JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 136/88

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. GEORGE REID

Roy Fairclough for Applicant

Miss Paulette Williams for the Crown

13th December, 1989 & 5th March, 1990

FORTE, J. A.:

The applicant was tried and convicted of the offence of murder in the Gun Court Division of the Hanover Circuit Court on the 8th of June, 1988. On the 13th of December, 1989 after hearing arguments of counsel for the applicant we refused leave to appeal, and promised then to put our reasons in writing. This we now do.

It is necessary for consideration of the submissions advanced, to make reference, in a summary form, to the facts as they were revealed at the trial.

On 27th April, 1986 a car was driven up to the home of the brother of the deceased. Two men came out of the car and went into the yard. One of these men was subsequently identified as the applicant. The deceased who was carrying a barrel approached the men at the back of the house. He took something from the barrel resembling ganja. He handed it to

the applicant who put it into a bag. By that time another car had come up and some other men alighted from it and joined the others at the back of the yard. When the handing over of the ganja had taken place, someone shouted "Police" - then the applicant and all the other men each drew a gun. The men then fired shots - one hitting the deceased, killing him. They then made their escape taking the ganja with them in the two cars in which they had come. In the end, no one could say from which gun the fatal bullet was fired.

On the 5th of August, the applicant was identified on an identification parade by the witness Ruddock and others. In his defence the applicant maintained that he was not on the scene and in fact did not know Woodsville which is the area in which the incident occurred. He challenged the identification by the witnesses contending that they had seen him before the identification parade in the police station. However, he called a witness a Mr. Hines who placed him at the scene at the time of the handing over of the ganja on the day of the incident. In fact this witness' testimony was consistent with the prosecution witnesses except that he alleged that although the applicant had pulled a gun, as did the other five men, they had all ran off to the cars, after which two of them returned to the back of the yard and ordered the deceased and others to take up the rest of the ganja. Whereupon, the deceased attacked them with a machete and was shot. He maintained that at this time the applicant was standing at the gate.

At the end of the case for the defence, the jury was left with two different accounts as to the applicant's whereabouts at the time of the shooting.

In the face of these facts, Mr. Roy Fairclough filed six supplementary grounds of appeal, all of which he was granted permission to argue.

The first five of these grounds, complain against the direction of the learned trial judge to the jury on the legal issue of whether on the accepted facts, the jury could conclude that on the basis of common design the applicant was guilty of the murder of the deceased.

The learned trial judge, during the course of his summation, made several references to the question of common design, but did give, though in his own words, the accepted formula for this doctrine. He said:

> "If two or more persons engage themselves in a joint enterprise and during the commission of that joint enterprise something happens or something is done and that thing which is done is within the scope of the joint enterprise, then each person who engages himself or herself in that joint enterprise, pursuing that common purpose, becomes liable for the act of each other. Put simply, the act of one becomes the act of the other."

It is however, in relation to the following words, used later in the summation, that most of counsel's complaints are directed:

> "Was it a common purpose, or were they acting independently of each other?
> .....
> Now if you say to yourself, yes, there was a common purpose, yes, there was this common design, you must ask yourselves the next question: Did the common design contemplate the use of violence? Did it? Is there any evidence upon which you could find that? The most lethal weapon you can find around is a gun. So if six men armed themselves with guns and go to a place, for what purpose you would

> "arm yourselves with a thing like a lethal barrel weapon like a gun? Why not with sticks and gloves and batons? Why with guns? So did the common purpose, if you find there was one, involve the use of violence? What does the presence of the guns suggest, if you find that they had guns? What does it suggest?
> .....
> And you don't arm yourselves with gun to go and tell a man howdy, or to go and wish him happy birthday. Certainly not. You arm yourselves with guns to go to a man's place, you don't have no reason to go there and then you pull out your gun on the man, what does it suggest? Does it suggest that violence, each man who was there armed with a gun contemplated the possible use of violence if it became necessary. If in those circumstances you say, yes, they contemplated the use of violence, if you say, yes, this common design contemplated the use of violence, and if you find that violence is used of the degree that was contemplated, and you bear in mind what is the degree of violence used - the men armed themselves with guns, and it's a gun that was used to kill Mr. Duhaney, you bear that in mind; because it would be a different matter if the men went with, let's say, three or four sticks and unknown to them one man had a gun and that man pulled out the gun and killed Mr. Duhaney, that would be a different kettle of fish, because you would say that is not the type of violence that was contemplated because they never carried guns, they carried sticks."

Mr. Fairclough in his usual lucid and deliberate manner, contended that these directions were in error, as the jurors were led to believe that the fact that each participant was armed with a deadly weapon and that one or other of such weapons was used then the act of the user is the act of all. Instead, he argued, careful direction ought to have been given as to what was the scope of the illegal enterprise and especially what degree of force, if any, was contemplated by the participants.

