JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 56/99

COR. THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

CARLTON HENRY
V
REGINAM

Delano Harrison and **William McCalla** for the Appellant

David Fraser, and **Donald Bryan** for the Crown

10th, 11th, 12th, 13th January, 2000 and 16th March, 2000

LANGRIN, J.A.

Carlton Henry, the applicant was convicted on the 8th March, 1999 in the St. Mary Circuit Court before a judge and jury for capital murder of Patricia Henry and sentenced to death as prescribed by law.

On the 13th January, 2000 at the conclusion of the hearing of his application for leave to appeal against conviction and sentence we granted the application and announced that we would treat the hearing of the application as the hearing of the appeal. We allowed the appeal against conviction and sentence, quashed the conviction and directed a judgment and verdict of

acquittal to be entered. In the interest of justice we ordered a new trial for non-capital murder.

We set out below the reasons for our decision.

The particulars of the offence were that on the 14th day of July, 1998 in the parish of St. Mary he murdered Patricia Henry during the course or furtherance of a burglary.

The evidence led by the prosecution disclosed that Sandralyn Henry after closing her dwelling house around 10:35 p.m. went to sleep in her bedroom accompanied by her mother and daughter. About 3:30 a.m. the following morning she was awakened by a man with a gun who ordered her to get up from the bed and hand over the key for a van which they owned. Shortly after she heard the voice of another man a voice she identified as that of the appellant.

The gunman took her mother by the hand over to a chest -of-drawers on the other side of the room and later to a passage nearby the room. She then could hear the voices of both men demanding money from her mother. After both men left the premises she discovered her mother dead.

The medical evidence revealed that the cause of death was massive haemorrhage due to major penetrating incised wounds of the anterior aspect of the neck. These injuries the doctor opined were consistent with being caused by a sharp knife.

Detective Inspector Louis Chambers stated that he visited the scene of the crime and spoke to Sandralyn Henry, the stepdaughter of the deceased who told him something. He said:

> "Immediately after speaking with Miss Henry based on what she told me, I left with a party of policemen to Faiths Pen in the parish of St. Ann in search of one Carlton Henry."

The applicant's defence was an alibi in which he gave sworn evidence and called a witness to support his story.

It is clear from the summary of the prosecution's case that they relied on identification, and in particular voice identification, as well as common design.

Several grounds of appeal were argued but we propose to discuss only the grounds which we consider have merit. These grounds can be examined as under.

Ground 1

1. That in his charge to the jury the learned trial judge fatally erred in leaving for their consideration inadmissible hearsay evidence in such a manner as to lend highly prejudicial support to the purported identification of the applicant by sole identifying witness, Sandralyn Henry.
2. That the learned trial judged erred when he ruled that the Crown had made out a case of capital murder against the accused as the Crown had failed to prove that the accused

was the one who had committed the murder beyond a reasonable doubt.

3. That in view of the comments of the learned trial judge in the presence of the entire jury panel from which the jurors were drawn, the jurors trying the case could have come to the conclusion that the summing-up of the learned trial judge was "slanted strongly in favour of guilt" and because of this they should find the accused man guilty without further deliberation.

In dealing with the validity of the first complaint we need to examine the portion of the evidence upon which learned counsel for the appellant based his submission and the manner in which the learned trial judge dealt with them in his directions to the jury.

> "Another factor that you would consider is how soon after this purported identification was the suspect identified. Well, the evidence immediately, immediately after the event, as soon as police came there this morning, this accused man was named. Naturally, the longer the period of time between the hearing of the voice and the purported naming of the accused would have prompted the possibility of error. Immediately the police came there the morning about 5:30 a.m. Carlton's name was called."

Later on in his summation he went on to say:

> "Now if you accept Detective Inspector Chambers' evidence that as a result of his speaking to Miss Sandralyn Henry, he immediately left for Faith's Pen in search of Carlton Henry, the reasonable inference is that Carlton Henry's name is the one that Sandralyn called immediately the police came to the scene. Is a matter for you. Well, this ties in with the next picture of voice identification."

The question is whether these were correct directions. Mr. Delano Harrison, Counsel for the appellant maintains that the witness Sandralyn Henry could not have permissibly testified that she had told Detective Inspector Chambers that she had recognised one of the miscreants as the appellant by voice and/or dress. Neither, permissibly could Detective Inspector Chambers have testified that Sandralyn Henry so told him.

