Sgd.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 9 & 10/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs.
GARTH WHYLIE
GARFIELD PITT

Lord Anthony Gifford, Q.C., for Whylie

Bert Samuels for Pitt

Lloyd Hibbert, Q.C., David Fraser and
Georgianna Fraser for the Crown

December 1 and 2, 1997; September 28, 1998 and November 29, 1999

BINGHAM, J.A.:

The applicants were tried and convicted in the St. Catherine Circuit Court on January 24, 1997, for murder arising out of the death of one Paul Clunis on June 11, 1994. They were sentenced to imprisonment for life at hard labour. The learned trial judge, in the exercise of his discretion in relation to his sentencing powers, as to the period to be served by the applicants before parole could be considered, made no recommendation.

Applications for leave to appeal having been refused by the single judge, were renewed before this court. Having heard the arguments of counsel, we treated these applications as the hearing of the appeals, dismissed the appeals, affirmed the convictions and sentences passed and ordered that the sentences commence as from April 24, 1997. In handing down our decision, we promised to put our reasons into writing. This we now do.

The Facts

The deceased Paul Clunis, a young man, lived at Barnett District, Above Rocks, in the parish of St. Catherine. At the time of his death there was an ongoing land dispute between his family and their neighbour, one Leonard Johnson.

On June 11, 1994, at about 7:30 p.m. there was a fire at Johnson's house which necessitated the fire brigade being summoned to put out the blaze. Sometime later that night, the applicant Garfield Pitt, who lived in the same district, went to the home of Gladys Clunis, the mother of the deceased, and enquired as to the whereabouts of the deceased. He was told that the deceased was not there. He then left.

Later that same night about 9:30 p.m., Gladys Clunis and her daughter Faith Clunis were standing in their yard when they observed a group of about ten men, including the two applicants. These men were all armed with various implements. The applicant Garfield Pitt had an iron

pipe and the applicant Garth Whylie was armed with a machete. The men were holding the deceased and pulling him along the road in the direction of the premises where Mrs. Clunis lived. The deceased's hands were tied behind his back with a piece of electric cord. He appeared to have been beaten and was not putting up any resistance. When the men got to a section of the road by Mrs. Clunis' house, the deceased was put to sit on the ground by a light post. At that stage, he appeared to Faith Clunis to be almost lifeless. While seated on the ground by the light post, further beatings were administered to the deceased. The applicant Pitt was seen to hit him twice in his head with the iron pipe. The other applicant Whylie used the machete which he had to stab the deceased in his back several times. This machete had no point at the end of the blade.

Following this, the men then uprooted some bamboo posts which formed a part of the fence to Mrs. Clunis' home adjoining the main road. These posts were placed unto the roof of the house. The roof was then doused with some inflammable liquid substance and set on fire. Objections raised by Mrs. Clunis and her daughter Faith to the actions of the applicants and the group of men were met with threatening words, expletives and stones were hurled at them causing the two women to beat a retreat further to the rear of their premises for their safety. This was not before they saw their house set on fire by the men and the deceased being dragged along the road by the electric cord which was now tied around his neck. The group of

men, including the two applicants, were now heading in a direction down a lane and away from the Clunis' house. The fire brigade was summoned to put out the blaze at Mrs. Clunis' house. The house was burnt to the ground.

Following a report which was made at the Glengoffe Police Station, Detective Acting Corporal Leroy Thompson visited the area around 1:30 a.m. on June 12. He observed the lifeless body of the deceased, Paul Clunis, hanging by a piece of electric cord tied around his neck from the limb of a mango tree. He also observed several wounds all over the body. The body was removed to the Spanish Town Morgue. Detective Thompson also observed a completely burnt out house belonging to Mrs. Gladys Clunis about three chains from where the deceased was seen hanging from the mango tree. There was another house which was burnt three chains from Mrs. Clunis' house. This house was that belonging to Leonard Johnson. Johnson was identified by Mrs. Clunis and her daughter Faith as among the group of men who were seen dragging the deceased along the road and setting fire to Mrs. Clunis' house and among the group of men who were dragging the near lifeless body of the deceased down the lane in the direction where his body was later found hanging from the tree.

Later that morning, Detective Acting Corporal Thompson revisited the area and took statements from Mrs. Gladys Clunis and Faith Clunis. He subsequently prepared warrants for the arrest of seven men, including the two applicants. The warrant in respect of Garfield Whylie was prepared in

the name of "Soup Bone". It was common ground that this was the name by which Whylie was known in the Barnett District area.

On June 30, 1994, Dr. Royston Clifford, the Government Consultant Forensic Pathologist, performed a postmortem examination on the body of the deceased at the Spanish Town Funeral Home. The body was identified by Gladys Clunis, the mother of the deceased. Dr. Clifford observed the following injuries:

1. There were linear abrasions and contusions on the front of the chest.

2. There were large areas of abrasions, some having a pattern shaped similarly to the object that caused them. They were scattered on both sides of the posterior or the back of the chest.

