THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 25 & 29/96

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

REGINA
vs.
ARNOLD HALL
WHITELY DIXON

Delano Harrison for both applicants

Kent Pantry. Q.C., Deputy Director of Public Prosecutions,
Lisa Palmer and Marlene P. Mahaloo, for the Crown

March 3 and 21. 1997

PATTERSON, J.A.:

The applicants, Arnold Hall and Whitely Dixon, were tried jointly in the Circuit Court Division of the Gun Court at Kingston before Paul Harrison, J. and a jury on an indictment which charged them both of capital murder of Delroy Russell in the course or furtherance of robbery. On the 12th February, 1996, the jury found the applicant Arnold Hall guilty of non-capital murder, and the applicant Whitely Dixon guilty of capital murder. Hall was sentenced to life imprisonment, and the court specified that he should serve a period of twenty years before becoming eligible for parole. Dixon was sentenced to suffer death. Both applicants applied for leave to appeal against conviction on various

grounds. At the hearing on the 3rd March, 1997, the court reserved its decision which is contained herein.

The case for the prosecution rested on allegations that the murder resulted from the concerted design of both applicants. They alleged that the applicants and another man, armed with a gun and knives, acted in concert to attack and rob the occupants of a home at Mount Ogle, Lawrence Tavern in the parish of St. Andrew, and that the murder was part and parcel of their common design. The main issue that falls to be decided by this court is whether the evidence supported the allegation of a common design to kill. Mr. Harrison argued that it does not, and, therefore, the conviction of capital murder against Dixon cannot stand - at the highest it would be no more than non-capital murder, and likewise, in the case of Hall, the conviction of non-capital murder could not stand.

The case for the prosecution depended to a large extent on the evidence of Mitchelle Ximines, and the evidence of confessions and admissions contained in voluntary statements made under caution by each applicant. Mitchelle Ximines, a school teacher, and her children lived at Mount Ogle. She testified that at about 7:00 p.m. on the 26th October, 1993, she had visitors who included her brother, the deceased. She was on the verandah of her home and her visitors were just about coming onto it. Three men, one with a gun and the other two with knives, came from the side of the house onto the verandah. The one with the gun held her by the neck, pointed the gun at her and ordered her into the house, asking for money and jewellery. Her brother, the deceased,

who had not yet left the house, ran further inside; but the witness could not say where he went.

What took place inside the house is very important to the issues that arise in this case. The witness testified that she told the gunman that she did not have either money or jewellery and he slapped her in her face with the gun. She was then in her bedroom. The gunman released her and ransacked a drawer in a dresser in that bedroom. The gunman then left the bedroom and went into the kitchen; one of the other men came in the bedroom and held a knife to her throat. That man eventually left her and the gunman returned and held her again. He then asked her "Weh the bwoy deh." She understood him to be referring to her brother who had run. The house, she said, is big, and the gunman asked her to go downstairs. She complied, followed by the gunman who was holding on to her with the gun pointed at her neck. The house is built on a slope, the verandah, living room, a bedroom and kitchen being on one level, and another bedroom and a bathroom on a lower level. A stairway leads from the kitchen to the lower level.

The witness said that when she got downstairs, she entered the bedroom, and turned on the light at the request of the gunman. The gunman looked in the room. No one was there. The gunman then requested her to turn on the bathroom light, which she did. Her brother, the deceased, was behind the door, and the gunman pointed the gun towards his forehead, said "Hey bwoy", and fired a shot which killed him. The gunman then ran from the bathroom, up the stairs to the kitchen and made good his escape.

The witness said she ran behind the gunman up the stairs, unto the main road in front of her house and then to the police station which was just a few chains from her house. She did not see either of the other two men when she reached upstairs. On her return from the police station she saw that the bedroom had been ransacked and $500 was missing from off the dresser. A component set and her son's school bag were missing from the "hall".

The witness testified that her brother was a mechanic "and he also collect on a bus" which plies between Kingston and Lawrence Tavern. This was not disputed. She said one of the men with knives was masked, but the gunman and the other man were not. She did not know any of the men. She went on an identification parade in 1995, but she was not able to point out anyone. So although she was able to give evidence of what the gunman did, she was not able to identify the applicant Dixon as the person who shot her brother, nor was she able to say who was the knifeman that placed the knife at her throat.

