when she told him that he would implicate himself and that is when he was cautioned. In cross-examination the following exchange occurred:

> "Question: Remember, you said that when you said he would implicate himself would you be referring to what happened, actually happened? That he said he went with 'Clapper'?
>
> Answer: When he said he went and saw 'Clapper'. He saw 'Clapper' took [sic] the gun and both went together to kill Sandy."

[12] Mr Paris submitted that the evidence that "Clapper" took the gun "was of an inflammatory nature and, as a consequence, had resulted in lending great prejudice to

the applicant". He further submitted that the learned trial judge ought to have told the jury immediately to ignore the evidence of " 'Clapper' take the gun" and to further reinforce this with an explicit warning in her summation. He further submitted that the learned trial judge omitted to provide sufficient guidance to the jury as to the importance of ignoring evidence that was elicited prior to any caution being administered to the applicant. There was no evidence properly before the jury that there was any admission of prior knowledge of any fact upon which any inference could be drawn, that the applicant knew or could have foreseen that "Clapper" was in possession of a firearm, and that he would use this firearm to shoot the deceased. Mr Paris referred to the case of ***McClymouth (Peter) v R*** (1995) 51 WIR 178.

[13] In ground two it was submitted by the Crown that the learned trial judge did all she could to warn the jury about the prejudicial statement made by the applicant, as she stated at page 229 of the transcript, "… I want you to completely disregard that issue of it, it was said before caution, what you are to concentrate on, if you accept it, is the caution statement and the question and answer". The case of ***McClymouth (Peter) v R*** was also referred to by counsel for the Crown.

Analysis

[14] It is an established principle of law that where two or more persons embark on a joint enterprise, each party is liable for acts done in pursuance of that enterprise and the consequences that flow therefrom.

[15] It is clear from the evidence (exhibits one and two) that the case for the prosecution centred mainly on the issue of common design or joint responsibility. It was therefore incumbent on the learned trial judge to adequately direct the jury on this issue. This is what the learned trial judge had to say at pages 257-258 of the transcript.

> "I said to you, where a criminal offense [sic] is committed by two or more persons, each of them may play a differebt [sic] part but if they are acting together as part of a joint plan or agreement to commit, they are each guilty. The words plan and agreement do not mean there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment, nothing need be said at all. It can be made with a nod or a wink or a knowing look or it can be inferred from the behavior of the party. The essence of joint responsibility for criminal offense [sic] is that each defendant share a common intention to commit the offense [sic] and played this part in it, however great or small so as to achieve that aim. Now, I also need to say to you that the mere presence at the scene of a crime of [sic] does not mean that a person is part of a common intention but the presence a [sic] the scene is capable of constituting encouragement so you have to examine it. If you accept that he said what these statements and these words mean and you have to decide whether or not, if you accept the statement that, based on what he has said, that his presence there with 'Clapper' that you can indicate that you can infer from that, from his presence there with 'Clapper' based on all the circumstances was, you can draw an inference that he had a common … he shared a common intention with 'Clapper' to kill this lady."

[16] It can be seen from the above passage that the learned trial judge correctly gave directions to the jury on common design and on the issue of encouragement.

The jury was told to examine the statements and words (exhibits one and two) and to decide whether or not the applicant had a common intention to kill the deceased.

[17] On the issue of encouragement, in ***Regina v Allan and Others*** Edmund Davies J (as he then was) opined on the requirement of encouragement at page 138:

> "In our judgment, before a jury can properly convict an accused person of being a principal in the second degree to an affray, they must be convinced by the evidence that, at the very least, he by some means or other encouraged the participants. To hold otherwise would be, in effect as the appellant's counsel rightly expressed it, to convict a man on his thoughts, unaccompanied by any physical act other than the fact of his mere presence."

[18] There is no question that the applicant was present at the scene. An examination of exhibits one and two indicates the following at pages 94-95 of the question and answer interview:

> "QUESTION 16: When you went and checked 'Clapper', what do you mean?
>
> ANSWER: Me goh tell him seh 'Links' dead.
>
> QUESTION 17: Did you assist in the killing of Novelette Johnson, o/c Sandy?
>
> ANSWER: Yes, me goh wid him.
>
> QUESTION 18: Did you know what 'Clapper' was going to …"
>
> Sorry.
>
> Did you know that 'Clapper' was going to kill Novelette?

ANSWER:	Yes, miss, because him seh she mek a speech seh me nuh like dem boy deh. A long time him fe dead.
QUESTION 19:	What did you do when you saw 'Clapper' shot [sic] Novelette?
ANSWER:	Me just stand up and look."

