GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.4 OF 2002

BETWEEN:

KYRON MCFARLANE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Ruggles Ferguson for the Appellant
Mr. Christopher Nelson D.P.P. for the Respondent

2002: November 26; 27;
2003: January 28.

JUDGMENT

[1] **REDHEAD, J. A.**: The island of Carriacou lies about 27 miles from the sister island of Grenada. It is a very tranquil island and does not boast of many activities. It is not the typical destination for the average young vivacious tourist. But may offer an ideal setting for the older tourist who wants a quiet get away.

[2] Reine Lindvall and Eva Lindvall, husband and wife arrived on Carriacou on 9th March 2002 as guests at Green Roof Inn Guest House. They were Swedish nationals and in their sixties.

[3] Frederick Sorborn, a Swedish national, Manager of Green Roof Inn Guest House testified that on Saturday 11th March 2000 the Lindvalls had breakfast and they left the Inn by foot at about 10.30 am. Ermine Gay testified that on 12th March 2000. She went to Paradise Beach. She arrived there between 3.00 pm to 3.30 pm. At about 5.00 pm while walking on the beach she came upon the body of the male deceased. Later that afternoon the police discovered the body of the female victim. Both Reine Lindvall and Eva Lindvall were brutally murdered.

[4] The was tried and convicted for both murders and sentenced to death by hanging. He now appeals to this court against his conviction.

[5] Five grounds of appeal were filed on behalf of the Appellant.

[6] Under ground 1 it was contended on behalf of the Appellant that the learned trial Judge misdirected and/or failed to adequately direct the jury on the issue of joint enterprise. Under Ground 3 it was alleged that the learned trial judge misdirected the jury on the issue of intention. Both grounds 1 and 3 were argued together. The Appellant gave a statement under caution to the police in which he said that on March 12th 2000, he and Plummer (Joseph Augustin) left home and went to the beach. Their mission was clearly to rob tourists on the beach. This is made quite clear from the Appellant's statement from the dock. The statement from the dock, though in greater detail, is substantially the same as the statement he gave to the police under caution. In the statement to the police the Appellant said while on the beach they saw a white man in the sea and a woman was on the sand. Plummer told him "let's stick them up" he told Plummer it did not make sense, "let we just grab the bag and run." Plummer stuck up the white man, while, he the Appellant, was talking to the white woman. He, the Appellant, asked her where was the money. She said it was in her bag. He told Plummer the money was in the bag, "let's go and get it." The same time the white man hit Plummer a punch. He told Plummer not to stab them and he Plummer gave the white man a cut, the white man fell. After the white man fell, we took the lady bring she and get the money,

he told me let's bring back the white woman dey. He said he told Plummer you told me it is a little cut you give the man, he said "the lady will talk."

[7] The Appellant also said in that statement he told Plummer that they should leave them but Plummer said he was not leaving them because he was afraid that the woman would talk. The Appellant said he left and went a distance. A little while after Plummer came and told him he gave the woman "a little juke". The Appellant said he asked Plummer why he did that? He, Plummer, told him it was just a little "juke" he had given her.

[8] The Appellant said in his statement to the police that Plummer took the white man's shirt and the jersey he wiped his hand on which there was blood, in the sand. He later washed his hand in the sea and he wiped the cutlass on the jersey.

[9] In his statement from the dock the Appellant gave a more detailed and explicit account of the incident. He gave an account of a plan on Friday 11th March, the day before the incident. He said that he and Plummer went on Paradise Beach to rob. There were two white persons on the beach. Plummer pulled a cutlass from his waist. He told Plummer that it did not make sense to go and rob the people with a cutlass. He suggested to Plummer that they should cut two pieces of wood instead. Plummer told him he was not going to rob anyone without a cutlass. An argument ensued between him and Plummer and consequently the robbery was aborted.

