MONTSERRAT

IN THE COURT OF APPEAL

CRIM. APP. NOS.4 & 5 OF 1996

BETWEEN:

[1] ALARIC LYNCH
[2] CHARLESWORTH PIPER

Appellants

and

THE QUEEN

Respondent

Before:
The Hon. Mr. G.M. Dennis Byron Chief Justice [Ag.]
The Hon. Mr. Albert Redhead Justice of Appeal [Ag.]
The Hon. Mr. Albert Matthew Justice of Appeal [Ag.]

Appearances:
Mr. Hogarth Sergent for No.1 Appellant
Mr. David Brandt for No.2 Appellant

1996: October 15
November 11

JUDGMENT

REDHEAD, J.A. [AG.]

The Appellants, Alaric Lynch and Charlesworth Piper were convicted on 16th July, 1976 on an indictment before Smith J and a jury of the offence of attempted murder. They were sentenced to seven years and ten years imprisonment respectively. They now appeal against their convictions.

The indictment on which the Appellants were convicted contained four counts. The first and second counts charged them for attempted murder of Anna Ryan and Koya Ryan respectively.

The third count charged the Appellant Piper for the offence of unlawfully discharging a firearm at Koya Ryan and the fourth count charged the Appellant Lynch for the offence of unlawfully discharging a

firearm at Anna Ryan. In relation to counts three and four of the indictment the jury returned a verdict of not guilty, in respect of both Appellants.

The case against the Appellants as put forward by the prosecution is that at about 7:00 pm on 15th October, l995 the Appellant Piper summoned Bertrand Hixon by telephone. Bertrand Hixon arrived shortly thereafter at Pipers home. Piper instructed him to go and look for@ Lynch. Hixon dutifully complied and went to Lynch's home. He called out to Lynch and told him, "Piper send me for you". Lynch got into Hixon's car and they later drove to Piper's home.

On their way to Pipers home, Lynch had stopped, got out of the car and brought back a black knapsack which he put in the car. On arriving at Pipers home, Piper got into the car and all three of them drove around town for a while. Hixon then drove to Piper's home. Piper left the car and returned with a black travelling bag which he too put in Hixon's car.

Piper then instructed Hixon to drive to Cork Hill. Hixon obliged. He drove over to Cork Hill by some friends. After staying there for a while, Piper told them, "let us go back to town." Hixon drove back to town with all three in the car. They drove around town again for a while.

Hixon then told the two Appellants that he was going because he was tired. Piper told Hixon to go to his, Piper's, house. Hixon drove to Pipers house. He parked his car and Piper got out of the car and went to his car, which was parked nearby. Lynch remained in Hixon's car.

Hixon fell asleep and when he woke up it was 1.20 am, by the clock in his car. Hixon got out of his car and went to Piper's car and knocked on the window. Hixon told Piper he was going home. Piper told Hixon to hold on and drop them off "on a move."

Hixon again dutifully obliged. He drove his car with the Appellants up George Street unto Hospital Road. When they were on the Hospital Road, Piper told Hixon to wind up the window of the car. The car windows were tinted black. Piper then told him to make the first right and the last right turn from the Hospital Road. Hixon did as he was told. Piper then told him to stop. Piper and Lynch got out of the car and they both took their bags with them. Hixon drove off and left them.

On the morning of 16th September, 1995 at about 2.00 am, Anna Ryan was awake. She was lying on a couch in the living room of her house. Her daughter Koya aged 10 years old, was asleep in a middle

bedroom of the house.

While Anna Ryan was lying on the couch, she heard explosions and the sound of falling glass. Three explosions came in rapid succession. Koya was at the window screaming. The windows are made of glass louvers. Anna Ryan then crept on her stomach backwards into Koya's bedroom. She then closed the door of Koya's bedroom because the light was on and one was able to see into that room from a window. When she got into Koya's bedroom, Koya was standing on her bed screaming. Koya then lay down on her bed. Anna Ryan lay on the floor next to koya's bed. They held hands and prayed quietly.

About half hour later Anna Ryan heard movements in the grass just outside the window of Koya's bedroom. She also heard male voices speaking in whispered tones. After a while the persons left.

