

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCRAP 2006/021

BETWEEN:

KEMBA SWANSTON

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice M. Pereira

Justice of Appeal

The Hon. Mr. Tyrone Chong, QC

Justice of Appeal [Ag.]

Appearances:

Appellant in person

Mrs. Pauline Hendrickson, Director of Public Prosecutions, with her,

Ms. Rhonda Nisbett Brown for the Respondent.

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2010: March 17;

2011: May 17.

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*Criminal appeal against conviction for murder and attempted murder – Appellant tried alone on indictment charging 4 other persons and the appellant jointly – Co-defendants pleaded guilty to lesser offences including manslaughter and sentenced – At appellant's subsequent trial former co-defendants testified as defence witnesses – Former co-defendants testimony exculpated appellant whilst admitting sole liability for crimes and asserting that appellant did not participate in their activities which resulted in the death and injury of the victims – Whether the learned trial judge's directions to the jury on joint enterprise prejudiced the appellant and deprived him of a fair trial – Manner in which evidence of convicted former co-defendants was dealt with by trial judge – Whether the evidence of the former co-defendants required the trial judge to give any specific warning – Whether the contradictory and conflicting testimony of the prosecution witnesses was capable of rebutting the evidence of the former co-defendants*

On 10<sup>th</sup> October 2006, the appellant, Kemba Swanston, was convicted for the murder of Dennis Trotman and the attempted murder of Davin Henry during an incident which occurred in Keys Village on the island of Saint Kitts, on 2<sup>nd</sup> June 2003. The appellant had

been tried on an indictment which charged Kurt Mills, Leon Norford, Antwan Thompson, Kenneth Mills and himself with murder on the first count and attempted murder on the second count. However, the appellant was tried by himself only after the other co-defendants had been convicted and sentenced. The prosecution's case is that on the day in question, the appellant, along with the other four co-defendants attacked the deceased and his brother, Davin Henry while they were trapped inside a bus which had stopped momentarily in Keys Village. The driver and all the passengers on the bus apart from the deceased and his brother came out of the bus. Then, the appellant along with the four co-defendants attacked the two who were trapped in the bus with stones, knives, machetes and other weapons, fatally wounding Dennis and seriously wounding Davin. On 5<sup>th</sup> December 2006, the appellant was sentenced to life imprisonment for the murder and 10 years imprisonment for the attempted murder. He appeals on the ground that the judge gave erroneous directions on the issue of joint enterprise and that he was prejudiced as a result of the conviction.

**Held:** dismissing the appeal and affirming the appellant's conviction for murder that:

1. It was unnecessary for the Prosecution to specify in the indictment exactly what function the appellant and the four former co-defendants were performing in committing the crimes. There are no provisions comparable to section 2 of the Jamaica **Offences Against the Person Act** in the **Offences Against the Person Act**<sup>1</sup> under which the appellant was indicted. Unlike the situation in Jamaica, murder in the Federation of Saint Christopher and Nevis is not categorized by statute as either capital or non-capital. Consequently, apart from the judge giving directions to the jury on the law of joint enterprise, the prosecution in the case at bar were not obligated to satisfy the three additional tests for capital murder formulated by the Privy Council in the previous Jamaican case **Daley v The Queen**<sup>2</sup> and re-iterated in **Andrew Hunter and Marlon Moodie**<sup>3</sup> before the appellant Kemba Swanston could be found guilty of murder, namely: (1) that the appellant Kemba Swanston by his own act caused the death of the deceased Dennis Trotman; (2) that the appellant inflicted or attempted to inflict grievous bodily harm on the person murdered; (3) that the appellant himself used violence on the deceased in the course of furtherance of the attack. In the circumstances, these Jamaican decisions cannot assist the appellant in his appeal.
2. Kurt Mills, Leon Norford, Antwan Thompson and Kenneth Mills' previous acceptance of full responsibility and for that matter sole responsibility for the crimes charged, did not render it logically impossible for the appellant to be guilty of the offences on the indictment as charged. The case against the appellant was that he was involved in a joint enterprise with these defence witnesses in the attack and injury to the victims. The testimony of these defence witnesses did not implicate the appellant. Their evidence exculpated the appellant, and did not fall

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<sup>1</sup> Chapter 56, The Revised Edition 1961 of the Laws of St Christopher and Nevis.

<sup>2</sup> [1998] 1 W.L.R. 494 at 501 A-B.

<sup>3</sup> Privy Council Appeal No. 64 of 2002 (Jamaica).

within the ambit of any recognized category of evidence which would attract a mandatory or specific warning.

3. Apart from the directions given to the jury on how they should assess and evaluate the evidence of all of the witnesses who testified at the trial of the appellant, it would have been better, if the jury had been warned that they must put the conviction of Kurt Mills, Leon Norford, Antwan Thompson and Kenneth Mills out of their minds in deciding whether or not to accept their version of the events. However, this is not a substantial error, and no miscarriage of justice resulted from this omission. Even if the jury heeded such a warning, there was an abundance of evidence on the prosecution's case to negate or rebut the evidence of the appellant and his defence witnesses. The jury rejected their evidence that the appellant did not jointly participate with the others in committing the crimes. Despite the discrepancies in the prosecution's case, the jury were entitled to accept, and by their verdict clearly accepted the evidence of the prosecution witnesses whose testimony fixed the appellant as an active participant in the joint attack on the bus and the victims.
4. Having regard to how the prosecution pitched its case, it was open to the jury to find the appellant not guilty of murder, but guilty of manslaughter depending on their findings regarding the intention of the appellant. That he was found guilty of murder while the other participants were convicted for manslaughter would offend no established legal principles.

