ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 of 1995

BETWEEN:

EUSTACE ARMSTRONG

\- Appellant

and

THE QUEEN

\- Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	- Justice of Appeal
The Hon. M. Satrohan Singh	- Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	- Justice of Appeal (Ag.)

Appearances:

Mr. D. Hamilton for the Appellant
Ms. C. Malcolm, Director of Public Prosecutions and
Mr. K. Thorn for the Respondent

1996: June 11 and 12;
July 22

JUDGMENT

MATTHEW J.A. (Ag.)

On January 31, 1 995 the Appellant was convicted by a Jury before Benjamin J. for the murder of Rolston Samuel and because he was under the age of 18 when the crime was committed on January 8, 1993, he was sentenced to be detained until Her Majesty's Pleasure be known.

The Accused had been jointly indicted with Everton Welch and the latter had applied for and obtained a separate trial some time earlier. The Accused was therefore tried separately.

The case for the prosecution was that the Appellant and Welch had gone to the dwelling house of the Deceased during the early hours of the morning of January 8, 1993 to steal when the Deceased returned to his home and surprised them. A struggle ensued and the Appellant and/or

Welch dealt several blows to the Deceased who later died from his injuries due to severe loss of blood consequent upon wounds to the scalp, neck and face.

The Appellant admitted that he went to the home of the Deceased with Welch to steal when no one was in the house but was urging that Welch went over and beyond what they had set out to do. This brings into focus the law of joint enterprise.

JOINT ENTERPRISE

In **CHAN WING-SIU and Others v. THE QUEEN 1985 1 A.C. 168,** the Judicial Committee of the Privy Council held that all those that take part in an unlawful joint enterprise would have the necessary intent to be guilty of murder or grievous bodily harm if they had foreseen that the infliction of serious bodily harm would be a possible incident of the joint enterprise; and that the prosecution had to prove beyond reasonable doubt that each of the appellants had contemplated that serious bodily harm would be an incident of their common unlawful purpose.

In **HUI CHI-MING v. THE QUEEN 1991 3 W.L.R.** 495 Lord Lowry in delivering the judgment of the Board considered that the accessory in order to be guilty, must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight still have participated in the enterprise.

In Archbold Criminal Pleading, Evidence and Practice 1994 Edition, the learned authors state as follows at paragraphs 19 - 23 and 19 - 30:

> "A person who is party to a joint enterprise, the pursuance of which results in the causing of another's death, may be criminally liable for that death either on the basis that he is guilty of murder or on the basis that he is guilty of manslaughter. It is fundamental to a conviction for either offence that the accused must have been party

to the act which caused death. The application of the law concerning joint enterprise in cases of homicide in practice raises two problems, (i) whether in the circumstances the accused was party to the act which caused death; (ii) if he was, whether his state of mind was such as to make him guilty of murder or of manslaughter.

……..

"A person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. There is, however, a wider basis for criminal liability, namely the principle whereby a secondary party is criminally liable for acts by the primary offence of a type which he foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. That principle meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight. Sir Robin Cooke's use of the word "authorisation" (i.e., in Chan Wing-Siu) does not add a new ingredient. It merely serves to emphasize the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight, still have participated in the enterprise; Hui Chi-Ming v. R. [19921 1 A.C. 34, P.C."

Although not making it a specific ground of appeal learned Counsel for the Appellant criticized the summing-up on joint enterprise and submitted that the directions were scanty. In his summing-up the learned Judge said:

"Now there is another aspect of the case which is very important and which I must give you direction on. It surrounds the principle of joint enterprise."

And then he proceeded to do just that in close to two foolscap pages. Although the learned Judge may not have described the law as accurately stated above, in my view he sufficiently directed the Jury on the facts and the law as it related to the Appellant.

The Appellant advanced three grounds of appeal, namely:

1. The learned trial Judge misdirected the jury as to the intent required by law -
   (a) in that he directed the Jury to apply an objective test to

ascertain the intent of the Appellant; and

(b) he included recklessness as an element of the mens rea of the offence of murder.

2. The learned trial Judge failed to give to the Jury any directions on manslaughter, notwithstanding that issue was fully canvassed as part of the Appellant's defence.

3. The learned trial Judge ought not to have exercised his discretion in allowing the prosecution to adduce into evidence:

(c) the uncautioned oral confession made to Superintendent Michael Lawrence, P.C. James Johnstone and Sergeant David Marshall; and

(d) the interview of February 9, 1993 immediately following - the same being in breach of the Judges' Rules and were oppressive.

THE INTENT

The intent necessary for murder has been pronounced upon in several English authorities and others arising in this jurisdiction.

In the **R V. MOLONEY 1985 LRC. (Crim) 566,** where the Appellant had fired a shot at close range and killed his stepfather, the House of Lords held that the mental element in murder requires proof of an intent to kill or to cause really serious injury. They held further that foresight by the Accused that death or serious injury is a probable consequence of his voluntary act is not equivalent or alternative to the necessary intention.

