Privy Council Appeal No. 53 of 1992

(1) Errol Dunkley and
(2) Beresford Robinson *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 27TH JULY 1994, DELIVERED THE 4TH OCTOBER 1994

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD BRIDGE OF HARWICH
LORD JAUNCEY OF TULLICHETTLE
LORD MUSTILL
LORD NOLAN

*[Delivered by **Lord Jauncey of Tullichettle**]*

The appellants were convicted of the murder of Orville Wright on 21st July 1988 in the Circuit Court Division of the Gun Court and sentenced to death. Their appeals to the Court of Appeal were dismissed on 16th November 1990 and they now appeal by special leave to the Board. At the conclusion of the hearing their Lordships indicated that they would humbly advise Her Majesty that the appeal of Dunkley should be allowed and that of Robinson dismissed and that they would give their reasons later. These reasons now follow.

The events leading up to the murder fell naturally into two stages:-

(1) At about 0300 hours on 16th January 1986 a number of men, one of whom was armed with a sub-machine gun, broke into a combined house and shop in Mountainside, Saint Elizabeth, where they stole various articles including a green barrel-bag and a bracelet belonging to one of the occupants, Sharon Rose.

(2) About 1600 hours on the same day villagers in a village some two miles away raised a hue and cry and chased four men who were believed to be the robbers into a morass. The deceased, who was one of the villagers, was leading the pursuit armed with a machete when one of the four men shouted some words including "shoot the man" whereupon three shots were fired. One hit the deceased causing injuries from which he subsequently died and another struck a witness, Shenriff Smith, in the stomach.

The principal evidence against Dunkley was that of Kerrol Allwood who saw him for about half a minute in tall grass in the morass and who identified him at an identification parade held on 18th February 1986. Sharon Rose also identified him as being present at the robbery and at a subsequent identification parade also held on the same date. Robinson was not identified as having been in the morass but there was other evidence linking him with the locus:-

(1) He gave a caution statement which he claimed to have been forced to sign by being beaten. However, after a voir dire it was ruled to be admissible by the trial judge. In that statement he admitted being present both at the robbery and in the morass at the time of the shooting and said:-

> "Ah me and four youth come down yah, before that we plan fe come down yah from the Wednesday. Me come check the youth Chinaman. After me go out at the bus stop, me see Chinaman, Youth and Dunkley in a the bus; me ask them whey them a go and them say, come man we a go country, St. Elizabeth, come man; me go in a the bus with them; them say me no fe talk to them when me come in a the bus; me never have no fare so Dunkley four dollars and me meck up me fare; everybody else pay them fare. We reach country about 8.30 p.m. in a the night; me no know whey we come off, we walk pon one straight road fe about five miles. Dunkley go a him sister yard; she is indian too, you know. Wednesday in a the night Dunkley say we a go a one man yard and we all go to the yard and the man fo the yard fire some shots after we and Popsie who a carry the machine gun open up some shot and we run. Before we go a this yard, when them fire after we, we go a one yard where Dunkley ask for Mr. Rowe; the people dem start bawl out fe thief and Dunkley said, come we lef yah so and we go a the yard where them shoot after we. We leave and go a the shop and the bar, and Popsie beat down the shop door and we go in and we robbed the people dem; youth, Chinaman and Dunkley tie up the people dam and we teck what we want. We left and walk on the road, and dem say day a alight out and we cant go out and we go in a the bush and hide. We in a the bush until 4.00 p.m. in the evening and dem say dem ah go pick up the things what them hide a one next spot, and me hear one man bawl out say, 'see dem yah' and we run.

Some youth back we up and one of them grab on Dunkley bag and Popsie fired some shots pon the youth and some other boys. The youth what grab on Dunkley drop, and me and my friend Youth run and later me no know what happen to youth.

Early in the morning me see a man and woman on the roadside and them tell me say a bus soon come fe go Town and me wait and take it. When me go pon the bus, me see Popsie, but me no talk to him. Him come off a Mandeville Square; lef him shoes, windbreaker and some other things. Me travel along pon the bus and police hold me in a the road block a Williamsfield. Signed Beresford Robinson, witness M ? date 19/1/86."