## JUDGMENT

- [1] **EDWARDS, J.A.:** The appellant was convicted on 10<sup>th</sup> October 2006, for the murder of Dennis Trotman and the attempted murder of Davin Henry which occurred at Keys Village on the island of St. Kitts on 2<sup>nd</sup> June 2003. On 5<sup>th</sup> December 2006, he was sentenced to life imprisonment for the murder, and 10 years imprisonment for the attempted murder. The appellant was tried on an indictment which charged Kurt Mills, Leon Norford, Antwan Thompson, Kenneth Mills and himself with murder on the first count, and attempted murder on the second count. However, he was tried by himself after the other co-defendants were convicted and sentenced.
- [2] The appellant was represented by learned counsel Mr. J. Hamilton at his trial. At the hearing of the appeal, learned counsel Ms. Angela Inniss, who was representing the appellant, requested and was granted leave to withdraw, after the

appellant told the court that he wished to argue his appeal himself without any legal representation. We satisfied ourselves that the appellant was previously served with a copy of the transcript of the proceedings and that he was in a position to argue his appeal against his conviction.

- [3] Thereafter, the appellant requested and was granted leave to amend the original ground of appeal which he had filed on 22<sup>nd</sup> December 2006. The new grounds of appeal allege that the learned trial judge gave erroneous directions on the issue of joint enterprise; and that he was prejudiced as a result of his conviction. The main contention of the appellant relates to how the trial judge dealt with the evidence of the convicted former co-defendants Antwan Thompson, Kenneth Mills, and Leon Norford whose testimony as defence witnesses, sought to exculpate the appellant from the events which led to the death of the deceased and injury to Davin Henry.

## **Factual and Evidential Background**

### **The Prosecution's Case**

- [4] The deceased and his brother Davin Henry were two of several passengers in a public passenger bus driven by Samuel Stevens during the morning of 2<sup>nd</sup> June 2003. Davin Henry was sitting in the front passenger seat of the bus whilst the deceased was sitting in the last passenger seat at the back of the bus. Mr Stevens testified that the bus got to Keys Village, and whilst on its way to Four Miles he got to a point at Four Mile Alley where he stopped the bus after turning to his left. Immediately, several men including the previously convicted Antwan Thompson, surrounded the bus, started to make noise, and angrily banged on the bus. Antwan had a knife in his hand and another man had a stone. Davin turned up his passenger window and the driver got out of the driver's seat, turned up his window, attempted to lock the driver's door whilst outside, but hurriedly left it unlocked and went to the side passenger door, when he noticed that these angry men were entering the bus through the sliding door. The driver unsuccessfully tried to calm the angry men and get them out of his bus. Having failed, the driver left the side passenger door, went to a nearby shop, spoke to a lady in the shop

who was one of the passengers who had jumped out of the bus, and then spoke to someone on the lady's phone.

- [5] The driver, Mr. Stevens, testified that when he came back out of the shop he saw the back glass of his bus smashed up and he heard a lady scream out. After a while he saw five fellows who were previously banging on the bus, come out of the bus and run in different directions. The appellant was one of the five fellows. Mr. Stevens said that he saw the appellant circling around his bus at first and then he later saw the appellant inside his bus "in the center within the third seat going back".
- [6] The deceased and his brother, Mr. Davin Henry, were obviously well known to the 4 co-defendants and the appellant before that fateful incident occurred. Mr. Henry's evidence was that he knew Antwan before, "me and he was in something during school, coming from work in a next bus, with me and my brother before that. I made a complaint to the station, so I done know, done looking out for anything...Kenneth and I had something. [THE COURT: You had something with everybody other than Kemba or not?] [ANSWER] Yes, sir. As far as I know my brother didn't have anything with Kemba."<sup>4</sup> Mr. Henry testified that while travelling in the bus he first saw the co-defendant Kurt Mills (who is also called Price) and Antwan standing in the road when the bus came up Four Mile Alley. He locked his front passenger door and wound up the window. Price tried to open the door. He knew that Price was coming to him as he did not get along with Price, and the other co-defendants Kenneth Mills, Leon Norford, and the appellant Kemba Swanston; and he did not like them.
- [7] After the driver got out and was talking to these men, Mr. Henry said that the passengers ran out of the bus.<sup>5</sup> Antwan slammed the driver's door on the driver's back while Price opened the sliding door on the left side of the bus. Mr. Henry

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<sup>4</sup> At pages 23 to 24 of the Transcript of proceedings

<sup>5</sup> At page 24

went on to say that the driver turned off and went into the shop and thereafter, Antwan Thompson:

"Put in his hand and hit me in my head. ...And when I see them, me and Antwan was in something before. I went to the back of the bus where my brother was... To get into the back of the bus, I just stepped over from the front seat where I was. Me and my brother in the bus and the only part of the bus that was open was the driver's door. When we [go] to the back of the bus, Antwan come in by the driver seat, flinging stone, bottle... Kenneth and Leon make trip back and forth with stone and bottle and come in the driver seat and flinging them back at me and my brother. There was no one else in the bus. The stones and bottles they were flinging catch me and my brother. They were moving that fast that I ain't know who fling stone catch me or my brother. Five minutes during the incident, I see Kemba [the appellant] running up Four Mile Alley that the bus came up with a knife in his hand. Kemba joined with them flinging stones, bottle, coming by the same door, the bus driver's side. Kemba had a knife in his hand. The others were flinging stones and bottles after me and my brother while we were in the bus.

