JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 212 &213/99

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag)

WINSTON McLEAN	**FIRST APPELLANT**
MARCUS CAMPBELL	**SECOND APPELLANT**
V	
REGINA	**RESPONDENT**

Ian Wilkinson and **Miss Shawn Steadman**
for both appellants
Miss Lisa Palmer for the Crown

WALKER, J.A.:

December 12, 2000 and February 19, 2001

On December 14, 1999 after a trial in the St. Catherine Circuit Court presided over by Theobalds J, sitting with a jury, Winston McLean was found guilty of capital murder and Marcus Campbell was adjudged to be guilty of non-capital murder on an indictment which charged both men jointly with the offence of capital murder. The particulars of offence as stated in that indictment read as follows:

> "Winston McLean and Marcus Campbell, on a day unknown between the 26th day of May, 1997 and the 28th day of May, 1997 in the parish of St. Catherine, murdered Alexander Samuel Edie, pursuant to an arrangement whereby money was intended to pass from the said Winston McLean to

> the said Marcus Campbell, as consideration for the said Marcus Campbell causing or assisting in the causing of the death of the said Alexander Samuel Edie."

The indictment was laid under s.2(1) (e) of the Offences against the Person Act which reads as follows:

> **2.**—(1) Subject to subsection (2), murder, committed in the following circumstances is capital murder, that is to say—
>
> (e) any murder committed pursuant to an arrangement whereby money or anything of value—
>
> (i) passes or is intended to pass from one person to another or to a third party at the request or direction of that other person; or
>
> (ii) is promised by one person to another or to a third person at the request or direction of that other person,
>
> as consideration for that other person causing or assisting in causing the death of any person or counselling or procuring any person to do any act causing or assisting in causing that death".

Following their convictions, McLean was sentenced to death and Campbell to serve a term of imprisonment of 20 years with an order that he should not become eligible for parole before serving a period of 12 years imprisonment.

On December 12, 2000 applications for leave to appeal against these convictions and sentences were heard together by this court. At that time we granted both applications and treated the hearing of the applications as the hearing of the appeals. Thereafter in the case of the appellant McLean, his appeal was allowed, the conviction recorded against him quashed and the sentence imposed set aside. In substitution therefor a

conviction for non-capital murder was entered and a sentence of life imprisonment imposed with an order that the appellant should serve a period of imprisonment of 20 years before becoming eligible for parole. As regards the appellant Campbell, his appeal against conviction was dismissed and the conviction affirmed. However, his appeal against sentence was allowed. The sentence imposed on him was declared to be a nullity and, consequently, set aside. In substitution therefor a mandatory sentence of life imprisonment was imposed and the appellant was ordered to serve a term of imprisonment of 20 years before becoming eligible for parole. In the case of each appellant we ordered that sentence should commence on March 14, 2000. What follows are our reasons for judgment as promised.

On May 28, 1997 the dead body of 72 years old Alexander Samuel Edie was discovered in an orange field situated off the Barry main road in the parish of St. Catherine. Subsequently a postmortem examination of the body which was in a state of decomposition revealed two stab wounds to the deceased's chest both of which penetrated the upper lobe of the left lung and resulted in massive bleeding. In addition to these injuries, there were two linear pattern abrasions along the neck caused by something tied around that part of the body. In the doctor's opinion the cause of death was strangulation and stab wounds to the chest. As to the time of death the doctor was unable to make any assessment.

The case for the prosecution against both appellants rested in part on cautioned statements given by them to the police. However, there was also evidence of a circumstantial nature. Following his apprehension

Campbell took a party of policemen to the scene where the deceased's body had earlier been found. There, Campbell is quoted as saying to the police party:

> " This is where McLean and I took Edie, stab him in the car first, took him out and threw him over the banking, and on coming back to the car, the deceased Edie was heard groaning, we realized that he was not dead and returned and gave him some more stabs".

An ice-pick found on the scene was identified by Campbell as the instrument which he said McLean used to stab and kill the deceased. Furthermore a prosecution witness, Corporal Brown, testified that at different times both Campbell and McLean, in oral statements made to him (Brown), admitted complicity in the murder of the deceased, each attributing blame for the actual killing to the other while denying being, himself, the actual killer. Cpl. Brown's evidence as summarized by the trial judge read in part:

> "Corporal Brown then proceeded to execute the warrant on the accused McLean and took back the accused man to the cell block. On the way, McLean repeated, or said, 'A nuh me kill the man, sir, a Marcus kill the man.' Brown told McLean about the ice-pick and the lighter and McLean said, 'A Marcus tek out the ice-pick, a nuh me, a nuh fi mi. After Marcus stab the man, or strangle him with the seat belt, all I did was hold the man in his trousers waist, drag him out the car and throw him down the gully. I heard him make a groaning sound, a told Marcus that the man was not dead and Marcus went down to the gully side, stab Mr. P. again and came up back and both of us drove away, back to Manchester'. According to Corporal Brown he asked the accused man where is the car and what type and he got the reply, a blue Tercel it is at Middlesex Car Rental in Mandeville".

