JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL Nos: 75,83 & 92/1999

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag)

SHAMAR LINDO, ERALDO LINDO
AND IVY PRYCE
VS
REGINA

Randolph L. Williams for the Appellants

Miss Paula Llewellyn, Acting Senior Director of Public Prosecutions and Ms Rochelle Cameron for the Crown

June 18 and November 15, 2001

SMITH, J A (Ag):

At the trial of the applicants for murder on the 23rd March 1999, in the Circuit Court for the parish of Clarendon, the appellant Shamar Lindo was convicted of murder and the appellants Eraldo Lindo and Ivy Pryce were convicted of manslaughter. They were sentenced to life imprisonment, 3 years imprisonment suspended for 2 years, and 2 years imprisonment suspended for 2 years, respectively. Their applications for leave to appeal were refused by the judge in chambers.

The said applications came before this Court on the 18th June 2001. We treated the hearing of the applications as the hearing of the appeals. At the conclusion of the hearing we gave the following judgments:

(i) The appeals of Eraldo Lindo and Ivy Pryce allowed. Convictions quashed and sentences set aside, judgment and verdicts of acquittal entered.

(ii) The appeal of Shamar Lindo against conviction for murder allowed. Conviction quashed and sentence set aside. Verdict, guilty of manslaughter substituted. Sentence of 6 years imprisonment at hard labour imposed to commence on the 23rd June 1999.

We then promised to put our reasons in writing at a later date. This we now do.

The appellants Eraldo Lindo alias Mass Champy and Ivy Pryce o/c Barbara are common-law husband and wife. The appellant Shamar Lindo o/c Captain is their son. For convenience we will hereafter refer to the appellants and their off-springs by their first names.

Eraldo and Ivy lived with their children Shamar, Terry, Maureen, close to the beach at Rocky Point in the parish of Clarendon. Eraldo was a fisherman and so was his son Shamar. The deceased Garth Thompson was also a fisherman, he lived in the same yard as his mother Lena Powell also at Rocky Point near the beach. In this yard there are two houses. The deceased lived in one. At the west end of the beach is a shop.

On the 5th January 1998, as is the custom in most rural districts, people had assembled at the shop. Among them were Terry and the deceased Garth Thompson. There was an altercation between Terry and Garth over the distribution of money which the latter had received from visitors for the provision of cooked fish and the washing of cars. For the purposes of this exercise it is only necessary to state that this altercation led to the deceased fatally stabbing Terry.

The Crown's case is that the acts of the appellants which resulted in the death of Garth Thompson were retaliatory. The main witness for the prosecution was Miss Lena Powell, a higgler and, as said before, the mother of the deceased, Garth. Miss Powell testified that she was returning home from the shop. As she walked along a track, she heard a voice. She saw Captain i.e. Shamar with a spear gun pointing towards Garth's house. Shamar, she said, flung a stone into the glass window of Garth's house. She asked him why he did that. He did not answer but Barbara i.e. Ms Ivy Pryce replied: "Yuh nuh see what Garth do to Terry?" She said that Ivy went to the door and attempted to push it open and Mass Champy (Eraldo) went to assist her. Shanni (Maureen) was at that time in the yard under a coconut tree. Ms. Ivy and Eraldo pushed the door open. She saw Garth in the house, clad only in underpants. Eraldo held unto Garth's underpants, Ms Ivy held his arm, and together they pulled him out of the house. Maureen gave Miss Ivy two stones. The witness then said:

> "The underpants that him have on burst and him (Eraldo) held underneath here so, on him seed. Miss Ivy hit him all over his body with stone. Maureen also hit Garth with a stone and ran off. During this time, Shamar was still standing in the yard with the spear gun."