At day light Anna Ryan observed that there were marks like bullet holes in Koya's bedroom, on the wall. There were also holes in the curtain and marks on the roof of the bedroom. Anna Ryan also observed holes in the aluminum louvers in Koya's bedroom. There was debris from the wall and fragment of bullets and pieces of aluminum from windows scattered on the ground and on the bed. In the living room parts of glass of the louvers in the windows were broken.

On the wall, which was about one foot from the couch where Anna Ryan was, there were holes in the concrete like bullet marks.

When Koya was standing on her bed, Koya's head was directly in the path of all the bullets that came into the room at that time, that is, the bullet holes coincided with Koya's height.

The following day on 17th October, 1995, the Appellant Lynch, took Sergeant Rueben Meade, Inspector Shotte and Corporal Barzey to an area, seventy-five feet from Piper's home and pointed to a spot where a search was made, a black garbage bag was found. In the bag was found a revolver, a shot-gun containing 11 shot-gun shells. Eleven .38 shells, forty-four .22 bullets and a .22 blank.

The defence of the Appellants was that of an Alibi. They admitted being taken by Hixon in his motor-car and being dropped off at the entrance to Hospital Road on the way to Webbs. That they then walked to Webb's to Sean West's house, where there was a sound system.

They stayed there until about minutes to 4.00 am. They left and they went to their respective homes.

Lynch denied taking the police anywhere and pointing out any spot to them where the guns were found. Rather, according to Lynch, about 5.00 am on 17th October, 1995, the police took him to a foot-path in Fort Ghaut and showed him where he, the police, removed from some bushes a black plastic bag, with two fire-arms and a sack, and asked him if he knew anything about them. He told him he knew nothing about them. Both appellants denied any knowledge of the guns and of the shooting.

Eight additional grounds of appeal were filed on behalf of the first-named Appellant. The additional grounds of appeal incorporate his original two grounds of appeal.

The additional grounds of appeal filed on behalf of first-named Appellant are as follows:

> "3. The Learned Trial Judge failed to direct the jury on the question of intent on a charge of attempted murder.
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> "4. The Learned Trial Judge failed to direct the jury adequately on circumstantial evidence.
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> "5. The Learned Trial Judge was wrong to tell the jury that he had ruled there is a case to answer after a no case submission was made.
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> "6. The Learned Trial Judge was wrong to tell the jury that they would have felt sure of the Appellant's whereabouts if he had brought his witnesses.
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> "7. The evidence cannot support the verdict.
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> "8. The Learned Trial Judge failed to direct the jury on common design or to show any common design to the evidence.
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> "9. The Learned Trial Judge failed to put the defence of the accused [sic] properly before the jury.
>
> "10. The Learned Trial Judge was wrong to direct the jury that the discrepancy of the bullets were [sic] a red-herring by the defence.

Ground three of the additional grounds of appeal and ground one of the original grounds of appeal are identical. So are also ground nine of the additional grounds of appeal and ground two of the original grounds of appeal.

Grounds eight and nine of the additional ground of appeal were not argued.

The two original grounds of appeal filed on behalf of the second-named Appellant were also subsumed in the additional grounds filed on his behalf.

The additional grounds of appeal filed on behalf of the second-named Appellant are substantially the same as those of the first-named Appellant. The grounds of appeal filed on behalf of the second-named Appellant are:

1. The Learned Trial Judge failed to direct the jury either at all or adequately on the specific intent which was required in the cases of attempted murder.
2. The Learned Trial Judge failed to put the case of the Appellant adequately to the jury.
3. The Learned Trial Judge failed to direct the jury adequately or at all what were the legal requirements of an attempted murder and failed to relate that definition to the facts of the case.
4. The Learned Trial Judge failed to direct the jury adequately or at all on what are the legal requirements of a joint enterprise and how that definition is related to the facts of the case.
5. The Learned Trial Judge erred when he informed the Appellant Charlesworth Piper in the presence of the jury that he had a case to answer.
6. The Learned Trial Judge erred when he directed the jury that if the Appellant brought a witness, they would of [sic] felt sure that he was where he said he was “but we don’t have Shawn West or anybody else to say where they were.”
7. By giving this direction he mislead [sic] the jury into thinking inter alia that the Appellant must prove that he was innocent.