"Kurt went up on a hill by the shop and when he come back down, he come back with a machete in his hand while the others like, Antwan, Leon and the rest of them was flinging stones and bottles. One of the stones catch the back glass of the bus. Kurt went with machete and clear the bus glass that mash up. Kemba was by the bus flinging the stones and bottle. My brother and I were still in the bus." <sup>6</sup>

[8] Mr. Davin Henry testified further as follows:

"When Kurt came back with the machete Kemba was still around the bus flinging stones and bottle. He was flinging them at me and my brother... We were in the bus. While they were flinging stone and bottle, Antwan took the machete from Kurt, come in the bus by the driver seat and saying, "Let's go to the back of the bus after them. Only two of them in the bus." Kemba Swanston was outside by the bus...

"I don't know what Kemba was doing outside the bus. Nobody came into the bus as far as the driver's seat. They did not reach to the back of the bus where we were. They only reach by the driver's seat where they were flinging the stones and the bottle. Antwan, Kenneth, Kurt, Leon and Kemba were by the driver's seat. None of them come to the back of the bus. ...The machete that Kurt had, he used the machete and cleared the back of the bus glass. They continue fling stones and bottle from the back and the side where the sliding door was. It was Antwan, Kenneth, Kurt, Leon and Kemba. After that, the glass them by the sliding door mash up.

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<sup>6</sup> At page19- 20.

Then when stone and bottle flinging in the bus by that side, a stone catch my brother in his head. He knocked out and drop over the sliding door where the glass mash up with his head hanging out of the bus. Kurt come from the back of the bus chop my brother between his head and his shoulder part with the machete. While he was chopping my brother with the machete, Antwan and Kemba was there when he was chopping my brother, close [to] him. While I was there, I saw Kemba with a knife in his hand. It had a chair frame in the bus. I take the chair frame and try backing them off my brother. Antwan had the machete that Kurt had. While I was backing them off with the chair frame, I get two stabs. When I look around, Kurt had a knife pulling it out from where he stab me on the right side of my bum and on the right side of my waist. While they were by my brother, Kenneth and Leon was throwing stone from below the bus where they had an empty land. Then a lady bawl out and say, if you all going kill him. [Court: Where was Kemba at the time?] Kemba was by my brother with a knife in his hand. [Court: What did she bawl out to him?] If you all going kill him. The five Accused turn off, and run went up the hill.”<sup>7</sup>

[9] Mr. Henry stated also that after this had occurred:

“I jumped in the driver’s seat and I drive the bus back down Four Mile Alley, heading to Cayon direction...the police jeep pass me. I stop the bus by the tank in Keys. Turn around the bus facing Keys. The police and the ambulance come back and met me in the bus and my brother. They took my brother out of the bus, put him in the ambulance. Took me out of the bus put me in the ambulance, went to the J.N. France Hospital...

“One of them fling the chair frame in the bus. I was trying to ward off Price, Antwan and Kemba. When Kenneth was inflicting the injury on my brother, Kemba was also there. At the time, Kemba was by my brother. Trying to defend myself and my brother, I couldn’t like see what he was doing. When my brother passed out, Kenneth and Leon were throwing stones and bottle. I received other injuries in my head. I received two injuries...I got stitches. I was at the hospital from the 2<sup>nd</sup> ...to the 11<sup>th</sup> of June. The stones they were throwing caught me other parts of my body, like my shoulder, my back, but the injury that catch me in my head that I get chop in my head”.<sup>8</sup>

[10] Dr. Stephen Jones, who performed the post mortem examination on the deceased on 4<sup>th</sup> June 2003, testified that he saw the following injuries on the deceased’s body:

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<sup>7</sup> At page 20-22.

<sup>8</sup> At pages 19 to 23 of the Transcript.

- (i) An incision/laceration injury on the skin measuring 2.5 cm x 1 cm in the right supraclavicular fossa (the space above the clavicle). The skin injury extended as a stab wound downward from the right to left behind the clavicle or collar bone to enter the right chest cavity throughout the second intercostal space (the space between the second and third rib; in the chest wall there was a stab wound in the upper lobe of the right lung which had the same disposition in its path behind the clavicle and into the chest wall; and the smaller tributaries of the larger axillary vein were cut. These injuries in the chest were associated with .5 litres of blood found in the right chest cavity. The stab wound in the upper lobe of the right lung is a part and parcel of the same one action.
- (ii) An incision/ laceration injury on the right anterior arm representing the 4.5 x 2cm entry of a stab wound; separated from an exit on the medial aspect measuring 3.5 x 1.4cm. The separation in the subcutaneous tissue between the entry and exit wounds was 2.5cm.
- (iii) An incision/laceration injury to the skin on the upper right back lying over the scapula (the shoulder blade) with a vertical line measuring 4 x 0.6cm.
- (iv) An incision/laceration injury on the skin of the right upper buttock with a horizontal line measuring 3 x 0.8cm just below the iliac crest (the upper part of the buttocks).
- (v) A slightly oblique incision/laceration injury to the skin on the left posterior forearm seven centimeters below the elbow measuring 4.8 x 2cm.
- (vi) There was generalized organ pallor and a collapsed spleen which had a wrinkled capsule.