(2) When arrested at 0630 hours on 17th January 1986 he was found to be wet and muddy from the waist down but dry above and his explanation therefor to the arresting officer was that it had been raining. In an unsworn statement from the dock he repeated this explanation and claimed that he knew nothing about the robbery or the events in the morass.

(3) When arrested he was found to be wearing a bracelet which was identified by Sharon Rose as having been stolen from her during the robbery.

(4) He was also identified by Sharon Rose as being present at the robbery and at a second identification parade which she attended on 18th February 1986. There was also Rose's evidence that a green barrel-bag had been stolen from her during the robbery and evidence from Allwood that a bag of similar description was being carried by one of the four men in the morass.

Dunkley's appeal.

At the outset of the trial Dunkley and Robinson as well as a third accused, Williams, who was acquitted, were represented by counsel. However late in the afternoon of the first day of the trial Dunkley's counsel withdrew from the case in the following circumstances. A police inspector, Henry, was giving evidence about the circumstances in which Shenriff Smith had made his identification of Dunkley at an identification parade. It appeared from this evidence that Smith failed to identify Dunkley on his first sight of the parade but had returned to view the parade on a second occasion when he had made a positive identification. The Crown sought to produce the form which Smith had signed on the second occasion. Mr. Frater, for Dunkley, objected and the following interchange took place:-

"MR. FRATER: I am saying it is so obviously irregular to have two identification parades.

HIS LORDSHIP: Is that the basis ...

MR. FRATER: Will you please hear me?

HIS LORDSHIP: Mr. Thompson, any objection?

MR. THOMPSON: No, m'Lord.

HIS LORDSHIP: Any objection, Mr. Morris?

MR. MORRIS: No, m'Lord.

HIS LORDSHIP: Very well. The form is ...

MR. FRATER: Is Your Lordship not hearing me?

HIS LORDSHIP: Mr. Frater, what you are saying does not make sense to me.

MR. FRATER: I am very sorry for that, m'Lord.

HIS LORDSHIP: The form is admitted in evidence as Exhibit 7.

MR. FRATER: I am objecting very strongly; and if Your Lordship is not hearing me on my objection, I ask that I be withdrawn from this case.

HIS LORDSHIP: You may do as you please.

MR. FRATER: I certainly will do that. You can't say I must not make a speech in my objection, that is what I am doing.

MR. McBEAN: Inspector ...

HIS LORDSHIP: You are going to tell me about irregularity, I am speaking about the admissibility of the form.

MR. FRATER: Does Your Lordship want to hear me?

HIS LORDSHIP: You have indicated that you are withdrawing, and I say you may do as you please.

MR. FRATER: That, I will do then; I certainly will do that.

(Mr. Frater withdraws at 3.21 p.m.)

MR. McBEAN: On the 28th June, 1986, at about 12.50 p.m. did you conduct an identification parade?

A. Yes, sir.

Q. Where did you conduct this identification parade?

HIS LORDSHIP: Mr. Dunkley -

ACCUSED DUNKLEY: Yes, sir?

HIS LORDSHIP: Your lawyer has abandoned you in the middle of the case. So the case having been started, from here on, you are on your own. You will have to defend yourself. I will give you every opportunity and give you every assistance that I can.

ACCUSED DUNKLEY: M'Lord, I am not capable of defending myself.

HIS LORDSHIP: That is not my problem. I can do nothing. You had a lawyer and he has abandoned you.

MR. McBEAN: Yes, inspector, on the 28th of June, 1986, about 12.50 p.m., did you conduct an identification parade?"

It is apparent from this transcript that the trial proceeded without pause after Mr. Frater's withdrawal until it was adjourned for the day at 1612 hours. This was to say the least a most unfortunate incident. The following further incident relevant to this appeal occurred a few minutes later during the examination-in-chief of Inspector Henry:-

"MR. McBEAN: Now, at the parade at Black River on the 18th of February, 1986, - let us go back there - apart from Mr. Shenriff Smith - well, did you see Mr. John Hall on any of those parades that day at Black River?