[10] On the following day Saturday 12th March he and Plummer returned to Paradise Beach. In his statement from the dock he said:

> "When we went to Paradise we see two white people coming up ... Plummer stick up the white lady, I ask her where the money is. She turn and say the money in the bag ... the bag was a distance away we bring she for the bag to get the money, me and Plummer. She husband leave from the sea while Plummer have the cutlass in the lady throat. Plummer take the cutlass from the lady throat and stick up the man while I was talking to the lady. When Plummer put the cutlass in the man throat. He take off the cutlass from the man throat. The man hit him a punch. The

> cutlass fall from he hand. He and the man was in a scuffle and then when I see the man was overcoming, I went and part them, when I part them Plummer get away, I let go the man, then after Plummer picked up the cutlass and chopped the man in his throat. I ask him what he do that for, wasn't that we come here for. I say we come here to rob. After that I leave him behind the man there and was talking to the lady to bring me and get the money …"

[11] Learned Counsel complained that the learned trial Judge directed the jury at pages 15 and 16 of the record as follows:

> "Foresight of what the principal offender might do, foresight of what the person with the cutlass might do is sufficient to justify a finding of guilt, to assign the intention of the perpetrator to the accomplice. It is prior contemplation by the accessory of what the principal offender might do and with what intention he might do, that is the important consideration. So in those circumstances you will have to determine whether the accused contemplated that the other person might inflict serious harm on the victims and that he might do that with the intention to kill, and if you so find that the accomplice contemplated that possibility than you could find him guilty of murder."

[12] Learned Counsel, Mr. Ferguson, submitted that the learned trial judge failed in his directions to sufficiently direct the minds of the jury to the essential prerequisites of establishing a joint venture: whether or not the act causing death was within the scope of the joint enterprise or alternatively, whether the act was foreseeable by the person whom it is sought to fix liability.

[13] Mr. Ferguson argued that the learned trial Judge was wrong in law to equate foresight of consequence with intention.

[14] In support of his argument learned Counsel referred to **R v Ward** (1987) 85 CAR 71:

> "The Appellant and two of his companions were involved in a fight. During the fight A was knocked to the ground and a series of blows delivered to him. Eventually he got up covered with blood and was taken to the hospital where he died. His body was found to have several stab wounds, two being responsible either singly or in conjunction for his death. One was caused by a knife and the other possibly by a pair of scissors. The Appellant was undoubtedly the owner of the scissors and P the owner of the knife. When interviewed by the police the Appellant admitted stabbing

> A. His defense was to stop A kicking him he struck out with his right hand in which he held the scissors but he had no intention of causing serious injury. He also maintained that he did not know that P was using the knife. Both the Appellant and P were convicted inter alia, of murder. On appeal that the trial judge had misdirected the jury by stating (1) that intention meant a desire to bring about a particular consequence or foresight that killing or grievous bodily harm would result from an act and if such foresight was proved, in law the foreseer was taken to have intended the killing or grievous bodily harm and (2) that in relation to joint enterprises, that a person was responsible for acts of another if that person contemplates and foresees the acts of the other as a possible part or result of a planned joint enterprise. It was held, inter alia, that it was only rarely necessary for a judge to go beyond the simple direction of intent, namely, that the jury must feel sure that the defendant intended to kill or do really serious bodily injury."

[15] At page 75 the Lord Chief Justice said:

> "On those rare occasions when the defendant's primary purpose may have been something other than the infliction of death or serious injury, it may be advisable to give a further direction on the distinction between intent and wish, as was done for instance, in **R v Hancock** [1986] 82 CAR 264. But when that is done it must be made clear that foresight of consequences is no more that evidence of intent…"

[16] In **Chan Wing-Siu and Others v The Queen** [1985] A.C. 168 three Appellants were each charged with murdering the deceased contrary to common law and wounding his wife with intent to do her grievous bodily harm contrary to Section 17 (a) of the Offences Against the Person Ordinance. The prosecution's case was that the Appellants went to the deceased's flat armed with knives intending to rob him. When his wife answered the door they rushed in, drew their knives and ordered her to kneel. While the third Appellant guarded her, the other two Appellants forced her husband into the kitchen where he was stabbed. As the Appellants left the flat the deceased's wife was slashed across the head. The deceased died from his wounds. Three blood-stained knives were left in the flat. The Appellants made statements to the police admitting having gone there that day but claiming their purpose had been to collect a debt owed by the deceased to the third Appellant. Only the first and second Appellants admitted taking a knife and knowing others had knives. The Appellants alleged that the deceased had

