JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 130/2001

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R v ANDRE JARRETT

L. Jack Hines for the Appellant

David Fraser, Deputy Director of Public Prosecutions (Acting)
Curtis Turner, Assistant Crown Counsel (Acting)
and Tara Reid, Assistant Crown Counsel (Acting) for the Crown

25th, 26th November, 2002 and March 4, 2003

SMITH, J.A.

On Thursday the 8th of May, 1997, 19 year old Christopher Lee was brutally attacked and mortally wounded. He was in the Emergency Room of the Kingston Public Hospital when he was visited by his mother, Mrs. Daphne Lee, and a cousin, Ms. Maria Smith, alias "Pam". Christopher, said, "Mum, come pray for me." She could not. The sight of his mangled face upset his mother's composure. She ran out of the Emergency Room. His cousin, Maria, took his mother's place at his bedside. He told her, "I know the boy who stabbed me. Him name "Bowla" and he comes from Payne Avenue. His mother name is "Junie." He told her that he did not

think he was going to make it. Christopher succumbed to the injuries on the 11th May, 1997.

Maria Smith made a report to Detective Sergeant Norman Hamilton who went to Brown's Funeral Home. There he saw the dead body of Christopher Lee. He observed lacerations to his face, chest, right armpit, back and neck. Detective Hamilton prepared a warrant for the arrest of the appellant.

On the 20th January, 1998 Sergeant Hamilton saw the appellant at the Hunts Bay Police Station. He told the appellant that he had a warrant for his arrest in respect of a murder committed on the 8th of May, 1997. He cautioned him and the appellant said, "boss mi never mean fi cut him up, is just a food mi did a look." Sergeant Hamilton said he read the warrant to him and charged him for murder. After the appellant was cautioned he said, "boss mi never mean fi cut him, mi want fi tell you how it go for mi want you fi help me." Subsequently, the appellant gave a caution statement in which he confessed.

On the 14th June, 2001, he was convicted of capital murder before Pitter J and a jury and sentenced to suffer death. In this Court, leave was sought and obtained to argue five supplemental grounds of appeal. Ground 3 was later abandoned.

The first issue is whether there was sufficient evidence to establish the necessary actus reus for robbery or attempted robbery to ground the

offence of capital murder under section 2(1)(d)(i) of the Offences against the Person Act as amended.

This section provides:

> "2 - (1) subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) any murder committed by a person in the course or furtherance of –
>
> (i) robbery
>
> (ii) ..."

The evidence on which the prosecution relied to establish the fact that the murder was committed in the course or furtherance of robbery came from statements alleged to have been made by the appellant.

In addition to what he said when he was first taxed with the allegation made against him, he is alleged to have voluntarily given a caution statement in which he said (page 151):

> "mi a walk pon the street and mi a look a food and mi si him and mi try rob him. Mi cut him and come back dung a mi yard and about two days after mi hear seh him dead fadda."

Mr. Hines, counsel for the appellant, submitted that the confession statement and the admissions taken at their highest do not disclose the commission of the offence of robbery. They merely indicate, he argued,

an intention to rob. He contended that there was no "actus reus proven to have been done by the appellant directly connected with the offence of robbery." He relied on **R v Robinson** (1915) 2KB 342 or (1914-15) 11 Cr. App. R 124 and **Comer v. Bloomfield** (1971) 55 Cr. App. R. 305.

Mr. Fraser, Deputy Director of Public Prosecutions (Acting) on the other hand submitted that the words "mi try rob him," suggest that the appellant went beyond indicating a mere intention to rob, which in itself would be sufficient, but that he attempted to rob the deceased. The learned Deputy Director further submitted that murder was committed in the course of or in furtherance of robbery if at the time of its commission the offender intended to rob or attempted to rob, or was escaping from a robbery. Mr. Fraser relied on **R v Masters** (1964) 2 All ER 623 and **R v Jones** (1959) 1 All ER 411. We think the submissions of the Deputy Director of Public Prosecutions are correct.

In **R v Harry Robinson** (supra) it was stated that mere intention to commit an offence does not constitute an attempt. Some actus reus must be proved to have been done by the defendant directly connected with the offence. And, of course, mere intention to commit an offence, except in the case of high treason, is not an offence. But where the intent to commit a crime is manifested by any overt act the party may be indicted for attempt to commit that crime. **Comer v. Bloomfield** (supra) deals with the question of whether certain acts were sufficiently proximate

to the offence so as to constitute an attempt. We do not find that case to be of much help.

