JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 151/95

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. V. ALDON CHARLES

Ravil Golding for Appellant

Kathy Pyke for Crown

24th September & 4thNovember, 1996

GORDON, J.A.

On 24th September, 1996 we heard submissions from counsel herein and consequently treated the application as the hearing of the appeal. We allowed the appeal quashed the conviction for capital murder set aside the sentence of death and substituted a conviction for non-capital murder, imposed the mandatory sentence of imprisonment for life and ordered that the prisoner be not considered as being eligible for parole until after he has served twenty-five years of the sentence which should commence on 23rd February, 1996. We now reduce to writing the reasons we promised then to deliver.

On the night of the 27th March, 1994 Mr. Lloyd Dixon sat in an armchair in his home at Plum Valley in Portland conversing with his wife. Sleep overcame him and from this he was disturbed some minutes after 10.00 o'clock. He saw his wife Lema Dixon standing in the room and the appellant with a gun in his hand standing beside her. His wife said "Lloyd, Bobby hold me up." He attempted to rise from the chair and the appellant raised his hand with the gun and discharged a shot from the gun. Mr. Dixon was shot by a bullet which passed through his "ear, mouth and throat and lodged in his shoulder." He slumped in his chair and lost consciousness. Before he was shot he observed another man standing in the doorway but he could not recall if this man was armed. Mr. Dixon had known the appellant "from he was a child growing up" and he knew he was taught in school by his wife who was a teacher.

Mrs. Juanita Hague lives on the side of the road opposite to the home of the Dixons. At about 10.00 p.m. on the 27th March, 1994 she was on her verandah and she saw the appellant known to her for many years and two other lads unknown to her pass her home on the road and enter the Dixon's premises. She summoned her son and spoke to him. She heard an explosion coming from the Dixon's home and she ran towards this home. She saw the appellant run from the house towards the back of the premises. She did not see the other two lads. Mr. Dixon came from the home injured and bleeding and they went to the road and assistance was sought to take him to hospital. Some 5 or 7 minutes after the appellant ran from the house another explosion was heard at the back

of the premises and investigations, later conducted, led to the discovery of Mrs. Dixon's body there. There were signs of a struggle and she had been shot in the head at close range.

Dr. Marjorie Yee Sing performed the post mortem examination on the body of Mrs. Dixon. She observed that Mrs. Dixon's panties were torn, her "ganzie" had multiple tears and her floral shirt had a few holes in the front and back. There was a 1cm diameter entry wound with burnt edges just below and behind the right pinna of the ear. The lower edge of the pinna was burnt and missing and there was a 2cm exit wound below and behind the left mastoid bone. The bullet in its course caused a fracture of the first cervical bone just behind the temporal mandibular joint which is a complete transection of the spinal cord. Death she found was almost instantaneous due to a compound commuted fracture of the first cervical bone with complete transection of the spinal cord secondary to a gunshot wound.

Dafta Garrick, Det. Cpl. Of Police went to the scene of the incident. He saw the body of Mrs. Dixon at the back of their premises. Electric lights were on in the premises and near the body he saw a brown bag with clothes and a sheet beside it. He also saw a plaid shirt and a bottle with 2 x $100.00 notes and a 50c coin. These articles were identified by Mr. Dixon as articles taken from the home. This officer obtained a statement from Mr. Dixon in hospital and subsequently issued a warrant for the arrest of the appellant. On 24th April,

1994 he arrested this appellant who on being cautioned said "Mr. Garrick what kind of idiot thing that you a carry off pon mi?"

The appellant in an unsworn statement denied involvement in the incident. He said he left Portland some 10 years before the incident and never returned. He never visited the home of Mr. & Mrs. Dixon. The witnesses were mistaken in their identification evidence.

The learned trial judge's treatment of identification which was the sole issue in the case was fair and clear and in conformity with the established guidelines. His management of the summing up was balanced and indeed Mr. Golding commenced his presentation by asserting he had examined the transcript with care "several times" and failed to find any area which he could hopefully challenge. The court however invited him to consider the statutory requirements for the charge of capital murder under section 2(2) of the Offences against the Person (Amendment) Act, 1992.

Thus energised, Mr. Golding submitted that there was no evidence indicating who did the actual shooting and the learned trial judge should have dealt with this in his charge to the jury.

Miss Pyke conceded that there was no evidence that the appellant shot the deceased nor was there evidence that he alone had a gun. She however urged that there was evidence that he used violence on the deceased.