attacked them with a chopper or knives, and the second Appellant stated that he stabbed the deceased in self-defense. The Appellants did not give evidence, and in relation to all three Appellants on both counts the prosecution alleged that the crimes of the type charged must have been contemplated by them as possible occurrences in the course of their joint venture. The jury was directed that each Appellant was guilty on both counts if proved to have contemplated that a knife might be used on the occasion by one of his co-Appellants with the intention of inflicting serious bodily injury. The Appellants were convicted on both charges and appealed to the Judicial Committee of the Privy Council.

[17] Sir Robin Cooke delivering the opinion of the Board said at page 175:

> "The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by that primary offender of a type which the former foresees but does not necessarily intend."

[18] There is such a principle it is not in doubt. It turns on contemplation or, putting the same idea in other words, authorization which may be expressed but is more usually implied. It 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 [See also **Hui Chi Ming v the Queen** [1992] 1 A.C. 34].

[24] In **Rabindreo Deo v The State** 57 WIR 174 Kennard C. said at page 192:

> "I would accept the reasoning of Lord Taylor Chief Justice in **R v Powell and Daniels** [1996 I CAR 14] and it is to be noted that the court in **Adams and Archer v The State** (unreported) had given the nod, so to speak, to **Chan Wing-Siu v R** [Supra] where it was held that a secondary party could be convicted of murder if the jury were satisfied to the extent of feeling sure that he had foreseen or contemplated or realized that death or serious bodily harm might result from the act of the principal party. I do not feel that, when the directions of the trial judge are considered as a whole, the jury was not properly directed on the mental element required to be proven by the prosecution in order to succeed on a charge of murder against the Appellant, who the prosecution alleged was a secondary party. I feel that the directions given by the trial judge were quite adequate as the trial judge had directed the jury that they should only consider foresight of consequences if they found that the Appellant did not have the specific intention to kill or to cause grievous bodily harm to the deceased."

[19] In the instant case there could be no doubt having regard to statement given by the Appellant from the dock, that he must have contemplated or foreseen Plummer, according to him, would have killed the male victim and absolutely no doubt that he would kill the female victim.

[20] The Appellant said in his statement before the jury:

> "Plummer stick up the white lady…Plummer have the cutlass in the lady throat and stick up the man while I was talking to the lady. When Plummer put the cutlass to the man throat he take off the cutlass in the man throat. The man hit him a punch. The cutlass fall from he hand. He and the man was in a scuffle and when I see the man was overcoming I went and part them. When I part them Plummer got away, I let go the man, then after Plummer picked up the cutlass and chop the man in his throat." Notwithstanding that the Appellant witnessed Plummer cut the man's throat he continued with the robbery on the man's wife, according to his own story.
>
> He said that after Plummer chopped the man in his throat, he, the Appellant, was talking to the lady to bring him to get the bag with the money. There is no doubt in my mind that according to the Appellant's statement before the jury it would have been quite clear to him that Plummer had evinced an intention to silence or get rid of the female victim and yet he went ahead and participated in raping her. The Appellant said in his statement from the dock that when the woman was taking him to get the money. "Same time Plummer come and reach me and told me that woman will talk."

[21] The Appellant must have foreseen that the only way for Plummer to silence her was by killing her.

[22] But look at what followed, according to the Appellant, he said to the jury "then after I tell him let we leave the woman and go."

[23] But did he leave the woman and go? Did his entreaty with his principal according to him meant to be taken seriously by Plummer, having regard to what subsequently transpired according to his (the Appellant's) own statement from the dock (I shall return to this later when I deal with ground 2). "After I walk from here

to there (indicating about 10 feet) to the mangrove and I calling Plummer. After he called me back, he tell me the lady take off she pants. He ask me if I want first. I tell him why he don't go first. After I change me mind and I took first and when I done I leave him there, he and the lady and I walk a good distance when he came and meet me he told he kill the lady."

[24] The prosecution's theory is that the Appellant acted alone and murdered both Mr. and Mrs. Lindvall. His caution statement to the police which is part of the prosecution's case alleges that Plummer was the one who killed both victims.