A. Mr. John Hall?

Q: Yes, at Black River.

A: Yes, sir.

Q: Did he come on any of the parades?

A: Yes, sir, he came on the parade with Errol Dunkley.

Q: With?

A: For Errol Dunkley, sir.

Q: Did he identify ...

HIS LORDSHIP: Wait now, you intend to call Mr. ...

MR. McBEAN: M'Lord, I, at this stage, don't intend to call him, just make him available. Just the fact of identification.

HIS LORDSHIP: No, you can't do that ... If you are not calling the man, how can you do that?

MR. McBEAN: Very well, m'Lord, I take your point, m'Lord."

Just before the conclusion of the first day's proceedings Crown counsel stated that the only witness outside was John Hall and the following interchange then took place:-

"HIS LORDSHIP: So what is the position with Mr. Hall then?

MR. McBEAN: He is being called, M'Lord.

HIS LORDSHIP: Mr. Hall, stay where you are. You are to return to court tomorrow morning at ten o'clock.

MR. HALL: Yes, sir."

In the event the Crown did not call Hall and it is hardly surprising that the defence did not accept the Crown's offer to make him available. Their Lordships are at a loss to understand the conduct of Crown counsel in this matter. To have made the statement "just the fact of identification" when there was no intention to call Hall was highly improper. Either the statement should never have been made or once made Hall should have been called by the Crown. Offering him as a witness to the defence in no way undid the harm which had already been done by the statement.

For the rest of the trial Dunkley was unrepresented. It is the case that the trial judge gave him a certain amount of help but he obviously could not enter the arena and cross-examine witnesses whose evidence might be unfavourable. That Dunkley was very much at sea was apparent from his plea, repeated on several occasions, that he did not know how to represent himself, a plea which the judge answered by saying that this was a matter between Dunkley and his lawyer and that however many times he said it the case was still going on. Although Mr. Frater cross-examined Allwood he had departed before Sharon Rose gave evidence. The trial judge fairly summarised Rose's evidence to Dunkley in so far as it affected him but Dunkley's cross-examination thereafter extended only to one and a half pages of the transcript. Rose's evidence was given after the voir dire which resulted in the admission of Robinson's caution statement and was of considerable importance to Dunkley

since it linked him at the robbery to Robinson who had admitted in his caution statement that he was later present in the morass.

Mr. Mansfield Q.C., for Dunkley, submitted that the withdrawal of Mr. Frater and the conduct of the trial thereafter had caused such prejudice to Dunkley that there was a real risk that a substantial miscarriage of justice had occurred. He referred first to section 20(6)(c) of the Constitution of Jamaica which provides:-

> "Every person who is charged with a criminal offence -
>
> ...
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;"

And to Article 14(3)(d) of the International Covenant on Civil and Political Rights which provides:-

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

He also referred to (1) *Robinson v. The Queen* [1985] 1 A.C. 956 in which it was held that a defendant in a murder trial did not have an absolute right under section 20(6) of the Constitution of Jamaica to representation after counsel had withdrawn in the course of the trial, and (2) the subsequent decision of the Human Rights Committee under the Optional Protocol of the International Covenant on the Civil and Political Rights in Robinson's case [*Robinson v. Jamaica* 30th March 1989 Communication No. 223/1987] to the effect that given the provisions of Article 14(3)(d) of the Covenant it was axiomatic that legal assistance should be available in capital cases and that the absence of counsel constituted unfair trial. Mr. Mansfield argued that in these circumstances a defendant facing a capital charge had an absolute right to legal representation throughout the trial, a proposition which was further developed by Mr. Engelman for Robinson who relied on the fact that the United Kingdom was already a party to both the European and the Universal Declarations of Human Rights prior to the making of the Order in Council which in 1962 created the Jamaican Constitution, as determining the construction which fell to be placed upon the word "permitted" in section 20(6)(c) of the Constitution.

