JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 34, 35 & 36/90

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA VS. **BARRINGTON CLARKE**
CONRAD HENDRICKS
ADRIAN CAMPBELL

Richard Small and Eric Frater for appellants

Miss Marcia Hughes for Crown

23rd, 24th September and 16th October, 1991

CAREY, J.A.:

On 24th September, we treated the hearing of these applications for leave to appeal convictions as the hearing of the appeals which we allowed. We quashed the convictions, set aside the sentences and directed that verdicts and judgment of acquittal be entered. We now give the reasons for that decision as promised.

These three appellants were convicted in the Manchester Circuit Court on 15th February, 1990 before Harrison J., and a jury for the murder of one Patrick Smith. The medical evidence showed that the cause of death was due to "blunt trauma to the head with skull fracture, contusions to the brain and right sub-dural haemorrhage." In the opinion of the pathologist, the injuries were consistent with infliction by a "fairly sturdy bottle" and she agreed that "if it was filled with fluid it would be fairly sturdy to inflict such an injury." .....

On external examination of the head, she found a 1cm laceration over the right side of the head behind the ear as also a horizontal fracture running from left to right across the crown of the skull 14cm in length. There was a 1.5cm contusion on the tip of the left temporal lobe. This, she described as a contre-coup injury, i.e., an injury sustained to the brain on the opposite side from which the blow was inflicted. We have deliberately set out the medical evidence for two reasons. Firstly, it has a direct bearing on the outcome of the case and secondly, it prompts us to observe that it is quite often counter-productive to call medical evidence before dealing with the manner in which the injuries were inflicted. We will expand on this later, but for the moment that comment will suffice.

So far as the circumstances of the killing went, these may be stated in a summary form. On 11th June, 1989 there was a church rally in the district of Ticky Ticky in Manchester. A number of persons, including the victim and the three appellants, attended. It all began with a fracas between the appellants on one side and Patrick Smith on the other in the course of which there was shoving and some fisticuffs. The appellant Conrad Hendricks also delivered a kick to Smith's belly and soiled his clothes. Bystanders restrained the appellants. Patrick Smith left for home, changed his clothes and returned to lean against a house close by the church where the rally was being held. Two brothers of the slain man, William and Kingsley Smith, related the incident which resulted in Smith's death.

It was their story that the appellants approached their brother Patrick, that Conrad "jukked" him with a bottle while the other two, hit him in his head with bottles containing drink. Barrington Clarke was said to have hit him at the right side of his head. It is not clear on the evidence on what part of his head Patrick Smith received the other blow. Another witness,

Sharon Powell testified that Adrian admitted to her that he and Conrad had licked out Patrick Smith.

The defence version was starkly different. Shortly put, when Patrick Smith returned to the scene of the first incident, he came armed with a machete concealed in the pullover he was then wearing. From there he removed this weapon which he used to beat Conrad on his back. During the course of the beating, Adrian Campbell flung a bottle which hit Patrick in his head. The defence called an independent witness Constable Herman Williams whose evidence, was in our view, of critical importance. he testified that some time between 8:15 p.m. and 8:30 p.m. on the night of the incident, the appellant attended at the Mandeville Police Station, made a report to him and showed him some injuries. He observed bruises and swelling on the left hand (presumably he meant arm) just below the elbow and swelling on his back. This officer's evidence stood unchallenged at the end of the case.

Mr. Small argued four grounds of appeal. In the first he complained of the trial judge's directions in relation to common design, specifically the scope of that common design. He submitted that his deficiency in that regard resulted in a failure to, or an inadequacy in applying the law to the particular facts of the case. The jury, he maintained, had no guidance in determining the separate responsibilities of each appellant in regard to the charge.

The trial judge directed the jury on the issue of common design (at pages 116-117) in these terms:-

> "The prosecution is basing its case on the principle of common design and you must still examine the actions of each accused persons separately as to what part he took in this incident in order to come to your common verdict.
>
> The prosecution's case of common design is based on the principle that if two or more persons join together to commit