[11] Dr. Jones concluded that death was as a result of a stab wound to the chest with haemorrhage and shock. The stab wounds were consistent with those caused by an object that had at least one sharp edge, e.g. a knife, since there is a stab of

penetrating compound. The laceration injuries could be caused by other objects that have a sharp edge, e.g. a sword, because there are just cutting motions and not stabs.

[12] One witness, Mr. Dominic Stevens, who was "liming" with other people by Four Mile Alley around 10:30 a.m. under a "guinep" tree, testified that Antwan, Kurt, Kenneth and Leon got up and attacked the bus like "in a hostage situation, two in front, two at the side." Then after a while Kurt and Kenneth left "and returned in about a minute with weapons" - knives and cutlasses. He went and spoke to the driver who was talking to the four co-defendants and took him to about 6 feet away from the incident. He said that he then saw the appellant coming up the Four Mile Alley bending over, picking up stuff like stones and bottles from the ground. The appellant reached to the bus, and "he and Antwan Thompson entered into the bus from the driver's side and they were throwing bottles and stones at the persons in the bus... The others were outside the bus, around the bus. Then after they couldn't get to the guys in the bus, they knock out the back window of the bus... They were trying to get to the persons in the bus from the backside of the bus and at the front. So they were throwing bottles from at the back and at the front, then they couldn't get to them that way, so they broke out the side windows of the bus on either side of the bus... Kurt, Kemba, Antwan, Kenneth, Leon; all five of them were trying to get to the passengers in the bus. After they broke out the side glass, then they were able to reach the passengers in the bus. They had knives and machete so they start stabbing and chopping at the passengers in the bus....Kemba had a knife....The attack on the boys eventually stopped... they ran up in the direction of the shop and into the hills."<sup>9</sup>

[13] Under cross examination Mr. Stevens stated that from a distance of 6 to 7 ft away from where the bus was, he observed what was happening after the initial attack. The throwing of the bottle and stones started when Kemba, the appellant, arrived he stated. Apart from the bottles and stones he was picking up while coming up Four Mile Alley, he saw him with nothing else in his hands. He said that while the

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<sup>9</sup> At pages 37 to 39.

bottles and stones were being thrown, a lot of things were going on at the time so he was not really paying all his attention to Kemba and what was going on there. He said he saw Antwan and Kemba in the front seat throwing bottles and stones. "At the point when they were stabbing and chopping at the passengers in the bus, that is when they knocked out the two side windows of the bus. I saw Antwan, Kemba, Kenneth, Kurt and Leon stabbing and chopping. I could see the weapons connecting with the people in the bus... I saw Kemba stabbing at the guy in the bus."<sup>10</sup>

[14] The evidence of another bystander, Mr. Leon Skeete, who was also by the "guinep" tree, placed the appellant as arriving on the scene after the passengers had got out of the bus, leaving only the deceased and his brother in the bus. He said that the four former co-defendants went for bottles and stones and started throwing them in the bus. When the appellant arrived, the four former co-defendants were trying to get in the bus, and the appellant joined in and started throwing bottles and stones also at the 2 men in the bus. His evidence was: "I saw Kemba pull out a knife. Then he send the rest [of the] boys them to get tools. I mean Leon, Kenneth, Antwan and Kurt. When they came back I saw machetes and knives....Kemba and Kenneth started trying to get in the bus with the knife and machete....The back glass and some of the side glasses were shattered. After the glass shattered they were chopping and stabbing at the fellows. Antwan, Kemba and Kenneth were stabbing and chopping at the fellows in the bus... There was nothing blocking me from seeing what was going on."

[15] There was also the evidence of the passenger Mr. Raul Charles, who testified that Antwan threw a stone in the bus after he and the other three co-defendants had surrounded the bus. Mr. Charles spoke to Antwan who allowed him to get out of the bus. While Mr. Charles was going down the Alley he saw the appellant coming out of a yard with a knife in his hand going up towards the bus. From a clear view, he said that he saw the appellant join the four former co-defendants who were throwing bottles and stones at the bus and moving around the bus. He stated also

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<sup>10</sup> At pages 42 to 43.

that the deceased was hanging out through the passenger window and Kenneth ran around on the right hand side of the bus and stabbed him and he was hanging out, bleeding from his neck. At that time, Kurt, Kenneth, Kemba were chopping and stabbing at the deceased. He said he never saw the appellant go into the front driver's seat of the bus.

