JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 46 & 47/91

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

REGINA vs.
LEROY MORGAN
SAMUEL WILLIAMS

Jack Hines for the applicant Morgan

Jeremy Palmer for the applicant Williams

Ms. Paulette Williams for the Crown

October 27 and November 16, 1992

WRIGHT, J.A.:

These are two applications for leave to appeal against convictions and sentences of death for the murder of George Chambers on August 11, 1989. The applicants were tried and convicted in the Home Circuit Court on April 12, 1991, before Wolfe, J. and a jury.

The principal witness for the prosecution was Patricia Gray who testified that on August 11, 1989, she was at her stall with her five-month old baby at 31 St. John's Road in St. Catherine where she lived. She said that 31 St. John's Road, in the Spanish Town area of St. Catherine, is a large compound with several houses accommodating many residents. She and her mother Lurline Wilson lived there. So, too, did the applicant Morgan, whom she knew since she was a little girl, known also as "Black Boy" and the applicant Williams, also known as "Clifford", whom she had known for about ten years. Williams' house was some distance from Miss Gray's.

At about noon on that day she was standing before her stall a little way from her house where she does her higglering, when both applicants came up to her and declared, "Bruce Golding said no P.N.P. mus'n stay down here so." However, her mother, Lurline Wilson, who was called by the offence, testified that she was sitting by the stall talking with her daughter when the men arrived and announced that "Bruce Golding tell them to buss down the boys' house and run them away because them is P.N.P." Patricia's response was, "Black Boy and Clifford, move from here with unno argument." They were so close to her that "Clifford" immediately pushed her in her face and she in return pushed him. The three of them then resorted to stone-throwing in the course of which she received blows. Her mother intervened and tried to get them to desist from the stone-throwing but to no avail.

Patricia then saw her brother, the deceased George Chambers, approaching about 2½ chains away. He came up to the scene of the hostilities and said, "Black Boy and Clifford, unno break that up because mi and unno grow too good if we have anything." But the conflict was not so and on so peaceful a note. "Black Boy" greeted this peace-making endeavour by pulling a gun from his right pocket and went after Chambers who ran back in the direction from which he had come. Both applicants gave chase. In panic, Patricia ran to her home leaving her five-month old baby asleep in the stall. They ran around a bend in the road and lost sight of them. According to her, some two minutes later she heard the sound of gunshot but when she gave a demonstration of the time span in Court it turned out to be seven seconds. She ran in the direction from which the sound had come and in the yard of one Mr. Ashley which is next door to "Black Boy's" home she saw her brother on his back bleeding from a hole in the region of his left shoulder and there were lacerations to his forehead. With the help of another girl, she took him up intending to get him to the hospital but he expired in their hands. They left him at the gate where his mother went

and saw the body. By this time, a crowd had gathered. The police were notified and at 1:30 p.m. Detective Sergeant Roosewell Edwards visited the scene and upon examining the body he observed that in addition to the injuries seen by Patricia there was also another wound in his back on the right side. The body was removed and the officer began a search for the applicants. Four days later, on August 15, the applicant Morgan was taken to the Police Station where the Sergeant arrested and charged him for the murder. On being cautioned he said nothing. A similar response was had from the applicant Williams whom the officer arrested the next day at the Spanish Town Police Station on the charge of murder.

Dr. Royston Clifford, Forensic Pathologist, who performed the post-mortem examination on the deceased on August 22, 1989, confirmed the presence of the two wounds to the shoulder and the back and identified them as gunshot entrance wounds about which there were no gunpowder marks which would have indicated close-range shooting. He certified the cause of death to be multiple gunshot wounds.

The applicant Morgan made an unsworn statement and called Lurline Wilson and one Earl Reid as witnesses. His statement is as follows.

> "I was in some stone throwing with Skully and some other people throwing stones at me. The incident done and I left. I didn't run down no one. I didn't shoot no one with no gun. That is all I have to say, M'Lord."