In order to connect each applicant with the murder, the prosecution relied on the evidence contained in written statements made under caution by each of them. In the case of Dixon, his statement was recorded by Sergeant Ornett Williams, on the 10th May, 1995. The relevant part reads as follows (pp. 191-2):

> "Mi right name is Fitzritson Gallimore. Mi friend dem call mi Whitley and Deamus. Mi live a Bellvediere District, Essex Hall, St. Andrew. Mi spar with some guys "by the name of Danny, Oral and Rougie. Dem come from Rose Hill area of St. Andrew.
>
> On Tuesday the 26th of October, 1993, in a the earlier part of the night, Daddy, Oral, Rougie and myself go

> a Mount Ogle pon the Main Road, one house deh near to the road. The four a wi go in a the house. When wi go in a the house, mi si some people. A only one gun was in a the group and a mi did have the gun in a mi hand. When mi inna the house mi si a boy whey mi and him have thing before, him was a ducta on a bus and him never want to give mi some change and we fight. When mi see him in a the house him run go down stair and mi go after him with mi gun in a mi hand. The gun was a 9 millimeter. When mi go down stair I see the man who ran down there. This man then grabbed mi and we start to fight fi the gun, him hold on the gun and mi manage to get the gun from him. Mi and him did a wrestle and a shot fired from mi gun and hit this man. He fell to the ground and I went back upstairs whey the rest a mi friend them did deh. When mi go upstairs them boy was not there mi see them on the road. When mi see them pon the road them have some appliances with them. All a wi then go over to Bellvediere, Daddy and Rougie left and mi and Oral sleep up there. When day light mi and Oral go down a Rose Hill and ml tell John Crow that a little thing gwan last night. Mi then hear say the man dead."

The applicant Hall dictated his statement under caution to Superintendent Trevor Chin on the 26th May, 1994. He admitted going to the premises on the night in question, along with others, and he confessed as to the role he played. The relevant part of his statement reads as follows (p. 115):

> "I went late October last year, me, Dawg, Pa Moose who dem call Akasa to and Mark go pone one work up a top Mount Ogle. Me never know weh me a go but dem say me fe just follow dem.
>
> We reach up a Mount Ogle and dem spot out de house dem did give me de long gun fe carry but when me reach the house Akasa tek it back from "me, and all a we walk go down in a de yard and dem go in and stick up de people dem and move out de appliance de man shuffle fe mek a alarm like and Dawg run him down in a de house and shot him wid de shot gun. About five people did in a de

> house and Dawg dem stick dem up and seh dem must lie down and seh dat me must do the searching. Me search the people and Dawg come in and seh me must pick up the video and carry it outside and me do weh him seh.
>
> De man weh get shot drop a ground and me carry out de T.V. me and one a dem boy tek out de component set. We left and walk through the bush and go back a Lacey, me carry de T.V. and de rest a man dem carry de other things dem."

The application of Arnold Hall

Mr. Harrison filed two grounds of appeal in support of the application of Hall. The first ground attacked the directions of the learned trial judge on the issue of common design, and the second, which was rolled up with the first, was put without details stating "that the verdict in unreasonable having regard to the evidence." This was really the main ground:

> "1. That, in his charge to the jury, the learned trial judge fatally erred in law in failing to direct them to consider the question whether, if they found that then co-Accused WHITELY DIXON had killed the deceased, he had, in so doing, acted without the scope of the common design, involving the Applicant, merely to rob -- in which event, they would be entitled to convict the Applicant of robbery with aggravation only (See Transcript pages 6-18; 1 14-115; 306-354)."

The learned trial judge's directions to the jury on the issue of common design must be examined. This is what he said (pp. 316-7):

> "The prosecution based this case in respect of the two accused men on the concept of common "design and common design in law is a situation where two or more persons joint together to commit an offence, and if that offence is carried out then each person (who) takes an active part in the commission of that offence and is guilty of that

> offence. And each person would be responsible for the actions of the other in carrying out that joint enterprise.
>
> So in respect of these two accused men the prosecution is saying that they were together in this common enterprise to rob the house that night. They were together in that common enterprise to inflict violence on these persons that night and so each person is responsible for the act of the other in carry (sic) out that general common enterprise.
>
> In respect of each accused man you would have to consider the evidence against them separately in respect of this charge. Separately as far as what did each person do, as far as the prosecution's case is concerned. And then you look at what each person has done and see how does it fit in with the general overall case of the prosecution, that they were acting together in this common enterprise to rob and the commission of the murder.
>
> The prosecution's case is that they went there, all three persons, one with a gun, two with knives. That means they were all armed, if you accept the evidence, and in those circumstances they committed murder and robbery. It is one common enterprise each person carrying out certain acts and in those circumstances they are both responsible for the acts of each other."

Mr. Harrison submitted that those directions were not enough in the circumstances of this case. He argued that there was evidence from which an inference could be drawn that the "shooting arose out of an act of personal reprisal." This inference, he said, could be drawn from the statement of the applicant Whitely Dixon, and the jury should have been told to consider whether the killing by Dixon was part of the joint enterprise. He submitted that `the general directions of the learned trial judge were flawed in that they tended to

suggest that the common design was, from the outset, to commit robbery and murder rather than that the murder may have arisen as a consequence of the intention to rob.