The case of **R v Masters** (supra) is on point. In that case Masters killed one L. who was a man of 75 years of age. Masters had gone to L. in order to borrow money, as he said. Instead of getting the loan he got a lecture as to his behaviour. When he did not get the loan, he had, according to his account, an urge to hit L. L's body was found subsequently with the head battered. The deceased's room was in complete disorder, but money remained in the house, e.g. in a coat and a wallet upstairs. Masters admitted ~~the homicide~~ but denied that it was in furtherance of theft. His case was that he never intended to steal the money, but panicked after the killing, and that the disorder found on the premises was due to the fact that he was trying to find bandages etc. to dab L's wounds. Masters was convicted of capital murder. On appeal against such conviction the Court of Criminal Appeal (Lord Parker C.J., Paull and Winn JJ.) held that a murder committed by a man at a time when he intended to steal, and in order to further that theft was capital murder, and the prosecution did not have to establish that a theft had actually been committed.

In **R v Jones** (supra) at 413 (B-E) Lord Parker C.J. described as perfectly correct the following summing-up of Lord Sorn in **H.M. Advocate v. Graham** (1958) S.L.T. 167 at page 169:

> "Now you have just heard it suggested to me by counsel for the defence that murder is only done in the course of theft if the man did it in order to get on with the theft after he had done the murder. I think that was the suggestion. I have only got to tell you that I do not agree with that. It is a question of what is meant by the course of a theft, and I think that the course of a theft is begun when perpetration is begun; that is to say that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime; and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away, not with the idea of going on, but with the idea of getting away, it still is murder done in course of theft. It would be, I think, somewhat ridiculous to suppose that Parliament has said 'We will make it capital murder if the householder wakes up and goes to interfere with a burglar and gets killed by a burglar who kills him in order to go on with his stealing, but we won't make it capital murder if the burglar murders him in order to run away'. I think it does not matter what he was going to do afterwards; or what he did afterwards; if he was in the course of theft and he did the killing, it is 'in course of' within the meaning of s. 5 of the Homicide Act; and I so direct you in law."

This court is clearly of the view that: "a murder committed by a man at a time when he intends to rob and in order to further that robbery is capital murder within the Act."

We must now turn to consider whether the directions of the learned judge were adequate. In this regard the judge told the jury (pages 257-258):

> "Now what is the charge? The charge is capital murder and the law defines capital murder as including any murder committed by a person in the course or furtherance – in the course or in the furtherance of a robbery. So, if whilst committing a robbery, the accused killed the deceased, then that would be capital murder. If the killing was done in connection with the robbery, that would be capital murder.
>
> You may ask why the gentleman is charged for capital murder when nobody has come and said he robbed him, but from the confession statement, as you heard mentioned, he himself, said "I tried to rob him and me cut him." Now, if you accept that you find that, this is true, then it would be in the furtherance or during the course of a robbery."

Later the judge further directed the jury as follows (p. 299):

> "If you find the accused guilty of murder you go on to consider whether he is guilty of capital murder. To find him guilty of capital murder, you must be satisfied that the murder was committed during the course of or in furtherance of robbery. If you are not sure whether this was during the course of robbery or in furtherance of robbery, then you would only consider the count of murder."

In the view of this court these directions are adequate. This ground therefore fails.

The second ground concerns the admissibility of the "Dying Declaration". It is necessary to refer to the relevant evidence.

The evidence of Ms. Daphne Lee, the mother of the deceased is that she saw the deceased in the Emergency Room at the hospital. He

had wounds "all over his face", and to his hands and chest. The deceased asked her to pray for him. According to Ms. Maria Smith when she was in the Emergency Room the deceased told her that it was "Bowla", (the appellant) who stabbed him. About 15 minutes later the deceased was taken to the X-ray Room. She went with him. The deceased was in the X-ray Room for about five minutes when according to Ms. Smith he became hysterical and told her that he did not think he was going to make it.