3. There were some linear or straight patterned abrasions with a point at the lower end and to the left posterior or left back of chest.

4. There were two abrasions as well as a half-inch long laceration to the forehead situated on the temporal scalp which is just behind the left ear.

5. On the anterior neck or front of the neck was an horizontal linear patterned abrasion with a groove. This consisted of a mark which came around the back of the neck and come up in a particular way having a pattern. This mark or groove suggested that an object was tied around the neck at some point in time. This groove was consistent with something like a piece of wire being tied around the neck of the deceased.

6. There were two small abrasions to the left side of the neck. There was a periorbital echymosis seen. This meant that the deceased sustained an injury which was now black and blue.

7. There were also contusions on both knees surrounding the small abrasions.

On dissection, the brain and skull were intact. There was no fracture. The brain showed marked congestion only. The lungs were also congested. All the other organs showed signs of congestion but without any significant injury. The cause of death was due to:

1. A number of blunt force injuries

2. Asphyxia due to hanging.

On October 8, 1994, Detective Acting Corporal Thompson arrested the applicant Garfield Pitt on warrants for the offences of the murder of Paul Clunis and arson. When cautioned, he denied any knowledge of the offences.

On January 26, 1995, Detective Acting Corporal Thompson arrested the applicant Garth Whylie, otherwise called "Soup Bone", on a warrant for the offences of murder and arson. When cautioned, he said, "Officer, a deh fire truck me go over deh pon."

The applicant Garth Whylie gave sworn evidence in his defence. He denied being at Barnett District on June 11, 1994, at 9:30 p.m. He testified to being at Linstead that day selling his wares from early in the morning up to

around 8:00 p.m. He then left for home but he did not reach Barnett District until 11:00 p.m. He took a taxi from Linstead which went as far as Above Rocks. He then walked to Parks Road before seeing a fire truck passing. He got a ride on the truck to Barnett District and went home. He had gone on the fire truck because he heard that two houses had been burnt out at Barnett District. He did not go to look at the houses but returned home to Parks Road where he lived with his mother. He denied having anything to do with the setting of the fire to Mrs. Clunis' house or with the beating and subsequent hanging of the deceased.

The applicant Garfield Pitt also gave sworn evidence in his defence. On the night of the incident he recalled being at his home at Barnett District around 7:15. He was in the process of installing a refrigerator which he had ordered when a young lady, one "Jubby", came and spoke to him. He contacted the police by a C.B. radio and spoke to them. He was given certain instructions which caused him to go to investigate what had happened. He saw a house on fire. He reported this to the police and then awaited the arrival of the fire truck which later came and drove down the lane to the house. He never went there but went back to his home. About two hours later, he was again contacted by someone and spoke to the police by the C.B. radio. Later that night the fire truck returned to the district. He accompanied the fire truck around to Mrs. Clunis' house, which was now on fire. He remained at the scene of the fire with the fire truck for a while until

they left. He then left and went home. He denied being in the company of about ten men and armed with an iron pipe beating the deceased, hitting him in the head. He denied being part of the group of men who carried the deceased along the main road to Mrs. Clunis' house and setting fire to the house, before pulling the deceased by a piece of electric cord tied around his neck down a lane to a mango tree and hanging him by the neck tied to a limb of the tree.

Given the accounts of the applicants Whylie and Pitt, if accepted by the jury or if they were left in a state of reasonable doubt as to whether the alibis raised by them were true or not, then a verdict of not guilty would ultimately result from their deliberations.

On the Crown's case on the other hand, and in particular the testimony of Mrs. Gladys Clunis and her daughter Faith Clunis, if believed, the killing of the deceased would have resulted from a concerted attack on the deceased by a group of men, including the two applicants, by binding him with an electric cord, beating him with machetes and an iron pipe until he was almost lifeless before hauling him off by the electric cord tied around his neck to a mango tree where he was hung up by his neck from a limb of the tree.

Learned Queen's Counsel Lord Gifford was granted leave to argue five supplementary grounds of appeal. He presented the submissions in

relation to grounds 1 to 3 and Mr. Samuels advanced the arguments in respect of grounds 4 and 5.

The Arguments

Grounds 1 and 2 can be dealt with together. These grounds read:

> "1. The learned trial judge misdirected the jury in relation to the evidence as to the cause of death, which was that the death of the deceased was caused by blunt force injuries and hanging (p. 14, 17). He ought therefore to have directed the jury that the accused persons must be found to have participated both in the attack which resulted in the blunt force injuries and in the act of hanging. But the learned judge directed the jury that they could find (contrary to the medical evidence) that the blunt force injury alone caused the death, and so convict them on the basis in participation to that attack. (p. 61)
>
> 2. The learned trial judge failed to direct the jury that since the accused persons were not shown to have participated in the hanging of the deceased (see p. 59, 60), then they could not be guilty of either murder or manslaughter."

