IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 66 & 67/96

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)

REGINA
vs.
PATRICK ORMSBY
LEROY LAMEY

L. Jack Hines and Miss D. Alleyne for Ormsby

Ravi! Golding for Jamey

Hugh Wildman, Deputy Director of Public Prosecutions,
and Valerie Stephens for the Crown

December 16. 17 & 18 1996 and February 19. 1997

PATTERSON, J.A.:

At a trial in the Circuit Court Division of the Gun Court at Kingston, these two applicants were convicted on the 16th May, 1996, of the capital murder of Shawn Donaldson in the course or furtherance of an act of terrorism. They were both sentenced to death. Our judgment on their applications for leave to appeal against conviction and sentence follows.

Both applicants had been tried and convicted previously of the murder of Shawn Donaldson. The principal witness at that trial was one Christopher Smikie. Without his evidence, the prosecution would not have been able to

proceed to trial and conviction. However, their convictions were quashed by this court but in the interest of justice, a new trial was ordered. Before the case came on for re-trial, the witness Christopher Smikle died. At the re-trial, the prosecution established his death and the fact that he had testified at the previous trial, and then applied to the court for the transcript of his evidence to be admitted in evidence and read. Both defending counsel objected to the application, but the learned judge, in the exercise of his discretion, granted the application and allowed the transcript of the evidence to be admitted and read to the jury. That was the only evidence which the prosecution relied on to identify and connect the applicants with the murder. Before us, both defending counsel contended that the learned judge wrongly exercised his discretion in admitting the transcript of evidence. Ground 3 filed by Mr. Hines reads as follows:

> **"3.** The learned trial judge erred in admitting the transcript of the first trial in that the discrepancies between the deposition of the now deceased witness Smikle at the Preliminary Enquiry; his statement to the officer Thompson and his evidence at the first trial giving different roles to different accused on different occasions of his narratives posited the fact that he was not an honest witness and was unreliable. This was unfair to the accused as the jury could not exercise fair judgment in the absence of the witness."

Ground 1 filed by Mr. Golding reads as follows:

> "1. The learned trial judge wrongly exercised his discretion in admitting into evidence the transcript of the evidence of the witness Christopher Smikle."

It is convenient to consider those grounds together. The evidence contained in the transcript follows: Christopher Smikle lived in Arnett Gardens. At about 9:30 a.m. on the 16th July, 1992, he, along with the deceased and two other persons, were sitting on a wall at premises on Thompson Street in Arnett Gardens. A lady said something and he then noticed three men with guns on Thompson Street, about a chain off, walking towards him. He recognised the men to be "Ninja", "Speedy" and "Radcliffe". He pointed out the applicant Leroy Lamey as the person he knew as "Ninja" and the applicant Patrick Ormsby as "Speedy". He said Lamey and Ormsby had handguns, while "Radcliffe" had a M16 rifle. Lamey then started firing shots in the direction of Septimus Street which intersects Thompson Street. At that time he did not know what Ormsby was doing as he could not see him. Before the men came closer he, the deceased, and the other two men ran from off the wall on which they were sitting and went underneath the cellar of the house on the premises. He looked through an opening in a zinc fence onto Thompson Street and saw "Radcliffe" leaning on the wall from which he had run, pointing his gun at a lady. He saw Lamey "firing the shot same way" and Ormsby talking to Lamey. The deceased then ran from underneath the cellar and jumped over a fence into the adjoining premises. Shots were still being fired. He saw Lamey with his hand on the wall pointing the gun in the deceased's direction, and then he did not see anybody again. When the firing ceased, he did not see Ormsby. He heard talking, and he came from underneath the cellar. By then, a crowd had gathered on the road some way off. He went to the gate of the third house

away from where he was, and he saw the deceased "lean back on a step." Blood was flowing from his side. The deceased was taken to the Kingston Public Hospital where he died.

Smikle said he had known Lamey for about two years prior to that morning. He would see him about once per week but he last saw him about a month before the incident. He knew that Lamey lived in Angola, a section of the Arnett Gardens community, and he had spoken to him from time to time. As to Ormsby, he knew him for about four years. Ormsby lived at Jungle Top in Arnett Gardens and he would see him daily, but "from the war start I don't see him again." He said the war was between Angola and "Beebow man dem." That completed the examination-in-chief of the witness.

In cross-examination, the witness admitted that he "did not actually see Shawn get shot" nor did he see him fall to the ground. The cellar that he went underneath was about three feet high. He did not see "Radcliffe" firing any shots. He admitted that he was "just a lowly" member of the "Beebow" gang, and that Lamey's presence would not be welcomed by members of the "Beebow" gang.

