JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 145/96

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. V. TROY GILBERT

Lord Gifford, Q C for applicant

Lloyd Hibbert, Q C & Lorraine Smith for Crown

January 26, 27 & April 3, 1998

RATTRAY, P:

The applicant Troy Gilbert was convicted in the Home Circuit Court on the 4th of November 1996 of the capital murder of one Hubert Gordon and by virtue of his age at the data of the commission of the offence was sentenced to he detained at the Governor General's pleasure.

The murder took place in Mount Charles district in the Mavis Bank area of St. Andrew on the 4th of June 1994. The deceased Hubert Gordon lived and kept a small shop there. Many persons living in that area are employed at a coffee cooperative factory referred to as the Central Factory and situated in Mavis Bank. As there is no nearby commercial bank some of the workers would have their salary cheques cashed by Mr. Gordon at his shop.

On 4th June 1994 at approximately 7.40 p.m. Mr. Gordon was found dead at his home lying on his back. A building block and a piece of stick both with blood stains were found beside him. The medical evidence given by Dr. Ramesh Bhatt who conducted the post mortem examination disclosed the following injuries:

> "1. Laceration 1/2" x 1/4" on upper lip, on the right side of the mouth.
>
> 2. Laceration 3/4" x 1/2" on the right side of the forehead.
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> 3. Laceration 1/2" x 1/4" on the right eyebrow.
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> 4. Laceration 1/2" in length on corner of mouth."

The medical opinion of Dr. Bhatt was that "death was due to intracranial haemorrhage as a result of injuries to head, caused by blunt external force." On dissection Dr. Bhatt found the following:

> "Scalp showed contusion on right temporal region and right side of frontal region. Skull showed fracture of right temporal wall and right orbital plate. The brain showed contusion on frontal lobe, in the inferior surface."

In answer to a question as to whether the haemorrhage was associated with all the lacerations or only one Dr. Bhatt stated:

> "Well, first, second and third, they are directly to the skull, second and third more than likely."

How did the applicant come to the attention of police during their investigation of the murder? The investigating police officer Cpl. Lenworth Mellis attended the scene of the murder that very night and saw beside the body of the deceased a piece of stick and a broken building block with bloodstains. All the pockets of the deceased were rifled. The premises which comprised the home and the shop Of the deceased was ransacked. In the course of the investigations, the brother of the applicant one Kevin Thompson, was taken into custody at the Gordon Town Police Station. On information received from Thompson, the applicant was taken to the Gordon Town police station and under caution when asked about cash and cheques which were taken from the deceased Gordon's pocket he said "the cash already spend down town" but with respect to the cheques, he had tried to change one at a shop operated by a Miss Johnson and was unsuccesssful and so he had thrown the cheques into some bushes at Mavis Bank. The applicant took the police to the bushes near to the

road at Mavis Bank and there they retrieved three cheques issued by the Mavis Bank Central Factory drawn In the names of Carlton McGann, Newar Ferron and Delom Davis.

Ferron and Davis gave evidence that these cheques had been cashed for them by Mr. Hubert Gordon the deceased.

The evidence of one Yvonne Johnson who operated a wholesale/retail business at Mavis Bank disclosed that in June 1994 the applicant came to her business place asking her to cash a cheque which he handed to her. This was a cheque made out to Delom Davis by the Central Coffee Factory. On noting that the back of the cheque was endorsed to Hubert Gordon, she refused to change the cheque and gave it back to the applicant commenting that it was a dead man's name written on the back.

Corporal Mellis asked if the applicant wished to give a statement under caution about the whole matter and the applicant agreed. Corporal Mellis took him to the Constant Spring Police Station CIB office where he was handed over to Assistant Superintendent Trevor Chin.

