JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 174/2005

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MRS. JUSTICE HAZEL HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

WHITFIELD WILLIAMS V. REGINA

Ms. Althea McBean for the applicant

Ms. Opal Smith, Crown Counsel, and Vaughn Smith, Crown Counsel (Ag.) for the Crown

January 22, and October 31, 2008

PANTON, P.

1. The applicant herein was sentenced by Gloria Smith, J., on December 2, 2005, to fourteen years imprisonment upon his conviction by a jury for the offence of manslaughter, arising from the death of Brian Sailsman, which occurred on a day unknown between the 10th and 14th October, 2002. A single judge of this Court refused leave to appeal. However, as is his right, the applicant has renewed his application for such leave.

The grounds of appeal

2. Ms. Althea McBean, appearing for the applicant, abandoned the original grounds of appeal that had been formulated by the applicant. Those grounds

challenged the sufficiency of the evidence, and sought to impugn the conduct of the police. We permitted Ms. McBean to argue the following supplemental grounds:

> "1. The verdict arrived at in this case was unreasonable having regard to the evidence before the Court.
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> 2. The learned Trial Judge did not properly deal with the issue of common design in her directions to the jury.
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> 3. The learned Trial Judge erred in admitting evidence of an accomplice and did not adequately address the issue in her directions to the jury.
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> 4. The sentence delivered by the Learned trial Judge was manifestly excessive in light of the circumstances of the case."

The evidence

3. In order that the quality of the grounds of appeal may be assessed, it is necessary to set out the simple facts on which the jury deliberated during the thirty-four minutes which covered the period of their retirement. The main witness for the prosecution was one Jason Morgan. He, the applicant and the deceased were employed on a truck owned by one Silbert Robinson. The deceased was the driver, while Morgan and the applicant were the sidemen. They set out at about 5 a.m. on October 10, 2002, from the premises of Industrial Sales Limited in the Spanish Town area of St. Catherine, with their

mission being to transport goods to Savanna-la-mar, the capital of Westmoreland.

4. The goods had been loaded on the truck from the previous night. On the morning of this trip, the applicant went to meet Morgan at the latter's house. They then travelled to Half-Way-Tree where they met four other men in a 'black turbo car' in which they went to Industrial Sales Limited. In setting out on their journey, all three men (the applicant, the deceased and Morgan) sat in the cab of the truck. Mr. Robinson, the owner of the truck, followed it to Gutters where gas oil was purchased for the truck for the journey. The applicant, it should be noted, was one who regularly assisted the deceased driver on the truck. On reaching Nineteen Miles in Clarendon, the sidemen left the deceased in the truck while they went to purchase breakfast.

5. On the return of the sidemen to the truck, Morgan who was ahead of the applicant, saw the deceased struggling in the truck with two men, one of whom had earlier been in the 'black turbo car'. The latter man had a knife and said to the other man that he was "to cut his throat and put him here so fi lie down". Morgan said, "what is going on here?" and ran back across the road to where the applicant was. The black turbo car then drove unto the scene and a man therein pointed a gun at Morgan. Thereupon, the applicant said to the gunman, "Him kriss. A my youth", referring to Morgan. The gunman then instructed them to go to the truck. The knifeman and yet another man pulled the deceased out of the

truck, and pushed him into the car. This took place in the presence of the applicant who neither said nor did anything. The car turned around and left the scene with the deceased.

6. The applicant, Morgan and two other men went into the truck which was then being driven by the knifeman. The applicant told Morgan not to worry as it was "his (the applicant's) thing this, and everything kriss'. The truck was driven to the Waltham Park area of the Corporate Area where the goods were unloaded by all, including the knifeman and the gunman. The knifeman then drove the truck away.