The witness said that Garth called out to her and she asked them: "unou ago kill him?" It is the evidence of Miss Powell that a son of Ms. Ivy called "Fire" went up to his mother saying: "Mother unou a go kill him," and thereupon took her away. She went willingly. Eraldo let go of the deceased and also left the yard. Only the deceased and Shamar were left. The deceased staggered to his feet. She testified that Shamar pointed the spear at him

and fired it into his left breast. The deceased held the spear, ran off, dragged it from his chest and then fell in the yard of a neighbour.

On the 14th January 1998, Dr Victor Lindo a registered medical practitioner performed a post mortem examination on the body of Garth Thompson. He observed a penetrating wound on the thorax anterior to the left near the midline medial to the left nipple. The wound penetrated between the left thorax cartilages and entered the pericardium over the centre of the heart. In his opinion the cause of death was a puncture wound of the heart.

Detective Sgt. Garrick testified that he told Shamar that it was reported to him that he, Shamar, had used a spear gun to shoot Garth Thompson. He cautioned him and Shamar said: "a defend me defend myself."

At the end of the prosecution's case the learned trial judge upheld a no-case submission made on behalf of Maureen. However, no-case submissions made on behalf of the appellants were rejected. All three appellants made unsworn statements.

Shamar told the Court that he was 17 years of age- he was born on 2nd May 1981. At the time of the incident he had just returned from sea. He saw Garth Thompson stab his brother Terrence in the neck with a knife. He, the appellant, flung a stone at Garth and ran. Garth chased him and flung stones at him. Shortly after whilst the appellant Shamar was going home he saw Garth coming out of a yard with a bottle and a knife in his hands. Garth shouted to him: "Hey boy, Captain, mi a go kill you too." Garth threw

stones at him and he returned the stoning. He warned: "Garth keep off a mi. Garth keep off a mi." He said Garth's reply was that: "mi fi go suck mi mumma him a go kill me." He again told Garth to: "keep off". Garth advanced towards him with a bottle and a knife as he moved backwards. His statement continued:

> "Same time mi lift up the spear gun and seh keep off a mi Garth keep off a mi and same time mi hear the people them seh him get shot."

He said he dropped the spear gun and ran. Garth picked up the spear gun and chased him. He ran into his house and locked the door. Garth turned back and then fell.

Eraldo Lindo in his statement told the Court that on the day of the incident he saw Terry Lindo coming from behind the shop on the beach with blood "spewing" from his neck. He then saw Garth and Shamar stoning each other. He went up to Garth and asked him: "You a go kill Captain like how you kill Terrence Lindo?" He said Garth rushed at him with a stone and a knife in his hands. They grappled and fell. Someone came to his (Eraldo's) assistance and Garth turned towards Shamar with a knife and a bottle. Shamar backed away and kept moving backwards as Garth advanced on him. He said he heard Shamar saying "keep off mi Garth keep off a mi." Then according to him,

> "all of a sudden the spear gun go off and it hit Garth in his stomach; and him muscle up and draw the spear gun out of his chest and held it up in his hand and start to run down Shamar."

Miss Ivy Pryce in her statement said she was a fish vendor and was on the beach that day. She spent much time in denigrating the deceased Garth

and in describing the incident between Garth and her deceased son Terry. She repeated Shamar's account as to what took place between Garth and himself. She told the court of Ms. Lena Powell's reluctance to assist her son (Garth) as he lay on the ground mortally wounded. Implicit in her statement is that she had no physical contact with the deceased Garth Thompson and was in no way involved in his death. At the end of the summing up, the learned trial judge withdrew murder from the jury in respect of Eraldo and Ms Ivy and left manslaughter only for their consideration.

Grounds of Appeal – Shamar Lindo

Dr. Randolph Williams sought and obtained leave to argue the following grounds on behalf of the appellant Shamar Lindo:

> **(1)** The directions of the learned trial judge on voluntary manslaughter were inadequate and confusing to the jury. (Transcript pp 124-126)
>
> **(2)** The learned trial judge misdirected the jury on the evidence and did not adequately assist the jury in identifying acts and words capable of amounting to provocation (p. 125 line 15 to p. 126 line 14).

