SAINT LUCIA

IN COURT OF APPEAL

CRIMINAL APPEAL NO.4 OF 2004

BETWEEN:

[1] FABIAN SYLVESTER alias SHORTCOCK
[2] SHAKA DESHONG

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh Rawlins — Justice of Appeal

Appearances:

Mr. Kenneth Foster, QC with Mr. Shawn Innocent for the Appellants
Ms. Victoria Charles-Clarke, Director of Public Prosecutions for the Respondent

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2005: October 25; 28;
November 28.

JUDGMENT

[1] BARROW, J.A.: At the conclusion of the hearing we dismissed the appeal by both appellants against their convictions for murder and against their sentences of life imprisonment. These are our reasons for decision.

The two versions of the shooting

[2] The deceased, Cuthbert Thornhill, also known as Boycott, was a sub-contractor who was in the habit of paying his workers from his vehicle that he parked on Riverside Road in Castries, which was a usual "hang out" area for him. On Friday 7th December 2001 the deceased was 'hanging out' around 4:30 in this familiar

area beside Riverside Road with three others. One of his workers came to the deceased and the deceased got up, took a white envelope out of his pocket, went to his vehicle and got into the left or passenger side of his vehicle. The three persons continued talking; they were about three yards away. One of the three was Matthias Martial who gave eyewitness evidence. The eyewitness looked up and saw Fabian Sylvester, also known as Shortcock, and Shaka Deshong, also known as Shaggy, standing near to the deceased who was seated in his vehicle with one foot in and one foot out.[1] Shaggy was in front and Shortcock was behind him. The eyewitness said he saw Shortcock pull a gun from his waist and he also saw Shortcock pulling on an envelope that the deceased was holding and was not releasing. The eyewitness said he heard a gunshot, the deceased released the envelope and the appellants walked away. A police officer was nearby and, alerted by the sound of the gunshot, he ran after the two appellants and fired some shots from his gun but the appellants escaped. Another of the three persons who had been in the company of the deceased gave evidence of the occurrence and the police officer testified as to his pursuit.

[3] Each appellant gave an unsworn statement. Shortcock stated that they went to sell the deceased two pounds of marijuana in a brown paper bag and the deceased sought to get him to accept $300.00 per pound instead of the stated price of $400.00 per pound. He said that the deceased refused to release the bag of marijuana, that he kept holding on to the bag, then he saw the deceased put his left hand behind his back between the two seats. He said he saw Shaggy make a grab for the same left hand, that the deceased kept pulling and Shaggy kept pulling and then he heard a loud sound and the deceased dropped the bag and exclaimed. Shortcock said Shaggy walked away and so he also walked away to meet Shaggy. He asked Shaggy if Shaggy had gotten shot and he said Shaggy told him “all the time is a gun the Ras have there.”

[1] Both appellants admitted their involvement in what occurred that day so no issue of identification arose.

[4] The appellant Shaggy gave a statement to similar effect that it was a marijuana sale gone bad and also described a tugging for the bag of marijuana. He said he saw the deceased reach behind the seat and pull a firearm. He said he held the deceased's hand and was pulling the deceased's hand and then he heard a gunshot and he walked away.

The direction on joint enterprise

[5] Criticism of the judge's direction on joint enterprise attracted the greatest attention in the appellants' skeleton argument. The judge directed the jury in the following terms:

> "You may very well come to the conclusion that Shortcock, Shortcock shot Boycott, you may come to that conclusion; and this is the law. And, if you are satisfied that both Shortcock – Shortcock and Shaggy were taking part in an unlawful joint enterprise, that is, they both had agreed to rob Boycott of his money – that's the Prosecution's case – if you agree that both Shortcock, shot Boycott, and you are satisfied to the extent that you feel sure, that Shortcock and Shaggy were taking part in an unlawful joint enterprise, that is, they both had agreed to rob Boycott of his money and the Shaggy knew that Shortcock had the gun, and Shaggy was sure that Shortcock would use the gun and shoot Boycott, if Boycott resisted, if Shaggy contemplated that Shortcock would – during the course of the robbery Shortcock would use the gun, shoot Boycott – but, of course, you would have to determine, first of all, if you come to the conclusion that Shortcock shot Boycott, first of all, you have to come to the conclusion or you have to find that Shortcock had the intention to kill.
>
> I'll address you on that because in that scenario, Shortcock would be, what is in law referred to as the principal. Shortcock would have the intention to kill, and if he did the shooting and he had the intention to kill, then, once Shaggy foresaw that there was a likelihood that Shortcock would use the weapon, then, Shaggy would also be guilty of murder. So, both of them would be equally be guilty of the offence of murder. Is that clear or do you wish me to repeat?
>
> So, if you find as a fact, that Shortcock voluntarily shot Boycott and – that is important – if you find that he voluntary shot Boycott, believing that it will probably cause or contribute to cause the death of Boycott, then, you can infer that he had – he intended to kill – you understand; can I go over that or is that clear. So, if you find that Shortcut – Shortcock did the shooting, you find that Shortcock had the intention to kill and he and Shaggy had a