The test of admissibility of the material left to the jury in the passages cited, is whether either witness could have testified to the matters asserted in the report for the purpose of establishing the truth of those matters. Unless, the statement was made by a defendant and constituted admissions of facts relevant to those proceedings, the statement was plainly inadmissible.

The two passages also underscore the speculative nature of these directions. Did Sandralyn Henry tell the police she believed or suspected that the appellant might have been one of the men because that particular man's voice sounded like the appellant's? Because there is no evidence of what Sandralyn Henry told the police that fateful morning. To direct the jury that

this appellant was named indicates a serious error on the most critical issue in the case. This Court cannot exclude the possibility that a substantial miscarriage of justice occurred. That being so this ground succeeds.

We now turn to the second ground of appeal.

The unchallenged medical evidence demonstrates quite clearly that the deceased died as a result of massive haemorrhage from injuries which are consistent with having been inflicted with a sharp knife. Of the two men who had burgled the deceased's house, one was armed with a firearm and the other, who was the appellant according to the Crown's case, was armed with a knife. The Crown's case of capital murder in respect to the appellant was presented on the basis that it was the appellant who had the knife and inflicted the fatal injuries. However, as the evidence unfolded, there was no direct evidence nor could an irresistible inference be drawn that the man seen with the knife actually used it to inflict the fatal injuries.

The learned trial judge in directing the jury had this to say at page 286 of the transcript:

> "You might well wish to infer that if the dagger or ratchet knife or whatever was in the hand of the accused person, then it would be a reasonable inference for you to draw because the killing was effected not by a bullet but by a cutting of the throat; but once you accept that they were acting in concert, you are not to ask yourselves 'but weh the other man deh, nuh two of them?' Acting in concert means that both are equally guilty if you find the evidence establishes that.... So that is the principle of common design."

Section 2 of the Offences against the Person Act provides inter alia:

> "**2.-** (2) If, in the case of any murder referred, to in subsection (1)..., 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.
>
> (3) Murder not falling within subsection (1) is non-capital murder."

In ***Regina v Oniel Simpson et al*** SCCA Nos. 44, 45 and 46 of 1995 delivered 27th January, 1997 (Rattray P, Patterson and Bingham JJA), in the judgment of Rattray P, the following passages occur at pg. 4 as an interpretation of the section:

> "The infliction of grievous bodily harm on the deceased must in my view be evidenced by an act of the appellant which caused injury to the deceased, severe enough to be classified as grievous bodily harm. The attempt to inflict grievous bodily harm on the person murdered takes place when someone tries to carry out that act.
>
> The presence of the appellant at the time when the deceased was shot though he was armed with a firearm in the absence of specific evidence of what he did with respect to the murdered victim does not in my view place him in the category of one who 'attempted to inflict grievous bodily harm on the

deceased.' The evidence also does not establish that the appellant himself 'used violence on' the deceased 'in the course or furtherance of an attack on that person.' In ***Leroy Lamey v The Queen,*** Privy Council Appeal No. 56 of 1995, their Lordships of the Privy Council in judgment delivered by Lord Jauncey of Tullichettle in considering Section 2(1) (f) of the Act stated:

> 'The starting point in any consideration ... must be the fact that its object was to reduce the categories of murder which attracted the death penalty. It follows that a construction which produces little or no reductive effect is unlikely to be correct. Furthermore regard must be had to the general principle that a person should not be penalized in particular, should not be deprived of life or freedom unless on the clear authority of law (Bennions Statutory Interpretations 2nd Edition page 574).

The interpretation of Section 2(2) must be approached in the same manner. In the absence of any evidence as to what the appellant did to the deceased at the time that the deceased was shot it is my view that the offence cannot fall within the category of capital murder under Section 2(2) of the Act which specifically identifies those who would be guilty of capital murder where the evidence implicating the accused person rests upon the common design of two or more persons. See also SCCA No 151/95 - ***R v Aldon Charles*** judgment of the Court of Appeal delivered by Gordon JA. at p. 9:

> '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'.