Lord Gifford, in advancing the arguments on these grounds, having reviewed the medical evidence touching on the issue of causation, said that on a fair approach to the injuries suffered by the deceased, he submitted that unless the applicants were a party to the hanging they could not be found guilty on the basis of being a party to the beating of the deceased. The learned trial judge by focusing on the beating of the deceased, in the light of the medical evidence, therefore, was to suggest to the jury that death was

caused from the beating the deceased got prior to the hanging; this was a situation not supported by the medical evidence. In so doing, the attention of the jury was removed from the real cause of death which was the hanging of the deceased.

Mr. Samuels for Pitt adopted the submissions advanced on these grounds by learned Queen's Counsel.

Learned Queen's Counsel for the Crown Mr. Hibbert, Q.C., in response related the sequence of events of the fateful evening commencing with the fire at Leonard Johnson's house at 7:30 p.m. culminating in the fire at Mrs. Clunis' house before the almost lifeless body of the deceased was seen being dragged along the road by the mob by a piece of electric cord tied around his neck in the direction where his body was later found hanging by the neck from the limb of a mango tree.

He submitted that the only reasonable inference that could be drawn from these facts is that the applicants and the other men accompanying them were not finished with the deceased yet and that it was these same men including the applicants who were responsible for his death.

We are of the view that there is much merit in the submissions advanced by Mr. Hibbert. There was evidence that the applicants were actively engaged in the beating of the deceased. This was borne out by the medical evidence of Dr. Clifford. This beating continued as the deceased was seated on his bottom leaning on the light post near his mother's house.

After the house was set on fire the deceased was then dragged along the road by the electric cord tied around his neck in the direction where he was later found hanging from the limb of the mango tree. At this time, the two applicants were seen walking with the group of men behind the deceased armed with a machete and an iron pipe.

The doctor opined that death was due to the blunt force injuries that the deceased received from the beating and from asphyxia resulting from hanging. The applicants, on the evidence adduced by the Crown, were thereby being implicated in both the beating and the subsequent hanging of the deceased. It was, therefore, of no moment which of these two factors was the substantial cause of death. These grounds accordingly fail.

Ground 3 reads:

> "3. The learned trial judge failed to apply the principle now enunciated in R v Powell and English (The Times, 31st October 1997), that a secondary party would not be guilty if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by the secondary party."

On the basis of the defence of alibi raised by the applicants, this ground is without merit. Once there was evidence by the Crown that the two applicants were part of a common plan to beat the deceased and from which it could be inferred that they were in agreement with the subsequent hanging of the deceased, the applicants were both guilty of murder.

R. v. Powell and another; R. v. English [1997] 4 All E.R. 545, a decision of the House of Lords, cited by learned Queen's Counsel in support of the proposition that where the act of the primary party which resulted in the killing of the deceased was fundamentally different from that foreseen by the secondary party, the secondary party could not be guilty of murder; those facts are clearly distinguishable from the instant case. Here the applicants have sought to contend that they were not present at the scene of the crime, but elsewhere. Once that defence is rejected, it is to the evidence adduced by the Crown, in particular the testimony of Mrs. Gladys Clunis and her daughter Faith Clunis, supported by the medical evidence of Dr. Clifford, that one has to focus on in determining, having regard to the nature of the extensive injuries inflicted on the deceased, as to whether the applicants were part of the common design to kill or cause grievous bodily harm to the deceased. It was in view of this evidence that the learned trial judge expressed himself in the following manner:

> "Was the hanging of the deceased subsequent by the persons be the cause of death? Or when Faith Clunis saw the body lifeless at that time, almost lifeless she said, was being stabbed with machete, was he already dead? Because if the hanging was the cause of death along with the blunt force injuries and you find that both accused men were involved in that, then you may say, if you find the rest of the evidence proven to you, that each person is guilty of murder.
>
> The evidence is also, the body was being dragged by the neck along the road and then subsequently hanged. The evidence is that Whylie and Pitt

> were walking behind the body; Whylie had the machete, Pitt had the iron pipe in his hand. So from that there is no evidence that Whylie and Pitt had been concerned in anything that happened after the body was being dragged on the ground with the cord around the neck and hanging from a tree.
>
> The doctor had found these linear abrasions and contusion to the body which are consistent with the infliction by the machete. And the doctor found this laceration to the head and contusion to the forehead and abrasions which, on the evidence, you may find could have been inflicted by the iron. Mrs. Clunis said she saw Pitt hit her son with the iron while he was on the ground.
>
> The prosecution is asking you to say that the principle of common design arises from the fact that these men were all armed with these implements. Pitt was armed with a piece of iron and there were these blunt force injuries to the deceased. On the other hand, up to the time that the deceased was put to sit on the ground, that the body then was almost lifeless, then it might be evidence to say that Pitt and Whylie were not concerned, on the evidence, with the subsequent hanging, if you find that was the ultimate cause of death, the blunt force injuries that were inflicted up to the time before the body was hanged."
> [Emphasis supplied]

