JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 3/93

COR: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

REGINA

VS.

VALNIE WILKINSON

Walter Scott for Applicant

Kent Pantry, Snr. Deputy Director of Public Prosecutions for Crown

October 3, 4 and 24, 1994

CAREY P. (AG.):

On 19th January 1993 in the St. James Circuit Court before Smith J. and a jury, the applicant was convicted of capital murder, and sentenced to death. It was alleged that he had participated in the shooting to death of one Carl Gordon on 8th September 1992, at Lilliput in St. James.

In the absence of any eye-witness account of the circumstances of the killing, the conviction depended on inference to be drawn from the evidence of Leon Evans and from a cautioned statement given by the applicant. Leon Evans was one of two watchmen at a construction site at Lilliput; his colleague was Carl Gordon, the victim. At about 9:30 p.m. on the night of 8th September 1992, they returned to the site on which there is a shed, to find the door to it, kicked in and the place ransacked. An electric breaker had been stolen. Both men set to, and were in the process of

putting the place to rights, when two men appeared, one of whom was armed with a gun. That man demanded to know the location of "de coke", i.e. cocaine, on pain of death. Evans was beaten up by this man, while his companion gave his attention to Gordon. Evans eventually lost consciousness and when he recovered, it was to find Gordon on the ground being beaten by the two intruders. This allowed him to make his escape and in the course of doing so, he heard a gunshot from the direction of the site. On his return with the police, he found his colleague shot.

The applicant gave a statement to the police under caution. In it, he recounted that he had a conversation with one Terrence whom he had told the location of some drugs as he was reluctant to try to obtain it. Terrence said he could find a man with a gun who would be willing to get it. He then promised to take Terrence to the house. Some time afterwards, Terrence fetched him to go to the house. He got into a car with Terrence and two other men. They were taken to Lilliput where he pointed out the construction site. This expedition appeared to have been a reconnoitering exercise because, as he continued, at 7:30 p.m. on the night of the 8th September he returned in the same car with Terrence and Terrence's friend, who was armed, to Lilliput. While he remained by the car, the other two men went to the site. They returned to say they had not found any drugs. He went to the shed, retrieved hash oil and handed it over to Terrence. He left both men by the shed and having returned to the car, he heard a gunshot from the direction of the site. After returning to Flankers from Lilliput, he observed Terrence with an electric breaker.

On the evidence of Evans, it was open to the jury to find that the scope of the common design was the stealing of drugs from the construction site with the use of a firearm. The cautioned statement which was a mixed statement, was capable of

(i) confirming the scope of the common design;

(ii) placing the applicant in the vicinity of the site when the victim was shot;

(iii) showing that his presence was non-accidental;

(iv) that he knew of the plan and was aware of the possession of a firearm by one of the men who was part of the plan to rob drugs.

The applicant's implication in the murder therefore rested on an acceptance that he was a part of the plan to rob whoever was at the construction site of drugs, the implementation of which contemplated the use of a firearm, and that he was present aiding and abetting the commission of the eventual killing of Gordon.

So far as the defence went, the applicant gave an unsworn statement which did not differ significantly from what had emerged from the cautioned statement. But, he in it did attempt to dissociate himself from the murder by asserting his absence from the scene when the shot was fired which killed Gordon, and that he was unaware of any guard being on the site.

Mr. Scott first challenged the adequacy of the learned trial judge's directions regarding the effect of the cautioned statement made by the applicant. In expanding this theme, he argued that the trial judge failed to direct the jury that in assessing the truth or otherwise of the statement they should seek to determine whether there was any evidence which either confirmed it or was contrary to it.

The learned trial judge between pp. 155-157 gave general directions on common design to the jury. We do not think it is necessary to rehearse them. All we need say is that they were correct, they were clear and they were adequate. He then applied the law to the facts and circumstances in this way (at p. 157):

> "... and you have to determine as judges of the facts, what was the scope of this plan, if you find that there was a plan. This pre-arranged plan, this unlawful pre-arranged plan. What was the scope of this plan, and we have to look now, at the statement given by the accused person to the police. That is what the Prosecution put in evidence as a statement given by the accused to the police.
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> You have to look at that carefully in the context of Mr. Evans' evidence, and say now, what you make of it."
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> [Emphasis supplied]

He subsequently moved to the statement and expressed himself thus (p. 160):

> "So, then, you have to look at that statement very carefully and look at it in context of Evans' evidence and the statement given by the accused.
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> Now, let me tell you, you will notice that the statement that was received in evidence as Exhibit 1, it diverges - well, it is not on all fours then. What I mean is that it is not identical to the statement made by the accused person. So, you have to decide now, whether or not this particular statement that was put in evidence by the prosecution was made by the accused.
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> As I understand the defence, it is not being denied that the accused made that statement. That is my understanding of it. It is not being denied. It is for you to say, bearing in mind the statement made in court, whether or not the statement exhibited in court here, whether that statement was given by him to the police. You must decide that."