> an act and that act is in fact carried out, well each person who takes an active part in the commission of that act would be guilty of the entire act; that is each person is liable for the actions of the others, the commission of that common act and even though only one person may inflict what is seen as the fatal blow, all would be guilty of that common act if they are engaged together jointly in performing that common act. The prosecution is basing its case therefore on this principle of common design. So it does not matter that one particular person is the one who inflicted the blow, according to the doctor, that caused the death. If you find that they were all involved in an attack on the deceased and they were all joined together in that common act on the deceased, then it means that each person is liable for the action of the others.
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> The prosecution's case is that on that particular day, the 11th of June, all three accused persons had bottles. The prosecution's case is that the accused, Conrad Hendricks was the one who thrust the bottle towards the deceased. The witness, Kingsley Smith, told you that Conrad used the bottle to chuck the deceased. He then told you that Barry hit the deceased with the bottle on the left side of his head. He told you that Adrian hit the deceased with the full bottle of soda also. It means therefore, the prosecution is asking you to say that based on those actions, all three accused persons were concerned with using bottles against the deceased and as a consequence the principle of common design operates in this case for the prosecution and they are asking you to say that all three accused persons were concerned."

This direction, as an academic statement of the principle of common design is unexceptional, but regrettably unhelpful and indeed quite incorrect as applied by the trial judge to the facts of the instant case. It is trite that a participation, the result of a concerted plan or scheme to commit a specific offence is sufficient to render the participant a principal in the second degree. We say so because the prosecution eye witness account did not show in our opinion, any plan to commit any offence. The slain man it was, who returned to the scene of the first incident. The appellants could hardly plan an attack in the absence of such foresight. But, although the eye witness account suggested a

concerted attack on the victim by two to the appellants, the medical evidence did not support that position. At any rate, it was a matter for the jury on a proper direction regarding the significance of the medical evidence, to determine whether that medical evidence was consistent with the evidence of the eye witnesses. The learned trial judge left the Crown's case to the jury on the footing that - "... all three accused persons were concerned with using bottles against the deceased" and necessarily planned the attack intending to kill or cause serious injury. In our view, the medical evidence showed, and we agree with Mr. Small in this regard, that one blow only was inflicted on the victim. The pathologist saw a laceration behind the right ear and a 14cm horizontal fracture across the top of the head from left to right. This injury must have been the result of the blow which inflicted the 1cm laceration behind the ear. We note that the suggestion of Crown Counsel put to the pathologist was that one blow had been delivered. We do not know if two blows could have caused the injuries, because the prosecution disenabled itself by calling the pathologist first and apparently had no concept or at best, an imperfect theory of its case. Accordingly, they never asked her to express any opinion whether the medical evidence was consistent with their case as revealed on the depositions. That deficiency, we have no hesitation in saying, severely weakened their case. Moreover, it misled the trial judge.

The direction which we think would have been appropriate to the prosecution case (including the equivocal state of the medical evidence) would be for the trial judge to say something along these lines:-

> "Whenever two or more accused are charged in the same count of an indictment with any offence which men can help one another to commit, it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another to

> do such an act and that in doing the act or helping the other accused to do it, he himself had the necessary criminal intent."

See **D.P.P. v. Merriman** (1972) 2 ALL E.R. 42. Such a direction would have been relevant to the circumstances of the case. The directions given by the trial judge, assumed that there was evidence of a preconceived plan to use bottles to kill or inflict serious harm to their victim and each of the appellants had participated therein with the necessary intent.

In our opinion, no useful purpose is served and indeed a jury might well be misled by what we would characterize as the "Lovesey" direction which is apt where the offence is robbery and the aider and abetter is for example the watcher against surprise: see **R.v. Lovesey** (1972) 3 ALL E.R. 42. Where the circumstances show that each independently did an act with the required intent to amount to the offence the subject matter of the charge, then the direction we have indicated should be preferred. We recommend it.

It follows from what we have stated that there is merit in this ground of appeal. We agree entirely that the trial judge failed to guide the jury in determining the separate responsibilities of each applicant as they arose on the evidence in this case.

Another serious complaint related to the trial judge's failure to present the defence of the appellant Adrian Campbell, in that he omitted to review the evidence of a witness, Constable Herman Williams, called by him to show that the appellant had received injuries that night. This evidence was of critical importance because, if accepted, it seriously undermined the credibility of the Crown's eye witnesses the brothers Smith.

Crown Counsel readily conceded that there was substance in this criticism.