[16] On the other hand, Ms. Natalie Norford who was one of the passengers who fled from the bus into the shop, testified that as soon as the bus stopped she saw the four former co-defendants and the appellant whom she knew before, surround the bus and someone swung a bike pump in the bus. She said she jumped from the bus and went into the nearby shop, and from there she heard the bus glass shattering and did not see anything. Under cross-examination she stated that "When they surrounded the bus I didn't see them with anything in their hands. I didn't see Kemba Swanston with anything in his hand. After I went in the shop, I was not looking at what was going on.

[17] Two other prosecution witnesses Mr. Alphanso Maynard and Ms. Beatrice Mills gave evidence favourable to the appellant. Mr. Alphanso Maynard, who was at the scene for three to five minutes after the bus stopped, and who previously knew the appellant for 13 years, stated under cross-examination that he did not see Kemba Swanston with a knife. "I didn't see him coming up the Four Mile Alley with a knife. I didn't see him stabbing anybody. I didn't see him go into the vehicle." Ms. Mills' evidence was that from the shop where she lived, she saw Kemba Swanston at the scene and she did not see him with a knife or a machete, neither did she see him throwing bottles or stones. She also did not see the appellant stab anyone. Further, there were four other witnesses whose evidence did not implicate the appellant as an active participant in the crimes.

### **The Case for the Defendant Swanston**

[18] The appellant in his testimony denied that he had a knife, or that he threw any bottles or stones at or in the bus. Neither did he see anyone throwing bottles and stones. He stated that he left his home and was on his way to the shop to get

lunch as it was lunchtime, and he arrived to find the back glass of the bus out, with Antwan, Kurt and Kenneth whom he played football and sports with, around the left hand side of the bus. He saw the deceased and his brother in the bus. He passed the bus and noticed that the window on the right hand side was broken. He saw the fellows running from the side to the back of the bus and looking in the bus. Kurt had a knife and Kenneth had a machete. He heard a woman say "You all going to kill the man?" and he moved away from under the tree where he was standing.

[19] The four former co-defendants were defence witnesses. Their exculpatory testimony sought to establish that the appellant did not participate in the attack on Mr. Henry and the deceased in the bus. Antwan Thompson testified that the appellant was not around when the bus came up. Antwan said that on seeing the deceased and his brother in the bus with whom they were in a kind of war with, "We attacked - - me Kurt Mills, Kenneth Mills and Leon. Kemba was not around when we attacked...Kenneth and Kurt Mills went for some weapons. Kemba was not there at that time. The weapons came back we attacked the bus. Only two people were in the bus when we attacked Darin Henry and Denis Trotman. I knew those two persons well, we in kind of a war, me, Kurt Mills, Leon Norford and Kenneth Mills. Kemba had no war with them. He was not part of our war with them. I know Kemba a long time. We hail, though we from the same village. I wouldn't say we are friends. Kemba was not there when we attacked the ...[boys] with weapons... I saw Kemba that morning. I saw him about 10 to 15 minutes after the incident started. I saw him when he come up and located himself under the tree on the right hand side with some other people there who were looking on. He didn't have anything with him. I did not call him to come up. I did not see him throw any stones and bottles. I did not see him do anything in relation to the attack."

[20] Under cross examination Antwan replied: "It is not true that I was trying to go through the driver's door with Kemba. I am saying that Kemba came up 10-15

minutes into the attack of the bus. He didn't take part in the attack...Kemba wasn't there... I know who was there with me."

[21] The former co-defendant Kenneth Mills said that the appellant came up the Alley while he was following the deceased and his brother back and forth. Kemba came up and went around the back of the bus. He said that Kemba was around on the right hand side of the bus when the stabbing and chopping was done by himself, Antwan and Kurt while Leon was at the back of the bus. He said that the appellant did not have any weapon, and he did not leave the scene with them. He said also that "Kemba did not throw any stones. He did not stab anyone with a knife. He was not a part of the attack. This thing was a gang related thing. I am in a gang. It is me, Thompson, Kurt Mills and Leon Norford. Kemba is not part of the gang. My gang and the other gang had something against each other. This is something from way back, this is not a just come thing. As far as I know Kemba did not have anything against the other gang."

[22] The former co-defendant Leon Norford testified that when Kemba came up the Alley:

"I was throwing stones at the bus still and Kenneth and Kurt and Antwan were throwing stones and the fellows with the weapons were there attacking. I didn't see Kemba do anything....He went to the back of the bus and he went to the right hand side where people were watching on. The others with the weapons were attacking....I didn't see Kemba on that side of the vehicle then. I didn't see him attack anybody with any weapon. I didn't see him throw any bottles and stones."

[23] Finally, the former co-defendant Kurt Mills said that when he was "throwing chops" at the bus the appellant Kemba Swanston was not present. "I see him about 14 to 15 minutes after. He was on the right hand side. I was on the left hand side... When I spot him he was not doing anything... After I spot him everything had almost wrapped up. When I spot him we were just getting ready to leave the scene." This witness denied that Kemba sent them for weapons, or that Kemba had a knife and was "throwing stabs that day."

