JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 59 & 60/2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

MARLON MOODIE
ANDREW HUNTER V. R

Dennis Morrison, Q.C. for Andrew Hunter

Dennis Daly Q.C. for Marlon Moodie

Paula Llewellyn Snr. Deputy Director of Public Prosecutions and Kenneth Ferguson for Crown

July 12, 13 & October 25, 2001

FORTE, J.A.:

The applicants were convicted on the 22nd March 2000 in the Home Circuit Court, for the capital murder of George Dewar, a member of the Security Forces. The Crown alleged that this killing took place on the 5th November 1998 while Mr. Dewar was acting in the execution of his duty.

As a result of the convictions, Mr. Hunter being under eighteen years of age, was ordered "to be held at Her Majesty's pleasure" while Moodie, as is ordained by law was sentenced to death. Both applicants applied for leave to appeal their convictions and sentences. Having heard submissions of counsel on their behalf and those of counsel for the Crown, we granted leave to appeal, and treated the application as the hearing of the appeals. In the end, we dismissed the appeal of Mr. Moodie and affirmed his

conviction and sentence. The appeal against conviction of Mr. Hunter was also dismissed. However, his appeal against sentence was allowed. The sentence was set aside and a sentence of life imprisonment imposed, with a recommendation that he should not be considered for parole until he has served a period of twenty years. At that time, we promised to put our reasons in writing. This we now do.

Acting Corporal Dewar, the deceased, was shot down while in pursuit of a group of men who had earlier fired shots at a police party of which he was a member. The primary witnesses for the Crown, were two other officers who were also in that police party and who were in the company of Ag. Cpl. Dewar when he was shot. These were Constables Phillip Mitchell and Orlando Milton.

Both police officers were with this party of policemen on motorised patrol on the 5th November 1998. They were in an unmarked service vehicle in which were four policemen, Constable Mitchell, Ag. Cpl. Dewar (the deceased), Constable Milton and Constable Cranston who was the driver of the vehicle. They were all dressed in "plain" clothes, but with vests, which were marked "police". Each of them was armed with a 9mm semi-automatic pistol. At about 2.30 p.m., they were travelling very slowly along Wild Street in Kingston, when both witnesses saw two "young men" standing on the left side of the road in front of a shop. These two men were the appellants. The appellant Hunter was seen to look into the shop, and as he did so two other men, recognized as Selvin Rhoden and Morgan Hinds, ran from the shop and joined the two appellants. All four men then pulled guns from their waist and fired at the police vehicle which was then about fourteen yards from them. The police vehicle then stopped. All the police officers alighted from it, took cover, and returned "the fire". The men, including the two appellants ran into nearby premises along Wild Street. Constable Milton, Ag. Cpl. Dewar and Cons. Mitchell gave chase, Cons. Cranston returning to the police vehicle. During the chase, the two witnesses went onto William Street, leaving Ag. Cpl. Dewar on

Shoe Lane. As they reached a particular premises on William Street they saw the appellant Moodie "trying to exit from the premises" onto William Street. On seeing the officers, Moodie pulled back, but not before Cons. Mitchell had time to recognize him. At that time, the appellant Hunter was behind Moodie, and he also pulled back. The police officers went back on Shoe Lane, and as they entered the lane, Hunter and Moodie were seen to come from premises on Shoe Lane. Ag. Cpl. Dewar was then on Shoe Lane – coming towards William Street. At this time he (Ag. Cpl. Dewar) was about six feet from the appellants. Both witnesses were then about 24 feet from the appellants, Ag. Cpl. Dewar being between the appellants and themselves.

