

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO 12 OF 1992

BETWEEN:-

1. ALEXIS PRINCE
2. GREGORY VALMONT

Appellant

and

THE STATE

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice  
The Hon. Mr. Satrohan Singh - Justice of Appeal  
The Hon. Mr. Albert N.J. Matthew - Justice of Appeal (Ag.)

Appearances: Mr. Ronald Armour for the First-named Appellant  
Mr. Kevin Williams for the Second-named Appellant  
Mrs. D. Wilson for the Respondent

-----  
1992: September 16,  
1993: March 8.  
-----

J U D G M E N T

SATROHAN SINGH, J.A.

On February 20, 1992, the appellants were convicted by a Jury before Adams J. of the offences of Murder and Robbery. They were sentenced to death on the convictions of Murder but the trial Judge passed no sentence on the convictions of Robbery. They have both appealed to this Court from their convictions and sentence.

The case for the prosecution was that these two appellants, acting on a joint enterprise to rob the deceased Laville Francis went to his home at Salybia, Dominica on the night of October 13, 1989. The first-named appellant entered the house with a gun leaving the second-named appellant by the kitchen as a look out. The first-named appellant then shot and killed Laville Francis and robbed him of \$2,528.00 E.C. The case for the prosecution rested mainly on the evidence of Jeanette Boyd who was present in the house when Francis was shot and robbed, and who purported to identify the first-named appellant as the murderer, despite the fact that at the time of such purported identification the intruder

had on a mask that covered his mouth only, leaving the upper part of his face exposed. The prosecution also relied on statements made under caution by these appellants which were capable of amounting to confessions. These statements were objected to at the trial on the ground that they were not given voluntarily by the appellants in that they were extracted from them under circumstances of fear and oppression. A *voire dire* was held by the trial Judge for the purpose of determining the voluntariness or otherwise of these statements at the end of which the learned trial Judge found both statements to have been made voluntarily, and admitted them in evidence.

Three grounds of appeal were argued on behalf of the appellants:-

- (1) The first-named appellant challenged the learned Judge's ruling at the *voire dire*, on the grounds that he applied the incorrect standard of proof when he admitted his statement, and, that the evidence led was of such a nature that he ought to have disallowed the prosecution from introducing the statement into evidence on the basis that its prejudicial value outweighed its probative value.
- (2) The first-named appellant also challenged the quality of the identification evidence against him.
- (3) The second-named appellant challenged the Judge's directions to the Jury in his summing-up on the issues of constructive Malice and Joint Enterprise.

I propose to deal firstly with the appeal of the first-named appellant and with the admissibility of his alleged confession.

This appellant objected to the admissibility of his statement on the ground that it was taken from him under circumstances of fear and oppression and that the statement was not his. The evidence on record shows that at the time of the taking of the

statement he was lying on a bed in the hospital with a bandaged leg and a drip to his chest, he having been shot by the police some seven days earlier, while they were effecting his arrest. He complained that in those circumstances, he did not know what was happening when the statement was taken and when he put his X mark to it. He also said the police threatened to shoot him in the bed if he did not talk and he believed them.

The trial Judge heard evidence from the prosecution at the *voire dire* including the evidence of one Dr. Paul who testified that on the day the statement was taken he had no difficulty in communicating with this appellant and that the appellant did not complain to him of unfair police treatment. The police witnesses testified that the appellant's leg was in fact bandaged and that he was on a drip that was there since he was arrested but that at no time did they threaten him or use any violence on him.

At the close of the case for the prosecution at the *voire dire*, learned Counsel for the first-named appellant, made a submission to the trial Judge that the prosecution did not discharge the burden placed on them to prove beyond a reasonable doubt that the statement was made voluntarily. The trial Judge responded by reminding Counsel that at that stage, all the prosecution needed to establish was a *prima facie* case and that they had done so. He then gave this appellant the opportunity to testify. The appellant then testified and called witnesses. The Court then ruled the statement admissible as being freely and voluntarily given. The record does not show what standard of proof Adams J. applied when he so ruled. Counsel for this appellant argued that the record being silent on the standard of proof applied by the Judge, and the trial Judge having found a *prima facie* case made out at the close of the case for the prosecution, that the standard of proof he must have applied was the equivalent to show a *prima facie* case only. Learned Counsel for the respondent contended that the trial Judge would have

applied different tests at different times, one at the close of the case for the prosecution and one at the end of the *voire dire*.