## The Directions to the Jury on Joint enterprise

[24] The learned trial judge's summation contains impeccable directions on the issue of mistaken identification evidence in relation to the prosecution witnesses who testified that the appellant had participated in the attack on the victims in the bus. This summation was in terms of the **Turnbull** warning. In dealing with the issue of joint enterprise, the trial judge gave the following directions to the jury at pages 138 to 142:

"The Defence of the Accused ...actually is, he did not participate....I am just suggesting to you that based on the facts it is open to you to find Kemba Swanston participated. Even if you do so, it is still open to you to assess whether or not based on the manner of participation he did not intend to kill on that morning.

"And I will go therefore into the question of joint responsibility, because it is here that we find the issues arising which may help you to understand why it is that these options are open to you. The Prosecution's case is that Kemba Swanston was involved in an attack with a group of persons and you actually saw and heard the other members of the alleged group come and give evidence as to what, according to them, what happened. But you also heard the witnesses for the Prosecution who also say that they saw the group and a number of them say that Kemba Swanston was part of that group. That's the first thing that you have therefore to decide as far as joint responsibility is concerned is whether in fact Kemba Swanston was part of their group - - of a group of persons that attacked the bus belonging to Samuel Stevens - - driven by Samuel Stevens that morning and inflicted the injuries on both of the victims. But you also have to look at it according to the type of detail that has been presented. At what point in time did he become part of the group, was he part of the group from the beginning or from an interval of five minutes later or ten minutes later or fifteen minutes later. All of these are time spans that have been mentioned by various witnesses. And they may impact on whether or not you feel, therefore that he shared a common intention to carry out the act of inflicting very serious harm or in the cause of death of Dennis Trotman and attempting to murder Davin Henry.

"Joint enterprise is something therefore that you need to examine very closely. Basically, to understand this approach that the Prosecution has taken by proving the case and in bringing Kemba Swanston before you. You may, for example, have noticed that there is not a lot of evidence that Kemba Swanston actually stabbed the deceased or Davin Henry, but that he could have is what the Prosecution is really saying. That he was part of a group that actually inflicted those stabs. You heard people say that he was involved in stabbing at them. He was actually one of the persons

doing the stabbing, but as to which one actually inflicted the fatal stab wound, that is not clear as far as the evidence is concerned. Because in a situation of joint responsibility, persons will play different roles or different parts in the exercise, in the attack, so some may have stones, some may have bottles, some may have machetes, some may have knife, but they are all jointly guilty, because the point of the whole exercise was to inflict serious harm to the deceased. And that is how they did it, by a joint exercise between them, making sure at the end of the day that the deceased was fatally injured and that Davin Henry was seriously injured. It implies therefore that there was a plan or an agreement to do this, but those words do not mean, plan or agreement in a formal sense.

"Indeed, if you look at the evidence, there clearly was no time to come up with a formal plan or agreement as to how to execute this attack. And it may explain a few things about the results of it and the way in which the whole thing happened. But it can happen on the spur of the moment that individuals, by the way in which they behave, forming a common intention. So if they are six or seven or five as the case be and they all get up at the same time and start to pick up stones and bottles and throw, it can be inferred from that action that they have all agreed to proceed in that manner and to take responsibility therefore for the results of that particular type of attack.

"Difficulties arise in cases where individuals may go to do something as a group, thinking that they are all empty handed or thinking that they do not intend to use violence and then one individual in the group decides that he or she will use violence and then the others - - the question of whether or not the others are to take the blame arises. It all depends on whether or not they are aware of the intention of that particular individual and go along with it nevertheless. So what are you looking at in this case, whether or not anyone of that group, if you decide or accept that the group did it as a whole including Kemba Swanston. Could anyone of that group say that they didn't know what the others were about? That they didn't know what this attack was trying to achieve and they did not know how it could result - - what it could result in, in other words, what could be the result of this type of attack. Could anyone of them in the circumstances have said that? There is a possibility if you want to look at it from the point of view that Kemba Swanston did not engage in it from the beginning, if you accept that particular version, that he may not have been there when they said, well let's go and get - - "There is only two of them" or whatever it is they said, "Let's go in the bus for them." But, if indeed, if he was there when they had broken windows of the bus, or when they had attacked with cutlass and knife and he participated in spite of the fact of seeing others with cutlass and knife, then it would be proven that he must have joined in with full knowledge that cutlasses or cutlass and knives were being used and still participated knowing how that could end. In other words, knowing the result of use of cutlasses and knives to stab at

or stab, inflict wounds on persons in a situation like that. So it is really ... for you to assess the facts very carefully and to come to a conclusion as to whether or not you see the ingredients, first of all, of a joint action, joint enterprise involving Kemba Swanston. If indeed it was that that he did join in late, what is the effect of that, if any or thirdly, that he didn't participate at all. And if that is the case, can he be guilty of anything, because he would not ...[have] formed any intention, because ...[he] simply would not have been a part of the attack. The essence therefore of joint responsibility, I must say to you is that each -- in this case it is only one Accused, but what they are saying is that this Accused along with others, shared the intention to commit the offences of murder and attempted murder and played some part in that exercise. So you have to be sure, first of all, that Kemba Swanston played a part in the attack and if you come to that conclusion, you still look at the facts you have heard. Kemba Swanston, do you agree or do you feel that he came late, and if so, does that have any impact on the extent to which he could have been part of the plan; as I said, not the plan in any formal sense, but the agreement, the spur of the moment intention to use weapons to inflict the injuries that were inflicted. It is in this regard, therefore that you may also consider that whether Kemba Swanston in his peculiar circumstances, may or may not have intended to kill, regardless of what the others intended to do, because he came late. It is only in that regard, but certainly as long as you accept that he was part of the attack it means he was involved in the offences that are charged, murder and attempted murder."