Here he makes the point of the difference between the cautioned statement and the unsworn statement and identifies the real issue which falls for determination, viz. was the cautioned statement given by the applicant? In an endeavour to be absolutely fair to the applicant, he leaves that as an issue although it is plain the defence are not denying it.

At page 173, he reminded the jury of that part of the cautioned statement where the applicant stated that they had gone to Lilliput and he had been left by the car while the other two men went to the site and said (pp. 173-175):

> "You must say what you make of this, Members of the Jury, because you remember how you are to deal with common design or acting in concert or so. You have to find, and you have to be sure that he was a party to this prearranged plan and that he played a part. Remember Mr. Paris addressed you and said that if you find that he was not there at all, or, put it this way - yes, he said 'not there, not present'. Mr. Paris is saying that if you find that he was not present you can't convict him at all.
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> Now, Members of the Jury, let me tell you this; a person does not have to be right there where the shooting or the killing takes place for him to play a part in it, and I think the best example I could give you is that three persons agree to go and commit robbery using a lethal weapon like a firearm and one decides to stay by the gate to be a watchman, or he was the kind of person who showed them - carry them there and tell them what to do or what not to do - but because he was known or might be identified or so, he doesn't go inside but he stays nearby to assist.
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> If you find that he was near enough to render assistance, if the necessity should arise, then although he wasn't actually in the shed that night but if you are sure that he was there and that he was there ready to assist, and in fact, that he was there and his part then was to either look out or to give any assistance that they might need, should the occasion arise, if you are sure about that, then it doesn't matter that he wasn't actually inside the shed. The act of those in the shed would be his like what I told you about in common design.
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> So, in other words, although he didn't actually pull the trigger, you would attribute the act of the one who pulled the trigger to him if you find that he was there playing his part, doing his part in this prearranged plan. On the other hand, if you find that he was there

"but he wasn't doing anything at all in pursuance, or he did nothing in pursuance of a prearranged plan, nothing to assist those who perpetrated this act, then, as Mr. Paris says, he would not be guilty because the act of those who killed the man could not be attributed to him. So, you have to find, as I say, that he was playing his part in this prearranged plan.

He said he stood up beside the car and 'they come back from up the house and tell me they did not find the drugs and I go up by the hut and I find the oil behind the hut under a grass heap and I give it to the car man and his friend, and I leave Terrence and his friend up by the hut and I don't know the outcome of what happened up there by the hut.'

Now, you have to say what you make of this. Mr. Paris is saying, on the one hand, that the enterprise was complete. He got the oil and he gave it to them and that is the end of it, and so whatever the others do, he says, would be unauthorized by him; but the crown is saying no. The crown is saying this whole prearranged plan - the agreement, the crown is saying, either expressed or implied, was that the firearm should be used if needs be, and that the accused contemplated the use of the firearm.

Now, what the crown is saying is that if you accept that he knew that there was a firearm - one of the men had a firearm - and that the men would go to effect robbery, if you so find, and that the use of the firearm was contemplated, or foreseen, either that he agreed that the the firearm should be used, whether expressly or implicitly, or that he foresaw that it might be used in pursuance of that prearranged plan, the crown is asking you to draw the inference, and if you are satisfied so that you feel sure, to say that he is guilty. It is a matter for you. You must say what is the scope of this prearranged plan, if you find that there was such an unlawful prearranged plan, and was the killing of Mr. Gordon outside the scope of this prearranged plan.

If you find it was outside the scope completely, an unauthorized act which was not foreseen, then he would be not guilty. So you must consider that carefully, Members of the Jury. He said he didn't know what happened up there by the hut. 'After a while dem come back down to the car and the car drive

> "off and mi goh back to Flankers and the car goh weh with the drugs and I never know the outcome of the drugs.' So, what he is saying is 'outcome of drugs.' Nothing about payment here. I am not too sure what that means. It is for you to consider it."

We are constrained to set out the above further quotation which relates to the cautioned statement to show how careful the trial judge was in dealing with the effect of that statement. He applies the directions on common design to the statement. All of the above, it is plain bear on the effect of the cautioned statement.