In the R **V. HANCOCK and ANOTHER 1986 LRC. (Crim) 726,** the House of Lords made certain amplifications to the guidelines laid down in Moloney but these did not detract from the intention expressed above. In Hancock it was stated that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the jury and to be explained. Its importance depends on the degree of probability: a high degree of probability may be overwhelming evidence of intent. Nevertheless, probability, however high, of a consequence is only a factor to be considered, with all the other evidence, in the assessment of intention.

In **HAZEL EMMANUEL v. THE QUEEN, Criminal Appeal No. 5 of**

1989 from Saint Lucia, Sir Vincent Floissac at page 5 of the decision stated:

> "An accused's criminal intent or intention in relation to his voluntary act or act or a consequence thereof is basically subjective to the accused. The accused's intent or intention is an inference drawn from his act and its relevant surrounding circumstances viewed collectively."

The learned Chief Justice then set out five sets of surrounding circumstances which could assist in the determination of the intention of the Accused.

And in **HILARY PATRICK TENCH v. THE QUEEN Criminal Appeal No. 1 of 1991** Sir Vincent at page 5 citing from a passage from Lord Diplock in **R v. Hyam 1975 AC. 55** at page 94 said: "Intention can only be subjective."

In the course of his summing-up the learned Judge said:

> "Just as long as the Accused is of sound mind and discretion, the question to be answered is whether the unlawful and voluntary act which he did was of such a kind that death or grievous bodily harm was the natural and probable result. Ask yourself this question, what would an ordinary, responsible person in the circumstances of this case have contemplated as the natural and probable result of the acts that are described to you in the evidence."

Learned Counsel for the appellant has submitted that this is learly the objective test. I agree; and in my view this is a misdirection on the law of intent.

Counsel further submitted that the learned Judge used the concept of recklessness as an element of the mens rea required in murder. The passages he complained about comes just prior to the passage quoted above. They are as follows:

> "Number one, an intention to cause death or grievous bodily harm or knowledge that the act which causes death would probably cause the death or grievous bodily harm to some person. And it does not matter that the Accused is indifferent as to the result that is caused by the death or bodily harm."

Then he goes on:

> "Grievous bodily harm. What does that mean. Mr. Hamilton quite accurately describes it as really serious harm. So for the purposes of this offence, you must establish in the mind of the Accused an intention to cause the death of the deceased or to do grievous bodily harm to the deceased or that the Accused knowing that his act could have caused death or grievous bodily harm was not mindful of the consequences."

Complaint is made specifically of the last sentence in each of the two passages. I think the complaints are justified. In Maloney's case Lord Bridge of Harwich who delivered the leading judgment said at page 576 letter d:

> "Whatever his state of mind, the appellant was undoubtedly guilty of a high degree of recklessness. Bur, so far as I know, no one has yet suggested that recklessness can furnish the necessary element in the crime of murder."

In **LEUNG KAM-KWOK v. R 1985 LRC. (Crim) 556,** the Privy Council also held *that there is no offence known to the common law as murder by recklessness. And in **R v. CRABBE 1985 LRC. (Crim)** 586), the High Court of Australia stated that reckless indifference is not an element of malice aforethought.

The learned Director of Public Prosecutions quite rightly informed the Court at the beginning of her submissions that she could not support the directions of the learned Judge in respect of the mens rea for murder in so far as the learned Judge applied the objective test in his summing up on the law of intent.

FAILURE TO GIVE DIRECTIONS ON MANSLAUGHTER

No where in his summing up did the learned Judge give to the Jury any directions that they could consider a verdict of manslaughter in respect of the Appellant.

In **R v. STEWART; R v. SCHOFIELD 1995 3 AER 159,** where the two appellants and a co-accused were indicted for the robbery and murder

of a Pakistani shopkeeper, the Criminal Division of the Court of Appeal of England held in effect that the co-accused could be convicted of murder whereas the appellants could be convicted of manslaughter.

In the course of his judgment Hobhouse L.J. observed that it is possible that a defendant whilst being a participant in a joint enterprise and responsible for the unintended consequences of acts done in the course of carrying out that joint enterprise, may lack a specific intent possessed by another participant. Later he stated that where proof of participation in the joint enterprise during the course of which the relevant

act was done is considered to prove only the mens rea appropriate to a lesser offence, only the lesser crime will have been proved against the defendant, although the act in question may have involved the commission of a more serious crime by another against whom a specific intent can be proved.

In another enlightening portion of his judgment the learned Lord Justice distinguishes between a person who took part in a joint enterprise and one who aided, abetted, counselled or procured the commission of a crime and then proceeds to discuss the possibility of the different states of the minds of the parties taking part in a joint enterprise. He stated as follows:

> "The allegation that a defendant took part in the execution of a crime as a joint enterprise is not the same as an allegation that he aided, abetted, counselled or procured the commission of that crime. A person who is a mere aider or abettor etc is truly a secondary party to the commission of whatever crime it is that the principal has committed although he may be charged as a principal. If the principal has committed the crime of murder, the liability of the secondary party can only be a liability for aiding and abetting murder. In contrast, where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another. This is a different principle. It renders each of the parties to a joint enterprise criminally liable for the acts done in the course of carrying out that joint enterprise. Where the criminal liability of any given defendant depends upon the further proof that he had a certain state of mind, that state of mind must be proved against that defendant. Even though several defendants may, as a result of having engaged in a joint enterprise, be each criminally responsible for the criminal act of one of those defendants done in the course of carrying out the joint enterprise, their individual criminal responsibility will, in such a case, depend upon what individual state of mind or intention has been proved against them. Thus, each may be a party to the unlawful act which caused the victim's death. But one may have had the intent either to kill him or to cause him serious harm and be guilty of murder, whereas another may not have had that intent and may be guilty only of manslaughter."