The cautioned statement given by the applicant to Assistant Superintendent Chin and in the presence of a Justice of the Peace, Gloria Miller, was challenged but admitted after the trial judge held a voir dire. It constitutes the crux of the Crown's case as to the killing of the victim Hubert Gordon. The statement tells of knowing one Godfrey whom he met on the Friday who told him he wanted him on the Saturday to follow him up to Mass Hubert (referring to the deceased). It continues:

> **"mi ask him for what, and he said mi mustn't question him because if mi noh come, him a goh kill mi. Godfrey left mi after him tell mi seh him will kill mi. Saturday, that is the next day, mi goh up a Mavis Bank, up a mi brother goh trim. Mi never si mi brother, soh mi never trim. So ah coming down back now, and when mi reach right down a Mass Hubert shop, mi si Godfrey inna one mango tree, and him call mi, and him come down off the tree and give mi four cheques and say me must change them and mi must tek one and change the next three and bring come give him. Me ask him wey we must change them, and him**

> sey mi must goh up a Miss Yvonne shop. Godfrey sey me must mek me and him goh a Mass Hubert house. Him sey him want goh over deh fi go lick him down cause him goh over there and him get some cheque, but him noh get noh cash. The two a wi goh over de yard and him sey mi must watch and tell him when Mass Hubert ah come. Mi goh down wey Mass Hubert have him goat pen and him goh 'round one corner. Mass Hubert come out ah di shop and goh down a him house and him goh down ah di house after Mass Hubert gone in - 'But Mass Hubert come out too quick and Godfrey draw back 'round ah one corner. It look like Mass Hubert see when him draw back, cause him come out fi look ah who, but by the time Mass Hubert look, him lick him wid piece ah board. Mass Hubert drop after him lick him. Mi run out ah di yard and run out ah road and start run down di road, and him run me down.
>
> And him ketch me and hold me back and carry mi over di house and him use a block and lick Mass Hubert inna him head, and then him seh me must use one block and lick Mass Hubert too, and mi seh no. Him sey him ah goh kill mi if mi noh do it, and mi tek up di block and mi lick him pon di side a him face wid it. Godfrey sey mi must search Mass Hubert pocket and mi search him and mi find a bungle ah twenty twenty dollar and him search him two pocket ah di back and tek out Mass Hubert billfold. Mi show him di twenty dollar bill dem wey mi tek out and him grab it from mi. Me and him left goh out ah di gate and mi run goh down di road."

He then describes his movement for the rest of the day. Whilst in a show at Mount

Charles he heard that Maas Hubert was dead.

> "Mi left and goh back home back home after show and Sunday now, mi ah goh up a mi brother fi goh trim and when mi reach up di road, ah si Godfrey and him sey to mi sey, if a don't get the cheque dem change yet, and me tell him no, and him draw him cutlass and run me down. Mi run goh ah Mavis Bank".

He narrates his further movements and continues -

> "When a come to Mavis Bank Tuesday morning, ah goh a Miss Yvonne shop and di shop window was opened, she and somebody was there talking and a ask her if she can change a cheque for me and she sey how much is on it, and ah tell her one thousand one hundred and ninety six dollars, and she tek it from me and she sey yes, and she look at it on di front and call di somebody name on the front. And after that, she spin it 'round and look at the back and see Hubert Gordon name pon it, and she ask mi if him don't dead, and mi sey yes, and she give it back. Mi goh up a di Hardware after mi left Miss Yvonne shop and ask di girl if she can change di cheque and ah tell her how

> **much is on it and she sey no. Ah order somethings, a machete, file, string bean and carrot and she sey she still noh have di change for it. Mi leave from deh and goh a di wall me and mi brother sit down ah talk and ah tek out di cheque dem and show him and him sey mi must carry dem goh give di person ah get dem from or do away wid it. Mi left mi brother and when mi goh round pon di track `round a Miss Blossom, mi tear up two and when ah reach by Miss Blossom** house, a wet up WO a di pipe mid throw **dem over di wall by Mr. Beckford house."**

He tells of his further movements, and of hearing that his brother Kevin was locked up by the police. He told his mother how he got the cheques and she took him to the Gordon Town police station where he was taken to the cell. He took the police to the area where he had thrown away the cheques and they were found.

The admissibility of the cautioned statement is not challenged in this application for leave to appeal, although its interpretation with respect to the issue of joint enterprise is, and will be dealt with later.