[19] An examination of the questions and answers indicate that the applicant apart from being present at the shooting was voluntarily and purposely present witnessing the commission of a crime. It is clear from the answers given by the applicant that there is an inference that he knew that "Clapper" was going to kill the deceased. It was the applicant who notified "Clapper" about what had happened previously about "Links' " death. It was the applicant who followed "Clapper" to seek out the deceased.

[20] The following passage from ***R v Coney*** (1882) 8 QBD 534 referred to in ***R v Clarkson and Others*** (1971) 55 Cr. App. Rep. 445 is quite instructive and at page 450 states:

> "Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

This passage was cited with approval by this court in ***R v Glenford Hewitt and Herbert Hewitt***; see also ***R v Dennie Chaplin and Others***.

[21] As to the participation of the applicant the learned trial judge in the instant case went through the exhibits meticulously with the jury. At page 260 of the transcript the learned trial judge said:

> "So you look at the words, if you accept that he said these things, then what he is telling you is based [sic] on the evidence, if you accept it, he knew the man that was going to kill the girl and that he went with him and he saw 'Clappa' kill the girl and he cut out afterwards.
>
> You are going to examining [sic] all of that, because if you find that he has said all of those words, then you say now, then in all the circumstances you have to say that you find that all that he has told you that he was part of this joint act to commit this murder.
>
> And as I said to you, if you find that his presence there was encouragement to 'Clappa' to shoot 'Sandy' then it is open to you to find that he was a part of what transpired that day and he would be responsible. So it depends on what you find from the statement, if you accept that he said that in his statement."

[22] The above passage clearly indicates that the learned trial judge left it open to the jury to find whether or not the applicant was part and parcel of a common design to shoot the deceased.

[23] We are of the view that the learned trial judge adequately explained to the jury the issue of common design. We are also of the view that it was open to the jury to find that the applicant was voluntarily and purposely present, and based on exhibits one and two, aided and abetted the killing of the deceased.

Ground 2

[24] A trial judge has a wide discretion in deciding the best way in mitigating the effects of prejudicial evidence admitted inadvertently or otherwise, which can be potentially damaging to an accused. This discretion gives the trial judge options including the discharge of a jury and a warning to a jury in the summation at the close of a trial. Each case will depend on its own set of facts. In ***R v Weaver*** [1967] 1 All ER 277 Sachs LJ said at page 280:

> "... the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged."

[25] The statement of the law in that case was followed in ***McClymouth (Peter) v R*** a decision of this court, where Carey JA said at page 184:

> "The court will be slow to interfere unless it feels that the applicant would be justified in saying that what occurred was devastating. The court must have regard to what was divulged, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark, as the court found in ***R v Coughlan*** (1976) 63 Cr App. Rep 33, or whether it was so prejudicial as to be not capable of curative action by the trial judge."

[26] It is necessary to examine the transcript to see what harm, if any, has resulted from the admission of the evidence complained of. This complaint resulted from cross-examination by defense counsel of Detective Sergeant Taylor, the officer who took the caution statement from and administered the question and answer interview to the applicant. The relevant portion of the evidence is worth repeating and is as follows:

> "QUESTION: But and you said earlier, when you gave your evidence, that when you went to the station, he told you something and you stopped him because you never wanted him to implicate himself?
>
> ANSWER: Yes sir.
>
> QUESTION: Remember, you said that? When you said he would implicate himself, would you be referring to what happened, actually happened? That he said he went with 'Clapper'?
>
> ANSWER: Went … he said he went and saw 'Clapper'. He saw 'Clapper' took [sic] the gun and both went together [sic] to kill Sandy."

[27] It is to be noted that the learned trial judge intervened by asking defence counsel to tread carefully, because he was referring to an earlier stage before the applicant was cautioned.

[28] The learned trial judge was cognizant of the fact that such evidence as elicited from the witness by defence counsel might have been prejudicial to the applicant. This is what the learned trial judge said:

> "Now actually under further cross-examination by Mr. Wellesley it did come out that according to her he was saying that the accused man had said that he was saying at the point where she stopped him he saw 'Clapper' tek up the gun that is not – I want you to completely disregard that issue of it, it was said before caution what you are to concentrate on if you accept it, is the caution statement and the question and answer. That evidence came out and as I said this was before any cautioning of the accused men." (Emphasis added)

[29] We are of the view that the learned trial judge gave the jury an explicit warning and emphasized the importance of ignoring evidence that was elicited prior to any caution being administered to the applicant. We are clearly of the view that the warning was adequate in all the circumstances. It is also our view that without that evidence there was clearly enough evidence from the caution statement and the questions and answers combined, that a jury could come to the conclusion that the applicant was involved in the shooting of the deceased and that he was voluntarily and purposely present and aided and abetted the shooter.

[30] Based on the foregoing, we are of the view that the application for leave to appeal should be dismissed and the conviction and sentence affirmed. The sentence should commence on 6 February 2009.