Dr. Ramesh Bhatt testified that on the 14th May he performed the post mortem examination. He observed: (i) an oblique laceration measuring 1.5 inches in length on the right side of the forehead above the eyebrow. He said he saw a linear abrasion extending from the lower end of the wound passing through the eyebrow, eyelid and the zygomatic region to the tip of the nose; (ii) a two-inch long oblique laceration on medial aspect of right forearm, just above the wrist and (iii) a stab wound injury to the chest. This wound was surgically interfered with. According to the doctor there was "evidence of repair of laceration to right ventricle of the heart and repair to the pericardium". It was the doctor's opinion that the instrument which pierced the chest also went through the heart.

The contention of Mr. Hines is that the learned trial judge erred in admitting into evidence as a "dying declaration", the deceased's

statement identifying the appellant as his assailant. He submitted that the fact that the declarant had asked for prayer suggested that he might have entertained some hope of recovery. Further, he submitted that in this regard it is important that the alleged declaration was made in the X-ray Room sometime before the declarant was taken back to the Emergency Room where he expressed his feelings. It is, he contends, from this express statement that the expectation of the declarant must be inferred. Therefore, he argued, at the time when the declaration was made the declarant did not have a settled hopeless expectation of imminent death.

Mr. Fraser, in reply, submitted that what took place in the Emergency Room should not be divorced from what took place in the X-ray Room. The evidence, he said, indicates that a period of 15-20 minutes elapsed from when the deceased was taken from the Emergency Room, to the X-ray Room and returned to the Emergency Room.

The request for prayer by the deceased when he was in the Emergency Room, in that context could only mean that he had a settled hopeless expectation of death. His statement in the X-ray Room that he was not going to make it was further evidence of that expectation of death, he contended.

We agree with Mr. Fraser that the declaration made between the request for prayer and the expression of feelings by the deceased was clearly admissible as a declaration made in extremity. The victim's serious injuries would have dominated his thoughts. The possibility of concoction or distortion could be disregarded. The learned trial judge was therefore correct in receiving the statement in evidence.

Alternatively, Mr. Fraser submitted that the statement was correctly admitted as the law governing dying declaration should now be examined against the analogy of **Ratten v.R.** (1971) 3 All ER 801, 1972 A.C. 378 and **R.v. Andrews** (1987) 1 All ER 513, (1987) A.C. 281. Those cases on res gestae reflect the modern approach where the emphasis is on the probative value of the evidence rather than on the uncertain test of whether the making of the statement was part of the event or transaction. In **Mills and Others v.R.** (1995) 3 All ER 865 (pages 875-6) their Lordships expressed the view that a re-examination of the requirements governing dying declarations against the analogy of **Ratten v.R.** and **R.v. Andrews** may permit those requirements to be stated in a more flexible form. However their Lordships stated that how far such a relaxation should go would be a complex problem and that such a development would only be prudent in light of a detailed analysis of the merits and demerits of such a course. We did not have the benefit of full arguments on this aspect. In any event it is not

necessary for this court to embark on such a course to dispose of the complaint in this ground by the appellant.

The fourth ground concerns the confession statement which according to the prosecution the appellant made after he was cautioned.

In directing the jury, the learned judge said (p. 268):

> "The method by which the confession was made may have an important bearing on the question of its truth. Now a statement made in consequence of violence or some other powerful inducement is less likely to be true than one, which is given freely. So, too where a confession is obtained by oppression, to render it involuntary it must be shown that it was obtained in circumstances which tend to sap and did sap the freewill of the accused.
>
> So Mr. Foreman and members of the jury, you must take into account all the circumstances in which the confession was made, including allegations of force, if you think they may be true, in assessing the probative value of the confession. If for whatever reason you are not sure whether the confession was made or was true, then you must disregard it. If on the other hand, you are sure both that the confession was made and is true, you may rely on it even if it was or may have been made as a result of oppression or other improper circumstances. So once you believe it is true, it was made, the confession was made and it is true, even if you think that it was obtained by oppression, or improper motives, you may rely on it, because it is the truth that you are seeking."

Counsel for the appellant complains that the above direction must have been confusing to the jury in that the learned trial judge

having told them that where a confession is obtained by oppression, to render it involuntary it must be shown that it was obtained in circumstances which tend to sap the will of the accused, in the same breath told them that if they believe the confession was made and is true even if they think it was obtained by oppression they may rely on it. We do not think there is any merit in this complaint. The impugned direction must be seen in the context of the direction earlier given at page 267:

> " A confession cannot be used as evidence against an accused person unless it is free and voluntary, that is to say, it must not have been extracted or induced by any sort of threat or obtained by any promise of favour nor by the exertion of force or any improper influence. The burden is on the prosecution to prove that the statement was free and voluntary. So there are certain conditions set before you can accept the statement. It must be free and it must be voluntary. You must decide whether or not the statement was made, and if so, was it free and voluntary? If your answer is yes, then you go on to consider what it means and what weight and value should be attached to it. If you can be induced to think that the confession was obtained but by some threat or beating its value must be inordinately weak."

