JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 64/89

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

REGINA vs. TREVOR BENNETT

Delroy Chuck of Delroy Chuck & Co.
for the applicant

Miss Paulette Williams for the Crown

June 24 and July 15, 1991

MORGAN, J.A.:

The killing in this case, so far as we are aware, is the first contract murder perpetrated in Jamaica. The actual murder was particularly brutal and callous. It involved the execution of Mr. Derrick Hugh, a former acting Registrar of the Supreme Court and Resident Magistrate.

The victim, forty-seven years of age, had retired to his locked room and to bed in a complete state of undress, save for a merino, when at about 3:30 a.m. on November 14, 1987, he was forced to open his door and was unceremoniously dragged out by a gunman. When told that there was a contract to kill him and he was to go downstairs to produce his passport (no doubt to ascertain if he was the correct person) he begged the gunman to be allowed to put on his brief. This mild request was met with the brusque and very callous reply, "Come on man, where you going you don't need no clothes". He was marched downstairs where his sister heard sounds which caused her to open her door, and to see a man with a gun in hand,neck-holding her brother.

When she shouted, a shot was fired at her which caught her in her knee. Then she saw and heard two other explosions from the gun which was poised at Mr. Hugh's neck. Mr. Hugh fell. The gunman fled, and Mr. Hugh, in the pangs of death, hurled himself through a glass louvre window, landing on a van parked under the window, then fell beside the van - dead.

Before all this, Mr. David Whilby, a visitor who slept in a room of the house that night, was earlier awakened by two gunmen, one who eventually shot Mr. Hugh and the other, as the Crown alleged, the applicant Trevor Bennett.

This application for leave to appeal concerns Trevor Bennett, who was convicted on the 13th April, 1989, before Ellis, J. and a jury in the Circuit Court Division of the Gun Court in Kingston for the murder of Derrick Hugh.

Mr. Whilby was awakened about 3 o'clock on the morning of the 14th November, 1987. At the bottom of his bed was one masked gunman with a gun at his back, and at his head, with a gun at his ear, another gunman also masked. Both spun him around in the bed when one said to the other, "No man, is the wrong man". Both pulled him off the bed and marched him to Mr. Hugh's room, and induced Mr. Hugh to open the door. Mr. Whilby and the victim were put to lie on the floor and then one gunman left to fetch the mother of the deceased, an old lady, who was brought to where the others were. The other gunman stood over them with his gun. The mother fell on the floor, crying and entreating the gunmen not to hurt her son. The applicant threatened to shoot her if she did not keep quiet, while the other man said to him, "Alright man, we get paid to kill him already". The latter then left the room with Mr. Hugh and the applicant was left to stand guard over Mr. Whilby and the mother. It was at this time that Mr. Whilby looked up and noticed the applicant rummaging the drawers in the room, and busily searching for money and jewellery. The mask kept slipping from his face giving Mr. Whilby the opportunity to observe him. Sometime afterwards, however, the applicant

heard the shots being fired downstairs. In panic he jumped over Mr. Whilby and Mrs. Hugh and fled from the room.

At the post-portem examination on the body of the deceased, Dr. Clifford, a Forensic Pathologist, found an entrance gunshot wound behind the right ear which went almost vertically downwards inside to the right lung, also a second gunshot entrance wound in the left clavicle at the level of the left collar bone which travelled through the left chest cavity, left lung, the ascending aorta, through the right lung and lodged in the muscles of the lower right lateral chest. In his opinion, death was due to gunshot wounds.

Fingerprints were found by the police on some glass louvre blades removed from a window of the house and rested on the roof. These prints matched the applicant's. He was also pointed out by Mr. Whilby at an identification parade as one of the men who entered the house on the night of the 14th November, 1987.

On 21st December, 1987, Detective Ayre saw the applicant, whom he knew for some nine years, at the Flying Squad Headquarters, Kingston. The applicant indicated that he wanted to "tell him something". Detective Ayre took him to the investigating officer, Superintendent Brown, and in the presence of Senior Superintendent Hibbert, he gave a written statement after he was cautioned. In it he said, inter alia, that at about 2:00 a.m. on the 14th November, 1987, while walking in the gully he saw one Lukie and told him he had no money. Lukie told him that he knew where they could go and get some money. He decided to go. Lukie had a gun and told him he was going to a house at the beach where some foreigners were staying. They started to walk and came to a premises, then he realized it was no foreigner as he saw no rent-a-car. Lukie went on to the roof then he went and removed some louvre blades and both went in the building.

Following that the applicant gave a substantially similar account as Mr. Whilby, as to what happened inside Mr. Hugh's house and how he ran, joined in the gully by Lukie,

who gave him $50.00 from the money taken from the deceased. In this statement, he did not admit, however, that he had a gun.

