

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 24/92

COR: THE HON. MR. JUSTICE RATRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

R. v. CLARENCE MARSHALL

Mrs. Arlene Harrison-Henry for Applicant

Carl McDonald for Crown

April 25 & May 16, 1994

GORDON, J.A.

At the hearing of this application Mrs. Harrison-Henry sought leave to argue six grounds of appeal. The first two complained that the learned trial judge failed to direct the jury on the issue of manslaughter and this led to a miscarriage of justice. We granted her leave to submit on the other grounds, but refused to do so in respect of the first two as on the facts and in law manslaughter did not arise.

The applicant was convicted by a jury in the Westmoreland Circuit Court presided over by Theobalds J on 10th February, 1992 on two counts of murder. The charges arose from the deaths of Mr. Amos Harry and Mr. David Barrett who were employees of Mr. Wesley Jackson. Mr. Wesley Jackson was a businessman who conducted business at Hartford in Westmoreland and on the morning of the 25th October, 1990 he despatched Amos Harry his salesman on his rounds which involved collecting money from debtors. Harry left driving a motor car and with him in the motor car was Mr. David Barrett a security guard who worked for the company contracted by Mr. Jackson to provide security for his operations. About 4.30 p.m. on the said day Dist. Cons. Jalleth Gayle was in a car proceeding from Montego Bay towards Sav-la-mar. At McField

in Westmoreland her car was overtaken by the car in which the deceased men were, she saw the car get out of control strike a wall and crash off the road. Two men ran from the back of the car, each had something in his hand and on going to the car she observed the two men in the front suffering from wounds to the neck and groaning. She knew the deceased Harry as "Indian" and Barrett as "Security". She sought assistance to take them to hospital. Constable Federal Bryan stationed at Whithorn, Westmoreland and who had been in Westmoreland for over 8 years came upon the scene of the accident at Tobie Hole, McField at about 4.30 p.m. and immediately after the crash. He saw 2 men running from the car towards him. He recognized the applicant whom he knew and he said to him "Marshall, what happen?" the applicant did not reply but he continued running with a .38 revolver in his hand. Bryan was summoned to the crashed car and on seeing the injured men whom he recognized. he retraced his step in an attempt to overtake Marshall and the other man but in vain. He called the name "Marshall" but got no response. He said the other man had a black plastic bag in his hand and the applicant had a firearm. He had known the applicant for 8 years and knew he lived at Hartford, Westmoreland.

Mrs. Alice Coke resided at Smithfield, Savanna-la-mar. She knew the applicant had been friendly with her grand-daughter Pauline Coke for about 3 years before she left Jamaica to reside abroad and in the 5 years since she left Mrs. Coke never saw the applicant. On the afternoon of the 26th October 1988, Mrs. Coke saw the applicant walk into her home, they spoke about the incident of the killing and robbery and the applicant said he was not involved. Policemen arrived at her home and the applicant was taken into custody and placed in the lock-up at Frome.

On 29th October 1990, Det. Inspector Joseph Morant spoke to the applicant in the Frome Police Station. The applicant expressed a desire to give a statement and Det. Supt. Winston Walker at Montego Bay was contacted. On 30th October, 1990 Det. Supt. Walker attended at the Frome Police Station and recorded a cautioned statement volunteered by the applicant. This statement was challenged by suggestions in cross-examination as not having been voluntarily given but that it had been coerced by beating administered by Det. Inspector Morant and others. This was denied. This is what the applicant said in the cautioned statement:

"Him use to tell me say him did live a foreign. Williams come to me one day and said him want some money. Me ask him how him going to get it. Him turn to me and say if him can come one day when me a go out with the sales man and take all the money we collect. Him say to me say when him come him going to just take the gun. Me say to him say me can't do that because a me ago inna trouble. Him say me must carry him go show him the route, where him can stop the car. Him left the job in December, 1989, but we still move. So last week Wednesday night him meet me by Rose Street, and say him going to take money tomorrow so me must carry him go show him the route. Him say me must meet him down town by the Chiney-man place where they make plastic bags. About 1.00 p.m. me meet him down there, sir, and we take

- s/Clarence Marshall

wit: J.H. Morant Det/Sgt

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one of the TA-TA bus that was going to Montego Bay and we come off up by Mackfield, and we walk go up about three (3) miles up Cornwall Mountain Road. Me pass some people wher me know and me call to some of them. We stop along the road and we see a car coming and we stop it, we go inside a it. We come about quarter mile down the road. The sales man stop and took up order at the last shop. The sales man come back in the car and drove off. Him a