The underlined passages above would suggest that the learned trial judge was seeking to draw a distinction between the responsibility of the applicants for the crime: this being relative to their involvement in the beating of the deceased as distinct from the hanging. It was on this score that counsel for the applicants sought to rest their arguments on the earlier grounds. As the evidence indicated, following the beating of the deceased,

the applicants did not withdraw from the encounter. Their subsequent actions in following behind the body of the deceased armed with an iron pipe and a machete was a clear expression of their intention that they were involved in the subsequent conduct on the part of the group of men dragging the deceased to his death. This was evidence from which the jury could and did infer that the applicants were active participants in both the beating and the subsequent hanging of the deceased. Given the evidence, on these directions the learned trial judge was being more than generous in his approach and this could hardly be a valid basis for a complaint. This ground accordingly fails.

Ground 4 reads:

> "4. The learned trial judge erred in suggesting to the jury that a burden lay on the applicant to prove his innocence (p. 7, 58)."

When these directions are examined, it is clear that the complaint is without foundation. It is necessary , however, to refer to the passages, the subject of the complaint. Having referred to the alibi defence being raised by the applicants, the learned judge said (p. 7):

> "If you find that the accused men have been successful in satisfying you of their innocence, then you should find them not guilty. If you are not sure whether or not they have convinced you of their innocence, equally you must find them not guilty because in this case the prosecution would not have made you feel sure of their guilt. But if you don't agree with what the accused persons have told you, if you don't believe they are speaking the truth, then you don't convict them

> because you don't believe them. You still have to go back to the prosecution case, examine what the prosecution witnesses have said along with what the accused persons have said and on that notion if you are satisfied of the guilt of the accused, then you have a duty to convict of this charge of murder if, as I say, you consider the evidence in respect of each accused man separately as to what he is alleged to have done."

Page 58:

> "If each accused man has satisfied you, successful in proving to you that he is innocent, or you are not sure whether or not you believe what he said, you should find him not guilty because in that case the prosecution would not have made you feel sure of the guilt of either accused man. If you don't believe what the accused persons have said, you don't convict them because you don't believe them, you still examine the prosecution's case, examine the evidence in respect of each accused man and on that examination, if you are satisfied to the extent that you feel sure of the guilt of the accused, then you have a duty to convict each accused man of the charge of murder."

On any proper assessment of the directions in the cited passages above, it is abundantly clear that the learned trial judge left to the jury the various courses open to them on the evidence. He was at pains, however, to remind them that in the final analysis the ultimate burden remained on the prosecution to satisfy them to the extent that they felt sure on the evidence before they could return a verdict of guilty against the accused men.

Ground 5 reads:

> "5. The learned trial judge failed to give adequate direction to the jury on the alternative verdict of manslaughter."

Given the evidence led by the prosecution, if accepted by the jury, then this ground of complaint is also devoid of merit. Once the jury found that the applicants were both involved in the beating as well as the subsequent hanging of the deceased and having regard to the medical evidence as to the injuries inflicted on the deceased, there was evidence upon which the jury could properly find that the applicants were responsible for the death of the deceased and that they acted with the requisite intention to kill or to cause grievous bodily harm. The issue of manslaughter, in our view, did not arise on the Crown's case. The defences of alibi raised by the applicants having been rejected by the jury therefore, the verdict arrived at was fully supported by the evidence.

Such directions, as the learned trial judge sought to give to the jury, therefore, can be viewed as having been done more in keeping with a factual situation in which the jury were of the view that the deceased died as a result of the injuries he received from the beating and being dragged by his neck by the piece of electric cord along the road. It was on this view of the facts that the learned judge was prompted to direct the jury along the following lines (p. 61):

> "If you find on the evidence and you can draw the inference that there are circumstances from which you can draw the circumstantial evidence of proof that these wounds were inflicted to the body but there was no intent to kill, but they must have known using it like that, that is the machete and using it with so many injuries the doctor found

> would have caused some harm to the body, then you could find that they are not guilty of murder but guilty of manslaughter." [Emphasis supplied]

In so far as the learned trial judge, in leaving manslaughter to the jury as an alternative verdict, directed them in the manner as set out above his directions cannot be faulted. The underlined passages are in keeping with similar directions approved by the Court of Criminal Appeal in England; *R. v. Church* [1965] 2 All E.R. 72; 49 Cr. App. R. 206.

It is for these reasons that in the result the applications were refused and the order was made in the terms set out at the commencement of this judgment.