JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 146/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

REGINA vs. DENTON AITKEN

Ravil Golding for the applicant

Hopeton Clarke for the Crown

June 7 and 28, 1999

WALKER, J.A.:

The applicant was convicted for the offence of capital murder in the Home Circuit Court, Kingston, on October 31, 1997. He was sentenced to death. Presently, he applies for leave to appeal against that conviction.

In the early afternoon of July 1, 1996, Curtis Russell was shot and killed in the course of a robbery at his business place, a cooking gas retail outlet located at 33 Mahoe Drive, St. Andrew. Shortly before this tragedy occurred Mr. Russell had driven a truck which was laden with cooking gas cylinders to the shop. Having parked the truck, he alighted from it and entered the shop. In a short time two men, one of whom was positively identified as the

applicant, followed Mr. Russell into the shop. The applicant was seen to remove a firearm from his waist as he entered through the door of the shop. Within seconds after this Mr. Russell was heard to say, "You can take it, man" and then two explosions were heard following which the applicant and his companion ran out of the shop. At this time the applicant was seen to be carrying two firearms while the other man was holding a firearm in one hand and a quantity of Jamaican paper money in the other hand. The evidence adduced by the prosecution was that Mr. Russell was a licensed firearm holder and had left home with his firearm which he carried in a holder that day. Following the hasty departure of the two men, Mr. Russell was discovered lying on the floor of the shop whereon paper money was "scattered all over." He was bleeding, having been mortally wounded as it turned out. He was, in fact, pronounced dead on arrival at the Kingston Public Hospital where he was taken by the police who attended the scene. A post mortem examination of the body of the deceased which was performed later the same day revealed the following injuries:

> "1) One entrance gunshot wound present on the right side of chest 37cms below the top of head and 11cms from midline. Diameter 1cm. It travelled the underlying tissues entered the thoracic cavity and exit at the left side of chest 28cms below the top of head and 15cms from the midline. Diameter 2cms. Both lungs and apex of the head are injured. Haemopericardium present.
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> 2) An entrance gunshot wound present on the back of left side of trunk 52cms

> below the top of head and 7cms from the midline. Diameter 2cms. It travelled the underlying tissues entered the thoracic cavity and exit at the back of the right side of trunk 55cms below the top of head and 25cms from the midline. Diameter 3cms."

The medical evidence as to the cause of death was a gunshot wound to the chest. Further, the doctor expressed the opinion, which remained unchallenged at the trial, that the gunshot wounds sustained by the deceased were caused by two different firearms. Significantly, at the time of this autopsy, the doctor observed an empty firearm holder lying atop the chest of the deceased.

In his defence the applicant gave a short unsworn statement the substance of which was that he knew nothing about the offence for which he was charged. He called no witness on his own behalf.

With the leave of the court, five supplemental grounds were argued in support of the present application. These grounds were stated as follows:

> "1. That when the jury first came back into court the learned trial judge did not ascertain precisely what were the problems and consequently it is therefore impossible to tell whether anything said by the learned trial judge resolved the problems or not.
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> 2. The learned trial judge failed to assist the jury when they sought assistance on the question of mistaken identity and the discrediting of the police, the withholding of which assistance constitutes a material irregularity.

> **3.** The learned trial judge wrongly assumed that he could assist the jury on questions of law only and this might have prevented the jury from seeking the judge's assistance on questions of fact with which they had difficulties.
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> **4.** The learned trial judge misdirected the jury on the law relating to Capital Murder when he told the jury '...if you find, from the evidence, that there was this robbery and there was this killing associated with the robbery, then it is open to you to convict the accused man of capital murder.'
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> **5.** The learned trial judge failed to deal adequately or at all with contradictions/discrepancies in the evidence of the prosecution witnesses."

The first, second and third grounds were argued together. They relate to a scenario where the jury having retired to the jury room were recalled to the court room by the learned trial judge. The record discloses precisely what took place at this stage of the trial. It is as follows:

> "JURY RETIRES UNDER SWORN GUARD AT 1:10 P.M.
> TIME 2:50 P.M.
>
> Mr. Foreman and members of the jury, I have sent for you because I observed that you are out for more than an hour, I had given instructions as to getting some refreshment; did you get it?
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> **MR. FOREMAN:** No, sir.
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> **HIS LORDSHIP:** I told the Registrar in court that they must see to it that you have refreshment, I went up to my chambers and nobody has gotten back to me, so I thought this had happened. The Registrar has not even come back to me to say this was not done. I am surprised about this because you must be hungry, I don't want these things to be happening in these places. I am awfully sorry about this.

JURY ROLL CALL

ALL PRESENT

REGISTRAR: Mr. Foreman, please stand.

HIS LORDSHIP: Have you arrived at any verdict?

MR. FOREMAN: It is not unanimous.