"drive a gwaan down the road and Williams turn and say to me, him a wait until when him come out of the area fi make a move. When we reach down the main road down by Mackfield me see Williams put out a gun from out of him waist and him waited until the car past the snack place and him point the gun at the security and tell him to give the gun him have and the security start to resist and Williams shot him inna him neck and him took out the gun from the security waist and same time the sales man step on the brakes of the car and said, 'Jesus Christ, oonu ago kill me?' And Williams turn the gun on the sales man and shot him. Me ask him why him shoot the man. Williams took up the bag with the money, take out some of it put into his black bag and we come out of the car. Williams give me the bag and say me must carry it. We ran down the road. Williams ran in front and me run behind him. When we reach near down a bush, Williams take the bag and say to me, him can't stop fi share the money now so him say to me, make me split in the bush because we can't walk together, it too suspicious. Before we split me ask him say where me wi see him and him say me must not worry, him will check me and him turn one way and me turn the other way. Me got lost in the bush and started to walk and come through a cow pasture and me walk until me come out on the road. Me reach Petersfield and me turn, make a left turn beside the post office and stop by a girl name Cutie. Me saw that she was coming to her gate and she said to me she was going to town. Me go further down the road, make a right turn and walk until me reach by Hartford. Me turn and go Pipers Corner and then to Smithfield. Me stop at a old lady me know for a long time, Miss Coke, and after I was talking to her me see the car drive up and four (4) policemen came out and hold me."

In his defence the applicant gave an unsworn statement from the dock in which he said:

"My name is Clarence Marshall, I live at 101 Darling Street. I am a Security Guard. On 25th of October, 1990 I wasn't at work I wasn't assigned a firearm. I didn't plan any killing, I didn't plan any killing and I didn't kill anyone sir."

Dr. Barrington Clarke performed the postmortem examinations on the corpses. On Amos Harry he found a through-and-through gunshot wound that passed from left to right in the neck passing through the fourth cervical vertebrae. Another gunshot wound in the left chest that penetrated the fifth intercostal space passing through the left lung through the fifth thoracic vertebrae and lodged in the right armpit.

David Barrett succumbed to a bullet wound that passed from left to right of the neck. Both men died from gunshot wounds they sustained and in each case death was almost instantaneous.

On the facts outlined it is readily seen that manslaughter was not an issue that could have been left for the jury's consideration. It was a case of murder or nothing and the defence raised in the statement from the dock was an alibi.

The prosecution's case was founded on the evidence of Constable Bryan with some support in the evidence of Sharna James, a school girl of 15 who said she saw the applicant and one Mr. Williams walking on the road in the district of Cornwall Mountain on the fateful afternoon. She afterwards saw both men in a white motor car driven by the deceased Amos Harry passing through Cornwall Mountain. The prosecution also relied on the cautioned statement of the applicant.

In the cautioned statement the applicant spoke of meeting Mr. Williams, the conversation they had in which Williams intimated his intention to commit robbery and sought the aid of the applicant in identifying the victim; he mentioned the use of a gun to which the applicant said he objected. However, in

conformity with the pre-conceived plan, the applicant met with Williams, they travelled together from Kingston to Westmoreland, stopped and entered the motor car with the victims and the robbery was effected and the victims executed. They fled the scene with the spoils of the robbery. The applicant, however said the shooting was done by Williams. Constable Bryan saw the applicant run from the car with a gun in his hand. The applicant said he had the bag with money. If the jury accepted the cautioned statement, there was a case made out of a common design to rob with the use of a lethal weapon. If the jury accepted the evidence of Cons. Bryan independent of the cautioned statement, then the fact that the applicant was seen leaving the car in the company of another man and at the time the applicant had a firearm in hand and two fatally shot men were in the abandoned motor car, then here also a case of common design was established. It was suggested to Inspector Morant that the cautioned statement was obtained by the use of coercive force. This he denied. The applicant in his statement did not support the suggestions. The voluntariness of the cautioned statement was before the jury as unchallenged and it was their duty to determine its truthfulness and the weight and value to be given to it.

In his charge to the jury the learned trial judge told them:

"Now, the rules of law in relation to confessions or caution statements is that it cannot be used in evidence against an accused person unless it is free and voluntary. It must not have been induced by any form of threat or inducement or by any promise of favour nor by exercise of improper influence. Well, you have heard both from Superintendent Walker and from Inspector Morant that neither one of them used any force by way of cross-examination.