Application of Whitely Dixon

It is convenient to consider at this time one of the grounds relied on by counsel in respect of the application of Dixon. That ground reads:

> **"2.** That at the close of the Crown case, the learned trial judge erred in law in declining the submission then made, on behalf of the applicant, that the offence CAPITAL MURDER ought not to have been left for the jury's consideration."

Counsel for the applicant submitted that non-capital murder arose in the case of Dixon. He argued that the evidence to show how it was that the deceased met his death came from the witness Ximines and the statement under caution of Dixon himself. He said since the applicant Dixon stated what it was that motivated him to chase the deceased, his act fell outside the scope of the common design and the jury should have been directed along that line.

A consideration of the submissions and arguments advanced by Mr. Harrison involves a visit to the principles governing the basis of culpability of offenders who embark on a joint enterprise. There can be no doubt that as a general rule, all those who join together and actively participate in the commission of a crime will be guilty as primary offenders. But the principle goes further than that. As Sir Robin Cooke recalled in ***Chan Wing-siu and others v. The Queen*** [1984] 3 All E.R. 877 at 880:

> "...a person acting in concert with the primary offender may become a party to the crime, whether

> or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all parties acting in concert."

Sir Robin Cooke continued by stating an even wider principle;

> "a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend."

It seems quite clear, both on the evidence of the witness Ximines and on the evidence contained in the statements on caution of both applicants, that the primary offence contemplated by the applicants was robbery. There is also ample evidence to support a finding that the applicants were armed with a gun and a knife. The witness Ximines testified that she saw one man with a gun and the other two men with knives. Both applicants, in their cautioned statements, admit to the carrying of a gun in the commission of the robbery. The prosecution case was advanced against both applicants on the basis that in the circumstances, they must have had in their contemplation to use the gun and/or the knives to inflict serious bodily injury on any of the occupants in the house, should the necessity arise. Each applicant must have contemplated and foreseen that a possible incident of the execution of their joint enterprise could be the killing of or infliction of serious injury to an occupant of the house. It is in those circumstances that the applicant Hall is said to be liable for murder as a consequence of the killing of the deceased done by the act of his co-adventurer, the applicant Dixon.

It seems quite clear that Hall had full knowledge of the fact that potentially murderous weapons were to be carried on the unlawful enterprise. He admitted in his cautioned statement that he carried the gun for some distance when going towards the house, and then he handed it over to his co-adventurer Dixon. The fact that they were armed with potentially murderous weapons gives rise to the inescapable inference that they must have contemplated using the weapons to overpower or eliminate all or any of the occupants of the house, should the necessity arise. Dixon, in his statement, made it quite clear that he recognised the deceased, and it is reasonable to infer that the deceased could have recognised Dixon. In the circumstances, it seems that the only reasonable inference open to the jury would be that the killing was done to eliminate the real possibility of future identification of at least one of the robbers. We reject the contention that there was evidence capable of supporting a reasonable inference that the shooting arose out of an act of personal reprisal by Dixon and, therefore, was not in the contemplation of Hall.

In our judgment, the learned trial judge tailored his directions to the jury on the principle of common design to fit the case presented by the prosecution. At their trial, both applicants elected to make unsworn statements. Each distanced himself from the contents of the cautioned statements which were admitted in evidence and formed part of the case for the prosecution. Each put forward a defence in the form of an alibi and denied committing the offence. In the circumstances, we consider the directions to be adequate to convey to the jury that the applicant Hall could only be convicted of murder if

they were sure that he contemplated that in the course or furtherance of the robbery one of the other robbers might use the gun or knife to kill or cause really serious bodily harm to someone within the house.

The Offences against the Person Act (as amended) provides that where murder is committed by a person in the course or furtherance of robbery, it is to be classified as capital murder. But when two or more persons are guilty of that murder, it is capital murder only in the case of any of them who, inter alia, "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." [Section 2(2)].

Undoubtedly, the jury had no difficulty in accepting the case for the prosecution on the basis of a common design. The evidence in support was overwhelming, and even if we had found that the omission complained of was justified, we think this would be a proper case to apply the proviso. In our judgment, there is no merit in the grounds we have considered.

The only other ground argued by counsel related to the applicant Dixon. That ground reads as follows:

> "That the learned trial judge fatally erred in law in failing to reconsider his earlier ruling, upon the voir "dire, admitting into evidence the Applicant's alleged cautioned statement (Exhibit 2)."