When the appellants came out of the premises they were in front of Ag. Cpl. Dewar who had his gun in his hand, pointed downward. Both men pointed their guns in the direction of Ag. Cpl. Dewar and opened fire. Ag. Cpl. Dewar fell to the ground. Thereafter the other two men, Rhoden and Morgan came out of the same premises, joined the appellants and all four men ran down Shoe Lane and escaped, but not before firing at the two witnesses. Cons. Cranston came with the "service vehicle" and Ag. Cpl. Dewar was then taken to the Kingston Public Hospital, but he was already dead. A report having been made to Supt. Renford Robinson i/c of Crime for the area, Cons. Mitchell joined a patrol team later that evening and went in search of the men. While on Adelaide Street, Cons. Mitchell saw the appellant Hunter who tried to run but was nevertheless held and taken to the Elletson Road Police Station. Supt. Robinson later arrested the appellant Hunter on a warrant and cautioned him, whereupon Hunter said "Mr. Rob, mi no fire no shot, a so and so, dem fire de shot."

On the 11th November 1998 the appellant Moodie was taken to the Elletson Road Police Station. Supt. Robinson told him that he had a warrant for his arrest for the murder of Ag. Cpl. Dewar and read the warrant to him. He thereafter arrested and charged the appellant Moodie for the murder of Ag. Cpl. Dewar. He cautioned the

appellant who said, "Mr. Robinson you know say a Stammer kill the police. Mi nuh fire nuh shot."

In his defence Hunter described his day's activities, all in the company of a witness Rohan Morris, and in relation to the relevant time i.e. the time of the offence, he testified that he was in the company of Morris at a particular bar. He remained in Morris' company until that evening when he was picked up by the police. He maintained that Morris was also picked up by the police and placed in the same vehicle as he was placed. The police admitted that Morris was also picked up, but maintained that he (Morris) was placed in a different vehicle. Rohan Morris and Verona Neil, the bartender at the Lapoka Club were both called as witnesses in support of the appellant Hunter, both purporting to place him in the bar at the relevant time.

In his sworn testimony, the appellant Moodie denied shooting Ag. Cpl Dewar. At the time the shooting took place he was playing football with his friends. Sonia Williams testifying in the case of Hunter spoke to the whereabouts of the appellant Moodie at the relevant time. She alleged in confirmation of his testimony that he was playing football with friends at her gate on Adelaide Street when she heard an explosion. She heard other explosions, and thereafter Moodie and his friends went in the direction from which the explosions had come.

The defence was therefore one of alibi. Both appellants also called in aid an entry made in the Station Diary at Elletson Road, by a Corporal Campbell who was called as a witness for the appellant Hunter. The entry stated "9.30 p.m. prisoners taken into custody, three male prisoners, namely Andrew Hunter, otherwise called Henkel, sixteen years old of 201/2 Bryden Street, Lamont Lee, otherwise called Marcus, twenty years old of 6 Black Street and Rohan Morris, otherwise called Simon, fifteen years old, 4 Upper Sligo Street, were taken into custody re case of murder of the late Ag. Cpl. Dewar."

To place this evidence in context, it should be noted that whereas Superintendent Robinson had said that these other men were taken into custody in respect of other crimes, the defence maintained that they were taken into custody in respect of the murder of Ag. Cpl. Dewar. The defence used this evidence to ask the jury to say that the police were not sure who fired at Ag. Cpl Dewar so they held two persons – Marcus and Rohan Morris whom they subsequently had to release. The directions by the learned trial judge on this aspect of the case, is the subject of complaint in the appeal and will be dealt with later in this judgment.

The appeal of Moodie

The first ground attacked the directions of the learned trial judge on the doctrine of common design. It reads:

> "That the learned trial judge's directions on 'joint enterprise' and 'common design' in the circumstances of this case was inadequate, inappropriate and likely to mislead the jury."

The learned trial judge directed the jury, in this regards as follows:

> "Let me tell you now, to go on to capital murder, what the prosecution must prove – maybe I should tell you this too, that where – and I am telling you a little about what we call common design. Although the prosecution is saying that both fired – but let me just tell you something about common design, first. Remember the doctor said either injury would have resulted in death or could have resulted in death. Let me just tell you that where two persons embark on a joint enterprise, each is liable for the act done in pursuance of that joint enterprise.
>
> So what we are saying here, members of the jury, if persons are acting in concert, and pursuant to that agreement, even if one kills, then both would be liable, both would be. If you should find that one kills and this was in pursuance of this common design, then both would be guilty. In other words, the one who did not fire the firearm could not come and say that, 'No, I didn't fire.' Once you find that they were acting in concert – in other words, that he was there aiding and abetting, each person acting together, then it would not matter who fired the fatal shot. Each would be or both would be liable."