It is trite law that at a *voire dire* in a criminal matter, the standard of proof required of the prosecution to establish the voluntariness of a confession was proof beyond reasonable doubt and that proof on a balance of probabilities is unacceptable. Prima facie (evidence) is not a concept that is regarded in law as a standard of proof. It is evidence arising at first sight, based on first impression. Earl Jowitt in his *Dictionary of English Law Second Edition Volume 2* p.1422 says:- "*It is evidence that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed by the Jury unless rebutted or the contrary is proved*". It is evidence which if not answered by the defence, can be used to found a conviction, if at the end of the day it satisfies the Jury or the Judge beyond a reasonable doubt.

I cannot agree with the submission of Learned Counsel for this appellant, that simply because the trial Judge found a prima facie case at the conclusion of the evidence for the prosecution, that in ruling the statement free and voluntary, he did not apply the correct standard of proof i.e. beyond a reasonable doubt.

At the close of the case for the prosecution, the learned Judge satisfied himself that the evidence led raised such a degree of probability in favour of the voluntariness of the statement, that it might have prevailed if he believed it, unless it was rebutted or the contrary proved. The question of giving credence to the evidence had not as yet entered his mind. The appellant then sought to answer that evidence. Having listened to the evidence of the appellant and his witnesses, he then ruled against the appellant. Having thus ruled, this Court must presume, in the absence of anything to the contrary that, having passed the prima facie stage, he would then have gone on to consider whether the

evidence as a whole satisfied him beyond a reasonable doubt as to the voluntariness of the statement. Even if the appellant had elected not to answer the prima facie case, and the Judge had gone on to rule that the statement was freely and voluntarily given, in the absence of anything to the contrary, this Court would have had to presume that the Judge followed the correct procedure and that having found prima facie evidence of voluntariness with no evidence in his rebuttal, he would then have looked at that prima facie evidence to see if it satisfied him beyond a reasonable doubt as to the voluntariness of the statement. Accordingly I find no merit in this ground of appeal. Learned Counsel for the first-named appellant then argued on the factual issue of fear and oppression in so far as it affected the voluntariness of the statement.

The classic formulation of the principle applicable to the admissibility of confession appears in *Ibrahim v R* 1914 AC 599 in Lord Sumner's speech at page 609:

"It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him, unless it is shown by the prosecution to have been a voluntary statement, in the sense, that it has not been obtained from him either by fear of prejudice (excited by threats or by violence or by oppression by a person in authority) or hope of (temporal) advantage held out by a person in authority. This principle is as old as Hale."

The House of Lords in *Commissioners of Customs and Excise v Harz and Power* 1967 1 A.C. 760 voiced its approval of this principle and in *D.P.P. v Ping Lin* 1975 3 AER 175 re-emphasized the importance of determining the question of admissibility of confession by the application of this test.

Oppression in this context, imports something which would tend to sap and has sapped the free will which must exist before a confession can be said to be voluntary. Whether or not there is

oppression in an individual case depends upon many elements and include such things as the length of time intervening between the periods of questioning, whether the appellant had been given proper refreshment or not and the characteristics of the person who made the statement. What may be oppressive as regards a child, an invalid or an old man, or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world. The act of oppression must be such as to excite the confession. *R. v Prager* (1972) 56 CAR 151.

The acts or circumstances of fear or oppression alleged by this appellant, were that the statement was extracted from him whilst he was on a hospital bed with a bandaged leg and a drip attached to his chest, he having been shot in the leg by the police at the time they were effecting his arrest and also, that they threatened to shoot him in the bed if he did not give the statement.

On these allegations, the trial Judge, when he ruled the statement admissible, must have disbelieved the evidence led on behalf of the appellant when he said he was threatened and that he did not know what was happening. His finding on the facts basically would then have been that the statement was taken from the appellant some seven days after he was shot and while he was on a hospital bed with his leg bandaged and with a drip to his chest. I can find no reason to interfere with that finding, the trial Judge having seen and heard the witnesses. That finding coupled with the evidence of the doctor already mentioned, without more, could not amount to the fear alleged or the oppression envisaged in *R. v Prager*. This ground fails.