7. Thereafter, the applicant, Morgan, the gunman and the driver of the black turbo car went into the car and went to buy food in the Waltham park area. The driver eventually let them out of the car, telling them he would return later. He did return with the other men, whereupon the applicant was invited upstairs and Morgan was instructed to remain downstairs. Some time after, the applicant came downstairs and said to Morgan that "dem tek him for fool". Morgan and the applicant took a bus to Constant Spring where the applicant gave Morgan $20,000.00 to keep for him. At the time of parting, the applicant told Morgan that he would be calling the owner of the truck.

8. At about 2.45 p.m. that day, the applicant telephoned Mr. Robinson, the truck owner and told him to come to Constant Spring immediately. Mr. Robinson obliged and met with the applicant at a bus stop. The applicant told Mr.

Robinson that six gunmen had seized the truck, and taken him to a place where he was put in a dark cage. Mr. Robinson advised that a report should be made to the police and this was done at the Constant Spring Police Station. Later that afternoon, the applicant told Senior Superintendent Calvin Benjamin that they had stopped to purchase breakfast and some gunmen traveling in a black car had come up, taken the deceased from the truck and placed him in the car; then, two of the men had taken him and Morgan to Mountain View Ave where they locked them in a house. Later, he said, the same gunmen had taken him to the square at Constant Spring and released him.

9. On the following day, October 11, 2002, Senior Superintendent Benjamin requested the applicant to take him to the premises on Mountain View Ave. where he had been caged. While they were on their way, the applicant informed Mr. Benjamin that he had not been kidnapped, and that he would take him to where the goods had been unloaded. The applicant took Mr. Benjamin and other police personnel to Mahoe Drive in the Corporate Area where he identified the receiver of the goods and the premises where the goods had been delivered. The receiver, one Paul Russell, confirmed that he had received the goods and had paid the applicant $7,000.00 for same. The applicant was cautioned. He responded that he had planned to take the goods but not to do the deceased anything. Both Morgan and the applicant were taken into police custody, and on October 25, Morgan handed over the sum of $20,000.00, which the applicant had given him, to the police.

10. Earlier, on October 14, Det. Inspector Leslie Ashman had received information which led him to Inswood Estate. He took the applicant with him. There, in bushes behind the factory, he saw the body of the deceased which was identified to him by the applicant. It was in the early stages of decomposition, with both feet tied. The facial and frontal bones were exposed, and the orbital cavities were empty. There was an incised wound across the upper anterior neck, and the pharynx and blood vessels of the neck were severed. There was extensive soft tissue haemorrhage, that is, massive bleeding into the tissue. The incised wound, according to the pathologist, Dr. Prasad, was caused by a sharp cutting instrument such as a knife. Death, he opined, was due to "sharp forced injury" to the neck, and would have been three to four days prior to the post mortem examination. Death would have been within two to ten minutes of the infliction of the wound.

11. The applicant gave a written statement, under caution, to the police on October 30, 2002. It was recorded by Det. Cpl. Balvey Thomas at the Lionel Town Police Station in the presence of Mr. Hopeton Clarke, attorney-at-law, for the applicant, and Det. Sgt. Colin McKenzie. On November 9, 2002, the applicant also gave answers to questions posed by Det. Sgt. Paul Thomas in the presence of Mr. Michael Lorne, attorney-at-law, acting on behalf of the applicant. Indeed, Mr. Lorne signed the document as a witness. There was a degree of consistency in the substance of what the applicant said on both occasions.

12. The applicant's statement and the answers he gave to the questions may be summarized thus:

(i) The truck was hijacked by men travelling in a black car;

(ii) The applicant was involved in a plan to hijack the truck;

(iii) The planning had taken place on Monday October 7, and there was a follow-up meeting with at least three of the men on October 9 at a gas station;

(iv) The applicant was given a telephone by one of these men for the purpose of maintaining contact with the group;

(v) The applicant witnessed the forced removal of the deceased from the truck into the black car;

(vi) The applicant travelled with Morgan and the other men on the truck to the Corporate Area where the goods were unloaded with the help of the applicant and Morgan;

(vii) The applicant was paid for his labour, and was fed;

(viii) The applicant gave a parcel of money to Morgan;

(ix) The applicant and Morgan were taken to Constant Spring, from which location the applicant called Mr. Robinson, the owner of the truck;

(x) The applicant told Robinson that the truck had been hijacked by some men in a black car;

(xi) The applicant and Robinson went to the Constant Spring Police Station, where the applicant made a report.