In order to assist in identifying the applicant Dixon as the gunman referred to by the witness Ximines, the prosecution sought to put in evidence a written statement which they alleged was voluntarily given by Dixon. Without the evidence contained therein the prosecution would have had to rely solely on an oral statement which the arresting officer said the applicant made on being apprehended, namely, "A no directly me directly kill the youth, a struggle me and him a struggle fe the gun and it go off and kill him." It is understandable, therefore, that the defence objected to the admission of the evidence. But it seems odd that defence counsel only said, "I am objecting, M'Lord" without stating the grounds for his objection. The learned trial judge then heard the relevant evidence on the voir dire in the absence of the jury from Sergeant Ornett Williams, Constable Orville Henry and the applicant Dixon himself. Dixon denied authorship of the written statement. He admitted that he had been asked questions about ganja, but said he did not say anything about murder. He said it was the police who prepared a statement, parts of which were read over to him, and that he signed because he had been hit in the mouth earlier and threatened to be hit again if he did not sign. The police officers had denied using any force or threat to induce the statement. The statement was said to be taken at the request of the applicant. In the circumstances, it was necessary for the judge to rule on the admissibility of the statement. He ruled that the statement was given and signed voluntarily and, therefore, admissible.

When the trial continued before the jury, defence counsel cross-examined the same two witnesses and Detective Constable Smith on the issues

of the authorship of the statement and the manner in which the signature was obtained. Before us, Mr. Harrison argued that there are grave irreconcilable discrepancies between the prosecution witnesses as to the circumstances giving rise to or surrounding the taking of the statement. He referred to the evidence of Sergeant Williams where he said on the voir dire that at about 9:00 a.m. on the 10th May, 1995, Detective Constable Smith of the Lawrence Tavern Police Station drove into the Stony Hill Police Station. Smith and the applicant came out the vehicle and this is what is recorded in the transcript (p. 144):

> **"Q:** Detective Constable Smith said in his presence?
>
> A: Told me that he wishes to make a statement.
>
> **HIS LORDSHIP:** Who wishes to make a statement?
>
> **WITNESS:** Gallimore, m'Lord, wishes to make a statement.
>
> **Q:** When you heard that, did you do anything?
>
> A: I cautioned Gallimore.
>
> **HIS LORDSHIP:** Where was Gallimore?
>
> **WITNESS:** He was held by Detective Constable Smith, m'Lord. I asked him if what Constable Smith said was true. He said yes, m'Lord.
>
> **Q:** At that point, what happened?
>
> A: He was taken inside the station.
>
> **Q:** Who took him in there?
>
> **"A:** Detective Constable Smith took him inside the station. I went out on the street.

Q: You left?

A: I left the station and went on the street."

The applicant Dixon is also known as Fitzritson Gallimore.

This is the testimony of Detective Constable Smith which Mr. Harrison referred to:

> **"A:** Well, Ma'am, I was not in a possession to take the statement because I had to get ready to attend Court, so I took him to the Stony Hill police station.
>
> **HIS LORDSHIP:** Yes.
>
> **Q:** At the Stony Hill police station, after you took him there, did you do anything else?
>
> **A:** I saw Detective Sergeant Williams and spoke to him.
>
> **HIS LORDSHIP:** Yes.
>
> **A:** Detective Williams was about to drive out of the station, M'Lord. I told Detective Sergeant Williams ...
>
> **HIS LORDSHIP:** Spoke to him?
>
> **Q:** You spoke with Detective Sergeant Williams?
>
> A: Yes, Ma'am.
>
> **Q:** Where was the accused man?
>
> **A:** I had taken the accused inside the guard room.
>
> **Q:** And where was the conversation taking place between yourself and Mr. Williams?
>
> **"A:** Outside the station yard.
>
> **Q:** After you spoke with Sergeant Williams, what did you do?

A: I left."

Detective Constable Smith did not testify on the voir dire, and it was contended that in light of the discrepancy disclosed by his evidence, the learned trial judge should have reconsidered his ruling on the voir dire that the statement was voluntary. He submitted that "a judge may recant admission of a cautioned statement if after cross-examination of the witnesses in the presence of the jury, evidence emerges that his ruling may have been incorrect." He supported his case by reference to the case of ***The State v. Abdool Azim Sattaur and Rafeek Mohamed*** [1976] 24 W.I.R. 157. But the facts in that case are easily distinguishable from those in the instant case. Counsel in the court below submitted at the close of the prosecution case that Dixon ought not to be called on and in support of his submission he relied inter alia, on the discrepancy between the evidence of Sergeant Williams and Detective Constable Smith and asked the judge to consider recanting his ruling. When that was pointed out to Mr. Harrison, he readily conceded that the learned trial judge did consider the matter and ruled that it would be one of the circumstances to be left for the jury to decide when considering the weight to be given to the statement. In those circumstances, we found no merit in this ground also.

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