> In my view the purpose of the section demands a restrictive interpretation. There must be an identifiable act carried out by the appellant and directed at the person murdered as distinct from the creation of an atmosphere of general fear."

It is clear from the above sub-sections that a person is guilty of capital murder if his own act caused the victim's death, or if he inflicted or attempted to inflict grievous bodily harm on the victim, or if he himself used violence on the victim in the course or furtherance of an attack on the victim.

In the instant case the man with the knife would be guilty of murder whether or not he actually used the knife to inflict the fatal injuries consistent with the doctrine of common design. However, in order to establish the offence of capital murder against the appellant the prosecution would have had to adduce positive evidence of an identifiable act of an assault of a physical nature on the victim by the appellant. A speculation as to who used the knife cannot suffice.

One other ground called for consideration. Christopher Lord who was charged with the offence of rape was acquitted by a judge and jury on the 2nd March, 1999. On the 3rd March, 1999 at the start of the Court sitting the self-same trial judge in the presence of the entire jury panel proceeded to address the jurors in the following manner as disclosed by the transcript:

> **"His Lordship**: Could you call up the jurors in yesterday's matter. (Registrar calls names of jurors in ***R v Christopher Lord*** and they take seat in jury box).

> Yes, these jurors here, on the basis of yesterday's hopelessly perverse verdict, I am going to excuse you from any further attendance for this circuit. What happens next term is a matter for them, for you and for somebody else.
>
> Whenever a summing-up is slanted strongly in favour of guilt, it is because the evidence warrants such a summing-up. For you to ignore my summing-up, when all I had to say was this man was patently guilty and for you to consider as man and woman, woman chiefly in this matter, that a young boy could go home in the evening or at night with two hands cut, one seriously, get no medical attention but get at the time assistance from his mother, and from his grandmother, and none of them came in court to say or to confirm that they treated any injury, for you to accept that boy as a witness of truth is a hopeless case of ignorance of real life and I find that you are all unfit for service as jurors in this parish. You are accordingly excused, I don't want to see you back here, not while I am sitting. You may go."

Paradoxically, on the 8th March, 1999 Carlton Henry was arraigned on the charge of capital murder and a jury was selected from the aforesaid panel.

Counsel for the appellant argued that the panel of jurors selected from that array were now put on notice by the judge that if they were not to be thought of as abject fools, or worst, dishonest, then they should be careful to sense the direction into which the presiding judge was guiding them . Once it seemed slanted strongly in favour of guilt they must make sure not to ignore his summing-up and thus, without more, find the appellant guilty. The fact that they took a mere eighteen minutes to arrive at their verdict in a capital murder case supported his argument.

A fundamental principle of trial by jury is that it is the function of the jury to assess the evidence and after that exercise, determine the facts.

Lord Keith in ***Director of Public Prosecutions v Stonehouse*** [1977] 65 Cr. App. R 192 at pg. 232 said:

> "It is the function of the jury, on the other hand, not only to find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed upon it, to the facts as they find them to be. I regard this division of function as being of fundamental importance, and I should regret very much any tendency on the part of presiding judges to direct juries that, if they find certain facts to have been established, they must necessarily convict. A lawyer may think that the result of applying the law correctly to a certain factual situation is perfectly clear, but nevertheless the evidence may give rise to nuances which he had not observed, but which are apparent to the collective mind of a lay jury. It may be suggested that a direction to convict would only be given in exceptional circumstances, but that involves the existence of a discretion to decide whether such circumstances exist, and with it the possibility that the discretion may be wrongly exercised. Thus the field for appeals against conviction would be widened. The wiser and sounder course, in my opinion, is to adhere to the principle that in every case where a jury may be entitled to convict, the application of the law to the facts is a matter for the jury and not for the judge. I see no reason to doubt that good sense and responsible outlook of juries will enable them to perform this task successfully".

We think that the judge's remarks were intemperate and unfortunate but were never intended to be relevant to the instant case. However, the fact is that we are unable to say that the appellant enjoyed a fair trial to which he was entitled.

We have considered whether a new trial should be ordered and have concluded that there can be no likely prejudice to the appellant if a retrial is ordered.

Accordingly, the appeal on capital murder is allowed and in the interests of justice a new trial ordered on a charge of non-capital murder.