Those words in a practical sense sets out adequately the principle of common design. Nevertheless Mr. Daly, Q.C. for the appellant, though not complaining so much as to the content of that passage, complains more so for what he contends are its deficiencies.

Firstly, he contends that "there was no allegation of joint enterprise upon which the four men, or any two or more of them had been in pursuit of, so that it could be said of them as did the trial judge that if 'pursuant to that agreement' (the joint enterprise) ... one kills then both would be guilty." Secondly, "that the action of one of the accused in the circumstance of this case was the spontaneous act of self-preservation of a fugitive who feared for his own life, and not an act in pursuance of an agreement or joint enterprise with the other accused or any of the other fugitives."

These contentions are inconsistent with the evidence. The chase of the appellants and their colleagues begun when they fired shots at the police party. That act alone demonstrates that the appellants acted together and with others in their attack on the police party. It is a reasonable inference from the circumstances of their acts that they shot at the policemen with the intention of causing them serious injury. The chase thereafter cannot be said to be anything else than that the policemen were in lawful pursuit of their functions and responsibilities in attempting to apprehend felons. These considerations can however be confined to the circumstances that existed at the time of the actual killing of the deceased. The evidence which the jury accepted is that the deceased was walking with his firearm pointed towards the ground, when both appellants came out of the gate, pointed their guns at him and fired. On that evidence, it is crystal clear, that both men were acting together, with the common purpose to injure the deceased, so as to avoid apprehension.

The contention by Mr. Daly, Q.C. that the actions of the appellants in firing at the deceased, could be the spontaneous act of self-preservation by each individual, is in our

view an invitation to the Court to stretch the evidence beyond the limits of rational reasoning. If the appellants were of the disposition to surrender themselves, they need only have thrown down their firearms and indicate that they were willing to submit to the police powers of apprehension and possible arrest. In any event the facts disclosed a strong case of common design on the part of both appellants and consequently the learned trial judge was in duty bound to direct the jury in that regard. He did so adequately in a way which imparted to the jury all the considerations necessary in coming to such a conclusion.

Ground 2 – Identification

In this ground Mr. Daly, Q.C. contended that the evidence of identification presented by the prosecution amounted to "no more than a fleeting glance in difficult circumstances and as such was an insufficient basis for the support of a verdict of guilty by the jury."

It is conceded by Mr. Daly Q.C. that both prosecution witnesses had three occasions to see the appellants:

(1) On Wild Street when they with others opened fire on the police officers;

(2) On William Street when they attempted to exit premises thereon, and then went back into the premises; and

(3) On Shoe Lane when Ag. Cpl. Dewar was shot.

Insofar as these opportunities are concerned, and against the background of the appellant's complaint in this ground of appeal it is necessary to examine the evidence of each of the purported eyewitnesses.

(a) Constable Mitchell

This witness knew both appellants before the incident. He knew Hunter for approximately two years. He had spoken to him prior to the date of the incident, and had last seen him about 1 ½ weeks before. The fact that he knew the appellant Hunter was not an issue at trial.

He also knew the appellant Moodie for about two years and saw him about three times each week. He had last seen him about a week before.

The first incident occurred at about 2.30 p.m. i.e. in daylight. Both men were together and about 22 yards from him. However, when the other two men came from the shop and joined the appellants, the car in which he was, was then about 12 – 14 yards from them. It appears that in examination-in-chief this witness stated that he saw both appellants for about two minutes on Wild Street. However, later in his evidence he said he looked at Moodie for five to six seconds at the shop and saw his face for the same length of time. He testified to having seen Moodie's face and chest on William Street for about four seconds and that that was time enough to see the appellant's face and entire body.