> joint enterprise, a joint plan to rob Boycott, and Shaggy knew that Shortcock had the gun and Shaggy contemplated or foresaw that Shortcock would use the gun to kill Boycott, then, both of them would be guilty of the offence of murder. It does not matter who pulled the trigger, both of them will be guilty of the offence of murder.
>
> If, on the other hand, you find as a fact, that it was Shaggy who shot Boycott, you apply the same equation. That is, and you are satisfied to the extent that you feel sure, that Shaggy and Shortcock were taking part in an unlawful joint enterprise, that is, they both planned to rob Boycott, and that Shortcock knew that Shaggy had the gun and Shortcock foresaw that Shaggy would use the gun to shoot Boycott and kill Boycott if Boycott resisted the robbery, once you come to the conclusion that Shortcot – Shortcock contemplated that during the course of the robbery, Shaggy would use the gun to kill Boycott – to kill Boycott, then Shortcock would be guilty of murder once you find that Shaggy had the intention to kill. So, both of them would be guilty of the offence of murder."

[6] The submission for the appellants was that the judge failed to properly or adequately direct on the law on joint enterprise. Counsel relied on the following passage in Archbold 1994 as a correct statement of the law:

> "Where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise. That includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise. HOWEVER, if a participant in the venture goes beyond what was tacitly agreed as part of the common enterprise the other party is not liable for consequences of that unauthorized act. It is for the jury to decide whether what was done was part of the joint enterprise or was or may have been an unauthorized act and therefore outside the scope of the joint enterprise."

[7] Counsel set out other passages on joint enterprise from a number of decisions that need not be repeated because counsel quite properly did not submit that the judge in any way misstated the law. The submission really boiled down to contending that the judge gave the jury very little assistance as to (i) what evidence constituted joint enterprise, (ii) what evidence went to show whether what was done was done as part of the joint enterprise, or (iii) was or may have been outside of the scope of the joint enterprise or (iv) what evidence went to show that the other accused contemplated or had the necessary foresight or contemplated that the co-accused intended to kill or cause serious harm to the deceased.

[8] The amount of assistance that a trial judge must give to a jury in a particular case and on particular issues will depend on the facts of the case; a lot is left to the discretion of the judge and an appellate court will not lightly interfere. In the instant case even on the version of events given by the appellants they were clearly engaged in a joint enterprise and I can see no reason why the judge needed to spend any time on pointing to evidence that showed there was a joint enterprise.

[9] There was very little evidence to consider on the questions whether the killing of the deceased was part of the joint enterprise or went beyond it or was in the contemplation or foresight of the co-accused and accordingly there was little on which the judge could direct the jury in that regard. It was a strong case that the prosecution put forward that the appellants went to rob the deceased of his payroll and that one of them went armed with a gun. The judge specifically told the jury

> "if you find that …Shortcock did the shooting, you find that Shortcock had the intention to kill and he and Shaggy had a joint enterprise, a joint plan to rob Boycott, and Shaggy knew that Shortcock had the gun and Shaggy contemplated or foresaw that Shortcock would use the gun to kill Boycott, then, both of them would be guilty of the offence of murder."[2]

[10] Once the jury decided to accept the prosecution witnesses as truthful there was no real possibility of their coming to any other conclusion than that the killing was in furtherance of the joint enterprise because the appellants did not put forward any evidence or even explanation, consistent with the prosecution's version of events, that could have led to the conclusion that the killing may have gone beyond what was agreed or contemplated. Only rank speculation could have led to that latter conclusion.

[11] A number of related contentions were contained in the skeleton argument but I do not consider that they call for extensive treatment. I do not see any substance to the complaint that the judge omitted to direct the jury that they ought to deal with each accused separately: even on their version of events the two appellants told

[2] P. 73 D, lines 10 to 14 of record.

essentially the same story and there was very little material to enable the two to be given separate treatment. In that context I do not see that there is any substance to the submission of counsel that there was a need for the judge to emphasize to the jury that they needed to get correct the sequence of which of the two accused ran at what point and which one was in possession of the gun. The evidence on these matters was before the jury for them to consider and it was properly left to the jury to decide what, if any significance, to give to it. The judge's direction, based on the evidence in this particular case, was eminently correct:

> "It does not matter who pulled the trigger, both of them would be guilty of the offence of murder."

Direction on the element of intent

[12] The appellants also argued that the trial judge misdirected the jury on the intent required for murder. This ground is founded on the direction to the jury in the following terms:

> "So if you find as a fact that Shortcock voluntarily shot Boycott – and that is important – if you find that he voluntarily shot Boycott, believing that it will probably cause or contribute to cause the death of Boycott, then you can infer that he had – he intended to kill – you understand; can I go over that or is it clear? So if you find that Shortcut – Shortcock did the shooting, you find that Shortcock had the intention to kill … then, both of them would be guilty of the offence of murder. It does not matter who pulled the trigger, both of them will be guilty of the offence of murder."