The warning he gave the jury afterwards did not cure this defect.

Mr. Sergeant, Learned Counsel for the first-named Appellant argued that the Learned Trial Judge failed in his directions to the jury to tell them what constitutes attempt and that even if he did so, he must go on to show what evidence there is to support that attempt.

Mr. Sergeant argued that a direction on an intention to kill would be sufficient direction but in the instant case an extended direction was required. Mr. Brandt contended that the Judge ought to have given a direction on "probability" as encapulsated in the guidelines set out in **Nedrick** 83 C.A.R. 267 page 270.

At page 147 of the record the Learned Trial Judge told the jury:

"Before you can convict Charlesworth Piper and Alarick Lynch or either of them of the offence of attempting to murder Anna Ryan or attempting to murder Koya Ryan, you must be sure of two things:

1. That the two of them intended to murder, that is, intended to kill Anna Ryan and Koya Ryan or either of the two of those. That is the first thing you must feel sure about. .
2. They had the intention when they discharged those guns at the house of Anna Ryan on the morning of 16/10/95.

If from the evidence which you have heard all you can assume or come to conclude is that the person or persons only intended to scare or to harm or send a message or any such thing then that would not be attempted murder. . . The intent you must feel sure about out of the evidence is an intent to kill and an intent to kill only. That is, you must feel sure that there was an intent to kill Anna Ryan and an intent to kill Koya Ryan.

An attempt is an act done with intent to commit a crime which may from a series of acts which would constitute the actual commission of the particular crime if it were not interrupted.

The prosecution is asking you in this case to feel sure that the crime that the two accused intended was murder and the murder in this case has to be killing, an intention to kill. Not the broad Montserratan murder of intention to kill or intention to cause grievous bodily harm. Because if you feel that act the person intended to do was to cause injury or fear then that would not be attempted murder even if you come to the conclusion that the persons did infact shoot off or discharge the guns.

Now, mere intent or preparatory acts are not enough for an attempt. But you must be sure in this case the intent that the persons had was to kill Anna Ryan and Koya Ryan."

This direction on the law of attempted murder is both sound and adequate.

Finally at page 155 the Learned Trial Judge said:

> "Now, in cases of attempt, the Judge determines whether there is evidence that you can feel sure there was an attempt and I will tell you that in this case, there is evidence which comes to you but of which you will have to determine whether there was the attempt. I say what evidence it is and you will have to determine out of the evidence whether in fact there was an attempt."

At pages 169 - 175 of the record the Learned Trial Judge said:

> "It is a matter for you out of the circumstances which you have heard from the evidence that if there were persons on the outside discharging guns, firearms towards the house in which there were Anna Ryan and Koya Ryan, that indeed those persons were in fact discharging not only at the house but at the persons in the house." Then, while she [Anna Ryan] heard gunshots fired and more glass fell into the living room and shots impacted on the glass. This glass was from louvres in the windows. You have photographs of the house which you can take with you in the jury room to see what the house is..... she said light was on in the house which would indicate that persons could see through the windows, that it is possible the persons on the outside could have seen persons inside."

The Learned Trial Judge also drew attention to evidence led, which showed that there were bullet holes on the walls just over the couch on which Anna Ryan was lying. The Judge also pointed to evidence which indicated that there were bullet holes which coincided with Koya's height, when she was standing on the bed.

In that regard the contention that the Judge did not point out evidence to support the legal definition of attempt cannot be maintained.

Mr. Brandt referred to **Nedrick** v R 83 C.A.R. 267 where the Lord Chief Justice at page 270 said:

> "When determining whether the Defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions: [1] How probable was the consequence which resulted from the Defendant's voluntary act? [2] Did he foresee that consequence?
>
> If he did not appreciate that death or really serious harm was likely to result from his act, he cannot have intended to bring it about. If he did, but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that the did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the Defendant recognised that death or serious harm would be virtually certain [barring some unforeseen intervention] to result from his violently act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm,

> even though he may not have had any desire to achieve that result."

Nedrick is a case involving murder. In order to appreciate the direction in Nedrick it is prudent to look at the facts of that case briefly.