In an unsworn statement the appellant said that he had told the police that he knew nothing about the murder. However he was beaten, threatened and forced to sign a statement. In his own words: "I could not tek di beating no more and I feel thirsty and hungry. That's the reason why I signed my name on the paper M'Lord" (p. 249). Thus, the

voluntariness of the statement as well as its authorship was challenged. In the context of this challenge the direction of the learned trial judge was absolutely correct, abundantly fair and unobjectionable. The learned judge followed the settled principles of law – see **R.v. Grant** 23 W.I.R. 132 and **R.v. Taylor et al** 30 JLR 100.

Counsel for the appellant further complains that the confession was taken in breach of the Judges' Rules in that no effort was made to obtain an attorney-at-law or a Justice of the Peace. We also see no merit in this complaint. The Judges' Rules are not rules of law but only rules for the guidance of the police. It is in the discretion of the judge to exclude a statement obtained in breach of the Rules. There is no complaint that the appellant was denied the opportunity to consult with an attorney. The learned trial judge addressed all the issues raised at the voir dire in exercising his discretion whether to admit the statement. Counsel for the appellant was unable to satisfy this court that the learned trial judge should or might reasonably have excluded it on the ground of unfairness. Accordingly this ground also fails.

Finally, counsel for the appellant complained that the judge erred in not leaving manslaughter for the jury's consideration on the basis of lack of the requisite intention. Mr. Hines argued that the appellant's statement to the police after he was charged and cautioned – "boss me never mean fi cut him..." – was sufficient evidence of the lack of intention

to kill or cause grievous bodily harm. On that basis, he argued, the trial judge should have directed the jury that they should consider all the evidence and having done so they should determine whether or not there was an intention to kill or cause grievous bodily harm. If they concluded that he lacked the specific intent he could not be guilty of murder but manslaughter.

Mr. Fraser for the Crown submitted with force that the evidence of lack of intent was so extremely tenuous that it did not cross the threshold of credibility so as to require the judge to leave it to the jury to consider whether it reduced murder to manslaughter. In the context of the medical evidence of a stab wound to the chest to speak of lack of intent was fanciful and unrealistic, he contended. The judge was correct in not leaving manslaughter, he urged. Counsel for the Crown referred to **Evans Xavier v. The State** Privy Council Appeal No. 59 of 1997 (unreported) 17th December, 1998, and **Alexander Von Starck v. The Queen** Privy Council Appeal No. 22 of 1991 (unreported) 28th February, 2000.

In **Xavier v. The State** the charge was murder. The prosecution relied on a caution statement made by "X" and on an eyewitness. In the statement "X" admitted robbing the deceased but said, "I hit him with the gun. I hear something like the gun go off. I did not pull the trigger." The principal eyewitness for the prosecution testified that she saw "X" with a gun in each hand. She saw him go behind the deceased while the

other man searched his pockets. She heard a bang and saw blood coming from the victim's head. The medical evidence on post mortem was that the gun was fired from within 12 inches of the head with the gun pointing upwards from the back of the head forwards. "X's" defence was an alibi. The judge told the jury that there were only two verdicts open to them, guilty of murder or not guilty. The sole ground argued before their Lordships' Board was that the trial judge did not refer in his summing up to a possible defence of accident. Accordingly, their Lordships were asked to substitute a verdict of manslaughter. It was their Lordships' view that if accident was open on ~~the evidence the judge~~ ought to have left the jury with the alternative of manslaughter. Their Lordships, however, held that the explanation given by "X" in his statement was wholly incredible. There was nothing whatever to support the theory that the gun went off accidentally when "X" used the gun to hit the deceased, more especially as the direction of aim was upwards. If on the other hand "X" had hit the deceased on the head with a downward movement of the barrel the shot would have missed the deceased altogether. Their Lordships regarded the explanation given by "X" in the statement, which was not supported by the only eyewitness, as fanciful and unrealistic. To have left the alternative verdict of manslaughter would only have served to confuse the jury as in **Fazal Mohammed v The State** (1990) 2 A.C. 320.