HIS LORDSHIP: Very well, what I am going to do, I am going to arrange for some lunch - well, I would like to ask you first of all, is to remind you that each of you had took an oath to give a true verdict according to the evidence, and you must not be false to your oath. You have a duty as an individual to deal with your oath, but you must collectively try to arrive at some decision because the verdict would have to be unanimous one way or the other.

Now, each of you has come to the jury box with your own experience and your own wisdom, and so your task is to pool that wisdom and that experience, to listen to each other, and to give and take; there must be some argument, but at the same time you must be true to your oath. That is the way you arrive at your decision. Listen to each other, listen to the argument which each one of you present and try to see if you can reach some decision.

Now, is there anything by way of assistance on any question of law, anything on which I could assist you? Confer among yourselves when you go back, because you had not had any lunch and I want to know that you have had something. So if there is anything that I can assist you with let me know before I send you back.

MR. FOREMAN: You had just said if there was any question on the law that you could assist us with, one of our member wants to clarify something on the evidence that was presented, will you also assist in that area?

HIS LORDSHIP: Yes.

MR. FOREMAN: I think that is the area that some of them need to be clarified, they

have not been able to grasp the actual scene on that particular day and would be able to see it better in some way set out in front of them. Would like to see the actual place and who was where at the time, is that possible?

HIS LORDSHIP: No, is only the evidence which you have heard, we can't have any new evidence, I can remind you of the evidence given by the witnesses in relation to where he was and what he had seen, but you can't get any additional evidence. We didn't have any evidence of the scene, no physical evidence, like a map or a plot. You have to understand what the witness has told you and to visualise the scene. Now, what in particular that you want to know? What has happen is that you are going basically on the crown witness for the prosecution.

MR. FOREMAN: What we would like, there are some concern or some issues have been raised as to what the actual witness could have seen or could not have seen, based on the actual area - the place, the actual road, the corner and everything else. Based on the testimony it would be true or not true that is basically it.

HIS LORDSHIP: The evidence which was given by Cons. Burton, is that he was standing at the intersection and what he says, is that he saw three men coming from that direction to his right. But what is the evidence that he gave is that there was no obstruction, he was able to see the accused person, there were two of them he was able to see their entire body, there was nothing that obstructed his view. What transpired is when he was asked in cross-examination was whether the accused person or these men could have seen him. He said well, his back was against the zinc fence and it is possible that the accused man might not have seen him; that is the evidence. But in so far as his evidence is concern(sic) as to whether or not he saw them, he said he saw them walking, he was one and a half chain away and they walked passed him and went to the shop. He saw their entire bodies, entire faces of these two men, he saw them when they were coming out. Remember he said there were no obstruction. That is the evidence coming from the prosecution. But that evidence wasn't

> disputed. What was disputed is whether or not the accused man could have seen the witness and he is saying, well, he doesn't know. He might not have seen him because his back was against the wall.
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> Well, you have to bear that in mind. But, the question of whether there was any obstruction, it is something which the witness, Constable Burton, was quite clear on.
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> **MADAM FOREMAN:** Your Lordship, what we have also found is that one, sorry. We have a position where it is felt that the gentleman, the accused, there may be a mistake in identity. It is felt by somebody, you know, that it could be that position. The other person feels that you could also have a situation where because of how they have discredited the police, you have told us we have to be careful about our own personal experience, but you also will find that sometimes people may have a previous opinion of a group of persons and apparently it might cloud their judgment also.
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> **HIS LORDSHIP:** Very well. Well, you see, you are judges of the facts and you must not rely on anything which you heard about this case before you came into court. You must just listen to the evidence which you got from that witness box and weigh the evidence and try to see, you have captured the witnesses, the demeanour of the witness, see whether or not you believe them and see whether or not the witness had an opportunity and whether you accept the witness as credible. This is a matter for you and you must give and take. Have discussions about it, but in the end pool your wisdom and pool your experience together, but don't have any sympathy for anybody. Please go back now and consider your verdict. I will have to arrange that you get some refreshments."

The gravamen of Mr. Golding's submission is that, having interrupted their deliberations, the learned trial judge failed to ascertain from the jury the precise nature of their problem and failed to render sufficient assistance to

them. On a careful analysis of all that transpired, it seems clear that the intervention of the learned trial judge was prompted primarily by a genuine concern for the personal comfort of the jury having regard to the fact that they had been in retirement for a period of 1 hour and 40 minutes spanning the usual luncheon adjournment which would normally have been taken from 1:00 p.m. to 2:00 p.m. Having recalled them he assured them that they would be supplied with refreshment, and at the same time he took the opportunity to enquire whether he could be of any further assistance to them in their deliberations on the case. Having heard the responses of the foreman, the judge proceeded to give them further directions on the issue of identification which was, indeed, the critical issue for them to resolve. He also directed them quite helpfully and correctly, we think, as to how they should approach their duty as a jury. In our judgment, the learned trial judge dealt adequately with the situation as he found it and we find no merit in these grounds.