A number of previous inconsistent statements were put to the witness, and when he denied making them, they were admitted in evidence. His deposition at the preliminary enquiry recorded him as saying, "The direction that the accused was shooting from, it was his shot that caught Shawn. I saw when Shawn fell to the ground". "The accused" there means Ormsby, since he was the only person before the court then; Lamey had not yet been arrested. So,

firstly, the witness was saying it was Ormsby who was firing shots, and that it was Ormsby who fired the fatal shot. Secondly, that he saw Shawn fall to the ground. This was undoubtedly inconsistent with his evidence at the trial, and the credibility of the witness must have been brought under close scrutiny. It was further put to him that when he gave a statement to Constable Thompson on the very day of the incident, he told him this: "Radcliffe had a big gun. He said aloud, 'Ds a di policeman gun, bway.' I then saw him fire a lot of shots." Here, again, is another serious inconsistency, since his evidence was that he did not see "Radcliffe" firing any shots. A third inconsistency was put to the witness. The depositions recorded him as saying, "I was standing behind a wall in the yard when I heard the explosions." He testified that he was stooping behind a wall underneath the cellar when he heard explosions. He was never standing behind any wall out in the yard when the shots were fired. This inconsistency had the effect of casting further doubt on the reliability and credibility of the witness, and consequently, weakening the quality of the evidence. But those previous inconsistent statements were admitted in evidence only because the witness did not admit making them. He was not an educated man, and it would be the duty of the jury to consider the apparent contradictions in the light of the witness' intelligence and his denial that he made them.

It was suggested that there was an obvious lacuna in the prosecution's case, which the testimony of the witness did not fill. In our view, it is clear that the prosecution could not say who it was that actually shot the deceased. There was no direct evidence in that regard, and so they must look to inferential

evidence. But inferences can only be drawn from proved facts. In the instant case, since the prosecution rested its case on the testimony of this witness alone, the learned trial judge was obliged to consider whether there were sufficiently proved facts from which the jury could infer that it was the applicants who killed the deceased. There was evidence that Lamey was seen firing shots in the direction of Septimus Street while the deceased was sitting on the wall in Thompson Street. The witness did not say that Lamey was firing in the direction of the deceased at that time. While the witness and the deceased were underneath the cellar, Lamey was "firing the shot same way." It seems that the only reasonable inference that could be drawn from that fact is that Lamey's shots were still directed towards Septimus Street. After the deceased ran from underneath the cellar, he jumped over a fence into the adjoining premises. Shots were still being fired, and Lamey was seen with his hand on the wall pointing the gun in the direction where the deceased ran. The deceased was seen sometime after, suffering from a gunshot wound. It seems that there were enough proved facts to be left to the jury for them to say whether the inescapable inference was that Lamey shot the deceased or, indeed, that one of the three men shot him. Of course, in deciding that issue, the jury would have to take into consideration the inconsistencies in the testimony of the witness.

The evidence against Ormsby was that he came along with Lamey. He was also displaying his gun. While Lamey was firing shots, Ormsby was talking to him. After the firing ceased, both men left the scene; they were not seen again. Although the witness said he did not see Ormsby firing any shots, in our view, his

presence was not accidental, and there was sufficient evidence to be left to the jury for them to say whether or not both applicants were acting in concert and if the killing of the deceased was part and parcel of a joint enterprise. Here again, the jury would be obliged to consider the inconsistencies brought out in the cross-examination of the witness.

There can be no doubt that at a re-trial the learned trial judge has a discretion to admit in evidence the transcript of the testimony of a deceased witness given at the previous trial. He also has the power to exclude such evidence if he considers it would be unfair to the accused to admit it. However, as was said by Lord Griffiths in ***Scott it Walters v. R.*** [1989] 37 W.I.R. 330 (at 340):

> "It is, however, a power that should be exercised with great restraint."

And provided the judge takes precautions to ensure that inadmissible matters are excluded before it is read to the jury,

> "...it is only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances will arise when the judge is satisfied that it would be unsafe for the jury to rely upon the evidence in the deposition. ...It is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion. It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

His Lordship was there referring to the admission of the deposition of a witness who has died before the trial comes on, but the guidance given in that case applies equally to the transcript of the testimony of a deceased witness in

a re-trial. However, in the case of previous testimony in a trial, most likely the witness would have been cross-examined, and possibly re-examined, so the judge would be in a better position to assess the quality of the evidence. It cannot be denied that here there were apparent inconsistencies put to the witness, but there were explanations which the jury would consider along with the inconsistencies. The question of identification, though a crucial matter, was not made a live issue, possibly because this was a recognition case in broad daylight within close proximity, and with sufficient time and opportunity to see and recognise the applicants. The identity evidence was not of such poor quality as would make it imperative for the judge to withdraw the case from the jury. A conviction resulting from such evidence would not be unsafe or unsatisfactory, provided the jury had been given the appropriate directions on identification evidence.

