ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS.9 and 10 OF 2003

BETWEEN:

KAMAL LIBURD

and

JAMAL LIBURD

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, S.C. — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal

Appearances:

Dr. Henry Browne for No.1 Appellant
Mr. Hesketh Benjamin for No. 2 Appellant
Mr. Anthony Johnson with both Dr. Browne and Mr. Benjamin
Mr. Dennis Merchant, D.P.P. for the Respondent

2004: January 28;
November 22.

JUDGMENT

[1] **REDHEAD J.A. [AG.]** Kamal Liburd and Jamal Liburd the appellants, are brothers. They are 24 and 20 years old respectively. Both were tried for the murder of Steadroy Henry Bart. On 1st July, 2003 the jury returned a verdict of guilty of murder against Kamal Liburd and a verdict of guilty of manslaughter against Jamal Liburd. The former was sentenced to life imprisonment for the murder and the latter was sentenced to thirty [30] years for manslaughter.

[2] On 2nd August, 2002 in the early hours of the morning, Jamal Liburd, the younger brother was seated on a wall at Westbourne Ghaut, in the town of Basseterre. Whilst there the deceased went up to Jamal and threatened to slap him. An argument then ensured. During the argument, Jamal dared the deceased to slap him. Whereupon, the deceased struck Jamal about the face or head.

[3] Upon Jamal, being struck, he got up from where he was seated and went towards the direction of Westbourne Ghaut.

[4] Conrad Davis, one of the main prosecution witnesses testified that after Jamal was struck and he was proceeding towards the Westbourne Ghaut, the deceased began throwing bottles and stones after him. Conrad Davis also said in his testimony that Jamal had a stick or club about 3 feet in length and some bottles.

[5] This witness then testified that he saw Jamal and Henry, the deceased, throwing stones at each other. Then the deceased began to run. Both the appellants were then in hot pursuit after him. Kamal caught up with the deceased grabbed the deceased and swung the club at his head but the deceased ducked the blow which did not connect. This witness said that at the time Kamal was holding unto the deceased, Jamal was running towards them. He, Jamal, then shouted to his older brother Kamal, "hold him! Hold him for me." The deceased pulled away from Kamal and continued to run east from Liverpool Row. Jamal and Kamal kept running behind the deceased, Kamal with the stick and Jamal with a bottle. According to this witness he saw both appellants with sticks and bottles in their hands.

[6] After a while, according to Davis, the deceased stopped running and began moving from side to side of the alley in a squatting position. He said that he saw Kamal swing the club at the deceased's head for the second time while the deceased was in a squatting position. The deceased fell to the ground. He then

saw Jamal threw the bottle at the deceased. The bottle struck the deceased in his head.

[7] Conrad Davis said that when the deceased was struck by both the appellants, the deceased had nothing in his hands. After the deceased fell he Conrad Davis, went to where he saw the deceased fall. He saw the deceased lying on the ground. He said, "I saw what appeared to be blood coming from the deceased." He saw a gash or cut. He saw pieces of broken bottles around his head.

[8] This witness swore on oath that he was able to witness the incident clearly as he was approximately 40 feet away and the area was lit by lamp posts.

[9] Two other persons gave eye witness account of the incident. Ronald Hixon testified that on 2nd August, 2002 between 12 midnight and 1.30 a.m. he was on Prickley Pear Alley when he saw the deceased. The deceased was saying he was going to 'burst their head'. He then heard the sound of bottles crashing.

[10] Hixon testified that he later saw the deceased pelt a bottle which he had in his hand. He then saw the two appellants running behind the deceased, one of the appellants had a base ball bat in his hand. The deceased ran up to the Alley. He had nothing in his hand at the time.

[11] The witness then said:

> "I heard a bottle smash. I rushed to come back to the end of the alley. Me and Yankee Guy (Conrad Davis). "boot" up there same time kamal said," if any one of you fuck us up we going to fuck you up" Jamal had the baseball bat Kamal had the machete in his hand I did not see what happened in Pickley Pear Alley."

[12] The other witness was Casilda Richards. She testified that on 2nd August, 2002 at about 10.00 p.m she was at the top of Pickley Pear Alley, she was with a friend Euline Jeffers. She said that while at Pickley Pear Alley she saw two men running up the alley. She recognized the appellant, Jamal, as one of the men. The other

man fell to the ground. She then heard the noise like a bottle. She then saw the two men run down the alley. This witness said on oath when she ran down the alley she saw the deceased lying in a pool of blood.

[13] The appellants have appealed to this Court against their convictions.

[14] Thirteen grounds of appeal are filed on their behalf. Grounds 2, 3 ,4, 5, 6 and 7 in my view could conveniently be taken together.