In the "question and answer", the applicant said that he had told the deceased about the plan to hijack the truck, and had suggested to him that he should inform Mr. Robinson.

The applicant's response

13. The applicant did not give evidence before the jury. Instead, he chose the safety of the dock from which he made an unsworn statement. He said he was twenty-five years old and was an electrician by trade. He admitted to the giving of the statement at Lionel Town, but said he had been threatened and hit on the forehead by Mr. Benjamin. He said that all that Morgan had said was untrue. All of them, he said, knew that the goods were going to be sold by Mr. Sailsman, the deceased. It was Mr. Sailsman who had planned to sell the goods. There was no plan for him the applicant or anyone to rob or do Mr. Sailsman any harm. It was because of Mr. Sailsman's plan to sell the goods why he, the applicant, volunteered to unload the goods.

Ground 1 –verdict unreasonable

14. We saw no reason to invite the Crown to respond to the submissions on grounds 1 and 2. However, we think it appropriate to make a brief comment on ground 1. The primary argument put forward thereon by Ms. McBean was that there was no evidence that the applicant was part of a plan to inflict bodily harm on the deceased. We formed the view that she was ignoring the evidence of Jason Morgan which clearly indicated that the applicant was fully aware that

violence was contemplated, in view of the presence of the gun and the knife and the forced removal of the deceased from out of the truck into the car. The applicant's statement to the gunman, "Him kriss. A my youth", referring to Morgan, shows that the applicant had some measure of control over, or understanding with, the gunman. The latter was left in no doubt that the applicant did not wish Morgan to be hurt. The assurance given to Morgan by the applicant himself when he said that it was "his thing this, and everything kriss", along with his voluntary unloading of the goods, and his acceptance of cash as reward for his labour, provided a sufficiency of evidence for the verdict arrived at by the jury. It should be added that at no time was there any hint of the applicant having second thoughts about the enterprise, and wishing to withdraw even in part. It is also not without significance that he gave the truck owner, Mr. Robinson, the clear impression that an unplanned robbery had taken place and that he did not know what had become of the deceased or the truck.

Ground 3 – The learned Trial Judge erred in admitting evidence of an accomplice and did not adequately address the issue in her directions to the jury

15. The main complaint by Ms. McBean in this regard was that the evidence against the applicant came from an accomplice, and that there was no corroboration of that evidence. Further, the learned judge did not point this out to the jury. Any other evidence against the applicant, she said, came from the caution statement and that did not amount to a confession, although the learned judge had wrongly described the statement as such.

16. There can be no dispute that the learned judge described the statement as a confession. There is no dispute either that the description was inaccurate, seeing that the applicant did not confess therein to the offence of murder or manslaughter. The impact of the use of the term 'confession' is minimal, however, given the otherwise very clear directions given by the learned judge in respect of the facts and the legal requirements before an adverse verdict could be properly returned by the jury. We are of the view that this incorrect terminology played no part whatsoever in the jury's deliberations or their verdict.

17. Ms. Opal Smith, for the Crown, argued that the learned trial judge gave adequate directions on the meaning of the term accomplice and as to what corroboration means. The failure to highlight the corroborative features was not fatal as there was corroboration, and by not pointing that out to the jury, it was the Crown that would have been prejudiced. Pointing out the evidence amounting to corroboration would, she said, have made the case against the applicant stronger, so he should not be heard to be complaining. In the circumstances, she submitted, there has been no miscarriage of justice, so the proviso should be applied.