In our judgment, neither applicant has advanced satisfactory grounds to merit an interference with the discretion exercised by the learned trial judge in admitting in evidence the transcript of the evidence of the deceased witness. Accordingly, this ground of appeal fails.

The indictment charged both applicants with capital murder, alleging that the murder was committed in the course or furtherance of an act of terrorism. Mr. Hines, on behalf of Ormsby, contended that "on the evidence the matter of terrorism did not arise." Section 2(1) (f) of the Offences against the Person Act (as amended) ("the Act") defines as capital murder:

> **"2(1)(f)** any murder committed by a person in the course or furtherance of an act of terrorism, that is

> "to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

Their Lordships' Board considered the construction to be placed on that provision in the case of **Leroy Lamey v. *The Queen*** (unreported) Privy Council Appeal No. 56 of 1995 - delivered the 20th May, 1996. This is what was said:

> "An act of terrorism by its very nature involves an intention to strike others with terror. The reference in the paragraph to the nature and extent of the violence and to the public or any section thereof as the object of the terror demonstrates that something more than mere consequential frightening of the victim or occasional bystanders is required. In their Lordships' view the paragraph requires there to be a double intent on the part of the murderer namely an intent to murder and an intent to create a state of fear in the public or a section thereof. The intent to create a state of fear may be demonstrated by the mere circumstances in which the murder has been committed or it may manifest itself in some other conduct of which the murder forms part such as the blowing up of a building or a high-jacked aeroplane. In neither case is it necessary that the murder be witnessed by others. Suffice it that the circumstances in which it took place are intended to create fear in those who are the objects of the terror when they become aware of the facts. However the paragraph does not apply to a murder committed with the sole intent of killing the victim whereby fear happens to be created in those who see it take place or hear of it."

The evidence on which the prosecution relied to prove "terrorism" may be summarised as follows:

> **(1)** Both applicants and another man, all armed and exposing their weapons, came in a section of a community in which they did not live and were not welcome.

> (2) A vast number of shots were fired on the street, apparently at no one in particular, and at least one woman was held up at gun point by one of the three men.
>
> (3) The deceased and three others, who were sitting on a wall, fled; the deceased and at least one of those persons hid under a cellar.
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> (4) Shots were still being fired when the deceased ran from under the house and jumped a dividing fence into adjoining premises. The applicant Lamey was seen with his gun pointing in the direction of the deceased.
>
> (5) The deceased was found on premises three doors away from where he ran, suffering from a gunshot wound from which he succumbed.
>
> (6) A gang, "the Beebow", of which the witness Smikle was a member, operated in the community. The applicants were not members of the "Beebow" gang, and their presence would not be welcomed by the "Beebow" gang. There was an ongoing "war between Angola and Beebow man dem." Lamey lived in Angola.

It is reasonable to infer that the three armed men, acting in concert, raided that section of the community in furtherance of gang warfare, and that their intent was two-fold; to murder, and to create a state of fear in a section of the public. They succeeded in killing one person and causing others to run for shelter. It is clear, therefore, that there was sufficient evidence to support a finding that the murder was committed in the course or furtherance of an act of terrorism. But the prosecution relied on the doctrine of common design alleging that both applicants (and the third person) were acting together to kill and terrify persons in that section of the community on that day and, accordingly,

would be guilty of murder. Therefore, the issue arose as to whether it was capital or non-capital murder in the case of both or any of them, having regard to section 2(2) of the Act. That was a matter for the jury to decide, and therefore it was incumbent on the learned trial judge to direct them in that regard. Both Mr. Hines and Mr. Golding have complained about the judge's direction on that issue. This is how Mr. Hines put it in the second ground of his appeal:

> "2. The learned trial judge erred in leaving Capital Murder to the jury in the case of the applicant when on the evidence of the transcript it is clear that having done no act of violence or attempted thereto on the deceased he could not under section 2(2) of the Offences Against the Person Act be guilty of Capital Murder. Further nowhere in his directions did he even refer to or point out the existence of the said section or the necessity for them to consider it."

