JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 153, 155, 156 OF 2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

R.V. DONOVAN GRANT
WINSTON MUNROE
DERRON BROWN

Shawn Steadman for Donovan Grant
Ian Wilkinson for Winston Munroe
Philip Dayle for Derron Brown

Janiece Nelson-Brown for the Crown

11th July 2003 and July 30, 2004

COOKE, J.A.:

On the 18th January, 1999, Trevor Salmon was murdered - a fatal bullet ended his life. At about 9:30 p.m. on that night three men entered the bar and restaurant of Mrs. Kathleen Godfrey on Nomprel Road, in Negril. They ordered drinks. A fourth person came into the bar and ordered a beer, paid for it and left. On leaving, this person called to one of the three persons who had earlier gone into the establishment. Those three men were not patrons of the bar who wished to quench their thirst. They were on a criminal mission. Two were armed with firearms and the

other with a knife. Present at the scene were Kathleen Godfrey and the Anglin brothers: Carvin, Germaine and Carson. The deceased was in the kitchen on the building. Clarence Godfrey, Kathleen's husband was in his room. After the three men secured their drinks the criminal plan began to unfold. Weapons were brandished. The Anglin brothers were put to lie in prone positions. Kathleen Godfrey was accosted. Apparently they knew of her recent "partner draw". She was man-handled and taken to a room at the back. From her was taken some $30,000. One of the men went into Clarence Godfrey's room and took from him about $4,000. The deceased was encountered in the kitchen. Despite his pleas, he was forcibly brought into the bar area, where the Anglin brothers were under guard. It was there he was shot in the head. The appellants, Grant, Munroe and Brown, were found guilty of the murder of the deceased.

The prosecution's case was that Munroe and Brown were two of the three persons who entered the bar. Grant is the person earlier described as the fourth person. All have now appealed against their convictions. At the hearing of the appeal counsel for the prosecution readily conceded she was unable to resist the challenge of Grant and Munroe. Counsel for Munroe felt unable to impugn the correctness of that conviction.

The appeal of Donovan Grant

Although a number of grounds of appeal were filed on behalf of this appellant there was no real debate as counsel for the prosecution conceded that there was an insufficiency of evidence to link him with the criminal activity which took place at Kathleen Godfrey's bar and restaurant on the night of the 18th January, 1999. Two of the Anglin brothers, Carvin and Carson gave evidence to the effect that after the three men had entered the bar, the appellant entered "shortly" after. He enquired if they were Jah D's sons to which there was an affirmative reply. He then ordered a beer and went outside. The appellant further called to one of the three men and spoke to him. Germaine's evidence is somewhat different. He said all four men came in together and ordered beers. The appellant went outside and returned. Then the appellant went outside and spoke with one of the men and immediately returned. That was the totality of the evidence as it pertained to the appellant. The question now arises whether on either version it could be said that a prima facie case had been made out as regards the appellant's participation in the murder of the deceased. In the written submissions on behalf of the appellant it was stated that:

> "There is no evidence that the First Applicant (Grant):
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> (i) was aware of anything that took place inside the bar (or was about to take place before he left);

(ii) by any gesture or remark indicated that he was aware of, or in agreement with, the plan of the other three men;

(iii) was aware that any of the men had weapons (and in fact, from the evidence it was made clear that the First Applicant did not have anything (weapon) in his hand);

(iv) was waiting outside for the men to complete their task as the witnesses stated that they could not see him after he went outside, or

(v) was seen with the men when they drove off in a car.

Based on those enumerated factors it was contended that the learned trial judge should have upheld the no case submission which had been made on behalf of the appellant. At its highest, the evidence merely indicated that the appellant was at the scene prior to the initiation of the criminal design and that he spoke briefly to one of the three men who had gone to Kathleen Godfrey's business place with criminal intentions.

R. v. Steve Brown et al SCCA Nos. 37, 38, 39 and 40 of 1996 delivered on 27th October 1997 (unreported) was cited for the proposition that mere presence is insufficient evidence to fix a person with involvement in a joint enterprise. The force of this submission cannot be denied. In his summing up, the learned trial judge directed the jury in general terms on circumstantial evidence and common design/joint enterprise. These were the usual directions. However, there was a failure to correlate the

evidence with the legal principles. If that had been done it is most likely that the learned trial judge would have upheld the no-case submission which had been made on behalf of the appellant. Grant's appeal was allowed and the conviction quashed. The sentence was set aside and judgment and verdict of acquittal entered.

The appeal of Winston Munroe

The case against this appellant rested entirely on the correctness of the identification evidence put forward by the prosecution. That came from two sources - Carvin Anglin and Clarence Godfrey. As rightly submitted on behalf of the appellant, Carvin Anglin's evidence should not have been left for the consideration of the jury. Firstly, he failed to identify the appellant at an identification parade on the 12th of February 1999. Anglin's inability to identify was in his words because "I couldn't remember his face." Yet, secondly at the preliminary enquiry he made a dock identification on the 30th of July, 1999. Thirdly, at the trial Anglin confessed in an unequivocal manner that he was in doubt as to the identity of the appellant. Fourthly, he admitted that he was mistaken as to the identification of the appellant. In these circumstances, the learned trial judge should have instructed the jury in strong terms that the identification evidence of Carvin Anglin was wholly without value. This the learned trial judge did not do. Rehearsing this aspect of Carvin Anglin's evidence without any comment must have led the jury to

erroneously assume it was of some value. Further, there was a misrepresentation in part of Anglin's evidence as the jury was told that he, Anglin had said he was not mistaken in respect of the identification of the appellant.