Although Jamaica is a signatory to the Covenant it has not been incorporated into Jamaican law which accordingly remains as stated in *Robinson v. The Queen*. Their Lordships are satisfied that there is no absolute right to legal representation throughout the course of a murder trial although it is obviously highly desirable that defendants in such trials should be continuously represented where possible. It is unnecessary to say more in relation to this argument.

Mr. Mansfield developed his argument further by referring to certain further respects in which Dunkley had suffered prejudice as a result of being unrepresented. It is sufficient to refer only to some of these matters:-

(1) The fact that Dunkley had been given confusing advice by the judge at the stage at which a motion to withdraw the case from the jury on the ground of lack of evidence would have been made. It is unnecessary to detail the advice which was given because their Lordships have no doubt that although it was to some extent confusing there was at that stage ample evidence to go to the jury and that any motion by Dunkley or counsel on his behalf would have failed.

(2) The inadmissibility of the evidence of Shenriff Smith as to his identification at the identification parade. This vitiated the trial which should have been stopped as soon as it emerged that he had only identified on the second occasion. Their Lordships do not agree. The circumstances of the identification clearly reduced its value but did not render the evidence thereof inadmissible. An appropriate warning from the trial judge as to its value, if any, would have been sufficient. In the event the judge went further and directed the jury to disregard entirely Smith's identification evidence. He cannot be criticised for so doing.

(3) The general prejudice of being left high and dry in the middle of a trial, lacking the ability to cross-examine witnesses and argue points of procedure.

(4) The particular prejudice of being unable adequately to cross-examine Sharon Rose.

(5) The prejudice resulting from Crown counsel's statement about Hall and the trial being allowed to continue without Hall being called as a witness, and

(6) the failure of the trial judge to exercise his discretion when answering Mr. Frater's request to withdraw by saying "You may do as you please".

There is undoubtedly substance in Mr. Mansfield's submission. In the first place where counsel appearing for a defendant on a capital charge seeks leave to withdraw during the course of the trial the trial judge should do all he can to persuade him to remain. If the proposed withdrawal arises out of an altercation with the trial judge

he should consider whether it would be appropriate to adjourn the trial for a cooling off period. The trial judge should only permit withdrawal if he is satisfied that the defendant will not suffer significant prejudice thereby. If notwithstanding his efforts counsel withdraws the judge must consider whether, and if so for how long, the trial should be adjourned to enable the defendant to try and obtain alternative representation. In this case although the judge did not exactly encourage Mr. Frater to withdraw he made no attempt to dissuade him and it does not appear that he considered the possibility of Dunkley trying to obtain alternative representation. Indeed he allowed the trial to proceed as though nothing had happened without even so much as an adjournment until the following morning. Their Lordships can sympathise with the anxiety of the judge to proceed with a trial whose start had already had to be postponed on many occasions but where a defendant faces a capital charge and is left unrepresented through no fault of his own the interests of justice require that in all but the most exceptional cases there be a reasonable adjournment to enable him to try and secure alternative representation. In the second place, once it had become apparent that Hall was not going to be called by the Crown, counsel for Dunkley should have objected strongly and moved that if he was not called the trial should be stopped and a retrial ordered. Dunkley could not be expected to know that such a motion should be made. Their Lordships do not however consider that the trial judge can be faulted for not giving the jury a specific direction about the Hall statement. He had already stated in front of the jury to counsel for Williams shortly after the statement had been made that not one shred of evidence had been adduced about Hall doing anything at the parade and there was therefore a good deal to be said for the view that he adopted the most sensible course by leaving the matter well alone thereafter. Nevertheless the matter was before the jury and may well have influenced their deliberations. In the third place Mr. Frater's withdrawal deprived Dunkley of the advantage of skilled cross-examination on his behalf of Sharon Rose.