Counsel for the appellant submitted that the inadequacy complained of related both to the directions on the law applicable and to the review of provocative conduct. It was the contention of counsel that the learned trial judge did not make it clear to the jury that the appellant could not be found guilty of murder if the killing was done under provocation. Counsel complained of the combined effect of the following directions. At page 124 of the transcript the learned judge said:

> "So in considering provocation ... you will have to consider whether that act was a deliberate act and if you find it was a deliberate act which in your view amounts to murder you must go on to consider provocation ..."

At page 125 he told the jury:

> "Provocation only operates in the context where you find the ingredients of a murder are there and established."

However at page 149 the following passage appears:

> "Only if you consider that the elements of murder were not proved that you go on to consider the provocation of manslaughter."

Dr. Williams contended that these directions constitute errors of law. The learned trial judge spent some time defining and explaining provocation. He made it abundantly clear to the jury that provocation reduces murder to manslaughter. At p. 126 he told them:

> "Because if you are left in any doubt as to whether there was provocation, depending on what weight you give to the unsworn statement of each or any of the defendants if you are left in doubt, you must say that there was provocation that reduces murder to manslaughter."

The passage complained of at p. 125, was a repeat of directions which the learned trial judge had earlier given at p. 124 just before he gave the directions complained of at p. 124.

In the directions at p. 125 (supra) the learned trial judge omitted the word "other" before "ingredients." However when one examines the directions on provocation as a whole, the jury would have been left in no doubt that before they could consider the issue of provocation they must be

sure that all the other elements of murder were present including the necessary intent.

In the directions which appear at p.149 the presence of the word "not" suggests either an innocuous slip by the judge or a mistake by the court reporters. The learned trial judge was merely repeating directions previously given on at least two occasions without the word "not". Indeed at p. 148 line 22 to p. 149 line 3, the learned trial judge expressed himself in this way:

> "But if you consider the ingredients are established and that he was not acting in self-defence, you have to go on and consider the question of manslaughter arising in the act of retaliation to a provocative act or acts or words and acts taken together or circumstances in their entirety whether or not that provocative act led to retaliation that you heard described."

If it were a slip by the judge this would not have escaped the jury. We are firmly of the view that the jury would not have been misled by such an obvious slip of the tongue. The jury were clearly made to understand that if they concluded either that the appellant was or that he might have been provoked, then he would not be guilty of murder but guilty of the less serious offence of manslaughter.

It was also the contention of counsel for the appellant Shamar Lindo that the learned trial judge misdirected the jury on the evidence and did not draw their attention to the specific acts capable of being provocative conduct. The appellant in his unsworn statement said he saw the deceased Garth stab his brother Terry. The learned trial judge gave the following direction (p. 125):

> "Now there is no doubt the circumstances of the death of Shamar's brother and clearly you remember he said - the evidence is that he was coming from sea. The knowledge of it, which would no doubt spread through the small village like wild fire would come to the ears of everybody ... So if he hears that his brother is killed in those circumstances, what constitutes the act towards his brother would be clearly matters for your consideration and you ask yourselves: Was knowledge of that sufficient to cause in Shamar a temporary loss of self control?"

Thus the learned trial judge left second-hand information of the stabbing rather than the fact of the actual witnessing of the stabbing as an act capable of amounting to provocative conduct. However in reviewing the appellant's case the learned trial judge correctly told the jury that the appellant said that he saw Garth stab his brother.