[15] Ground 1 alleges that the verdict of the jury of 10-2 for murder was void because the foreman failed to state in open court how the jury was divided and by failing to ascertain the number of jurors who dissented and by failing to do so the verdict was not a proper and lawful one.

[16] The record indicates that when the jury were asked whether they agreed on a verdict of murder in respect of the appellant, Jamal, they said that they were not agreed. They indicated that they were divided 10-2 in respect of the murder charge. This was after deliberating for three hours and six minutes. The procedure, in my view, was for the Judge to have inquired whether there was any possibility for them to arrive at a unanimous verdict on the murder charge. If the jury thought it was possible and if they required further directions, it was then incumbent on the learned trial judge to give such further directions. If, after four hours they were not able to agree then he would have been in his discretion to discharged them : R v Newton[1]. Similarly if they said it was unlikely that they would have been able to arrive at a unanimous verdict on the murder charge, then he should have discharge the jury. In either of the above cases he would order a retrial on the murder charge.

[17] Although what was done was procedurally incorrect, yet in my judgment the appellant, Jamal, was not prejudiced by the verdict. In fact, he may have

[1] 13 Q.B. 716

benefited by the incorrect procedure. If the correct procedure was followed it is not inconceivable that the jury, if they had retired for a further period could have returned a verdict of guilty of murder or he could have been found guilty of murder on the retrial. In any event the unanimous verdict of manslaughter, cannot in my view be assailed. This ground of appeal is therefore dismissed.

[18] I now turn to the second ground of appeal, that is that the learned trial judge failed to raise the defence of alibi although the first named appellant at all material times said that he was not present at the scene of the crime I am of the view that it is incumbent upon the judge to give a full direction to the jury on the law so as far as it pertains to alibi. Any failure by the learned trial judge to do so would amount to a misdirection I have perused the record thoroughly and I am unable to find any statement given by the first-named appellant to the police in which he said he was not present at the scene. In fact when sergeant Dore cautioned Kamal Liburd and told him about the incident, according to the sergeant Kamal Liburd replied "me eh no what you talking about". Neither can I find any thing in the evidence which indicates that the first named appellant said he was not present at the scene. This appellant gave no statement to the police. He gave no evidence before the court He did not make a statement from the dock, the question therefore of alibi cannot arise. This ground of appeal is therefore dismissed.

[19] I now deal with ground 8. Learned counsel for the appellants argued strenuously and skillfully that this case is based on joint enterprise. For there to be joint enterprise, he argued, that there must be a principal and secondary party.

[20] Dr. Browne contended that on the facts of this case the prosecution cannot and had not established a principal or a secondary party and therefore the appellants ought not to be convicted. I do not agree. If two persons are engaged in a joint operation, then, in my opinion, the jury should be able to draw the inference from the evidence and the conduct of the parties which party is the principal or the secondary party. As indeed they have done in this case by their verdicts. I

perceive that Dr. Browne's argument on appeal, was that none of the appellants should have been convicted for the murder of the deceased having regard to the pathologist report which is a follows:

> "My final conclusion was a severe brain edema and tonsillar herniation laceration of the brain tissue, right tempo occipital wound inflicted with a sharp object."

[21] In cross-examination the pathologist said the wound was inflicted by a sharp object like a machete. Having regard to this evidence and that no one saw any of the accused persons inflect a blow on the deceased with a machete Dr. Browne's contention was that both of the appellants ought to be acquitted.

[22] I do not agree, I have regard to the testimony of the prosecution witnesses Conrad Davis, Ronald Hilton and Cassilda Richards who said that they witnessed the incident. Moreover they gave accounts that immediately after the deceased was struck by the appellants, or one of them they went to where the deceased was lying and saw blood about his body. If the jury believed this testimony, there was no opportunity for anyone else to inflict any injury on the deceased but the two appellants.

[23] Moreover, Ronald Hixon testified before the jury that he saw Kamal, the first-named appellant just after the incident, coming down the Alley with a machete in his hand.

[24] If the jury accepted this testimony they were entitled to have concluded that he could have inflicted the wound with the machete.

[25] There was ample evidence for the jury to have found that there was an opportunity for Kamal to inflict the wound with the machete. It is interesting to note that the jury returned a verdict of guilty of murder against Kamal Liburd, thereby in my view accepting the evidence of Ronald Hixon.

[26] It is not perhaps insignificant that having regard to that evidence which the jury must have accepted, they found Kamal Liburd, the first named appellant guilty of the offence of murder and Jamal guilty of manslaughter. It should also be borne in mind the evidence of Conrad Davis which is, in my view significant. He said:

> "When Henry [the deceased] was struck in his head, I walked up to him and saw Henry lying on the ground. I saw what appeared to be blood from Henry. I saw the gash or cut. I saw pieces of broken bottle around his head area."