> "The appellant was charged with murder. The Crown case was that he had a grudge against a woman, as a result of which he had threatened to "burn her out". Thereafter he had gone to her house in the early hours of one morning poured paraffin through the letter box and on to the front door and then set it alight. He gave no warning. The house was burnt down and as a result one of the woman's children died. The appellant confessed he started the fire but said he did not want anyone to die. His defence at his trial was that he neither started the fire nor had he made any admission to that effect. The jury were directed that if when the appellant set fire to the house he knew that it was highly probable that, that act would result in serious bodily injury to someone in the house, even though he did not desire to bring about the result, he was guilty of murder. The jury convicted the appellant of murder and he appealed on the ground that the jury had been misdirected."

In the instant appeal, there is cogent evidence to suggest and in fact from which the jury could properly come to the conclusion that the bullets were fired directly at Anna Ryan and Koya Ryan. In the circumstances it could not be said that the risk to which the Appellant were exposing Anna Ryan and Koya Ryan to death was slight. It was only fortuitous that in the circumstances they were not killed.

In the circumstances the Nedrick case differs from the instant appeal and there was no need for the Judge to give the direction as given in Nedrick.

This ground of Appeal therefore fails.

Grounds one and three of the second Appellant's ground of appeal are the same.

I now turn to ground 5 of the second Appellant's ground of appeal which is identical to ground 5 of No.1 ground of appeal.

Both counsel argued that the Learned Trial Judge erred when he informed the Appellants in the presence of the jury that they had a case to answer.

Mr. Brandt on behalf of the second-named Appellant argued that the Judge in making this statement in the presence of the jury without telling the jury that he did not come to that conclusion based on the fact

that he was sure they were guilty, left in open to them to conclude that if the Judge said that they had a case to answer, they must be guilty of the offences charged.

Both Mr. Sergeant and Mr. Brandt referred to the case of **Crosdale v R** 46 W.I.R. 278 at 286 6 L-H where Lord Slynn stated:

> "That brings their Lordships to the third question whether the jury should be present during the judgment on the applications that, that the defendant has no case to answer or whether the jury should subsequently be informed of the judge's reason for his decision. There is no reason why the jury should be privy to the judge's reasons for his decision. In order to avoid any risk of prejudice to the defendant, the jury should not be present during the course of the judgment or be told what the judge's reasons are."

In the present case the Learned Trial Judge did not advance reasons to the jury why the Appellants had a case to answer. The judge, even without saying to the Appellants in the presence of the jury that they had a case to answer, by calling on them and putting them on their election, the jury must have known that they had a case to answer.

There is no merit in this ground. This ground therefore fails.

Mr. Sergeant argued that the decision of the jury is perverse in that they found the Appellant Alarick Lynch not guilty of discharging a firearm at Anna Ryan and Koya Ryan and on the same facts guilty of attempted murder, by discharging a firearm at them.

The third count of the indictment charged the appellant with the offence of unlawfully discharging a firearm at Koya Ryan. The fourth count charged Alarick Lynch with the offence of unlawfully discharging a firearm at Anna Ryan. On the facts it was impossible to prove which of the Appellants fired at which occupants of the house.

In that regard, the jury's verdict of not guilty in relation to these two counts shows that the jury appreciated the issues and had a mature understanding of the facts thereby returning a very sensible verdict.

Whereas on the counts of indictment which charged them with attempted murder of Anna Ryan and Koya Ryan the circumstances were different.

The Prosecution's case was that they both acted in concert. They went to the home of Anna Ryan and they both discharged firearms at the occupants in the house. In that regard, it was not necessary for the

prosecution to prove which of the Appellants fired at which occupant of the house.

This ground of appeal therefore fails.

The final ground argued on behalf of both Appellants, was that the Learned Trial Judge erred when he directed the jury that if the Defendants/Appellants brought a witness, they would have felt sure that they were where they said they were on that night and not when the prosecution said they were Abut we don't have Shawn West or anybody else to say where they were.

And that by giving this direction the Learned Trial Judge mislead the jury into thinking that the Appellant must prove that they were innocent.