Mr. Golding relied on the following ground:

> "3. The learned trial judge failed to properly and adequately direct the jury that if they did not find the requirement of terrorism proved then of necessity they could only convict the Applicant of Non-Capital Murder and not Capital Murder."

The learned trial judge directed the jury on the doctrine of common design and this is how he concluded those directions: (p. 334)

> "The prosecution has brought the accused persons before you on an indictment, charging them, each accused, with capital murder. It says that on the 16th of July, 1992, each person, acting together, caused the death of Shawn Donaldson. In the circumstances Donaldson's death at the hands of the men was murder and it is capital murder."

He continued by directing the jury on the ingredients of the offence of murder, and then this is what was said: (pp. 337-339)

"Members of the jury, that definition and what the prosecution has to prove relates to murder simpliciter, but in this case the prosecution has gone further to say that this murder is capital murder. And the circumstances alleged which may make this killing capital murder, are that the men were openly engaged in the firing of guns in the open street on the 16th of July, 1992, in a manner which, by its nature and extent, was calculated to create fear in the public or section of the public.

When you are considering whether this killing attracts a description of capital murder and it is your function to decide on the facts, you consider the alleged circumstances first, three men, each armed with firearm, two with hand guns and one with an M16; you haven't got to take it from me. Again call upon your experience. An M16 rifle is an assault rifle. Assault rifle in the sense that it is used in war, has its origin in the Vietnam War. M16. So there was an M16 and two hand guns and the men who had these weapons paraded them and shot them in the public street, Septimus and Thompson Street.

Person or persons of the public were there when this was happening. A witness who gave evidence, and is now deceased was there. You heard or the allegation is that the man with the M16 was covering a woman. You may draw the inference, what was this covering for?, was it to drive fear in this person that the person can't alert anybody to what is happening?

The other allegation is that the three men or who were sitting on the wall, seeing these persons, ran away and the men fired at them. The allegation or the circumstances with which you have to consider, to say whether it was calculated to drive fear into the public, the other one is that the person or the community being covered with the M16 is a member of the public. The people who ran away were members of the public. And also other circumstances which you have to consider is that the killing of the deceased was brutal if not senseless.

> "Members of the jury, it is your function to carefully consider those circumstances as alleged and see if they fit into the statutory definition of an act of terrorism, that is to say, an act of violence involving the use of firearm by the person, which by reason of nature and extent is calculated to create fear in the public or in any section of the public. If you so find, you may say the charge is capital murder."

Where any murder is committed by a person in the course or furtherance of an act of terrorism, the Act classifies such a murder as capital murder [section 2(1)(f)]. But it is subject to subsection (2) of section 2 of the Act, which provides that if, in such a case, two or more persons are guilty of that murder:

> "...it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

It is quite clear that the learned trial judge did not direct the jury in terms of section 2(2), and in our view, he fell in error in not having done so. Mr. Wildman readily conceded that no directions were given in that regard, but he submitted that where the directions on common design are adequate, failure to give a section 2(2) direction is not fatal, and the proviso can be applied. He submitted that the evidence supported a classification of capital murder in both. We do not agree.

In this case, there was no direct evidence to suggest that when Lamey was seen pointing his gun in the direction that the deceased had run, he fired then and that it was a shot from his gun that killed the deceased. Had the

matter been left to the jury for their consideration, we are unable to say whether or not they would have drawn the inference that it was Lamey who shot the deceased or did any act that would render him guilty of capital murder. It is plain that no such inference could be drawn in the case of Ormsby. It follows that the convictions for capital murder cannot stand, and that convictions for non-capital murder should be substituted instead.

Both counsel complained that the learned trial judge failed to direct the jury as to the manner in which they should evaluate the evidence contained in the transcript of the testimony of the deceased witness Smikle. The jury were given full and careful directions on how they should treat the inconsistencies highlighted in the transcript. Dealing specifically with the transcript, the learned trial judge told the jury that the case was novel in the sense that the only eyewitness evidence as to the possible facts in the case came from the transcript of that witness' testimony which was given at a previous trial. He explained that the witness had died and that the law permitted the admission of the evidence in the transcript. He then continued: (pp. 345-346)

> "I was saying that the transcript members of the jury, demands your careful consideration, it is evidence in the case, it is the evidence.
>
> You will have to bear in mind in considering that evidence, that the maker of the statement contained therein was not cross-examined in your presence. You therefore, have no experience or opportunity to see how he would have stood up in cross-examination. But the transcript is the evidence. And again I remark, the demanding of your careful consideration, careful consideration of everything stated therein and the circumstances in which those statements were made.