The learned Director of Public Prosecutions could not support the directions of the learned Judge in so far as he decided to leave out the question of manslaughter from the consideration of the Jury as it clearly arose on the defence of the Appellant where he contended that the co-Accused went beyond what had been agreed to be the joint enterprise. I tend to agree.

BREACH OF THE JUDGES' RULES

At the trial evidence was led by Detective Sergeant David Marshall of New Scotland Yard to the effect that the Appellant had made an oral confession to him that Everton Welch and himself had killed the Deceased. It appears that soon afterwards Marshall called his colleagues, Detective Constable James Johnstone and Detective Superintendent Michael Lawrence, both also from the New Scotland Yard, and asked the Accused to say to Johnstone and Lawrence what he had just said to him. The Appellant complied and then there followed an interview by the officers with the Accused lasting from 10.15 p.m. to 11 .50 p.m. on February 9, 1 993 and during which over seventy questions were asked of the Appellant.

Before the confession to Marshall the Appellant had been interviewed for about 2 hours by the same three officers and it was after the first interview while Marshall was waiting for a local officer to take control of the Accused that the alleged confession was made.

At the trial the Appellant unsuccessfully challenged the admissibility of the second interview. Before this Court he takes issue not only with the admission into evidence of the interview but also the oral confession made to the three officers immediately before the interview.

It appears therefore that he is not challenging the oral confession made to Sergeant Marshall alone. The admissibility of that confession can only be supported on the principle enunciated in Rule 1 of the Judges' Rules which is as follows:

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it."

The challenge to the oral confession made to the three officers together and the subsequent interview is that the interview was oppressive and that the Appellant should have been cautioned before asking him to give the oral confession.

Rule 2 of the Judges' Rules is as follows:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting any questions, or further questions, relating to that offence."

The Rule goes on to state the manner of the caution.

When he gave his substantive evidence, and by that I mean not his evidence on the voir dire, Sergeant Marshall stated:

> "I explained to Mr. Armstrong that we had reason to believe that he and Everton Welch had murdered Mr. Samuel."

Neither at that stage nor later when all three officers were present did he or any of them administer a caution to the Appellant in the terms required by Rule 2 of the Judges' Rules.

The learned Director of Public Prosecutions conceded that the Rules were breached but submitted that despite the breach the Judge had a discretion to admit the evidence because the Rules are not mandatory.

It is true that the Judges' Rules are not rules of law but only rules of practice drawn up for the guidance of police officers but it is very desirable that police officers in the conduct of their investigations of serious offences should adhere to them. I am of the view that the Appellant should have been cautioned before he gave the oral confession to the three New Scotland Yard detectives and before the subsequent interview.

THE PROVISO

The learned Director of Public Prosecutions has conceded to the main points raised by the Appellant but has strenuously submitted that this Court should apply the proviso to Section 40 of the Eastern Caribbean Supreme Court Act, Chapter 143, and dismiss the appeal on the ground that despite the misdirections no miscarriage of justice had actually occurred.

To decide that question the Court must try to determine whether it can with certainty be said that had the Jury been properly directed they would inevitably still have convicted the Appellant of the offence of murder.

The strongest evidence against the Appellant comes from his unsworn statement made to the Jury. In that statement the Appellant admitted going to the home of the Deceased with Everton Welch to steal and while they were in the process of searching, the Deceased returned to his house and met them in the house and when the Deceased ran past him to go for his gun he held on the Deceased and wrestled with him till Everton came and struck the Deceased who fell to the ground.

Despite that event the Appellant proceeded to go in the Deceased's bedroom where he picked up a VCR which he eventually carried away. When he came out from the bedroom with the VCR he saw Everton over the Deceased with a knife in his hand at the throat of the Deceased. Everton told him to go for the gun in the car and he did so. He returned to the kitchen and he saw some money come out of the pocket of the Deceased. He said he bent down to pick up the money and the Deceased grabbed his foot whereupon he took up a cutlass which was nearby and struck the Deceased with it. He and Everton then left the scene.

It seems clear that the Appellant was an active participant in the infliction of blows to the Deceased. He struck the last blow. He at no time did anything to disassociate himself from the joint enterprise. The Appellant must have been a party to the acts which caused the death. He was virtually present throughout and his mens rea could sufficiently be proved by proof of his participation in the joint attack on the Deceased.

I am of the view that had the Jury been properly directed they would inevitably have returned the same verdict of guilty of murder.

I would therefore dismiss the appeal.

A.N.J. MATTHEW
Justice of Appeal (Ag.)

I concur. C.M.D.BYRON
Justice of Appeal

I concur. SATROHAN SINGH
Justice of Appeal