

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 126/96

**COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.**

R v JOSEPH THOMAS

Mr. Delroy Chuck for Applicant

Mr. Dwight Reece for the Crown

20th November & 17th December, 1997

GORDON J.A.

In the Home Circuit Court with Theobalds J, presiding, the appellant was on 11th October, 1996 convicted on two counts of capital murder.

The deceased Arthur McFarlane and Junior Spencer were shot and killed in the course of a robbery on 29th May, 1993. There were two eyewitnesses to the crime, Rohan Spencer, the son of Junior Spencer and William Spencer, the brother of Junior Spencer, deceased.

The witnesses and the deceased were at a garage and bus depot at 41 Killarney Avenue, Patrick City, St. Andrew on the night of 29th May, 1993 at about 9:00 p.m. Junior Spencer was in the garage working on a bus, William Spencer was sitting on the back of a car and Rohan Spencer was in the office with Arthur McFarlane collecting money from conductors at the end of their tour of duty. Mr. McFarlane had

just received a bag with money from a conductor when Rohan Spencer saw his father being pushed at gun point into the office by a gunman. Following this gunman was the appellant who was also armed with a gun. The appellant robbed Mr. McFarlane of a gun he had. Mr. McFarlane resisted and Rohan Spencer heard the sound of a gunshot explosion. The applicant asked Rohan where the money was and Rohan said all they had was on the desk. This the applicant seized and proceeded to search the drawers of the desk. Urged by the other gunman both left the premises and Rohan saw that his father Junior Spencer and Mr. McFarlane had what appeared to be gunshot wounds and were apparently dead. Each body had a gunshot wound to the head and Mr. McFarlane had an additional chest wound.

Rohan Spencer, 16 years old at the date of trial said he had known the applicant from he was attending primary school. He saw him two weeks before the incident on Patrick Drive. The applicant when he entered the office said to McFarlane "Don't move, bwoy" because me know you have it". He later told the other gunman "shoot him in a him head, shoot him in a him head". This command was given with respect to McFarlane.

William Spencer was near the front of the garage when he saw the two gunmen enter the premises. He recognised the applicant as someone he had known for over 20 years. They had been neighbours sharing a common back fence. He knew him as Joe Thomas. The garage was brightly lit with electric lights and he sought to conceal himself as the intruders invaded the office and effected the robbery which he witnessed. He heard three explosions and he saw the applicant and his colleague make a hasty retreat. They in entering and in leaving passed close by where he was located. His evidence corroborated that given by Rohan.

Det. Sgt. Ranford Davis visited the scene of the incident. He saw the bodies of the deceased. He had known them before. Spencer he said had a bullet wound to the head and McFarlane had two bullet wounds, one to the head, the other to the chest. He recovered four (4) spent cartridge cases and one lead bullet in the office. He interviewed witnesses and prepared warrants for the arrest of the applicant. On 31st January, 1995 he executed the warrants by arresting the applicant.

The applicant gave evidence. He said he was unaware of the crime until the 26th December when policemen came to his home and took him in custody. He was held for three days, released and later re-arrested.

He said his name is Clive Stewart, he had never been known by nor has he ever answered to the name Joe or Joseph Thomas. While in custody the police took his personal items including photographs. He lived in Pembroke Hall, and he did not know the Spencer witnesses. He declared he did not know Killarney Avenue in Patrick City. He knew no area in Patrick City. He knew nothing about the crimes.

The sole ground of appeal by Mr. Chuck ran thus:

" In support of Ground 1, unfair trial, the learned trial judge was less than evenhanded in his summing up when he said "Well, I do not anticipate you having any problem there that it was the accused who killed him and perhaps here,.... "

Mr. Chuck submitted that he had a duty to bring to the court's notice this statement made by the learned trial judge in detailing what the prosecution had to prove. The passage was completed in this manner by the judge

" I should indicate to you the principle of what is known as common design".

Then follows direction on common design which were unobjectionable. Mr. Chuck submitted that the impugned passage was a misdirection and by itself is ground for

setting aside the conviction. He however, conceded that in subsequent passages the learned trial judge gave directions which in law were absolutely correct and thus expunged the error portrayed in the above passage.

The passage complained of was given in this context::

"Now, I said, the prosecution has to prove the death of the deceased. Well, I do not anticipate you having any problem there that it was the accused who killed him and perhaps here, I should indicate to you the principle of what is known as common design. When two or more persons join together to commit an offence, commit a crime, that offence is committed, then each person takes an active or participates in the offence is guilty of the crime. That is the broad principle. So, if you accept that there were two persons taking part - this is the prosecution's case, in a planned robbery, it does not matter which of them is charged with the fatal act. If they were acting in concert, both of them would be guilty of the crime - of the offence".

Following on that direction the judge told the jury:-

"The prosecution naturally has to prove the killing and that it was the accused who did it or participated in it or that it was done in furtherance of an act of robbery".(emphasis added)

Earlier in his summing up he gave the jury full and lucid directions on the burden and standard of proof and following on the passages identified above, he proceeded to deal with the issue of identification , in a manner which sets the record straight and corrected the lapse complained of by Mr. Chuck. He directed:-

"It is readily understood, members of the jury that the real live issue in this case is whether that accused man is the person who held up robbed and shot the two persons named in this indictment... The real live issue is, is it the man? Whether his name is Joseph Thomas or whether his name is Clive Stewart, is it is this man who took part in that robbery that night"?

The judge then dealt with the issue of identification giving the jury directions on the factors they had to consider and the evidence supportive of the pi oper

identification. The evidence was that the garage premises were lit with bright lights . The office was also brightly lit and the witnesses declared they had known the applicant for many years. William Spencer then thirty four had known the thirty eight year old applicant "from he had sense" and Rohan twelve years old at the time of the offence had known the applicant from he was in primary school. The time the witnesses had the applicant under observation varied from three minutes to under a minute, but they gave details of the applicant's movements they observed and of the conversation Rohan had with the applicant and the applicant with his comrade in crime. There was evidence to satisfy the jury the applicant was properly identified.

The witness William Spencer mentioned in his testimony that the applicant had been to prison many years before. The learned trial judge said then that he would deal with it later and in his summation he quite properly directed the jury to disabuse their minds of that chance remark made not in response to any question that was asked.

The evidence of the prosecution witness was forthright and convincing and the summing up of the learned trial judge was fair , balanced and presented with clarity to the jury. The defence was adequately addressed. We find no merit in the ground advanced by Mr. Chuck, the application is accordingly refused.