As reflected in the decision already given, we found no merit in this contention which formed the fulcrum of the applicant's complaint. In our view, the directions were not only correct and adequate, but rather than misleading the jury, the learned trial judge was at pains in assisting them in plain and simple language to understand a doctrine which may otherwise be not easily understood.

He invited the jury to consider firstly whether there was in fact a common design, and then to determine whether the use of violence was contemplated as a part of that common design. His inviting the jury to consider whether the fact of each person being armed with a firearm, and the fact that firearms were in fact used, were indicative of the contemplation of the use of violence and violence by "the gun" was correct in the circumstances of the case, and we can find no fault in that regard.

One other ground was argued by counsel for the applicant i.e. ground 5 which reads as follows:

> "The learned trial judge having previously rubbished (p 135) the section of the evidence of the witness Hinds which was not supportive of the case for the Crown, as an after thought told the jury (p. 145) that if they accepted the view of the evidence urged by Counsel for the Defence, whom the learned trial judge had earlier described as having 'latched' on to Mr. Hinds, then its effect was not an undermining but further proof of the perpetration of the common design as contended for by the Crown."

In advancing this ground, counsel contended that the learned trial judge should have left to the jury the defence apparently arising from Mr. Hines' testimony: that is to say that if it were to be accepted, the jury could conclude that the men who returned to the back of the yard were then acting outside of the scope of the common design and were so doing when the deceased was shot.

It will be convenient to record verbatim the relevant parts of the transcript of Mr. Hines' evidence. It reads:

"Q: But two of the others came back?

A: Yes, sir.

Q: To where?

A: To the back of Mr. Duhaney's yard.

Q: To the back of Mr. Duhaney's yard?

A: Yes, sir.

Q: And what happened?

A: After he came back round he stick up - he draw the gun on us again and said ...

Q: That's the two men who came round stick you up again?

A: Yes.

Q: And said what?

A: Said, 'Oono not taking up the rest of the ganja,' and I never answer; I was just standing there, and I was there until they moved, start to walk backway.

Q: Who started to walk backway?

A: The two gunmen.

Q: That is, they held the gun and started walking backway?

A: Yes, and they spin around.

Q: Before they started walking backway, did they do anything?

" His Lordship: No, you can't do that, It's examination-in-chief.

Mr. Marcus: Thank you m'lord.

Q: Yes?

A: So after they spin around Ansel Duhaney grabbed a machete that was on the ground.

Q: Describe it how it look.

A: The machete that they used to .....

Q: The broad one?

A: Yes. And he run after them and chopped one of them on the shoulder there.

Q: From behind.

A: Yes.

Q: After them chop him what happened?

A: After he chop him he spun around.

Q: He who?

A: The same gunman who get the chop.

Q: Yes.

A: He spun around and shot him in his mouth; when the next friend hear the shot go off, he spin around too.

Q: That's the other gunman?

A: Yes, and he shoot him as well.

Q: Shoot Mr. Duhaney?

A: Yes.

Q: As well?

A: Yes.

In the process of his submissions, Mr. Fairclough quite properly in our view conceded that this evidence, was open to the interpretation that this incident, if it did occur, was a continuation of the common design.

In any event, in our opinion the passage referred to in the ground, as an afterthought, made it very clear to the jury, how they should treat the testimony of Mr. Hines. It reads:

> "So, what Mr. Marcus urged upon you in his address is this, 'if you find that this man was there, then he was there only to take ganja and that is what they did, and having taken the ganja and go about their business, standing up out in the road now, these other men have brain wave which have nothing to do with the man, nothing at all to do with the man and they just come back now, shoot Mr. Duhaney, this was never ever a part of the plan.' If you find that that is so, or if you are in doubt whether or not that is so, then he would be entitled to be acquitted because it must be - for him to be liable, what was done must be part of the common plan. But, you know, something, when they go outside with the ganja, if you believe what Mr. Hinds said, they don't say, you know, 'well, boy we get what wi want, mek wi gwaun,' Mr. Hinds seh they were out there waiting and what Mr. Hinds say, they come back and ask for ganja, 'Bring out the rest of the ganja,' and if you accept what Mr. Marcus urged upon you, that all that was happening was this ganja thing, when they go back and ask for ganja, it was still a section of the plan."

The jury were therefore told that if they concluded that the shooting was not a part of the plan or they were in doubt in that regard, then the applicant should be acquitted.

For these reasons, we found that there was no merit in the complaints made in the Grounds of Appeal nor in the submissions made in their support, and consequently refused leave to appeal.

For the aforesaid reasons I hold that the Orders prayed for in the summons dated 8/11/90 ought to be refused.

The Costs of the Summons are to be Costs in the Cause.

Certificate for Counsel granted.