Lurline Wilson testified, as was mentioned earlier, of the arrival of the applicants, the declaring of their purpose in coming, the resultant impasse with Patricia and of her failed endeavour to restore peace. Her son, the deceased, arrived and called for a halt. According to her, the stone-throwing was stopped but they were still talking. The witness then returned to her home leaving the others on the scene. She observed, however, that the applicants and the deceased walked off a short

distance. While she was engaged in washing, because of what she heard a little boy saying as he ran by, she visited the scene of the killing and saw the body of the deceased by Mr. Ashley's gate. She could not give an estimate of the time lapse. She did say, though, that she found him dead in the same direction in which she had seen him go. Asked in cross-examination how long she had remained on the scene after the stone-throwing had stopped she said fifteen minutes but when she was made to demonstrate it turned out to be thirty seconds. She does not mention hearing any gunshots.

The evidence of Errol Reid is somewhat curious in that he testified to being aroused from his bed by an uproar between 10:00 a.m. and 11:00 a.m. He also lives on the compound at 31 St. John's Road. When he came outside the two applicants ran past him in the opposite direction to which he was going as he went to a shop. He purchased cigarettes and while he was in the shop he observed people running about and stones being thrown so much so that the shopkeeper closed the shop. After about six to seven minutes (demonstrated to be ten seconds) the shop was re-opened and when he came outside he saw George Chambers, the deceased, run up the road with his hand in his pocket. He went home but returned to the road after a while and as he stood there he saw Chambers retracing his route with his hand in his pocket. He held Chambers and cautioned him to behave himself. While he was speaking to Chambers, Patricia came and told Chambers to let Reid, whom she called "Chicken", let him go because "de boy dem run gone over de yard dah so." He, therefore, let go of Chambers and returned to his home and while there he heard two or three explosions which caused him to return to the road where he saw the deceased being carried by two women.

It presents some difficulty to relate his evidence to the rest of the case. In point of time, it is earlier than the events which culminated in the death of George Chambers. Patricia Gray was certain about her time because she supplied lunch to factory

workers who had come for lunch at mid-day and left, whereas the witness speaks of events between 10 to 11 a.m. As for the details, they stand alone. We doubt very much that a jury could have accepted him as a witness of truth.

Samuel Williams made the following unsworn statement:

> "I wish to say I an the deceased, George Chambers, throwing stone. And a group of people throwing stones at me. The incident finished and I left. I didn't run him down and I didn't shoot him with any gun. That is all I have to say, Sir."

After a careful and painstaking summing-up in which the issues of common design and circumstantial evidence, on which the Crown's case was rested, were fully dealt with by the trial judge, the jury retired but after twenty-nine minutes returned for further directions on the drawing of inferences. They received further directions for fourteen minutes and then retired again to return in fifteen minutes with unanimous verdicts of guilty against both applicants who were duly sentenced to death.

The application of Morgan for leave to appeal against conviction and sentence rests upon a single ground which reads:

> "That the learned trial judge erred when he directed the jury as follows (on page 113):
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> > 'Now, if this woman had meant to come here and lie to you, you don't think she would have gone the whole hog and say, I ran behind them and I see when Morgan shoot him? She does not do that. She said, I ran to my home and is something I hear now that took me down and saw him dead.'
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> It is inescapable that by such a direction he was instructing the jury that pivotal witness PATRICIA GRAY was a witness of truth. This direction was unfair and went beyond the permitted sphere of fair comment and usurped an integral part of the sole prerogative of the jury, which in coming to their verdict is to determine whether the witness is or is not a truthful witness. This prejudicial direction undoubtedly persuaded the jury to an adverse verdict."

To extract this portion of what the trial judge said in order to formulate a ground of appeal complaining of unfairness

not only does violence to the judge's directions but is unfair to him as well and but for the energy generated by Mr. Hines in presenting his submissions one could be pardoned for thinking that that matter was not susceptible of argument.