At Shoe Lane he had taken cover behind a wall and looked at intervals. That shooting was "like a split second. It happened quickly."

(b) Constable Orlando Milton

This witness who also knew the appellants before the incident, testified that in the total time covering the period, he had seen both appellants for about 50 seconds. However, when asked to detail the length of time in respect of each place, he stated that on Wild Street he had seen both appellants for 9 – 10 seconds, on William Street he had seen them for about 3 seconds, and on Shoe Lane for about 3 – 4 seconds. When added, the sum total of time would amount to fifteen or seventeen seconds.

It is this evidence, summarily set out above upon which Mr. Daly, Q.C. has based his submission on this ground. In my judgment, given the fact that, (i) this was a recognition case, in circumstances where both appellants were seen fairly regularly by one of the witnesses at times prior to the incident, (ii) it was an identification made in broad daylight, and, (iii) the total time was sufficient in order to give an opportunity for an accurate identification, the learned trial judge was correct in leaving it to the jury to determine whether a mistaken identification had been made. Nor can it be successfully argued that the adverse verdict arrived at by jury cannot be supported by the evidence. This ground fails.

The third ground of appeal reads as follows:

> "That the learned trial judge failed to give the jury any or adequate assistance as to the circumstances in which self defence might or could arise if at all, in relation to persons who had committed or were committing a serious crime but who believed reasonably, that their lives were in danger and acted in defence of their lives. Indeed the learned trial judge usurped the jury's functions by directing them without explanation, that self-defence did not arise."

The learned trial judge did withdraw the issue of self-defence when he directed the jury thus:

> "Also too if the killing is done in lawful self-defence, it is no offence at all. And here let me be quick to tell you that self-defence does not arise."

Mr. Daly, Q.C. in a very courageous and ingenious argument contended that the appellants in the circumstances of this case could "reasonably" have believed their lives were in danger and acted in defence of their lives. Even applying the correct test in self-defence i.e. whether the appellants honestly believed that their lives were in danger, in the circumstances of this case, the issue of self-defence did not arise. The appellants were escaping felons, who had earlier fired shots at the police party, and continued to shoot at the police until they ran and made good their escape, though temporarily.

Later, when they were faced with apprehension, they each fired at Ag. Cpl. Dewar, who though holding a gun in his hand, made no attempt to shoot the appellants, the firearm in his hand being pointed to the ground. The appellants did not surrender to the policemen, but instead shot and killed Ag. Cpl. Dewar. In our view self-defence never became an issue and the learned trial judge was correct in withdrawing that issue from the jury.

The fourth ground of appeal concerns the treatment of the learned trial judge of evidence concerning an entry in the Station Diary made on the evening when the appellant Hunter was taken into custody. The Station Diary of the Elletson Road Police Station was tendered into evidence during the defence of the appellant Hunter. The entry was allegedly made when the appellant Hunter was brought into custody for the murder of Ag. Cpl. Dewar.

It stated that Andrew Hunter, Lamont Lee (Marcus) and Rohan Morris were taken into custody at 9:30 p.m. "re case of murder of the late Ag. Cpl. Dewar." The entry was made by Cpl. Campbell who was the station officer at the relevant time and who testified to that effect. However in cross-examination he stated that what he wrote in the diary was based on what he was told by the person who brought the prisoners there. On that factual background Mr. Daly, Q.C. for the appellant filed and argued the following ground:

> "That the learned trial judge's directions (p.704) that 'what is in the diary is not evidence as to the contents of which you consider to find facts' was erroneous and misleading and detracted from his directions that if the jury found that Marcus and Junior Morris were taken into custody and charged with the murder of Corporal Dewar, it would raise some doubt as to whether the police actually knew who fired the shots that killed Dewar. The entries in the diary were on the contrary strong evidence that the two men were so charged."