Where the fourth ground of this application is concerned, counsel for the applicant argued that the instant case fell squarely within the ambit of section 2(2) of the Offences against the Person (Amendment) Act, 1992. Section 2(2) provides:

> "**(2)** If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), 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."

In this case, capital murder was charged pursuant to section 2(1)(d)(i) of the Act.

Against the background of section 2(2), counsel for the applicant submitted that the directions of the learned trial judge were deficient. Those directions were given in the following terms:

> "The Prosecution's case is that this accused man embarked upon a robbery of the deceased and in the furtherance of that robbery the deceased was killed. The Prosecution tells you that the robbery was the stealing of money and a firearm.
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> So, if you find, from the evidence, that there was this robbery and there was this killing associated with the robbery, then it is open to you to convict the accused man of capital murder. If, however, you find that it was the accused who killed or took part in the killing of the deceased, but you are not sure or certain whether it was during the course of a robbery, or you find that although he took part in the killing, there was no robbery, then it would be open to you to convict him of the lesser offence of murder. If you find that he took no part in any killing or in any robbery, then you must acquit him."

Mr. Golding relied heavily on the decision of this court (Forte, Downer, Gordon, JJA) in ***R. v. Aldon Charles*** (unreported) S.C.C.A. 151/95 delivered 4th November, 1996.

In that case the evidence showed that the appellant, while armed with a gun and acting in concert with two other men, invaded the Dixons' house, and that in the course of robbing the couple the appellant shot and injured Mr. Dixon. Subsequently, Mrs. Dixon was, herself, fatally shot but there was no evidence to prove that it was the appellant who shot her. The Court of Appeal allowed the appeal, quashed the appellant's conviction for capital murder and substituted a conviction for non-capital murder. In delivering the judgment of the court, Gordon, J.A. explained the ratio decidendi thus:

> "Section 2(2) provides a departure from the common law application of common design. The common law provides for a conviction of non-capital murder. To amount to capital murder the Crown must prove that the injury which resulted in the death of the victim was inflicted by the appellant or that at the time of its infliction the appellant attempted to inflict grievous bodily harm to the victim or he used violence on the victim in the course or furtherance of an attack on that person. The requirements point to a personal involvement by the appellant in a physical assault on the victim; such an attack may involve the infliction of grievous bodily harm.
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> The directions of the learned trial judge placed emphasis on the crime of robbery thus embodying section 2(1)(d)(i) of the Act. He however failed to embrace the full contents of sections 2(2) which encompass the participation of the appellant in the use of violence on the deceased victim at the time of the infliction of the fatal injury.
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> That there was a robbery there is no doubt. Articles taken from the house were abandoned by the robbers outside. The ground around Mrs. Dixon's body gave

> evidence of a struggle and the state of her garments, torn panties, blouse and shirt (sic), provided evidence of physical violence being inflicted on her at the time of or immediately before she was shot. The jury should have been directed on the entire requirements for capital murder as provided for in section 2(2) of the Act. They should have been assisted in terms of the foregoing assessment to evaluate the evidence and determine whether the appellant was guilty of capital murder. The robbery had been committed in the house. Mrs. Dixon was shot outside the house. That violence visited on her could have been related to the robbery, being done after, it could have been immediately after; it could however have been violence independent of the robbery as it was subsequent to the appellant hasty departure from the house by five to seven minutes. Perhaps because of the proclaimed finality of the sentence the legislature prescribes that the culprit must be personally involved in the infliction of the violence on the victim. The evidence must therefore be direct or the inference of guilt must be absolutely inescapable. The directions to the jury must be given with impeccable clarity and the hiatus in the evidence carefully explained."

In our view, ***Charles'*** case is easily distinguished from the instant case. Here there was no hiatus in the evidence for the judge to explain. The evidence pointed to the involvement of two armed robbers in the murder of the deceased and once the jury found that the applicant was one of those two men and, further, accepted the unchallenged medical evidence that the gunshot wounds to the deceased resulted from the use of two different firearms, as obviously they did, it was an inescapable inference that the applicant, himself, shot the deceased. In these circumstances, the

applicant would be guilty of capital murder within the context of section 2(2). Looking at the case in this way, we consider that the directions of the learned trial judge, though terse, met the legal requirement.

The fifth ground of this application was not pursued with any vigour, and understandably so. It is true to say that the learned trial judge directed the jury in general terms on contradictions and discrepancies without pointing to any possible example of the same on the evidence. However, the directions were correct in law and it was the exclusive province of the jury to make specific findings in accordance with those directions.

Accordingly, this application for leave to appeal is refused.