[25] Also at page 178 of the record the judge said:

"Remember that this issue of joint enterprise is very important and you must decide whether Kemba Swanston was on the scene. Secondly, whether he participated. Thirdly, [at] what point he participated, if he did and how did he participate? And whether or not you are satisfied so that you feel sure he participated in such a way that he was involved with a murder or an attempted murder or indeed that he may have been involved in manslaughter because he didn't really [intend] to be involved in a murder. Not having been part of any scheme to do so."

### **The Submissions of the Appellant**

[26] Mr. Swanston submitted that the witnesses for the prosecution gave conflicting and contradictory stories which on analysis by the Court, was found to be not substantial evidence against him. He questioned whether he could be lawfully convicted on the basis of a joint enterprise existing between him and the other persons who were called co-defendants, although he stood trial alone, and had no

co-defendants at his trial. He submitted that the directions to the jury to deliberate on joint enterprise had created prejudice for him; and that linking him to persons who the jury knew were convicted 8 months prior to his trial was an assassination of his character. Consequently, he was deprived of a fair trial and erroneously convicted for murder on the basis that he was acting jointly with 4 persons who were convicted for manslaughter, although these 4 persons had testified that they had inflicted the wounds to the deceased; and that he (Kemba Swanston) had not acted jointly with them. Mr. Swanston complained that the evidence of these defence witnesses outweighed the prosecution's case and a miscarriage of justice occurred because the trial judge ought to have given, and did not give any special directions to the jury on how they should approach the evidence of the defence witnesses in the peculiar circumstances of the case.

[27] The appellant referred to the Privy Council case **Andrew Hunter and Marlon Moodie v The Queen**<sup>11</sup> in support of his contention that in the absence of any evidence that he had inflicted the fatal wound to the deceased he ought not to have been convicted for murder.

[28] In **Andrew Hunter and Marlon Moodie** the decision turned on a statutory provision in section 2(2) of the **Offences Against the Person Act 1864** as amended in 1992 by which murder in Jamaica is categorized as either capital or non-capital murder according to the definitions under the Act. The appellants were tried and convicted for the capital murder of a member of the security forces acting in the execution of his duties. Specifically, section 2(2) of this Act required that in order to sustain a conviction for capital murder in the case of the appellants:

“... it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it.”

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<sup>11</sup> Privy Council Appeal No. 64 of 2002 (Jamaica).

- [29] The Privy Council held that it is necessary for the trial judge in a case where two or more persons are accused of that type of capital murder, to give a direction about the application to the case of section 2(2). It is not enough for the judge to give directions to the jury about the law of joint enterprise in the circumstances which make it capital murder. The jury must be invited in a case of that kind to reach a separate verdict for each defendant on the question whether he is guilty of murder. But it must also be made clear to the jury that a separate verdict is required against each defendant as to whether the murder which he committed was capital murder as defined by the statute.
- [30] The Privy Council also explained at paragraph 6 of the judgment that the purpose of section 2(2) is to limit the imposition of capital punishment. "Its context is the case where two or more persons are guilty of the same murder, either because of their own act or on the principle of concert or joint enterprise. It seeks to separate out those whose participation in the murder was on the principle of joint enterprise from those who must answer for their own acts by the imposition of the death penalty."

### **Submissions for the Respondent**

- [31] Learned Crown Counsel Ms. Nisbett-Browne submitted that the issue of joint enterprise arose because the evidence adduced showed that other persons were involved in the offences for which the appellant was indicted. The trial judge was therefore obligated to give, and did give adequate directions on joint enterprise, mentioning the other participants in the attack on the deceased and his brother, regardless of the fact that the appellant was tried alone.
- [32] Ms. Nisbett – Browne admitted that the judge gave no special directions to the jury concerning the defence witnesses; and she contended that how the trial judge dealt with the evidence of the defence witnesses was sufficient. The learned trial judge having carefully reviewed the evidence of Kurt Mills, Leon Norford, Antwan Thompson and Kenneth Mills said in his directions (at page 178) to the jury:

“So, foreman and Members of the Jury, that is what you have coming from the defence as oppose[d] to what you have coming from the prosecution. It is for you to determine the facts in the case to decide who you believe and who you don’t believe.”

[33] Earlier on the judge had given general directions (at pages 126 to 127) on how to assess the evidence of all of the witnesses. The judge further gave the following directions (at page 147):

“Indeed, anything that has been said ... on ... behalf of the Accused that may cast doubt on the evidence of the Prosecution, you have to take it and assess it and determine whether or not the Prosecution has been able to rebut that by its own evidence, because it is for the Prosecution to prove the case and not for the Accused to disprove. So anything that they may have raised that may draw inferences that are favorable to the defendant, unless they are equally powerful inferences or actually not equally powerful inferences, but more powerful inferences, more weighty inferences on ...behalf of the Prosecution that rebut those that may have been drawn based on the evidence of the Accused, then you have to accept what the Accused and his witnesses said.”