Clarence Godfrey was in his room at the back of the building which housed the bar and restaurant. He said he was lying on his back on his bed putting a baby to sleep. He heard talking coming from his wife Kathleen's room next door. He opened his eyes a little and listened. He heard the demand that Kathleen should give "more money". Then the appellant entered his room through the doorway which separated his room from that of his wife. Over this doorway hung a curtain. The appellant had a gun. He was "grabbed in his chest and taken into his wife's room." As he was being taken he was face to face with the appellant. Apparently, the person taking him to his wife's room proceeded in a backwards fashion. In his wife's room, there was Kathleen and a man with a knife. He was put to lie on his face. His watch and money were taken from him while in his room. It was the evidence of Clarence that while in his room there was a bright light which emanated from a clear bulb therein and at all times he was looking at the face of the intruder. The time span in his room was estimated at "a minute, a minute and a half". He was further able to see the face of his assailant while he was being taken into his wife's room, and before he was put to

lie on his face. This time span was estimated as "about three minutes plus, four minutes." On the 12th February, 1999, Clarence Godfrey pointed out the appellant as the person who had entered his room armed with a gun.

Cross-examination of Clarence Godfrey revealed inconsistencies:

(a) At the preliminary inquiry he said he was able to see the intruder who entered his room from the light which came from his wife's room, presumably through the curtain.

(b) At the preliminary inquiry he said that the first thing the intruder did was to turn him around and "lean" him over the bed.

(c) In his police statement given the day after the incident he said he was sleeping and awakened by the person who entered his room.

These inconsistencies affect the opportunity of Clarence Godfrey to properly discern the features of the intruder. They are also relevant to his credibility. It is not an improbable inference that he was turned around because he was sleeping. These inconsistencies must be considered as weaknesses which are relevant to a proper assessment as to the reliability of the identification evidence of Godfrey. It is incumbent on trial judges to indicate to the jury areas of weakness in evidence of identification: see **R.v. Turnbull And Others** [1977] 1 Q.B. 244. In this case the learned trial judge in dealing with the identification evidence of Godfrey as it pertained to the appellant did not advert to these inconsistencies. This

was a failing. In **R.v. Baker, White, Tyrell, Johnson, Brown and Phipps** (1972) 12 J.L.R. 902 at page 912 g this court offered advice as to the responsibility of trial judges in dealing with previous inconsistent statement(s):

> "This duty is usually sufficiently discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all can be placed on his evidence."

It is true that Godfrey did point out the appellant at an identification parade. However, it must be recognized that an identification parade is part of the process in the determination of the reliability of the total identification evidence. If the primary evidence as to identification is deficient the result of an identification parade cannot supplement nor indeed cure this deficiency.

The inadequacies in the approach and the treatment by the learned trial judge of the identification evidence pertinent to the appellant dictated that the appeal should be allowed. And so it was. The conviction was quashed. The sentence was set aside and judgment and verdict of acquittal entered.

The appeal of Derron Brown

The case against this appellant was essentially grounded on a caution statement given by him on the 6th February, 1999. There was no contest as to the admissibility of this statement. In it he recounted how on the night of the 18th January, 1999, he along with others went to the bar and restaurant. He was the person who had the knife. He spoke of a firearm being brandished and Kathleen Gregory being set upon and taken to a backroom. He told how Clarence Godfrey was brought and put to lie on his face. He said he heard "a shot fire." They left in a motor car and drove to Lucea. He received Nine Hundred Dollars ($900).

This appellant made an unsworn statement in which he claimed to have been elsewhere at the time of the murder. He lived in Good Hope. On that day he had been working with his cousin who had "taught him trade." In the evening he went to visit his girlfriend and then returned to his home. As to the caution statement he was intimidated and consequently "I then decided I had to give a statement regarding what I hear from Mr. Simpson:" (Mr. Simpson was one of the police officers involved in the investigation).

The caution statement indicates the following:

(1) The appellant had embarked on a joint enterprise to effect a robbery at the bar and restaurant.

(2) This enterprise involved the use of weapons – firearm and a knife.

(3) The appellant was an active participant in the perpetration of the robbery and in particular when the firearm was brought into use.

Having embarked on this joint enterprise the appellant, in the circumstances outlined above, would have been liable for any act done in pursuance of executing the plan: see **R.v. Anderson; R.v. Morris** [1966] 2 QB 110. It will be recalled that the appellant said he was not present. There is no evidence to suggest that the shooting of the deceased was a departure from the common design nor in any way outside the contemplation of the appellant. See **R.v. Reid** 62 Cr. App. R 109; **Chan Wing-siu v.R.** [1985] A.C. 168.

This appellant was sentenced to a term of life imprisonment and the learned trial judge determined that a period of 25 years should elapse before eligibility for parole could be considered. The appeal is dismissed. The conviction and sentence are affirmed. The sentence is to commence from the 22nd November, 2000.