[27] If this evidence is accepted it means that no other person other than the appellants had an opportunity to inflict any further injuries on the deceased. The evidence of Cassilda Richards is in my opinion of like effect.

[28] Dr. Browne's argument therefore that both appellants should be acquitted because no one saw either of them inflict a wound on the deceased with a machete, he was in fact asking this court to substitute its verdict for that of jury when there is evidence from which the jury could have properly concluded that Kamal used the machete to inflict the fatal injury.

[29] Dr. Browne's argument that there was no positive evidence that the No. 1 appellant did use the machete on the deceased is correct but equally there is evidence from which the jury could have drawn the conclusion that he used the machete on the deceased.

[30] Dr. Browne in his skeleton submissions argued that the learned trial judge failed to direct the jury that if one of the accused suddenly forms the intention to kill using a weapon in a way in which the other could not have expected the unsuspecting accused cannot be said to be acting in concert. The acts of the accused who used the machete cannot be attributed to the other. He not only formed a different intent but acted in a way which the other could not have expected, according to the argument of Dr. Browne.

[31] Dr. Browne contended that in short the accused who used the machete not only brought about the death of the victim with a different intent to that of the unsuspecting accused, but also used a weapon which the unsuspecting accused did not know of or suspect he had with him. If this is so, the essential ingredients of the offence committed by the primary offender are different and though the other actions of the other accused coincide with the commission of the murder those actions did not contribute or assist in bringing about the death of the victim. Learned Counsel, Dr. Browne referred to R.v. Anderson and Morris[2].

[32] The arguments and submissions of Dr. Browne referred to above could only have weight if there is evidence that Jamal Liburd, the No. 2 appellant, was unaware that Kamal Liburd the No. 1 appellant had the machete. The arguments and submissions would also have substance if the defence was that Jamal Liburd was unaware that the Kamal had the machete. But that was not the defence.

[33] In Anderson and Morris [Supra]

Welch, the deceased, met Anderson's wife a convicted prostitute. Anderson's wife took Welch back to her flat where he tried to strangle her. She ran into the street pursued by Welch, met Morris told him what happened. Morris and Welch fought. Anderson arrived on the scene and learned from his wife what had happened, got a knife in Morris' presence and went off with Morris and his wife in a car to find Welch. When Welch was found there was a fight as a result of which Anderson stabbed Welch to death.

[34] The judge directed the jury as follows:-

> "If you think there was a common design to attack [Welch] but it is not proved in the case of [the applicant Morris], that he had any intention to kill or cause grievous bodily harm but that [the applicant Anderson] without the knowledge of [the applicant Morris], had a knife, took it from the flat and at sometime formed the intention to kill or cause grievous bodily harm to Welch and did kill him – an act outside the common design to which [the applicant Morris] is proved to have been a party – then you would or

[2] 1966 2 ALL ER 644 at 648

> could on the evidence find it proved that [the applicant Anderson] committed murder and [the applicant Morris] would be liable to be convicted of manslaughter provided you are satisfied that he took part in the attack or fight with Welch."

[35] The court of criminal appeal held this to be misdirection. It quashed the conviction of Morris and ordered a retrial in respect of the appellant, Anderson. Morris in his statement to the police said that he fought with the deceased but he did not know about the knife being used. In evidence before the court he denied that the applicant Morris took the knife in his presence. He also denied fighting and taking part in the fight in Station Street i.e. when the deceased was stabbed.

[36] Apart from the misdirection referred to above there were also the denials by Morris as to his knowledge about the knife which Anderson was carrying.

[37] The witnesses in the instant cases put both appellants together or in close proximity with one another most of the time during the incident, could it be said with any reason that Jamal could not have known that Kamal was carrying a machette? That to my mind would be quite incredible.

[38] I return to Dr. Browne's ascertain that the prosecution have failed to establish which one of the appellants was principal and who was the secondary party and therefore neither of them should be convicted of any offence.

[39] In my judgment the case of R. v Bryne[3] does not support Dr. Browne's contention. The facts in Byrne are as follows:

> "Terrance Bush was fatally stabbed in the hallway of his home. The incident was witnessed by Maureen Bush, Terrance Bush's wife. She informed the police that three brothers, Dennis, Anthony and James Boyne were responsible for the attack and for Mr. Bush's death.
> Mrs. Maureen Bush's evidence has always been that all three brothers had knives and that all three attacked and stabbed her husband, thereby killing him. All three brothers have been tried for the murder of Mr. Bush.

[3] 1 EWCA Criminal 632

But, most unfortunately they have all been tried in difference courts on different occasions.