At the trial the learned trial judge, in the voire dire, ruled the statement to be voluntary. The applicant, in his defence, made a lengthy unsworn statement in which he repeated the same facts as in the caution statement and facts which Mr. Whilby gave as to events inside the house. He added, however, that he was "set up" as he had "screeched" on companions and had given their names to the police with respect to a previous robbery charge. The police had held him and he, as a result of absence, had lost his job and had no money for his baby's food. In the gully, these same men threatened to kill him, but afterwards decided that he should accompany them on this robbery. The three men were outside while Lukie and himself went in the house. At page 287 of the transcript he narrated what occurred in Mr. Whilby's room and after, thus:

> "He asked the man who else was there and he said that another was in the other room but in this house, sir, what I saw was not likely to be no robbery. What I saw in the house did not look like a robbery. If it were a robbery I would not know what they were going for. The approach to me that it was a robbery but I did not think it was but when I see some books on the law of Jamaica that is the time I get to realise that it maybe someone from the counsel of bar or a lawyer or somebody living there. He then took the man into the room which Mr. Hugh was and began asking him for a book. Show me your passport. He was asking him for his book. Must be passport book. I was wondering whats going on at this time. An old lady came upstairs afterwards and asked what have my son done and Lukie reply to her that your son is fi dead. He then put the old lady to sit down and she was saying: 'Lord have mercy upon us' and things like that. He told her to stop making all that loud noise and she said: What have he done, what have he done, he has done nothing'. He replied to her: 'We get pay fi kill him, him a go dead'. "

It is evident on his case that he was aware at an early stage when inside the house that this enterprise was to kill and not to rob. Yet he said nothing then nor later while in Mr. Hugh's room or even availed himself of the opportunity of withdrawing. He, however, concluded by saying that he had no intention to kill, and no intention to rob.

Mr. Chuck filed one ground of appeal:

> "That the learned Trial Judge failed to impress upon the jury that if, after review of all the evidence, they are left in reasonable doubt as to the guilt of the accused then they must acquit. In particular, the burden and standard of proof have not been properly explained and presented to the jury."

In support of this ground, he directed us to parts of the summing-up where the learned trial judge, he urged, failed to direct the jury in respect of what they should do if they were in doubt. At page 300 of the transcript the learned trial judge said this:

> "But if you disbelieve what he tells you, or if what he tells you leaves you in any doubt, equally you don't convict him of murder. Maybe something else which later on I will elaborate on, but just for the purpose of this here, now. If, however, you disbelieve him completely, can't accept his unsworn testimony, that doesn't say on that alone you can say yes, he is guilty. You have to go back and look at the sum total of the evidence which the Crown has put before you to see if it satisfies you so that you feel sure that the accused is guilty, because no burden is cast on the accused. This is how you approach this concept of the burden and standard of proof."

Such a direction which emphasizes to the jury the duty of the Crown to satisfy them that they feel sure, that the accused has no such burden, and if they disbelieved or were in doubt they could not convict is, in our view, adequate.

The learned trial judge gave directions on duress to the jury which left Mr. Chuck to argue that he misdirected

himself and left to the jury the issue of duress which he ought not to have done, thus embarrassing the defence.

Not only is it correct in law that duress was not available to the applicant on the charge but also the unsworn statement did not embrace it. In **R. v. Wayne Spence** S.C.C.A. 202/88 delivered 18th June, 1990 (unreported), Rowe, P., after a careful and extensive review of the law and authorities on duress, concluded:

> "We take the view that the law of duress in Jamaica as it applies to cases of murder is the same as it is in England and consequently the defence of duress is not available to a person whether he be a principal in the first or second degree, that is to say, whether he be the actual killer or an aider or abettor."

On the Crown's case and on his own case he was at the least a principal in the second degree. This defence of duress was neither advanced nor relied on and in our view the directions in no way prejudiced the defence but would rather operate to his advantage.

In our view, the case was defended on the basis that the applicant was not part of the common design and had no intention to kill. The applicant said that his companion had a gun; the Crown's case was that both had guns.

In **Chan Wing-siu and others v. The Queen** (1984) 3 All E.R. 877, where one accused charged for murder along with two others who did the actual stabbing, was found guilty, the Court was asked to consider the learned trial judge's direction that the jury could convict each of the accused if he was proved to have had in contemplation that a knife might be used by one of his co-adventurers with the intention of inflicting serious injury. The Privy Council held:

> "A secondary party was criminally liable for an act committed by the primary offender which the secondary party foresaw but did not intend, if he took part in an unlawful joint

> "enterprise and it was proved beyond reasonable doubt that he contemplated and foresaw that the primary offender's act was a possible incident of the execution of the planned joint enterprise. Whether a secondary party contemplated and foresaw the primary offender's act could be inferred from the secondary party's conduct and any other evidence which explained what he foresaw at the time. .... the Crown had shown beyond reasonable doubt that each of the accused had contemplated that serious bodily harm might be a consequence of their common unlawful enterprise and .... there were no grounds for holding that the possible risk of serious injury was so remote that it could be disregarded. The jury had been properly directed. The appeal would accordingly be dismissed."