According to Cpl. Brown on one occasion when in company with each other the appellants were apprised of the contents of the cautioned statement made by each of them. Thereafter having been cautioned by him (Brown) the following inter-change of words took place between the appellants:

> "Campbell said, 'A nuh me kill di man, a you kill di man. Mr. Brown, a done tell you how it go already. A him kill di man all di money dat him get, mi nuh get non a it'. McLean replied by saying, 'A yuh kill di man. Mr. Brown, you think one man can kill one man. A panic mi panic when di lady ask mi 'bout the receipt and the money' and when mi tell Marcus fi mek wi kill di man him sa no cause the disgrace is too much."

On appeal the following grounds were filed and argued together on behalf of the appellant McLean:

1. The learned trial judge erred in law in misdirecting the jury, or failing to direct the jury adequately or at all, in relation to the application of section 2 (1) (e) of the Offences against the Person Act to the facts of the instant case.

2. The learned trial judge erred in law in failing to direct the jury adequately or at all, alternatively in failing to assist the jury adequately or at all, regarding the facts upon which a verdict of guilty of capital murder could be based or returned against the First Appellant. The facts relied upon were at best ambiguous and did not bring the case against the First Appellant within the ambit of section 2(1) (e) of the Offences against the Person Act.

3. The learned trial judge erred in law in leaving the issue of capital murder to the jury.

4. The verdict (of guilty of capital murder) is unreasonable having regard to the evidence.

In our opinion there was considerable merit in these grounds. The only evidence that could, conceivably, have formed a basis for a finding that

this was a "contract killing" was to be found in the cautioned statement of McLean. That part of his statement reads as follows:

> "I told Marcus that I am going to pay Delroy some money to kill Mr. P. Marcus said no, I must not pay Delroy the money, I must pay him to kill Mr. P., because him need the money to buy some baby clothes because his woman soon have baby.
>
> The next day I said to Marcus, 'Don't let us kill Mr. P, it better we make dem lock us up and we go to prison'. Marcus said no, disgrace going to come down on our families.
>
> I had a wedding to go to in St. Thomas on Saturday the 24th of May, 1997. I was to carry the bride so I went to a rent a car company name Middlesex Car Rental in Mandeville Friday 23rd May, 1997 and rented a white Nissan Sunny for one week, for Two Thousand Dollars per day. We went to the wedding.
>
> This car was giving trouble so I returned the car Monday the 26th of May, 1997 and they gave me one blue Toyota Tercel. Later the same day Marcus, Devon and me went to Mr. P house in Braeton, St. Catherine. His grand-daughter serve us bullybeef sandwich and drink. Mr. P carry me into a room and said he wanted to talk to me in private. I went into the room with Mr. P. In the room Mr. P started talk rough with me saying we stealing him, he is going to send us to prison or kill wi because him join lodge. We stayed there for a while then left. When we were in the car, I said to Marcus, what we going to do? Marcus said, I must give Devon bus fare and send him home. I gave Devon $500 and drop him down town Kingston to get bus. We drove to Papine to cool out. And whilst we were there Marcus and I decided to kill Mr. P.
>
> Marcus said, all mi have to do is give him money to buy 2 spliffs and after him smoke mi will si. After night come dung, we drove to Spanish Town, I gave Marcus $500 to buy the spliff".

This evidence, which was arguably equivocal, gave rise to critical questions which required resolution by the jury e.g.:

(a) Was the money paid at all, bearing in mind the fact that the statement was challenged by the appellant?

(b) If so, was the money paid simply to facilitate the purchase of a spliff (ganja), or was it paid in pursuance of an arrangement and as consideration money for procuring the demise of the deceased?

In our view it was imperative that the trial judge should have given careful directions to the jury along these lines since, in the final analysis, it was for them to interpret this statement. Such an interpretation as they placed on the statement might, or might not, have brought the case within the context of s.2(1) (e) of the Offences against the Person Act and so within the ambit of the indictment as laid. Regrettably, the trial judge gave the jury no assistance in this regard, and it is our view that the failure to do so deprived the appellant McLean of an opportunity of being convicted of the lesser offence of non-capital murder. In these circumstances we determined that McLean's conviction for capital murder could not be allowed to stand and ordered as we did.

In respect of the appellant Campbell, Mr. Wilkinson stated quite frankly that having "combed" the record he concluded that there was nothing to argue against Campbell's conviction for non-capital murder. Having, ourselves, examined the record we reached a similar conclusion and so affirmed that conviction.

On the matter of sentence Mr. Wilkinson conceded that he could urge nothing in favour of McLean. Concerning Campbell it was common ground

that the sentence imposed on him was a nullity in light of the fact that the mandatory sentence prescribed by law was a sentence of life imprisonment, (see s.3A (1) of the Offences against the Person Act). We, therefore, set aside the invalid sentence and imposed the sentence fixed by law. In the case of each appellant the sentence imposed was accompanied by an order that the appellant should not become eligible for parole before serving a period of 20 years imprisonment.