[13] The complaint of counsel for the appellants is that here the judge was directing the jury on the objective test for intent in violation of the provisions of sections 71 to 75 of the Criminal Code of Saint Lucia 1992 which establish that the intent for murder is a subjective one.[3] I do not see how that can be argued. The specific language of the judge was, if the jury found that Shortcock voluntarily shot Boycott "believing that it will probably cause or contribute to cause the death of Boycott"

[3] Section 72 provides: "If a person does an act of such a kind or in such a manner as that, if he had used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that the act would probably not cause or contribute to cause the event."

then the jury could infer that he intended to kill. What Shortcock believed could only be subjective. The direction was not about what he could be presumed to believe or what he probably believed as a matter of inference from what he did; the direction was if he did an act believing that it would cause a result then it could be inferred that he intended that result.

Burden on the prosecution to negate the defence

[14] Another ground argued by the appellants was that the judge failed to "give a special direction that a further burden rested on the prosecution to negate beyond reasonable doubt the existence of" the plea of accident as a defence.[4] Ample treatment was given to this ground in the skeleton argument for the appellants but it seems to me that the complaint is fully answered by regard to the following passage from the direction of the learned judge:

> "If from what they told you in – from the statement from the dock, notwithstanding, they do not have to prove anything, but if you believe anything that they told you from the docks, means they are not guilty of any offence, because they have raised - - the defence of accident. I'll tell you why. If you have any reasonable doubt as to the - - what they told you from the dock was true, if you, if you have a doubt as to whether - - as to its truthfulness, then equally they will be not guilty, because it means that the Prosecution would have failed to prove the case against them to the extent that you feel sure. You understand that? So, once they give you an explanation, if you accept that, not guilty. If you have any doubt as to the truthfulness of their explanation, equally, not guilty; because it means that the Prosecution would have failed to satisfy you to the extent that you feel sure of the guilt of the Accused."

[15] It seems to me that the trial judge, in that passage, did exactly what counsel argued the trial judge was obliged to do: he told the jury that the defence of the accused was accident; that the accused did not have to prove anything; that the prosecution needed to make them feel sure of the guilt of the accused; and, that if the prosecution left them in any doubt about the explanation of the accused then the prosecution would have failed to make them sure of the guilt of the accused.

[4] Counsel ascribed the quote to Baptiste v The State (1983) 34 WIR 253

To my mind this fully amounted to giving a special direction to the jury that the prosecution had the burden of negating beyond reasonable doubt the existence of the defence of accident.

[16] Counsel argued that the judge improperly directed the jury on how they should assess the accused men's defence of accident by referring to the evidence of the pathologist as to the path that the bullet travelled through the body of the deceased without cautioning the jury that the pathologist was no ballistic expert so that the jury should not rely on his evidence to determine the angle from which the bullet entered the body and hence to determine the veracity of the accused as to how the deceased came to be shot. What the judge did, when he was summarising what the appellants said about the shooting having occurred accidentally, was to refer to their demonstration about how it happened and say to the jury that they had to ask themselves,

> "does that coincide with … Dr. King's evidence, in the manner in which he said that the bullet traversed the body. Because he says, from nipple down to the waist, it's a matter for you. That's your - - as the saying goes, that's your call. You will have to determine that question."

[17] The judge did not convey to the jury that there was any evidence from the pathologist as to the angle from which the bullet entered the body. In fact the pathologist gave no evidence as to the angle of entry of the bullet. The closest he came to doing so was to answer that the injury that what he saw was consistent with the victim having been seated and the injury having been inflicted from the left side by someone standing to the left of the victim. There is no basis for the suggestion that the doctor gave evidence that was outside of his expertise and that a ballistic expert should have given, instead.

Duty to read dock statements to the jury

[18] The complaint that the summing up was imbalanced against the appellants boiled down to the submission of counsel that the judge ought to have read to the jury the appellants' respective statements from the dock in full. That submission is

purely argumentative. There was no reason in principle or in law to require the judge to do any such thing. The judge gave a fair and full summary to the jury of what the appellants said and treated in this summary the accident defence of the appellants. He was not required to do more. When counsel urged the judge at the conclusion of the summing up to read the dock statements to the jury the foreman of the jury very pointedly indicated that there was no need for this "since that evidence was given as recent as this morning it's very fresh in our minds." Counsel then indicated that he would be guided by the jury's response because, as counsel said, he did not want to have any dispute with the jury. So determined was counsel to go with the jury's indication that he thereupon insisted to the judge that the judge should not read the statements as the judge was clearly proposing to do to satisfy counsel's earlier request. It is, therefore, surprising that counsel should now contend that the judge should have read the statements to the jury. It is a contention that has no force, to my mind.

[19] There were a number of other grounds that were treated in the appellants' skeleton arguments that counsel did not address in oral argument. I would assure counsel that they were fully considered. However, none of the grounds raised on the appeal came close to succeeding. Hence, we dismissed the appeals.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh Rawlins
Justice of Appeal