The applicant said he had no gun but all the others had guns including the co-adventurer who he accompanied inside the house. With such an armoury it must surely have been in his contemplation that the guns were likely to be used to protect themselves from anyone who tried to prevent them from completing their plan, or for some other purpose with the possible risk of serious injury.

Although the applicant said he had no intention to rob or to kill, the tenor of his unsworn statement was that he went there for the purpose of a robbery and not a killing.

In view of the fact that no ground of appeal was filed relating to common design, the Court nevertheless enquired of Mr. Chuck if he had any submissions to make in that regard. He indicated that he had given such a ground of appeal some consideration but had concluded that the Crown's case was overwhelming, as the applicant had put himself on the scene and in the circumstances any such submission would be a waste of time.

At page 297-298 of the transcript, the learned trial judge said:

> "...the prosecution is relying on a doctrine of or concept called common design, common design or joint enterprise. And it operates like this, Mr. Foreman and Members of the Jury. Where two or more persons acting together in furtherance of a common purpose, a common plan or a joint

> "enterprise, then those who are present actively assisting or engaged in carrying out that design or plan, are equally guilty in the eyes of the law. The act of the one becomes the act of the other, and in such a circumstance, Mr. Foreman and Members of the Jury, it doesn't matter whose hand pulled the trigger which discharges the fatal bullet or bullets.
>
> But let me tell you this before, because I will have to come back and relate this concept of the evidence, let me just tell you before. Before you can convict the accused person where the doctrine of common design is relied upon, you have to be satisfied so that you feel sure that there was an unlawful joint enterprise. Secondly you have to be satisfied so that you feel sure that the act or actions which resulted in the death of Derrick Hugh was a part of this joint enterprise. In other words, you have to be satisfied that that act was within the scope, the contemplation of this joint enterprise. And thirdly, you have to be satisfied so that you feel sure that the accused must have agreed, must have agreed to the action and must have foreseen, must or ought to have known that that would have been an incident of the joint enterprise. Later on as I said before, Mr. Foreman and Members of the Jury, when I am reviewing the evidence I will relate that some more to you."

In no part of these directions or elsewhere did the learned trial judge tell the jury the effect of an act of a co-adventurer outside the scope of the common design. His approach at page 310 of the transcript was that the co-adventurer, having clearly expressed, in the presence and hearing of the secondary party, that he was going to kill Mr. Hugh, left him to watch Mr. Whilby and Mrs. Hugh while he went off with Mr. Hugh to kill him. In those circumstances, as a watchman and being then aware of the full scope of the plan (and continuing to keep guard) he actively participated and, therefore, was equally guilty of the murder of Mr. Hugh. We find no fault with these directions.

The applicant's statement, we have previously noted, coincided with the prosecution but he said:

> "I was astonished of the actions which was going on."

This may well have meant that there was a departure by the principal party from the common design to rob which now extended to the execution of Mr. Hugh and his astonishment was sufficient to disassociate himself from that plan.

The dictum of Sloan, J.A. in **Whitehouse** (1941) W.W.R. 112, 115, 116 applied with approval in **R. v. Antonio Becerra** 62 Cr. App. R. 212 at page 213 states:

> "After a crime has been committed and before a prior abandonment of the common enterprise may be found by the jury, there must be, in absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant on their willing assistance up to the actual commission of that crime. In order to break the chain of causation and responsibility, there must, where practicable and reasonable, be a timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequence."

There was no evidence which amounted to a withdrawal or disassociation or anything which indicated a timely communication of the applicant's intention to abandon or remove himself from the plan. Accordingly, in our view, there was no necessity

for any further directions from the learned trial judge.

The applicant on his own case was aware, or ought to have been, that the plan was not robbery but to kill:

(1) When he realized it was not the house of a "foreigner".

(2) When his companion menaced Mr. Whilby with the gun and declared it was the wrong man.

(3) By the clear remark of his companion that they were paid to kill and his intention was to kill.

He remained as a guard and made no attempt to remove himself prior to the commission of the murder. In our judgment, he was clearly, on his case, a part of a common design which was to execute Mr. Hugh.

For these reasons the application for leave to appeal is refused.