The judge later dealt with the applicant's admission of hearing a gunshot and directed the jury in these terms (p. 176):

> "So, you see, here again, now, he is saying he wasn't in the presence; but you must look at that, whether he was near enough to render assistance, whether that was his part, or whether, as what Mr. Paris is saying, he wasn't part of the plan at all. He wasn't involved in that plan to rob and to use a firearm to rob. It is for you, Members of the Jury, to say what you make of it."

Finally he reminded them of the applicant's unsworn statement, suggested to them alternative interpretations of the statement and left it to them to say which alternative they should accept bearing in mind the burden on the prosecution to prove the essentials of common design.

It seems to us that having required the jury to consider the statement in the context of Evans' evidence (p. 160) and then gone on to examine and discuss with them the cautioned statement in that way, leaving to them not only the incriminatory parts but also the exculpatory parts, the trial judge was acting in accord with the law as we conceive it. Mr. Scott cited R. v. Jones, 2 Car. & P. 629, the headnote to which reads:

> (If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt; the Judge will leave the whole of the conflicting statements to the Jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal)."

That is certainly a case of respectable antiquity and the law as expressed in the first part of the headnote, has not changed since those days. It is sufficient to refer to a decision of this Court - R. v. Lawrence S.C.C.A. 111/88 (unreported) delivered 10th July 1989 where the relevant authorities were reviewed and it was held that the duty of the trial judge where a mixed statement is admitted in evidence, is to leave the statement to the jury in its entirety. See also R. v. Duncan, 73 Cr. App. R. 359.

Assuming that R. v. Jones (supra) can be regarded as authority for the proposition that a trial judge is bound to give directions that if a mixed statement is tendered and there is "in the whole case no evidence but what is compatible with the assertion of innocence so given, the judge will direct an acquittal"; we are clear that such a situation does not exist in the present case. Far from that being the case, rather the other evidence was compatible with guilt.

We are satisfied for the reasons we have stated that the learned trial judge's approach to the cautioned statement was correct and his directions more than adequate.

Mr. Scott also complained that the trial judge gave inadequate directions as to the scope of the alleged common design of which the applicant admitted being a party.

The scope of the common design, as it emerged from the evidence of Evans, was robbery of drugs. Counsel for the applicant sought to say that the evidence from the cautioned statement was that the robbery of drugs was complete before the shot was fired and in the circumstances, the trial judge should have explained this to the jury. We disagree. The scope of the plan which involved and contemplated the use of a firearm, must have included making a clean escape and preventing apprehension. It could be no answer to the charge for the applicant to assert that having successfully retrieved the hash oil, and left the other men on the site, one of whom to his knowledge was armed, and having returned to the getaway car that he was discharged of all responsiblity for what took place thereafter. The evidence showed that he was present in the vicinity of the scene of the murder, and thus in a position to render assistance to his companions in furtherance of the robbery. The applicant's mere leaving the scene did not bring the robbery operation to a successful conclusion.

The argument in this regard seemed also to have proceeded on the basis that if the scope of the plan was to steal hash oil, robbery of any other drug would be outwith the plan. That argument in our view was a hopeless one and we need say no more about it except to point out, the obvious, that a profit can be made from any drug, be it hash oil or "coke".

It was also contended on behalf of the applicant that the trial judge should have acceded to the no-case submission made to him because the cautioned statement of the applicant only put him on the scene.

In our view, the incriminatory aspects of the cautioned statement had far greater significance than learned counsel contends. Not only did the statement put the applicant on the scene, it put him on the scene when the murder was committed and in the company of men who had set out to his knowledge to steal drugs,

and one of whom, to his knowledge, was armed with a gun. There was plainly evidence fit to be left to the jury and accordingly nothing in the point.

For all these reasons, we reject the arguments relating to conviction.

We now turn to deal with the verdict returned, which was, guilty of capital murder. Section 2(2) of the Offences against the Person (Amendment) Act 1992 provides that it is capital murder only "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". It is not disputed that this applicant was not on the scene when the fatal shot must have been fired. Since he was not, he can only be guilty of non-capital murder which accordingly we substitute for the verdict returned, and sentence the applicant to imprisonment for life. The Court specifies the period which the applicant should serve before becoming eligible for parole as twenty years.

In the result the order is that the application for leave to appeal is treated as the hearing. The appeal is dismissed. A verdict of guilty of non-capital murder is substituted. The sentence of death is set aside and life imprisonment substituted. The Court specifies twenty years as the period to be served before the applicant becomes eligible for parole.