Mr. Armour, in arguing his final ground of appeal, challenged the quality of the identification evidence led against the first-named appellant and contended that without the statement of this

appellant, a reasonable Jury properly directed would not have convicted on that evidence. I find the Judge's directions to the Jury on identification adequate, but I find consideration of this issue academic having found the confession to be properly admitted.

Accordingly, I would dismiss the appeal of the first-named appellant.

Mr. Williams for the second-named appellant rested his appeal on one ground only, that the learned trial Judge misdirected the Jury on the question of constructive malice and joint enterprise. Learned Counsel contended that the case for the prosecution being one of a joint enterprise to rob, and one of the robbers having apparently ventured outside of the agreed plan, the Judge should have directed the Jury that for them to convict the second appellant of murder, they ought to consider whether he was part and parcel also of a plan to kill in effecting the robbery.

The learned trial Judge gave this direction to the Jury on this issue:

"If you are sure that he went to that house on the occasion in question intending to take part in a robbery, of its occupants and you are sure that when Laville Francis was shot the No.2 accused was acting together with the gunman for the purpose of robbery, then he too would be guilty of murder even though he did not do the shooting himself because in law providing he was acting in concert in relation to robbery, acting together with the man, in relation to robbery, then the act of the gunman becomes the act of the No. 2 accused."

Similar directions are also reflected in other parts of his summing-up to the Jury.

In *Chan Wing-Sui and Others v The Queen P.C. (1984) 3 All E.R. 877*, it was held that a secondary party was criminally liable for an act committed by the primary offender which the secondary party foresaw, but did not intend, if he took part in an unlawful joint enterprise and it was proved beyond reasonable doubt that he contemplated and foresaw that the primary offender's act was a possible incident of the execution of the planned joint enterprise.

Sir Robin Cooke makes this observation at p. 881:-

"That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

In *Hui Chi-Ming v The Queen P.C.* (1991) 3 WLR 495, Lord Lowry in delivering the judgment of their Lordships referred to the word "authorisation" used by Sir Robin Cooke above and considered that Sir Robin used this word to emphasise that mere foresight was not enough. His Lordship considered that the accessory in order to be guilty, must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight still have participated in the enterprise.

In *Archbold Pleadings Evidence and Practice in Criminal Cases* 1992, Edition at p.2056, paragraphs 19-20 and 19-31, the learned Author, having reviewed the authorities, crystallised the following principles on Joint Enterprise.

"A person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. There is however a wider basis for criminal liability namely, the principle whereby a secondary party is criminally liable for acts by the primary offender of a type which he foresees but does not necessarily intend. That principle meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

Public policy requires that where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are

to be carried, and in the event they are in fact used by his partner(s) with an intent sufficient for murder, he too will be guilty of that offence if the Jury are sure beyond reasonable doubt that the defendant contemplated that in carrying out a common unlawful purpose (for example, robbery) one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm. It is what the individual accused in fact contemplated that matters.

In some cases it may be necessary for the judges to give the Jury more help, viz. where the accused regarded the risk as so remote that he disregarded it. Although a risk of killing or serious bodily harm has crossed the mind of a party to an unlawful enterprise, it is right to allow for a class of case in which the risk was so remote as not to make that party guilty of a murder or intentional causing of grievous bodily harm committed by a co-adventurer in the circumstances that in the event confronted the latter. But if the party accused knew that lethal weapons, such as a knife or a loaded gun, were to be carried on a criminal expedition, the defence should succeed only very rarely.

In cases where an issue of remoteness does arise it is for the Jury to decide whether the risk as recognised by the accused was sufficient to make him party to the crime committed by the principal. No one of various available formulae is exclusively preferable, e.g. a substantial risk, a real risk, a risk that something might well happen. The question is not one of semantics. What has to be brought home to the Jury is that occasionally a risk may have occurred to an accused's mind, fleetingly or even causing him some deliberation, but may genuinely have been dismissed by him as altogether negligible. If the Jury thinks there is a reasonable possibility that the case is in that class, taking the risk in such circumstances should not make the accused a party to such a crime of intention as murder or wounding with intent. The Judge is entitled to warn the Jury to be cautious before reaching that

conclusion.