To have any effect a mis-statement of the evidence must be such as to make it reasonably probable that the jury would not have returned their verdict of guilt if there had been no mis-statement: See ***R v Wright*** 58 Cr. App. R. 444. We cannot say that this mis-statement by itself would have affected the verdict of the jury. But this is not all. The learned trial judge failed to indicate to the jury other specific "acts" capable of amounting to provocative conduct. For example the appellant said the deceased told him he was going to kill him and told him to suck his mother. Miss Llewellyn with great candour concedes that the statement of the appellant Shamar embraces at least three such "acts" which should have been brought more intimately to the jury's mind. We agree entirely. In effect, therefore, provocation was not adequately left to the jury. The Court was not sure that

if it was done the jury would inevitably have convicted of murder. Accordingly, a conviction for manslaughter was substituted.

Eraldo Lindo and Ivy Pryce

Counsel for the appellants was granted leave to argue the following supplementary grounds:

(1) The learned trial judge did not adequately relate the directions on common design to the evidence. He did not direct the jury on the significance of the evidence that the two applicants were not present when the deceased was stabbed and there was no evidence of any pre arranged plan with the assailant.

(2) The learned trial judge erred in not upholding the no case submission made on behalf of the two applicants. The circumstances of their presence at the house of the deceased did not point inescapably to the conclusion that there was a common design with the assailant. When the two applicants left the scene the deceased was alive and was stabbed subsequently in their absence.

The Evidence

The evidence against these two appellants came from Miss Lena Powell. She was on the way home walking along a track when she saw the appellants at the home of the deceased. Her house and that of the appellant, Miss Ivy Pryce, are situated in a yard off this track. She did not know how they got there. She could not say that they went there together. She had earlier seen the dead body of Terry on the track. She saw Shamar in the yard with a spear gun pointing at the deceased's house. The appellant, Eraldo Lindo was at the door of the deceased's house. The

appellant Miss Ivy, was in the yard with Shanni. Then Shamar flung a stone through the glass window. She asked him "why him a lick on the glass on the glass window, what the house do him, him a lick it down?" Shamar did not answer. Ms Ivy answered:

> "You nuh see whey Garth do Terry out deh so. You nuh si whey Garth do Terry?"

Then Miss Ivy went to the deceased's house and together with Eraldo pushed the door open. They pulled out the deceased and began to beat him. The deceased called out "Auntie Lena!" The witness cautioned: "Onnu cool and easy nuh." Then "Fire" (Ms Ivy's son) took his mother away. Eraldo released the deceased and also left. It was after they had left that, according to the witness, Shamar speared the deceased.

Withdrawal

A secondary party may be able to escape liability for aiding and abetting an offence if he makes an effective withdrawal before the offence is actually committed. The authorities do not seem to define closely what must be done in criminal cases involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend on the circumstances of each case. What is clear however is that where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to withdraw to those who wish to continue. What is timely communication must be determined by the facts of each case. However such communication must serve an unequivocal notice upon the other party to the common unlawful purpose that if he proceeds he does so on his own: See ***R v Whitehouse***

(1941) 1 WLR 112 and ***R v Becerra and Cooper*** 62 Cr. App. R. 212. It seems that in this regard a distinction must be made between a person who was a party to a joint criminal enterprise and a party who gave unsolicited assistance to the principal.

In ***R v Perman*** (1996) 1 Cr. App. R. 24 the Court of Appeal (England) expressed doubts as to whether a party to a joint criminal enterprise could effectively withdraw therefrom once the criminal activity had commenced. Where there was no joint enterprise and the secondary party only gave unsolicited assistance the measures necessary to absolve him from liability as an accessory will vary according to what assistance, encouragement, etc he had given. In ***Becerra and Cooper*** (supra) the appellants had been convicted of murder committed during the course of a burglary. ***Becerra*** had provided the knife to ***Cooper*** just before the killing. The Court of Appeal held that ***Becerra's*** sudden departure from the scene with the words "come on, lets go" when surprised by the victim was not sufficient to amount to an effective communication of withdrawal. In such a case it would seem likely that the only effective withdrawal would be physical intervention to prevent the committing of the crime. In the instant case there is no cogent evidence of a pre-arranged plan to murder or inflict injury to the deceased. When the appellant Ivy was warned that her action might cause serious injury she unhesitatingly left with her son "Fire." The appellant Eraldo, shortly thereafter followed. They did not provide the spear gun to Shamar. No words of encouragement were uttered by them. All these are factors for the jury to take into consideration in deciding whether or not their departure

from the scene amounted to an effective withdrawal in the particular circumstances. This called for a careful direction to the jury. It was a difficult case. The learned trial judge took murder from the jury in respect of these appellants. The jury was asked to consider whether or not they were guilty of manslaughter. In leaving manslaughter for their consideration the learned judge told them (p. 117):