The cumulative effect of these three matters is such as to lead their Lordships to the conclusion that the conviction of Dunkley was unsafe and cannot be sustained. Their Lordships would, however, wish to make it clear that while the facts in this case warrant the foregoing conclusion it by no means follows that the same consequences would flow when the appellant's only complaint was that he had been left unrepresented at some stage in a trial.

Robinson's appeal.

Mr. Engelman advanced two main arguments in support of this appeal:-

(1) That given Dunkley's absolute right to representation throughout the trial the absence of such representation deprived Robinson of a fair trial. Had Dunkley been properly represented, it was argued, his counsel could perhaps have shaken Sharon Rose's evidence in cross-examination and could have weakened the Crown's case on common design. This argument is not easy to understand. In the first place Robinson was throughout represented by counsel who was well able to challenge Sharon Rose's evidence on identification during the robbery and to attack the Crown's case on common design since there was no suggestion that Robinson was the man with the gun either at the robbery or in the morass. In the second place if Dunkley had elected to defend himself the same argument could have been put forward. Thus it would logically follow that where one of two co-accused chooses to defend himself and common design is in issue the accused, who is represented, can never receive a fair trial - a result which is manifestly absurd.

(2) That the direction of the trial judge on common design was inadequate in a situation where the intent of the actor depended upon his reaction to a third party intervention. The judge directed the jury at some length and on a number of occasions as to how to approach the question of common design. Their Lordships do not consider that his directions could be faulted so far as they went and they did not understand that Mr. Engelman was criticising these directions. His criticism was directed to the fact that no specific direction had been given to the jury in relation to the intervention of Orville Wright with his machete. This was, he submitted, an overwhelming supervening event which removed the action of the gunner from the common design of robbery (*Regina v. Anderson* [1966] 2 Q.B. 110 at page 120D). Therefore the jury should have been directed to consider whether the men in the morass could have anticipated the use of a weapon by one of their number to ward off attack by Wright. Although self-defence was mentioned by the judge there was no suggestion that Dunkley, who was being pursued, fired the fatal shots and the evidence suggests that another person was responsible therefor. Self-defence therefore does not appear to be relevant. According to Robinson's caution statement, which the jury must have accepted as voluntary and accurate, one Popsie, who had been with the group both during the robbery and in the morass, had already fired the machine gun prior to the robbery at someone into whose yard they had gone and who had fired at them. The gun was not fired during the robbery but Popsie, according to Robinson, fired the fatal shots in the morass. To suggest, therefore, that the firing of the latter shots was something outside the common design is quite unrealistic, particularly having regard to the fact that one of the four men shouted "shoot the man" whereupon the shots were fired. The gang set off armed with a machine gun which they had used once when fired upon, which they had not required to use when robbing Sharon Rose because there was no resistance, but which they did not hesitate to use when pursued by Wright

into the morass. It is perfectly obvious that the use of the gun in the morass to shoot their pursuers was all part of the common design to rob and thereafter evade capture. The action of Orville Wright in pursuing with a machete was no such overwhelming supervening event as to remove the action of Popsie from the scope of the common design. It follows that the direction of the trial judge in relation to common design was entirely adequate. Robinson's appeal therefore fails.

Before the Court of Appeal Dunkley and Robinson were separately represented. Carey J.A. who gave the judgment of the court, rightly in their Lordships' view, criticised the conduct of Mr. Frater and of the trial judge in telling the former "You may do as you please". The court nevertheless concluded that in all the circumstances the trial judge was justified in not adjourning the trial on the departure of Mr. Frater. It is apparent, however, that the real question addressed to the Court of Appeal on behalf of Dunkley was whether he had been prejudiced by the failure of the judge adequately to assist him in certain specified respects. The Court of Appeal rejected these submissions holding, correctly in their Lordships' view, that while the judge had a duty to secure a fair trial he could not act as defence counsel. The points taken by Mr. Mansfield as to prejudice to Dunkley arising from Crown counsel's statement about Hall and the lack of skilled cross-examination of Sharon Rose on his behalf do not appear to have been taken. In these circumstances it may be that the Court of Appeal would have come to a different conclusion had these points been before them.