The indictment charged capital murder "committed in the course or furtherance of a robbery". The evidence established that three persons invaded

the home of the Dixons and the Crown's presentation was based essentially on common design. The provisions of section 2(2) of the Act fall to be considered; it runs thus:

> "(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." [Emphasis added]

Capital murder as charged falls under section 2 (1)(d)(i) of the Act. When however the evidence points to a joint enterprise, to convict of capital murder the Crown must prove, that, the accused "by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on the person murdered, or himself used violence on that person in the course or furtherance of an attack on that person." [Emphasis supplied]

The directions given by the learned trial judge on capital murder are to be found on pages 164, 165, 166 and 167:

> (i) " (P. 164) The prosecution is asking you to draw the inference, a reasonable and inescapable inference, to draw the inference that men came into the premises. One of whom shot and killed Mrs. Dixon and in the course of the murder or in the furtherance of it, the men shot and killed Mr. Dixon (sic) as well as the other men committed a robbery.

"The charge, Members of the Jury is one of capital murder and you cannot conclude that capital murder was committed unless the Prosecution has made you feel sure. First of all, that robbery was committed and that Mrs. Dixon was killed in the course or furtherance of that robbery.

(ii) (P. 165) The Prosecution has to make you feel sure that this accused man, having considered all the ingredients in the law of murder, that you are sure about it. That this accused man shot and killed Mrs. Dixon, but if you are not sure that he killed in the course or furtherance or a robbery or that he did not kill in the course or furtherance of a robbery, then you could only return a verdict of guilty of non-capital murder.

(iii) (P. 166) Before you can convict the accused man, you must be sure that he committed the offence himself or that he did an act or acts as part of a joint plan with others to commit it. Put simply, Members of the Jury, that they were in it together. <u>You can only convict the accused man of the offence of capital murder if you are sure that he by his own act caused the death of the deceased or himself caused violence on that person in the course or furtherance of a robbery.</u> [Emphasis added]

You will remember the evidence of both Mrs. - well, the evidence of Mr. Dixon. He saw the accused man beside his wife, gun in hand and that Mrs. Dixon had earlier said, 'Bobby hold me up." Was he there and then using violence? Did he go on to kill Mrs. Dixon? The evidence is that he ran in the room, one explosion heard. That was told to you by both Mr. Dixon and Mrs. Hague, but Mrs. Hague told you that about six, five to six minutes after, she heard another explosion.

> (iv) (P. 167.) Did he himself fire the shot killing Mrs. Dixon? As I told you you are entitled to draw reasonable and inescapable inferences from the facts in order to come to a conclusion in determining what the facts are and ultimately determining what the decision is."

The evidence led by the prosecution established that Mrs. Dixon was seen by her husband standing in the room with the appellant armed with a gun beside her. Another man was at the doorway. The appellant fired a shot at Mr. Dixon injuring him. The appellant was next seen running from the house towards the rear of the premises and Mr. Dixon was seen to leave the house injured and in search of help. No evidence was given of the movements of the man at the door or the location of the third man. No evidence was given of Mrs. Dixon's exit from the house but some 5-7 minutes after the appellant left the house another gunshot explosion was heard and this inferentially was the occasion of the infliction of the fatal injury to Mrs. Dixon. The presence of the gun in the house in the course of the unlawful entry therein and the robbery and the use by the appellant of that gun to inflict injury to Mr. Dixon sufficiently indicate an intent to inflict grievous bodily harm as being a part of the common design. There is however no direct evidence of how Mrs. Dixon came to be shot. While the evidence shows that the appellant was armed with a gun, it is silent on the arms, if any, that the other two men had. There is an inescapable presumption that Mrs. Dixon was fatally shot by one of the three men who invaded her house, but on the evidence it cannot be said it was established

beyond reasonable doubt that that man was the appellant. The fact that the appellant was seen leaving the house would not absolve him from blame and he would still be caught in the wake of common design even if he ran away leaving his companions to complete the job. He would still be guilty of murder.

Where the evidence indicates that one person committed the crime it may be fairly presented for a jury's consideration. Where as here indicated there is evidence of common design great care is required in the judge's summation. 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.

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 section 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.

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, 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.

We are unable to say that had the jury been given the appropriate assistance they would not have returned a verdict of guilty of non-capital murder. We therefore were obliged to adopt the course indicated.