On the day of the giving of the cautioned statement Corporal Mellis returned to Constant Spring where the applicant was in custody. He received from Assistant Superintendent Chin, the cautioned statement in the presence of the applicant. He made enquiries of the applicant as to the whereabouts of the Godfrey who was mentioned in the cautioned statement and he charged the applicant with the murder of Hubert Gordon. Corporal Mellis continued his investigations with respect to Godfrey. He then returned to the applicant who was in custody and again administered a caution to him. The record reads:

> **"Q. After you cautioned him, tell us what you did?**
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> **A. I tell him that I made enquiries in respect of Godfrey and my investigations reveals (sic)** that at the time of **Mr. Hubert's** murder **Godfrey was at the farm. Mr. McGann's farm.**
>
> **O. You told him that?**
>
> **A. Yes. I did not believe his story. At this stage he said "Officer mek me tell you the truth, sar, a me alone."**

The learned trial judge queried the admissibility of the additional statement given after the applicant was in custody already charged, but after counsel for the applicant without making objection stated that he intended in cross-examination to deal with it as a matter of weight rather than admissibility the evidence of the second statement was allowed.

Lord Gifford, Q C for the applicant has contended before us that the learned trial judge erred in directing the jury that on the facts the applicant could have been aider or abettor, since as learned counsel maintains, on the medical evidence the blow to the side of the face of the deceased admitted by the applicant in the cautioned statement could not contribute to the death of the deceased. An examination of the medical evidence as related does not support this submission which in our view is without substance.

He next challenged the admissibility of the additional verbal statement given after the accused was charged for the offence and maintained that the learned trial judge erred in exercising his discretion in favour of admitting it.

No objection was taken at the trial to the admissibility of the evidence which was clearly in breach of the Judges' Rules. These Rules of course are not rules of law but rather rules for the guidance of the police. It is the question of fairness which has to be considered by the trial judge before making a decision to admit the evidence even if in breach of the Judges' Rules. The trial judge in his direction to the jury stated:

> **"... it does appear that Mellis, after having seen the caution statement, did go back to the accused, because** *the* accused said, the accused in denying **that he ever used those words, said that Mellis came back to him and Mellis told him that he had locked up Godfrey. So from that point of view it would seem that some conversation did take place after the caution statement was taken.**
> **Now, it is for you to decide whether or not Mellis can be believed in this aspect, or, in fact, any aspect of his evidence, because it's a matter for you whether in fact the accused did say it is a lie he was telling, it was him alone. A matter entirely for you. I don't know, you**

> **know, Mr. Foreman and members of the jury, if it is significant that on the account of Mellis, who went to the scene, just after 8:00 o'clock or thereabouts in that vicinity, he saw a stick, remember he said it was about five feet long, about this wide. (indicates) That stick had on blood, and** then **he** Saw this part Of the Mt* **with blood stains. Would that indicate that there were two people. I don't know. It's entirely a matter for you. Again, Mellis comes and tells you that based on investigation he went and confronted the accused, but we are not told what is the nature of the investigation. Just a blank statement, based on investigation. It's a matter entirely for you, Mr. Foreman and members of the jury, what you make of Mellis' evidence in this regard."**

Furthermore, counsel for the applicant rather than objecting to admissibility of the evidence stated that he considered the best way of dealing with this aspect of the matter was to probe it in cross-examination. In these circumstances, the credibility of the evidence being properly left to the jury, this submission cannot be substantiated.

Lord Gifford, Q C further submitted that the learned trial judge misdirected the jury in dealing with the issue of joint enterprise because,(1) that issue did not arise Oh the facts; (2) if it **did, then the jury should have been directed that the applicant having withdrawn his consent to the enterprise by running away could not be guilty of the murder;** (3) **that the direction implied that if the applicant contemplated that any violence would *be* used on *the* deceased he would be equally guilty of murder.**

With respect to (1) **the learned trial judge posited his direction to the jury on two** bases -

> **(a) that the applicant had acted alone based** upon **his admission to Cpl, Mellis that Godfrey was not involved in the killing or**
>
> **(b) that it was the accused and another who carried out the robbery.**

With respect to (b) what the learned trial judge said was as follows:

> **"What the prosecution is saying** here is **that they went out, if you find there were** two **persons, *the* two persons embarKed upon a joint enterprise, unlawful joint *enterprise* of *robbery*** In **respect of Maas Hubert; and where two persons embark on a joint antAmtica**

> each is liable for the acts done in pursuance of that joint enterprise. So if it was contemplated that violence would be used on Maas Hubert, then the accused man, if you find he was a participant, he would be equally guilty of the murder even if he didn't strike the fatal blow."