The trial judge had just begun discussing the evidence led by the prosecution and was emphasizing the need to regard Patricia Gray's evidence carefully, she being the only eye witness for the Crown. This is what he said at pages 113-114:

> "She is the sister of deceased. Well, that by itself does not taint her evidence, does not make it unacceptable, because it is her brother who has died. I ask you, or I advise you, I want you to look carefully at her evidence when you are assessing it. But you might very well ask yourselves the question: if this woman had come here to lie to you in this case, what would have prevented her, Madam Foreman and members of the jury, from telling you, 'I saw when my brother was shot and killed'? What would have prevented her from doing that? She said 'No I don't see that, all I see, is when Morgan draw the gun and I so afraid, I ran and left my five months old baby in the stall.'
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> Now, if this woman had meant to come here and lie to you, you don't think she would have gone the whole hog and say, 'I ran behind them and I see when Morgan shoot him'? She does not do that. She said, 'I ran to my home and is something I hear now, that took me down and I saw him dead'. So against that background, do you find her to be a witness of truth, or a liar? You are the sole judges of the facts. You must make up your minds what you think about her. Again, I remind you that this is a comment which I make, it does not bind you, you are free to reject it if you disagree with it."

When the impugned passage is seen in the context in which it appears, it becomes immediately clear that there is no valid ground for complaint.

The question of unfair comment by a judge was dealt with by this Court in **R. v. Dave Robinson** (unreported) S.C.C.A. 146/89 delivered April 29, 1991 and was followed in **R v Stanley McKenzie** (unreported) S.C.C.A. 62/91. In delivering the judgment of the Court in **Dave Robinson**, Carey, P. (Ag.) said at page 4:

> "It is trite that a trial judge, as part of his duties to ensure fair trial and to assist the jury on the facts of the case, is perfectly entitled to comment on the facts. Counsel for the Crown, as well as counsel for the defence, are equally entitled to do so. But the judge is neither counsel for the prosecution nor for the defence: he represents neither side, he represents the interests of justice. His comments must therefore always be fair and just: they must be warranted on the facts and issues which fall to be determined. His comments may be strong but he must not fail to warn the jury that they are entitled to reject his comments in favour of their own judgment if they consider his views erroneous or fanciful or misconceived or for any good reason unacceptable to them because they are the judges of the facts. The verdict that is sought is theirs. Where therefore the comment tends to ridicule the defence, or to suggest that there is some burden on the accused to prove his innocence, or erodes the defence, or is unwarranted on the facts, the judge would have over-stepped the lines of proper judicial comment. He would be failing most seriously to ensure the fair trial that the Constitution guarantees and would lead to a substantial miscarriage of justice. This list is not intended to be exhaustive."

In the instant case, Wolfe, J. made it abundantly clear that the passage complained of represented a comment which did not bind them which they were free to reject and, as the sole judges of the facts, come to their own conclusion. We very much doubt that such a comment qualifies as being strong, but even if it did, it is by no means unfair.

The ground of appeal fails as being wholly unmeritorious.

For the applicant Samuel Williams, Mr. Palmer very belatedly filed three grounds of appeal which he sought leave to appeal. They read:

> "1. THAT the learned trial judge failed to direct the jury adequately on the Law relating to the appellant's defence of alibi and the significance of the evidence for the defence relating thereto.
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> 2. THAT the learned trial judge failed to direct the jury that the witness Patricia Gray had an interest to serve.

> "3. THAT the learned trial judge failed to give the jury a sufficient warning of the danger of convicting on evidence where a witness makes allegation of political motivation against the accused."

However, as it transpired, none of these grounds could get off the ground. In the first place, this applicant's defence was not really an alibi. Rather, he merely put the prosecution to proof. He admitted being present during the initial stage of the events and even said he left. Further, he denied running down anyone or shooting anyone. So no evidence relating to an alibi was adduced nor could counsel identify any such evidence. In fact, the trial judge generously labelled the defences of the applicants as alibis and then proceeded, quite appropriately, to direct the jury that they were under no burden to prove the alibi. As regards Ground 2, counsel could identify no evidential basis for the complaint. Indeed, this as well as Ground 1 bears no resemblance to the case. Ground 3 is also demonstrably out of harmony with the facts of the case. At pages 111-112 of the summing-up, the trial judge alerted the jury to the polarization in the society because of politics and warned them to approach the evidence with caution although there was no evidence that Patricia Gray was a participating politician.