> "The defence, particularly Ormsby, has stressed for your consideration, they have adopted by Mr. Golding too, a number of inconsistencies and discrepancies. You will have those to go in with you and look at them. The defence stresses these inconsistencies which arose on the cross-examination of the witness Smeikle. The defendant is saying that those inconsistencies or discrepancies are so serious that they do violence to the credibility of the witness, and ask you to say that you cannot believe him.
>
> You will recall the direction which I gave you earlier on how to deal with discrepancy and inconsistency and you will act in accordance with those directions."

In our view, those directions were sufficient to direct the jury upon the proper approach to the evidence contained in the transcript and the weight which they might attach to it in the circumstances. We find no merit in the contention of counsel.

The only other ground that remains for our consideration was raised by Mr. Hines. He complained of the manner in which the jury were given further directions. This is what transpired: The jury retired at 12:44 p.m. and returned at 2:30 p.m. The foreman announced that they had not arrived at a unanimous verdict. The learned trial judge then enquired of the foreman: "Is there any area that you need assistance on?" This is what followed: (pp. 367-369)

> **"FOREMAN:** The area of identification.
>
> **HIS LORDSHIP:** Any other aspect?
>
> **FOREMAN:** No.
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> **HIS LORDSHIP:** Please sit. You wish me to assist you further on the question of identification?

"FOREMAN: Yes, m'Lord.

HIS LORDSHIP: What area?

FOREMAN: It is not clear who was there actually at the scene of the crime.

HIS LORDSHIP: You need further directions on that?

FOREMAN: It would appear so, m'Lord.

HIS LORDSHIP: Mr. Pantry, you heard?

MR. PANTRY: Yes, m 'Lord.

LORD GIFFORD: M'Lord, clearly if it is not clear who is there, Your Lordship could emphasize the Jury have to be satisfied as to the presence of each accused and maybe any surrounding, if I understood the comment to be whether it was clear who was there, then Your Lordship could well underline what the Jury must be satisfied of in relation to each accused.

MR. PANTRY: In relation to that, m'Lord, I think that maybe Your Lordship should emphasize the evidence as led in relation to who was there.

HIS LORDSHIP: Thank you Lord Gifford and Mr. Pantry. Members of the jury, you remember I told you that the evidence is contained in the transcript, remember that. In the transcript the evidence of Christopher Smeikle. He saw them, he said he saw three persons. Remember I told you the circumstances which you had to consider as to the identification, the lighting, if they were known before, and he told you from the transcript which you looked at, that he knew the names of these people, Ninja, Speedy and Radcliffe, remember that. He went on to say, to identify the person he knew as Speedy and Ninja. Ormsby is Speedy and Ninja is Lamey. That is on the transcript which you have. He said he knew these people before, the one for four years and the one for two years.

> "The accused Ormsby tells you that he knew the witness Smeikle very well, and I told you that in that circumstance you consider whether that would be something which goes towards the identification. I told you, however, that although that would be a recognition, people have been known to make mistakes in recognition cases. Remember I warned you that you are to be careful and satisfied, careful in acting on identification evidence because of the consequences and what would have happened. Remember too, that you must be very sure. You must be satisfied that all the elements of identification are there.
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> I emphasized the weaknesses that could be, that are there, I told you about the identification in the light of the alibi and how you are to deal with it, and in that you still wish me to go ahead and tell you more on it? And you must consider the evidence of identification in relation to each accused separately. Remember that the prosecution is acting on the concept of common design, acting in concert. Is there anything else you wish me to tell them?
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> **LORD GIFFORD:** Only taking the words of the foreman. If they were not there, who was there? The defendants will be entitled to an acquittal.
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> **HIS LORDSHIP:** Mr. Pantry?
>
> **MR. PANTRY:** Nothing, m'Lord.
>
> **FOREMAN:** M'Lord, we will retire again."

The jury retired for a second time at 2:45 p.m. and returned with a unanimous verdict at 2:53 p.m.

It seems quite clear that the assistance which the jury required was given to them by the learned trial judge. It encompassed a very narrow area on the question of identification. That issue had been fully explained to the jury before

they retired, and there was nothing more that could be said by way of further directions. We find no merit in this ground.

Conclusion

It is our judgment that the application of each applicant for leave to appeal is granted. We treat the hearing of the application as the hearing of the appeal. The appeal is allowed in each case and the verdict of capital murder is set aside and a verdict of non-capital murder substituted therefor. In view of section 3B(3) of The Offences against the Person Act (as amended), we will adjourn the issue of sentence to be determined on a date to be fixed by the Registrar.