Miss Henry, Learned Counsel for the Respondent conceded that the use of the word "sure" was unfortunate. However, I look at the context in which it was used. The Learned Trial Judge in his summing up at pages 215 to 217 of the record said:

> "[They said] they did have bags but in those bags were records which they took with them to Shawn West's Place. They spent the rest of the night there from about 1.20 to about 4.00 o'clock, then they went home and therefore they would not have been anywhere near the Magistrate's house. Now as I have said they don't have to bring witnesses to show that, that is so where they were but indeed you would have felt sure that, that is where they were if, indeed they had brought Shawn West to say yes, at about 1.00 o'clock I saw them come walking and they spent the rest of the night there. We were all playing music or records or some such thing and we were there on that night and therefore they could not have been where the prosecution say because they were with me. But we don't have Shawn West or anybody else to say where they were but as I have indicated the Defence does not have to prove anything at all. If they ask you to accept something and you feel that it could be so, it does not have to be so. They don't have to prove anything. If you feel they could have been where they said they were and they were not around the Magistrate's house, did not have any guns, did not know anything about it, you just feel that it could be so then, it means that you cannot feel sure of the case for the prosecution and you will have to acquit him, the accused."

Counsel for the appellant Piper, argued that the appellant's main defence being an alibi, the direction of the Learned Trial Judge had the effect of depriving him of that defence. Counsel emphasised that by

using the word "sure" the Judge was conveying to the jury that they had to feel sure that the appellant was a Shawn West's home in order for him to maintain the alibi.

I agree that the word sure should never have been used by the Judge and he fell in error too when he said:

> "But we don't have Shawn West or anybody else to say where they were."

That sentence by itself suggests that there was a duty on the appellants to call a witness to support their alibi but when the impugned sentences are juxtaposed against the rest of the passage in the summing up, I am confident that the jury was left in no doubt that it was the duty of the prosecution to satisfy them that the alibi was false and not for the appellants to prove that their alibi was true.

Just before the Judge uttered the impugned words, this is what he said:

> "Now as I said they don't have to bring witnesses to show that, that is infact where they were." …… followed by the words complained of in the same sentence. "But indeed you would have felt sure that, that is where they were if, indeed they had brought Shawn West to say yes." This was followed by: But we don't have Shawn West or anybody to say where they were."

Again this sentence can only be regarded as unfortunate but immediately following this sentence, this is what the Learned Trial Judge said to the jury:

> "But as I have indicated the defence does not have to prove anything at all. If they ask you to accept something and you feel sure that it is so, it does not have to be so. They don't have to prove anything. If you feel that they could have been where they said they were and they were not around the Magistrate's house .... then it would mean that you cannot feel sure of the case for the Prosecution and you will have to acquit him."

The foregoing passage shows quite clearly that the Judge directed the jury that it was the prosecution who had to prove the case against the appellants and that it was the prosecution who was placed with the burden of disproving the alibi. Apart from the two sentences complained of there is nothing wrong with the Judge's summing up. The sentences though unfortunate having been used in context in which they were used could not have deprived the appellants of their defence.

Later on in the same passage, the Judge told the jury:

> "But even if you disbelieve them. Even if you don't believe them, you cannot say well, you know they ask me to accept something. I don't believe them, they are not speaking the truth, I don't believe
> them you can’t go up there and say I am going to convict them, you can only convict them if you feel sure that they were the persons outside the house of the Magistrate on the night of 16th October, 1995 and they had the guns in their hands.., and those are the persons who shot at the Magistrate and Koya Ryan that night and that they intended to kill Anna Ryan and Koya Ryan."

The Judge was saying to the jury that even if they reject their alibi they cannot convict the appellants. If they were going to convict the appellants, they had to be satisfied, so that they feel sure of the prosecution’s case, that is the effect of the paragraph and that is the correct approach and cannot be faulted in anyway.

This ground of appeal therefore fails.

I would therefore dismiss the appeal and affirm the conviction and sentences.

ALBERT REDHEAD
Justice of Appeal [Ag.]

I Concur.

C.M. DENNIS BYRON
Chief Justice [Ag.]

I Concur.

ALBERT MATTHEW
Justice of Appeal [Ag.]