Conversely, if such a man whilst agreeing to take part in a burglary does not contemplate the use of violence, in that case, if and when it erupts is something quite outside what he anticipated, then that man is not guilty of either murder or manslaughter. If a man goes out with others to commit a burglary and he foresees as a probability that unlawful violence will be used during the burglary by one or more of his accomplices, then if such violence when it occurs causes death, he is guilty of at least manslaughter."

In the instant matter, for the second-named appellant to be properly convicted of murder, the prosecution had to satisfy the Jury beyond a reasonable doubt, not only that this appellant was acting in concert with the first-named appellant to rob the deceased but also that he had foresight that in effecting such robbery the first-named appellant intended to use the violence he in fact used and that with such foresight he still participated in the enterprise. Unfortunately, the learned trial Judge's directions to the Jury on this issue are not as clear as they ought to have been.

The Court was however invited by Counsel for the respondent to apply the provisions of Section 38(1) of the Eastern Caribbean Supreme Court (Dominica) Act Chapter 4:02 and dismiss the appeal if it considers that no miscarriage of justice has actually occurred. On that issue the only evidence from the prosecution against this appellant was his statement under caution.

In that statement he said:

*"Well the night me and Alexis come out by Alexis and go by wadon. So when we reach there now Dan go and pull the door and Alexis go inside the house. Alexis open another door and Dan go inside. I stayed outside by the kitchen. Alexis shoot the man inside the house and go in the drawing room. Dan ask Alexis why he shoot the man. Alexis say is his mind to shoot the Lady. Dan tell him not to shoot the lady. Alexis push the lady*

*outside and she start to shout. Alexis take the money under the man head on the bed and we go away. We share the money. Alexis gave me a portion of the money and I go my way".*

By way of defence this appellant made this statement from the Dock:

*"They told me they shot the man and they give me some money. I did not know if they had planned to shoot the man. I took the money and hide it.".*

The murder weapon, a long gun, was also evidenced before the Jury and this Court had the opportunity of seeing same. Because of its size, it was open for the Jury to have reasonably concluded that it could not have been effectively hidden from this appellant and that he must have known when they went to commit the robbery that the first-named appellant had this gun with him. This would then have placed this appellant in joint possession of the weapon. However, a finding of such joint possession by the Jury would not *per se* be enough to support a verdict of murder or manslaughter. *R v Reid*. The intent with which this appellant was in joint possession of the weapon with the others would have to be looked for and would have to be inferred from the circumstances.

Given the circumstances of the instant matter, and with robbery being an offence intrinsically involving the use of violence, the fact of such joint possession of the murder weapon, would allow of an inference that there was an intent to do harm of some kind. As against that there is this appellant's statement from the dock that he *"did not know if they had planned to shoot the man"* and, there is in his statement to the police that he was merely to be the "look out" in the enterprise and that after the first-named appellant shot the deceased one Dan (another alleged participant in the enterprise) asked that appellant *"why he shoot the man"*. All this material, taken cumulatively would have left a Jury properly directed with options as to their verdict depending on what they believed. And, this being purely a question of fact for the Jury to decide, this Court cannot with certainty say, what

verdict would have been returned by the Jury, had they been properly directed. We therefore are not disposed to apply the proviso as requested by Learned Counsel for the respondent. We would have to allow the appeal of this appellant and set aside his conviction of the offence of murder. We feel however that the interests of justice require that there should be a new trial of this appellant for this offence and we so order. Learned Counsel advanced no arguments against this appellant's conviction of the offence of robbery and, having perused the record of appeal we find no justifiable reason to interfere with that conviction. Accordingly we would affirm that conviction.

In conclusion, the appeal of the first-named appellant is dismissed and the convictions and sentence affirmed. The appeal of the second-named appellant against his conviction of the offence of murder is allowed, the conviction is quashed, the sentence is set aside, and a new trial is ordered for that said offence. His appeal against his conviction of the offence of robbery is dismissed and the conviction is affirmed.

SATROHAN SINGH  
Justice of Appeal

I concur.

SIR VINCENT FLOISSAC  
Chief Justice

I concur.

ALBERT N.J. MATTHEW  
Justice of Appeal (Ag.)