18. We are of the view that the complaint against this aspect of the summing-up does not carry the force that Ms. McBean ascribes to it. This is how the learned judge dealt with the matter:

"Now, the first witness that was called on behalf of the prosecution was Mr. Jason Morgan and this witness can be described as an accomplice, in law. What that means, is that he is a person who, it is said, participated in respect of the actual crime charged, because as you heard and counsel for the defence reminded you, that although he said he had been charged, he didn't tell us that he was charged for murder, but you heard from the police officer subsequently, that he was in fact charged for the murder of Mr. Bryan Salesman and was taken to court on some occasion and subsequently those charges against him had been dropped and you remember what was said. So in law, he is called, what is known as an accomplice.

Now, where an accomplice gives evidence on behalf of the Prosecution, I must warn you, the jury, that although you may convict on his evidence, it is dangerous to do so unless that evidence is corroborated. Now, what is corroboration Mr. Foreman and members of the jury? It is some independent evidence intended to support the allegation of the witness, not merely that the offence has been committed, but that the accused committed the offence, or participated in the commission of the offence. However, if you believe he is a witness of truth, you may convict on his evidence.

However, please bear in mind that this witness may also be described as a self confessed liar. So in addition to being an accomplice, he has told you that he lied. You remember he said he gave the first statement to the police in this matter and that he had lied when he gave that statement. So when you come to assess his credibility, you will have to bear all these things in mind to determine if he is, in fact, a witness that you can rely on, in determining the guilt or innocence of this accused. So you have to bear these things in mind. Number one, that he is an accomplice and that it is dangerous to act on his evidence because he might have an interest to serve and secondly, that he is a self confessed liar."

19. In ***Davies v Director of Public Prosecutions*** [1954] 1 All E.R. 507, the House of Lords considered the question of the evidence of an accomplice. Lord Simonds, L.C., having reviewed the decisions and reasoning in several cases including ***R v Baskerville*** [1916] 2 K.B. 658, ***R v Davies*** [1930] 22 Cr. App. Rep. 33 and ***R v Lewis*** [1937] 4 All E.R. 360, said:

> "The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions, more particularly in the third. These propositions as amended read as follows:
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> '*First proposition*: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. *Second proposition*: This rule, although a rule of practice, now has the force of a rule of law. *Third proposition*: Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907'." (p. 513 A-B).

It is clear that the learned judge was guided by these propositions. Although she was so guided, it would have been desirable for her to have outlined the evidence capable of amounting to corroboration. Notwithstanding that failure, no miscarriage of justice has occurred.

20. In accepting the prosecution's case, and in returning a verdict of guilty of manslaughter, the jury must have relied on the evidence of Jason Morgan. There is nothing in his evidence to suggest that he was a party to the planning of either

the robbery or the killing; nor was he involved in the seizing of the truck or the kidnapping of the deceased. Indeed, his evidence indicates quite clearly that he was surprised at the turn of events. However, he participated in the unloading of the goods, and in receiving the parcel of money that the applicant asked him to keep. To that extent, therefore, it was appropriate and necessary for the learned judge to have dealt with him as an accomplice. Although the applicant in his unsworn statement has said that Morgan gave false evidence, the fact is that the applicant's statements to the police confirm the seizing of the truck, the kidnapping of the deceased, the unlawful disposal of the goods from the truck and the receipt of money by the applicant for same. The only point of departure between the account of Morgan and that of the applicant to the police is in respect of the applicant's utterances at the scene of the seizure of the truck. The applicant's statements, however, do go further and provide the background and history of the events that led to the killing of the deceased. In the circumstances, even if the learned judge had made an error, and we are not of the view that she did, no miscarriage of justice has occurred.

21. In keeping with our appreciation of the evidence, and given the appropriateness and adequacy of the summation, we find no merit in this application, notwithstanding the efforts of Ms. McBean. The application for leave to appeal is accordingly refused. The sentence is to commence from March 2, 2006.