[25] Joseph Augustine also known as Plummer gave evidence on behalf of the prosecution. He denied that he was involved in any robbery with the Appellant on 11th March 2000. He denied that he was involved in any killing of the victims. He denied that he was involved in any rape of the female victim. He denied that he was present with the Appellant on Paradise Beach on the 11th March 2000. He however admitted that he was present with the Appellant on Paradise Beach on 10th March, 2000 when they both planned a robbery which was subsequently aborted. The forensic evidence supports the view that the Appellant had sexual intercourse with the female victim.

[26] Yvonne CruickShank, Chemist and the Director of Forensic Laboratory in Jamaica testified that she did a DNA test of blood samples from the Appellant. She also had a vaginal swab allegedly taken from Eva Lindvall.

[27] According to the Chemist this was what she found:

> "Having done these typing tests, we had a match between the vaginal swab allegedly taken from Eva Lindvall, the male fraction with the sample of blood allegedly taken from Kyrone McFarlane. The probability of such a combination is 1:20 million…Eva Lindvall's own profile is 6:1billion."

[28] The population of Grenada and Carriacou combined is in the region of about one hundred and twenty thousand persons.

[29] A DNA test was done of Joseph Augustine that did not confirm that he had sexual intercourse with the female victim. There was no independent evidence to confirm the presence of Plummer (Joseph Augustine), on the scene at the time of the murder except the unsworn testimony of the Appellant and his cautioned statement to the police.

[30] However as the learned Director of Public Prosecutions, rightly submitted in my view, that the learned trial Judge was entitled to address the jury in the manner in which he did having regard to the issues and the relevant law involved in this case.

[31] Having regard to the statement from the dock made by the Appellant I am in full agreement with this submission by Mr. Nelson.

[32] Grounds 1 and 3 of the appeal are therefore dismissed.

[33] I now turn to ground 2. In which it was argued that the learned trial Judge failed to direct the jury on the defence of withdrawal.

[34] Learned Counsel, Mr. Ferguson, argued that the learned trial Judge should have addressed the jury on the defence of withdrawal. He contended assuming, but not conceding, that there was an original common intention to kill. He submitted that there was sufficient evidence to show an abandonment of that intent on the part of the Appellant. I do not agree for reasons already stated. However I shall now analyse those reasons more closely. Taking the Appellant's story into consideration, he said that Plummer, the principal, stuck up the woman, obviously with a cutlass because he said that Plummer took the cutlass from the woman's throat and put it in the man's throat. There cannot be any argument that at that point in time he did not appreciate that a lethal weapon was involved in the robbery by his principal. A fight ensued between the male victim and Plummer. According to the Appellant he separated them, the principal and one of the victims. The lethal weapon was still at hand for use by the principal. Having parted the

principal and the male victim he continued in his quest to rob the female victim. It was then that Plummer chopped the male victim in his throat. It would have been obvious then to the Appellant or at least foreseeable that Plummer would kill in order to carry out the robbery. Yet after the male victim was chopped in his throat and dead or dying, the Appellant continued in his quest to rob the female victim. However the Appellant in his statement to the jury said that after Plummer chopped the man in his throat. Plummer told him that he was "afraid that the woman would talk." That to my mind should have been a clear indication to the Appellant that Plummer intended then to get rid of the woman. That being so, he thereafter participated in the rape of the woman. The question of withdrawal in my judgment, does not arise. This ground of appeal is therefore dismissed.

[35] On pages 16, 41 and 43 of the record the learned trial Judge gave adequate directions on the issue of manslaughter. This ground of appeal is without merit and is therefore rejected.

[36] I deal now with ground 4. This ground alleges that the verdict of the jury is unsafe and unsatisfactory. Learned Counsel for the Appellant, Mr. Ferguson referred in support for this ground on:

[37] In **R v Cooper** (1968) 53 Cr App. R 82 the head now reads:

> "In accordance with Section 2 (1) of the Criminal Appeal Act 1968 an Appeal on the ground that the verdict was unsafe and unsatisfactory, the Court of Appeal must now ask itself the subjective question whether it is content to allow the verdict to stand, or whether lurking doubts cause it to wonder whether injustice has been done. The reaction may not be based strictly on evidence, but can be produced a general feel as experienced by the court."