In the instant case the prosecution relied on the statement of the appellant in which he said "mi never mean fi cut him." This is sufficient evidence to raise the defence of lack of intention to kill or cause grievous bodily harm. What is important is the actual intention of the appellant. This must be viewed subjectively. The jury must be sure that the accused intended to kill or to cause grievous bodily harm before they may return a verdict of murder. They can only decide what his intention was by considering all the relevant circumstances and in particular what he did and what he said about it. The prosecution in the present case had no eyewitness. Is the medical ~~evidence of the stab~~ wound on post mortem such as to render the appellant's statement as to his intention wholly incredible? We think not. The threshold of credibility is a low one: see **Evan Xavier v. the State** (supra). We think that the threshold was reached. The judge ought to have left it to the jury to decide whether in light of all the circumstances and in particular the medical evidence they could be sure that the appellant had the requisite intent. It seems to us that normally, where there is evidence of the expressed intention of an accused person to do or not to do something it is the duty of the trial judge to leave the consequences of such intention or lack of intention for the consideration of the jury, with of course the proper directions.

The learned trial judge should have followed up his impeccable direction to the jury on intention by leaving the alternative verdict of

manslaughter to the jury based on the appellant's alleged mixed statement.

No doubt, the learned trial judge had in mind the decision of this Court in **Rv. Trevor Lawrence** (1989) 26 JLR 273. In that case this Court per Gordon, J.A. said (p. 280):

> "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 exculpatory aspect placed before the jury."

The cases referred to in the above extract are **R.v. McGann** SCCA No. 70 of 1987 (unreported) 30th May, 1988 and **R.v. Prince** SCCA No. 31 of 1983 (unreported), 14th October, 1985. However, in **Alexander Von Starck v. The Queen** (supra) their Lordships were clearly of the view that the approach of this Court as reflected in the above cases was incorrect. In addressing the function and responsibility of a trial judge, their Lordships said (pp 6-7):

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have

been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognized in ***Xavier v. The State*** (unreported, 17th December 1998; Appeal No. 59 of 1997, a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In **Xavier** the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that 'If accident was open on the evidence, then the judge ought to have left the jury with the

> alternative of manslaughter.' In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and the alternative should have been left to the jury."

In voicing their disapproval of the approach of this Court in respect of mixed statements their Lordships expressed themselves thus (pp7-8):

> "The approach adopted by the Court of Appeal restricts the judge's responsibility and the scope of the jury's considerations to the particular issues upon which the parties chose to found their submissions. Such a restriction is inconsistent with his duty to secure that a just result is obtained in the whole circumstances disclosed in the evidence. The principle which was identified in ***Lawrence*** relates to a denial of the contents of the earlier mixed statement. In the present case it is by no means certain that the appellant denied the contents of his earlier statements. But even if he had, the principle, if it was correct, would operate to exclude from the consideration of the jury one of two inconsistent lines of defence for each of which there was evidence in support, such as an alibi and a plea of self-defence. That cannot be correct. The principle penalises a defendant who departs in his evidence from an account and explanation which he has earlier given in a way which seems to their Lordships to be contrary to the achieving of a just result. With reference in particular to what was said in **McGann** the issues in a criminal trial fall to be identified in light of the whole evidence led before the jury. An issue, such as a line of defence, may well be raised by the admission of a mixed statement. Nor is it easy to understand how an exculpatory part of a mixed statement can be excluded and still retain significance sufficient to emphasise the necessity

> for the prosecution to prove the essential ingredient in its case which the exculpatory element sought to qualify.

Conclusion

The learned trial judge ought to have left the possibility of a verdict of manslaughter to the jury based on the alleged statement of the appellant that he did not "mean to cut " the deceased. His failure to do so deprived the appellant of the chance of being convicted for the lesser offence.

We have treated the application for leave as the hearing of the appeal. The appeal is allowed, a conviction for manslaughter is substituted for that of murder.

The court was told that the appellant was born on the 24th December, 1977 that would make him 19 years of age at the time of the offence. He has no previous conviction. He has been in custody since the 28th January, 1998.

In view of the seriousness of the offence we think a long term of imprisonment is appropriate. The sentence of this Court is that the appellant be imprisoned for 20 years with hard labour. The sentence is to commence on the 14th September, 2001.