[34] Finally, she submitted that the evidence for the prosecution was overwhelming despite the conflicting testimony of some of the witnesses, as several persons testified that the appellant was involved in the attack on the victims, and the jury obviously believed those witnesses.

### **Analysis and Conclusions**

[35] The indictment charged the four former co-defendants and the appellant jointly in count one with murder, and in count two with attempted murder. It was unnecessary for the Prosecution to specify in the indictment exactly what function the appellant and the four former co-defendants were performing in committing the crimes. There are no provisions comparable to section 2 of the **Jamaica Offences Against the Person Act** in the **Offences Against the Person Act**<sup>12</sup> under which the appellant was indicted. Unlike the situation in Jamaica, murder in the Federation of St Christopher and Nevis is not categorized by statute as either capital or non-capital.

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<sup>12</sup> Chapter 56, The Revised Edition 1961 of the Laws of St Christopher and Nevis.

- [36] Consequently, apart from the judge giving directions to the jury on the law of joint enterprise, the prosecution in the case at bar were not obligated to satisfy the three additional tests for capital murder formulated by the Privy Council in the previous Jamaican case **Daley v The Queen**<sup>13</sup> and re-iterated in **Andrew Hunter and Marlon Moodie** before the appellant Kemba Swanston could be found guilty of murder, namely: (1) that the appellant Kemba Swanston by his own act caused the death of the deceased Dennis Trotman; (2) that the appellant inflicted or attempted to inflict grievous bodily harm on the person murdered; (3) that the appellant himself used violence on the deceased in the course of furtherance of the attack. In the circumstances these Jamaican decisions cannot assist the appellant in his appeal.
- [37] The issue originally arising on the indictment was whether the four former co-defendants and the appellant had jointly committed the crimes; and not whether the crimes were committed by either the appellant or the four former co-defendants. The four former co-defendants having pleaded guilty to lesser offences on the indictment including manslaughter on the first count, this accounted for how the appellant came to be subsequently tried alone on the same indictment. The appellant's separate trial did not change the issue arising on the indictment. The case for the prosecution remained that the appellant was acting in concert with the other former co-defendants and that he participated in committing the crimes as charged on the indictment.
- [38] That said, it has been well established law for many years that where one of several persons jointly charged pleads not guilty, the other persons who have pleaded guilty will not be co-defendants in the subsequent jury trial proceedings for the defendant who has pleaded not guilty, for the purpose of their status as defence witnesses at his trial. Having pleaded guilty on a previous occasion, the former co-defendants of the appellant were no longer persons charged in the same proceedings afoot, namely the trial of the appellant. The former co-

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<sup>13</sup> [1998] 1 W.L.R. 494 at 501 A-B.

defendants would be treated as ordinary witnesses, like every other witness at the trial, where they are called as defence witnesses.

[39] In the instant case, Kurt Mills, Leon Norford, Antwan Thompson and Kenneth Mills' previous acceptance of full responsibility and for that matter sole responsibility for the crimes charged, did not render it logically impossible for the appellant to be guilty of the offences on the indictment as charged. The case against the appellant was that he was involved in a joint enterprise with these defence witnesses in the attack and injury to the victims. The testimony of these defence witnesses did not implicate the appellant. Their evidence exculpated the appellant, and did not fall within the ambit of any recognized category of evidence which would attract a mandatory or specific warning. The learned judge clearly did not consider their testimony as evidence from a co-defendant or an accomplice who has implicated the defendant, deserving of the customary warning for the jury to examine the evidence of each co-defendant with care because each has or may have an interest of his own to serve.<sup>14</sup> The trial judge's approach was correct.

[40] Apart from the directions given to the jury on how they should assess and evaluate the evidence of all of the witnesses who testified at the trial of the appellant, it would have been better, if the jury had been warned that they must put the conviction of Kurt Mills, Leon Norford, Antwan Thompson and Kenneth Mills out of their minds in deciding whether or not to accept their version of the events. However, this is not a substantial error, and no miscarriage of justice resulted from this omission in my view. Even if the jury heeded such a warning, there was an abundance of evidence on the prosecution's case to negative or rebut the evidence of the appellant and his defence witnesses. The jury rejected their evidence that the appellant did not jointly participate with the others in committing the crimes. Despite the discrepancies on the prosecution's case, the jury were entitled to accept, and by their verdict clearly accepted the evidence of the prosecution witnesses whose testimony fixed the appellant as an active participant in the joint attack on the bus and the victims.

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<sup>14</sup> Regina v Knowlden and Knowlden (1983) 77 Cr. App. R. 94.

[41] Having regard to how the prosecution pitched its case, it was open to the jury to find the appellant not guilty of murder, but guilty of manslaughter depending on their findings regarding the intention of the appellant. That he was found guilty of murder while the other participants were convicted for manslaughter, would offend no established legal principles in my view.

[42] I accordingly reject the appellant's grounds of appeal. He has not appealed against the sentences imposed. I would dismiss his appeal and affirm his conviction for murder.

**Ola Mae Edwards**  
Justice of Appeal

I concur.

**Janice M. Pereira**  
Justice of Appeal

I concur.

**Tyrone Chong, QC**  
Justice of Appeal [Ag.]