Despite the failure of the grounds advanced on behalf of the applicants the Court has itself carefully perused the record of the case and concludes that the judge's summing-up is unimpeachable. He dealt adequately with all the relevant factors; hence counsel's failure to find even one arguable ground of appeal. Leave to appeal against the convictions is accordingly refused.

Classification

Because of the provisions of the Offences Against the Person (Amendment) Act, 1992, which came into force on October 14, 1992, it is necessary to determine into which classification the case of each applicant falls, the relevant sections being sections 2(1)(f) and 2(2) which read as follows:

> "2.--(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say--
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> .....
>
> (f) any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public.
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> (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 causes 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."

The evidence accounting for the death of George Chambers attributes the incident to the declared intention of the applicants to drive out certain residents from the area because of their political affiliation. Indeed, the witness called by the defence said that they declared that their purpose was to "burn down the boys' house and run them away because them is P.N.P." Such an act, in our opinion, falls squarely within an act of terrorism as defined, that is:

> "An act involving the use of force by that person which by reason of its nature and extent is calculated to create a state of fear in the public or any section of the public."

The relevant section of the public to be considered is the compound constituted by 31 St. John's Road from which the evictions were threatened and it requires no stretching of the imagination to conclude that such an undertaking as was announced would certainly create a great state of fear in that community.

Leroy Morgan

On behalf of this applicant, Mr. Hines endeavoured, but unsuccessfully, to arrive at a meaning of "calculated" which would avoid the consequences of the section, namely, that the murder of George Chambers took place in the course or furtherance of an act of terrorism. It was his submission that Leroy Morgan did not with a number of persons gather and fire deliberately with wanton disregard with a view to instilling fear in the public. Therefore, he continued, there is no evidence of an act calculated to create a state of fear in the public or any section of the public. That submission ignores the declared purpose of their visit and the fact that, when opposed, they promptly resorted to violence by stone throwing and their response to George Chambers' entreaty clearly manifested an intention to brook no opposition in executing their mission. The direct effect of the announced mission would be to create fear and such an intention can readily be attributed to this applicant. But quite apart from the direct effect of the declaration, the undertaking on which they were embarking was likely to, and so calculated to, create fear in that section of the public. Having regard to the chronology of events the shooting took place during the hot pursuit of the intented victim and within seconds after this applicant had run out of sight of the witness Patricia Gray giving rise to the inescapable inference that the gun was fired by him. Leroy Morgan is, therefore, guilty of capital murder under section 2(1)(f) of the Act.

Samuel Williams

The liability of this applicant involves a consideration of section 2(2) (supra). By seeking to introduce a change into the application of the well-established common-law principle of common design, this section would seem to introduce an anomaly by limiting the application of the death penalty in the way it does. But there is a rule of construction of statutes which inveighs against absurdity for which regard must be had if the

statute itself must not become an engine of injustice. If this rule is ignored the statute could be made to sanction the manipulation by the more cunning and crafty felons of the less able among them so that during an act of terrorism, as defined by the Act, only one felon need be armed while the others ensure that none of the intended victims escape and in the end only the lone gunman would be required to pay the ultimate price with his life. Such a result would not only encourage the mischief which the Act aims, but would be manifestly unjust and absurd.

How then must the role of Samuel Williams be regarded? On the evidence he made the same mission statement as did Morgan and he was the first to resort to violence when he pushed Patricia Gray in her face and thereafter joined in the escalation of the violence which occasioned the peaceful intervention of the deceased. The violence stepped into a higher gear when Morgan drew the gun from his pocket and, together with this applicant, began chasing Chambers. That was participating in an act of violence against Chambers such as to bring him within the provision of the Act against terrorism by attempting, i.e. endeavouring to inflict grievous bodily harm on the person murdered in the course or furtherance of an attack on that person, i.e. George Chambers. Further, it would seem that the pursuit of Chambers by this applicant under cover of the gun in Morgan's hand qualifies as the use of violence by him on Chambers in the course or furtherance of an attack on Chambers. On the facts of this case we can find no logical basis for differentiating between the two murderers. Samuel Williams is also guilty of capital murder.

Conclusion

The applications for leave to appeal are refused. Both applicants are guilty of capital murder and the Court substitutes such verdicts for the verdicts returned by the jury.