We desire to state that the evidence of this witness was dealt with in a postscript to the summing up, for the trial judge had completed his summation but for reasons which we are unable to understand, then requested the foreman to advise him if the jury wished to withdraw to the jury room. He was told instead that two female members of the jury wished to visit the ladies' room. In their absence he must have recollected that he had omitted to deal with all the evidence. On their return, he said this at p. 137:-

> ON RESUMPTION
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> JURY ROLL CALL: ALL PRESENT
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> HIS LORDSHIP: Mr. Foreman, and members of the jury, there was another witness for the defence, Constable Herman Williams. He told you he got a report on the 11th of June, on the night of the incident, at 8:15, 8:30. He saw Conrad Hendricks who came to the station, made a report to him; he saw on him bruises to the left hand and a swelling on the back, he sent him to the hospital. Well that presumably is the evidence put before you to say that there was in fact bruises to the back of Mr. Conrad Hendricks, presumably that was inflicted by the slapping by the machete and you use that evidence in considering along with the rest of the evidence, when you come to consider, the question of the fact of self-defence and the fact of the possible provocation, because that is put forward by the defence for you to consider."

That colourless recital of the officer's evidence was left to the jury without any assistance whatever regarding its significance. This evidence was of profound importance especially because a Crown witness William Smith was specifically asked if he saw anyone hit Conrad (Hendricks) that day and had responded with an emphatic no. It should be remembered that the defence were alleging that the slain man had slapped Conrad Hendricks with the machete with which he had armed himself when he returned to the church premises. The evidence of the police witness as

was previously noted, was not challenged in any way.

In our judgment, in no sense could it be contended that the defence of Adrian Campbell had been dealt with properly and adequately. But that omission affected not only Adrian Campbell but the two other appellants as well. That evidence as we said before, effectively undermined the account of the incident given by the brothers Smith to support the prosecution. They spoke of the three appellants setting upon the victim and two of them administering blows, but denying any attack by the victim. The injury to Conrad Hendricks therefore remained unexplained on the Crown's case. Not only was it consistent with the defence, but also with the medical evidence of the Crown. It is enough to say that none of these matters was placed before the jury.

A trial judge has a clear duty to assist the jury to arrive at a correct verdict. With respect to the facts, he is obliged to explain to them the significance of evidence. His duty is not fulfilled by repeating evidence and telling the jury to take it into consideration. We are satisfied that this failure effectively deprived the appellants of a fair chance of a clear acquittal and led to a substantial miscarriage of justice.

There was another unsatisfactory feature of the summing up which related to the trial judge's direction on excessive force with which we must deal. He left for the jury's consideration, the following question - at page 131:-

> "... and you must decide whether or not the slapping with the machete was enough at that time for the deceased to be struck with these bottles in order to ward off the attack, or you find that it was an excessive amount of force to be used at the time by the accused and so caused the death of the deceased. Well, it is a matter for you because you are the ones to say whether or not you find that the force used in

> the circumstances to repel that attack was reasonable or it was excessive. If you find that the force was excessive it means that the defence of self-defence fails and it does not help the accused."

The issue of self defence arose only in respect of Adrian Campbell. He, it was, who flung the bottle to prevent the slain man injuring Conrad Hendricks. To throw one bottle in these circumstances, could not we think, be equated with excessive force. In our judgment such a consideration ought not to have been left to the jury. It would have been helpful merely to remind the jury:-

> "... If there has been attack so that defence is reasonably necessary it will be recognised that a person defending another cannot weigh to a nicety the exact measure of his necessary defensive action. If the jury thought that in a moment of unexpected anguish a person repelling an attack on another had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken..."

Palmer v. R (1971) 1 ALL E.R. 1077 at page 1088.

We would remind that in the present state of the law on self defence, the subjective element of the accused has to be emphasized. See **Beckford v. R.** 36 W.I.R. 300. The direction which we have isolated, amounted to a misdirection because there was no factual basis on which it could rest.

We feel obliged to add that we believe that this very experienced judge must have been extremely tired when he embarked on his summing up at 12:10 p.m. upon the completion of addresses by both counsel at 12:10 p.m. He should have adjourned for lunch and given himself an opportunity to refresh himself so as to be able properly to do justice to this important aspect of his functions. This Court has recommended in **R.v. Carroll** C.A. 39/89 delivered 25th June, 1990 that an adjournment before

undertaking the process of summing up can be helpful. We wish to call attention to this aid in promoting the proper administration of justice in our Courts.

Finally, we are obliged to Crown Counsel for her candour and sense of fairness when she conceded that she could neither support the conviction nor press for a new trial.