> "Of course if you find that they were there to do harm to him and it is the sort of harm even though not serious harm but that death of the deceased arose from the harm that they were doing even though you might find that one went a little further, even if you find that it would be open to you to find that they are guilty of something less than murder, that would be manslaughter."

Later on the learned trial judge revisited the issue (p. 149):

> "And of course you have to consider the circumstances, in fact, the highest you could ever if you consider those participation, the highest you consider the conduct of the other two accused, notwithstanding, I hardly see how you could consider it any higher that's Eraldo and Ivy Pryce."

This we think is not adequate. We are of the view that the learned trial judge should have gone on to direct the jury that it was for them to decide whether the acts of these appellants as described by the witness, if they accept the witness' evidence were committed pursuant to a joint enterprise involving the principal i.e. Shamar. And if their acts were not so committed, then "joint enterprise" could not provide a basis for the finding of guilt against them for they would not have participated in the criminal acts of the principal: See ***R v Heather Stewart and Barry Schofield*** (1995) 1 Cr. App. R. 441. The importance of this direction is borne out by the fact that

the judge left the issue of provocation in respect of the principal to the jury. In our view the fact that the judge was obliged to leave for the consideration of the jury the issue as to whether or not Shamar was or might have been provoked to kill, indicates that the criminal act of the principal might not have been done pursuant to a joint enterprise. The provocation might well have been "an overwhelming supervening event relegating into history matters which would otherwise be looked upon as causative factors."

It would therefore be incumbent upon the judge to direct the jury along the line that in the event they found Shamar guilty of manslaughter on account of provocation then joint enterprise could not provide a basis for the conviction of the appellants Eraldo and Miss Ivy. In a fair attempt to deal with this difficult situation the learned trial judge gave the following direction (P. 149—150):

> "So I will leave to you manslaughter if there was any joint enterprise or was it the actions that culminated in the death but of course you must remember too, bearing in mind the conduct of Eraldo and Ms Pryce whether there was a separation of these hostilities and then this man (Shamar) go on to do something deliberately or be involved otherwise. Because you might find there is such a consideration of the part played by Eraldo and Miss Pryce as not to warrant this consideration in the context as to what happened to Shamar and Garth afterwards. So you consider that."

We think that this direction was not adequately specific on the defence of withdrawal which arose on the Crown's case and the appellants' defence that they were not parties to the act which caused the death of Garth Thompson. The appellants were entitled to be acquitted if the jury were not sure that they were parties to the act which caused the death of Garth. The

learned trial judge ought to have made it abundantly clear to the jury that the mere presence of the appellants in the yard was not enough to make them parties to the crime. The learned trial judge ought to have directed the jury along the line that if they accepted the evidence of Ms Lena Powell that the appellants Eraldo and Miss Ivy pulled the deceased from his house and beat him they should then go on to decide whether those acts were committed in the course of carrying out a joint enterprise with the principal – Shamar. If the acts were not so committed then joint enterprise could not provide a basis for a finding of guilt against them.

Further the jury should have been told that if they should conclude that the appellants were giving unsolicited assistance to the principal and had effectively withdrawn before the offence was actually committed, they would not be responsible for the act of the principal and should be acquitted. These non-directions on the part of the learned trial judge, we think deprive the appellants of a reasonable chance of acquittal and accordingly we made the orders referred to at the outset.