[38] At 85 Widgery L. J. Opined:

> "The important thing about this case is that all the material to which I have referred was put before the jury. No one criticizes the summing-up, and indeed Mr. Frisby for the Appellant has gone to some lengths, to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the

> case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over throughout the years that this court must recognise, the advantage which a jury has in seeing and hearing witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere."

[39] Having said that and Mr. Ferguson emphasized the fact, that there was no criticism of the summing-up in Cooper, yet the Court of Appeal quashed the conviction.

[40] At page 86 Widgery LJ concluded by saying:

> "We have given ernest thought in this case to whether it is one in which we ought to set aside the verdict of the jury notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy. After due consideration, we have decided we do not regard this verdict as safe, and accordingly we shall allow the appeal and quash the conviction."

[41] Cooper was a case involving identification of an assailant who assaulted a young lady. The assailant was in the company of two other men. Although the young lady picked out the Appellant at an identification parade six weeks after the incident. It appeared that "this was a difficult identity case."

[42] The difficulty about identification came about because a Mr. Davis gave evidence on behalf of the defence. In evidence in chief he said that he visited the Appellant and one Peter Burke in prison and then when the Appellant was talking to Peter Burke, the Appellant was saying that he was identified the day before and he was very disturbed about it. Peter Burke's answer was that the girl was probably mistaken and it would all come right in the end.

[43] Davis also gave testimony that he asked Burke if he was going to let an innocent man suffer when he done it. Burke's response was that there was nothing he could do about it because he had a very bad record and would get four years if he confessed to the offence.

[44] The record reveals that Davis's testimony was not discredited in cross examination as regards that evidence. This is significant because no one other than Davis confessed to the offence. The allegation of the victim was that she was assaulted by one individual.

[45] In these circumstances it is understandable that the Court of Appeal would have had a lurking doubt notwithstanding the flawless summing-up of the learned trial Judge.

[46] Having regard to the evidence as a whole in this case and in addition to the statement given by the Appellant to the jury there cannot be any doubt or lurking doubt to cause this court to wonder whether an injustice has been done. This ground is without merit and is therefore dismissed.

[47] Under ground 1(10) the Appellant through his counsel, complained that the learned trial Judge failed to leave the issue of manslaughter to the jury.

[48] At page 14 of the record the learned trial Judge instructed the jury in the following terms:

> "Before a person can be convicted on the basis of aiding or abetting the commission of an offence he must at least know the essential matters which constitute that offence and it must be proved that he intended to have aided or abetted the commission of the offence. So you must be satisfied that he knew then what was going to take place, what was planned was a crime, that he knew that crime involved violence, that use of violence and specifically, the use of a lethal weapon; and then he knew that the use of that weapon or the commission of the crime might lead to death, or in terms of the offence of manslaughter, that the commission of that crime might lead to death of someone, without him specifically intending the death, or that it might lead to harm to someone."

[49] At page 15 the learned trial Judge said:

> "In the particular circumstances that the perpetrators of the crime carried the cutlass with them, even if there was only one cutlass and only one person carried the cutlass, on that basis, you may infer that the

> accomplice would have contemplated the possibility or the likelihood that it would be used in the commission of a crime, and if he contemplated the likelihood that that might result in death then he might be assigned responsibility for that intention to cause death. If, in your view he contemplated only the likelihood that it might result in harm then you would return a verdict of not guilty of murder but guilty of manslaughter."

[50] In my judgment this is a clear direction on the issue of manslaughter and the learned trial Judge was quite fair in putting the case to the jury.

[51] In the instant case however there is nothing to cause anyone to have a lurking doubt. The learned trial Judge put all the issues before the jury. The summing-up as a whole was fair and balanced.

[52] The jury was entitled to return a verdict of guilty of murder having regard to Appellant's own statement from the dock. The appeal is therefore dismissed. The conviction is affirmed.

Albert Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I concur

Ephraim Georges
Justice of Appeal [Ag.]