"It was suggested to them that threats were used, a wire whip, but you have no evidence from the accused in the dock and cross-examination does not by itself establish the truthfulness of allegations. You must have evidence to support it. But bear in mind, the burden of proving that the confession was obtained without inducement, is on the crown. So if you accept Walker's evidence, if you accept Morant's evidence that **neither** of them used any **inducement** or threat or beat the accused, then that statement would have been proven to be free and voluntary. So, you as members of the jury, have to decide first of all whether or not the statement was made. Then you heard evidence from Superintendent Walker and from Inspector Morant that the accused man did make that statement. If the answer is, yes, the accused made it, then you ask yourself next, was it free and was it voluntary? There again you have had evidence which is for you to accept or otherwise and if it was free and voluntary, then you decide what it means when you come to retire. I will give you a copy of the statement so that you can look at it once again and then finally, you decide what weight and what value you attach to that confession.

In ground 4 the applicant complained that the learned trial judge erred in his failure to direct the jury in law to deal with the cautioned statement, its meaning and its implication. Mrs. Harrison-Henry submitted that she had no complaints to direct at the passage quoted above and in effect abandoned this ground.

The complaint in ground 5 was that the learned trial judge's directions to the jury on the principles of common design were inadequate and misleading.

The passages impugned are to be found at pages 169-170 of the transcript:

"Now, in an offence involving violence, such as a robbery, if killing ensues during the commission of the offence, as long as it can be established to your satisfaction that each person who took part in the robbery knew of the likelihood that a firearm would be used, then if murder ensues, all are guilty regardless of who pulled the fatal trigger. So that is what the principle of common design is all about. But in order to find all the participants guilty of murder, you must be satisfied that each one of them knew that the other one had a firearm and that the firearm, it was contemplated between them would be used either to effect the robbery or to escape apprehension after committing the robbery. That is what the principle of common design is all about. When two (2) persons, two or more persons embark on a joint enterprise each is liable criminally for acts done in pursuance of the joint enterprise, if it is established to your satisfaction that all of the persons knew and contemplated the use of violence, whether it is by gun or knife, if killing results all of the persons can be found guilty of murder.

Well, the only evidence from the accused in this case is that killing was accomplished by the use of a gun. At close range the bullet went into the neck of the deceased person and it is a matter for you to infer from that what could have been the intention of the person who discharged the firearm. Tie that in with what I told you about the principle of common design and then you must be in a position to say that you accept that even if the firearm was discharged by another person, there was a common agreement or intention between that other person and this accused man to effect a robbery and in doing so, it was intended that the firearm would be used if necessary.

"Remember that it is the actual intention that you are seeking to discover. So here again, you take into consideration what the accused man said by way of an explanation. He has said that he didn't take part in the plan. He never agreed to any killing. It was at most, a plan to rob. But all this falls back on the common design principles that I have indicated to you."

Mrs. Harrison-Henry submitted that the words "contemplate" and "the likelihood that a firearm would be used" are matters that contribute to intention and the learned trial judge failed to adequately address this. The direction, she submitted, ought to have gone further in order to assist the jury in determining the intention of the applicant.

We have read the transcript and find there is no support for the applicant's contention. The cautioned statement clearly indicates that it was in the contemplation of Williams that a gun would be involved. The applicant did not seek to withdraw from the enterprise, but he in furtherance of the plan travelled to Westmoreland with the author. He said he saw Williams produce a gun and held same for some time before it was used offensively and he did nothing to disassociate himself from the use thereof. He continued in the plan after the men were fatally shot and even enquired about the sharing of the loot. A factor in the jury's contemplation was the evidence of Cons. Bryan that he saw the applicant run from the motor car with a gun in his hand. The other man was seen carrying the bag. The inference could be drawn that it was the man with the gun that shot the victims and his statement casting the blame on Williams the jury could have rejected. The learned trial judge in a fair presentation reminded the jury that the applicant in the cautioned statement was saying he had no part in the killing. He was involved in a plan to rob. Common design and intention received fair treatment and in our considered view this ground fails. Ground 6 states:

"The Learned Trial Judge failed to explain the meaning of the mistakes conceded by Constable Bryan within the context of the evidence."

This ground was not pursued. The learned trial judge dealt adequately with the subject.

The other ground mentioned by counsel was that which dealt with classification of the crime as is required by the Offences against the Person (Amendment) Act 1992.

Mrs. Harrison-Henry conceded that the case does not fall in the category of non-capital murder.

The victims were killed in the course or furtherance of robbery and by virtue of section 2(1)(d)(i) the applicant is guilty of capital murder. In the result therefore the application for leave to appeal is refused, the convictions affirmed and the sentence of death imposed stands.