Dennis Byrne was tried first. He was acquitted of murder but convicted of manslaughter. He did not seek leave to appeal his conviction. Anthony was tried second and convicted of murder on 26th September, 1998. James fled to Ireland and was extradicted in January, 1999. At the first trial of James Bryne in July, 1999 he was acquitted of murder but convicted of manslaughter. On 13th March, 2000 the Court of Appeal dealt with an application for leave to appeal against conviction by Anthony and an appeal against conviction by James. The application of Anthony raised a number of points, all of which the Court of Appeal dismissed except for one that was an application by Anthony to call the evidence of his brother James. Because James was out of the Country when Anthony was tried, James was not available as a witness. The Court of Appeal granted Anthony leave to appeal so that the Court could consider the issue whether the evidence of James should be admitted.

The Court of Appeal then dealt with the appeal of James. At the trial of James the Crown's case had been that James was part of a joint enterprise with his two brothers to commit a murderous attack on Mr. Bush. At paragraph 21 of the judgment of the court the Lord Chief Justice set out the possible hypotheses that the jury would have to consider at the trial of James [in order to determine whether or not he was the principal or a secondary party-my words].

[40] He identified them as follows:

"[1] If the jury accepted that all brothers had knives and stabbed the deceased, then James was guilty of murder either as a principal or on the basis of joint enterprise.

[2] If the jury were satisfied that one of the brothers other than James had a knife and used it to stab the deceased and James participated in the attack on the deceased knowing of his brother's possession of the knife and foreseeing that it might be used to inflict really serious bodily harm on the deceased then James was guilty of murder on the basis of joint enterprise.

[3] If the jury were satisfied that one of the brothers other than James had the knife and used it to stab the deceased and that James participated in the attack on the deceased knowing of the brother's possession of the knife and foreseeing that it might be used to inflict injury falling short of serious bodily harm on the deceased, then James was guilty of manslaughter on the basis of joint enterprise.

[4] If the jury were satisfied that one of the brothers other than James had a knife and used it to stab the deceased, but that James participated in the attack on the deceased not knowing of that brother's possession of the knife and not foreseeing that a knife might be used to inflict any injury at all on the deceased ,then James was not guilty of murder and not guilty of manslaughter."

[41] With respect, I adopt the Lord Chief Justice's hypotheses as representing the law on joint enterprise as it stands today. There is evidence that the No. 1 appellant, Kamal Liburd, was seen with a machete shortly after the injuries were inflicted on the deceased.

[42] The jury was therefore entitled to draw the inference that Kamal could have inflicted the injury with a machete which the pathologist said in cross examination that the injury could have been caused by a sharp instrument such as a machete. The evidence is that Kamal and Jamal were engaged in an attack on the deceased. Having regard to what I have said above that it is quite unlikely that Jamal would not have know that Kamal had the machete having regard to kind of weapon a machete is as it is not something that can be easily concealed.

[43] Sir Robin Cooke advises us in Chang Wing Siu v R[4]:

> "The case must depend on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former 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, authorization which may be express but is more usually implied. It meets the case of a crime foreseen as possible incident of a common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

[44] This ground of appeal is therefore dismissed.

[45] I now turn to ground 13. The appellant alleges that the learned trial judge erred in law by not providing the jury with a simple and lucid direction regarding the evidence led against each alleged joint participant and the law that obtains to each participant concerned. This therefore can give rise to a miscarriage of justice.

[46] On page 40 of the record the learned trial judge told the jury that they must consider the case, against each of the defendants separately. He than dealt with each appellant separately. The learned trial judge told the jury:

[4] 1984 3 ALL ER 877 at p.880

> "If looking at the case of Kamal you are sure that with the intention to kill or cause grievous bodily injury took some part in committing the offence with Kamal he is guilty of murder. If looking at the cases of Jamal, you are sure that with the intention to kill or caused grievous bodily injury or took some part in committing the offence with Kamal he is guilty of murder. In respect of Bluff, that is Jamal the issue of provocation arises."

[47] If Jamal is regarded as the secondary party, then, in my opinion, when the judge told the jury that they must be sure that he had the intention to kill or to cause grievous bodily injury in order to find him guilty of murder, in my opinion, that was putting the case too high. Chang Wing Siu [Supra].

[48] In my judgment the learned trial judge dealt with all the issues and gave a clear and lucid direction to the jury in the manner they should approach the case. This ground of appeal therefore fails.

[49] The appeal is dismissed. The conviction and sentences are affirmed.

Albert J. Redhead
Justice of Appeal

I concur.

Brian Alleyne, S.C.
Justice of Appeal

I concur.

Michael Gordon, Q.C
Justice of Appeal