Hunter and Junior (Rohan) Morris both testified that they were taken in together and with other men. However, there was evidence from Superintendent Robinson that they were taken in with other persons but those other persons including Morris were apprehended in respect of other crimes and not in respect of the killing of Ag.Cpl. Dewar.

The impugned directions of the learned trial judge reads as follows:

> "Now what is in the diary is not evidence as to the contents of which you can consider to find facts; but you can look at the fact that the entry was made, and you must look now, bear that fact in mind what the parties are saying, what Mr. Robinson is saying and what the accused are saying.
>
> The defence of course are asking you to draw the inference that that is in support of what the defence is saying, that other men were taken into custody in respect of the same murder. And they ask you if you so find to go on further to say that what that means, is that the police are not sure who fired at Dewar, or they don't know who fired at Dewar; that they held on to two other persons who were ultimately released and not charged; that is Marcus and Junior Morris. That is what they are asking you to say, bearing in mind what is entered there is not evidence of contents.
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> The crown is asking you to say that what Corporal Campbell put there is what some person or persons told him. That there is no evidence that the persons who told him were connected with the arrest of these persons. So there it is, you can't draw the inference because it would be like hearsay."

Then in conclusion on this point the learned trial judge left the following with the jury:

> "If you conclude, members of the jury, that these two persons, Marcus and Junior Morris, Stumpie, I think, he is otherwise called, were also taken into custody in respect of the murder of Dewar, then it would seem to me, if this is your finding – it is not for me to find, you are the judges of the facts – if this is your finding, it would seem to me that would raise some doubt as to whether or not the police actually knew who fired the shots. But as I say, it depends on what you find."

While having no complaints re the latter passage of the learned trial judge's directions, Mr. Daly, Q.C. nevertheless complained that the force of those directions, was reduced by the earlier passage which spoke to the Station Diary not being evidence as to its contents.

It is fairly reasonable to assume as Mr. Daly, Q.C. conceded that when the learned trial judge spoke of the entry by saying "what is entered there is not evidence of its contents" he really meant to say that it was not evidence of the truth of its contents. We are however unable to share Mr. Daly's Q.C. view that the clear directions later given by the learned trial judge, which was in our view more than favourable to the appellants, could have been affected by what the learned trial judge earlier stated. At the end of the day, the interpretation of the entry, called for by the defence was left most favourably to the jury, who obviously rejected the implications which the defence advanced. No successful complaint can therefore be made.

The appeal of Alexander Hunter

The first two grounds of Hunter's appeal coincided with Grounds 1 and 4 of the appellant Moodie's grounds of appeal. Mr. Morrison, Q.C. for the appellant, rested on the submissions made by Mr. Daly, Q.C. in respect of those two complaints. Consequently, they have been considered in the context of Moodie's appeal with the same results. Firstly, the evidence revealed ample opportunity and time for the identification to be made of Hunter which justified the learned trial judge leaving that issue for the jury. Secondly, the conclusion in respect of the entry in the Station Diary and the learned trial judge's treatment thereof must be the same as in the appeal of Moodie.

Mr. Morrison, Q.C. however argued the following ground of appeal which relates to the sentence which ordered that the appellant be detained at the Governor-General's pleasure. The ground states:

> "That in any event the sentence imposed on the Applicant that he be detained at the Governor General's pleasure pursuant to section 29(1) of the Juveniles Act is unconstitutional and should be set aside (R. v. KURT MOLLISON (No. 2) SCCA No. 61/97, judgment delivered on May 29, 2000)."

We were constrained to adhere to the majority decision of this Court in the cited case, which concluded that such a sentence is unconstitutional. We did so despite being aware that that decision is on appeal to Her Majesty's Privy Council. While experiencing some concern as to the alternate sentence advanced by the Court in the ***Mollison*** case, we nevertheless followed it. At some other time we will have to reconsider whether the substitution for the statutory sentence now found to be unconstitutional on the basis of the doctrine of the separation of powers should not be that the convicted young person be detained at the 'Court's' pleasure."

The above reasons, resulted in our decisions on this appeal, which we have earlier set out.