The learned trial judge further directed:

> "So the prosecution is really putting their case on two limbs. One, they are saying we don't have to prove common design you know, we don't have to prove etitorprise bebause he said he we* thew He said he used a stone to hit Maas Hubert. But in addition the prosecution is also saying there is also this joint enterprise where they set out to lick down Maas Hubert to rob him."

It is clear law that if two or more persons set out with the common purpose of attacking another person in order to rob him and in the course of this attack that person dies both would be criminally responsible for the death of the victim. With respect to (2) the implication of the whole of the cautioned statement was left to the jury. It was a mixed statement, in part inculpatory and in part exculpatory. The learned trial judge was not required to direct the jury with respect to a possible withdrawal of consent to the common enterprise of robbery which resulted in the death of *Hubert* Gordon. At the trial the applicant denied on oath the contents of the statement. In R. v. *Trevor Lawrence* SCCA 111/88 Gordon J.A. (Ag) as he then was, reviewed the law on mixed statements as established by the cases and stated correctly:

> "The principle to be extracted from these cases is that where at a trial a prisoner denies the contents of a mixed statement made by him and adduced by the Crown and his defence otherwise is rejected by the jury he cannot afterwards be heard to complain that he should have had the benefit of having the exeuipetory esbeet pieced before the ju-:,

With respect to (3) the impugned direction must be looked at in its entirety. The learned judge stated -

> "What the prosecution is saying here is that they went out, if you find there were two persons, the two persons embarked upon a joint enterprise, unlawful

> **joint enterprise of robbery in respect of Maas Hubert; and where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. So if it was contemplated that violence would be used on Maas Hubert, then the accused man, if you find he was a participant, he would be equally guilty of the murder even if he didn't strike the fatal blow."**

The learned trial judge was here outlining the prosecution's case to the jury. He later gave his direction as follows:

> **"If you find that he was part of this joint enterprize and there was this contemplation that physical harm, really serious harm would be occasioned to the deceased in order to effect the robbery, then he would be guilty of murder if there was this contemplation. Now, what the law says is that if during the course or furtherance of a robbery, the accused caused the death of or inflicted or attempted to inflict grievous bodily harm on the person murdered, you who himself use violence on that person in the course or furtherance of an attack, that person then, who so did, would be guilty of 'Capital Murder'."**

The summing up must be looked at as a whole to determine its fairness or otherwise. This ground of appeal therefore also fails.

The final area in which Lord Gifford, Q.C. took issue with the summing up was in relation to the trial judge's direction on duress. In the cautioned statement the applicant was saying that his act against Maas Hubert was committed consequent on duress from Godfrey. The summing up in this regard was as follows:

> **"Now during the caution statement you will see where the accused man is saying that the other person, one Godfrey, said that he would kill him if he didn't do what he ordered. Well, Mr. Foreman and members of the jury, you must disregard this entirely because what he is saying here is that he was forced to. In law it is known as duress and it is a direction to you in law as regards murder. Duress in law is no excuse. So all those parts of the caution statement, if you so accept that statement and that part of it that pertains to being forced to do something or you will be killed, that must be ignored completely."**

Lord Gifford, Q.C. submits that duress was relevant to the question of whether the applicant was engaged in a joint enterprise and/or was aiding or abetting Godfrey. Again, this was an exculpatory part of the statement rejected by the applicant in his sworn evidence before the jury. In any event, I can find no error in the learned trial judge's statement of the law in respect of duress.

Consequently, we agree with the submissions of Mr. Hibbert Q.C. for the Crown that there was no evidence of withdrawal by the applicant from the joint enterprise which could properly be left to the jury. On the facts if the jury accepted the cautioned statement which was reduced to writing they could properly conclude on the basis of joint enterprise that the applicant was guilty of capital murder, he having admitted that in the course of the attack on the deceased he hit the deceased in his face with a concrete block. If the jury however accepted his verbal statement given after he had been charged that he alone was involved, the question of joint enterprise would not arise and he would also be guilty of capital murder.

The application for leave to appeal is therefore refused.