

**BARBADOS:**

**[Unreported judgment]**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Criminal Appeal No 36 & 37 of 2000**

**BETWEEN:**

**JUNIOR CHRISTOPHER LOWE**

**DAVID O'NEAL WILLOUGHBY**

**(Appellants)**

**AND**

**THE QUEEN**

**(Respondent)**

**Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice Errol Chase and The Honourable Mr. Justice Frederick Waterman, Justices of Appeal.**

**2001: July 27th & 30th.**

**Mr. Ralph Thorne for Appellant Lowe.**

**Mr. Andrew Pilgrim in association with Ms. Peta-Gay Lee-Brace and Ms. D. Scarlett for Appellant Willoughby.**

**DECISION**

On October 13, 2000 Junior Lowe and David Willoughby were convicted of the manslaughter of Tito Skinner on February 20, 1998 and on November 8, 2000 they were each sentenced to 14 years imprisonment. Skinner died on February 20, 1998 immediately after being shot. The case for the Crown was that he received the fatal injury in a room at a house in St. Michael where he had gone to buy a gun, that he was alone in the room when Lowe and Willoughby entered the room, each armed with a gun, pursuant to a plan, not to sell Skinner a gun but to rob him, and that one of them shot and killed him. The case against Lowe was based on a written statement (Exhibit D) which the police testified he had given:-

"... I went by de old house and I see Blacks and I hand he de weed. Nuff more men did out there so Black call me one side and tell me that he got a man from St. Lucy that want to buy a gun but we tekking he money and gine mek he lef' de place, no gun ain't passing. I see de man in de house sitting down pon a bicycle and I went in de front and lie down pon a sheet .... Then .... came dey riding a bicycle that belong to one of the fellas that did dey .... Blacks went off in de yard and talk and then them come back in. .... call me and he and me went by de side door and he tell me that de man got de money 'pon he and he got de gun but he ain't passing none, he gine show de man how he is a serious man. I tek out my gun and he pull out a .38. He pull back de hammer 'pun de gun and I do de same thing. I really didn't mean nutting by pulling back de hammer 'cause I did doing it all day. Me and .... went to de fella. He did in de bedroom sitting down 'pon a chair. Me and .... pull 'pun he and when he went to get up .... shoot he. I did real frighten and I ain't know if I miss and pull my trigger. I still pointing at he but .... run and he hold me and start stabbing and we fall down and I kick he off. I get up and stumbled through de door. I still had my gun holding. When I get outside I fall down but I get back up and Early Blacks did dey and I give he the .32 I had. I stumble and went up de road and fall down by a wall."

The case against Willoughby was based on evidence given by civilian witnesses Tetron Alleyne, Linwall Walkes and Wendell Sobers.

It was that

- (i) Skinner was in the room alone;
- (ii) Willoughby and Lowe, both armed with guns, went into the room to rob him;
- (iii) Willoughby and Lowe both shot Skinner in the course of the robbery; and
- (iv) Skinner died from a shot fired by one of them in the course of the joint enterprise to rob him.

When the prosecution closed its case, Lowe made an unsworn statement in which he told of being stabbed in the back by a man who told him that he had come for the money. He spoke of hearing gunshots, of the man starting to stab him and of his running. He told the police that he had not shot anyone because he had no gun, he did not kill anyone, he did not know anything about that. He had been in no condition to give the police a statement.

Willoughby also made an unsworn statement in which he said that he had told the police the truth. He did not kill anyone. In a statement to the police that was admitted in evidence he told of the incident in which Skinner was killed (Exhibit C):-

"I was in the back room at the house. I was putting food in a bowl to eat and I hear somebody holler. When I looked around I saw tall fella making stabbing motions at X with something nickel in his hand. Then I heard a shot lick. Someone, X drop down and the fella sit down 'pon he and start to stab he. I heard two more shots lick and I run to the door like everyone else. I never had any gun. I didn't shoot nobody nor take part in shooting anybody."

The grounds of appeal filed on behalf of Lowe are:-

1. The sentence is excessive.
2. The trial judge erred in law in disclosing in the presence and hearing of the Jury that Lowe had given evidence during the voir dire which conflicted with the statements made during his unsworn testimony before the jury and in so doing prejudiced Lowe and deprived him of a fair trial.
3. The trial judge misdirected the jury as to the defences available to Lowe and failed to adequately direct the jury as to the defences so available and so pleaded and further erred in that he
  - (a) failed to direct the jury as to the defences implied in the statement attributed to Lowe;
  - (b) withdrew the defence of self-defence as a defence available to Lowe;
  - (c) directed the jury that Lowe was not pleading the defences of self-defence, provocation and accident and any or all of the said defences and in so doing deprived Lowe of a fair consideration of the defences available to him.
4. The trial Judge erred in law in directing the jury as to the burden of proof and standard of proof on an accused person and in doing so may have led the jury into shifting that burden from the prosecution.
5. The trial Judge erred in law in directing the jury as to the offence of involuntary manslaughter
8. The trial Judge erred in disclosing the result of the voir dire to the Jury
9. The trial judge erred in directing the jury to consider a joint enterprise to rob as constituting the offence before the Court.
10. The trial Judge erred in failing to adequately direct the jury as to how they should consider the written statement attributed to Lowe.
11. The trial Judge erred in directing the jury to draw inferences on the basis of contested evidence in such a manner as if the said evidence was uncontested.
12. The trial Judge erred in failing to properly exercise his discretion to exclude the written statement attributed to Lowe;
13. The verdict is against the weight of the evidence.

The amended grounds filed on behalf of Willoughby are:-

1. The trial Judge's directions on manslaughter were confusing and misleading;
2. The trial Judge failed to put the defence of Willoughby;
3. The trial Judge erred in law when he directed the jury to consider evidence against Lowe as evidence against Willoughby;
4. The trial judge erred in law when he failed to give adequate directions to the jury on circumstantial evidence;
5. The verdict is against the weight of the evidence;
6. The trial judge erred in law when he directed the jury that they could not reach a manslaughter verdict on their initial retirement.

Lowe's appeal

Ground 2: The irregularity to which counsel refers is that the judge referred to an answer "I can't recall" given by the appellant Lowe during cross-examination on the voir dire. This could not have prejudiced Lowe in any way.

Ground 3: This was a manslaughter verdict and provocation reduces murder to manslaughter, so that even if there had been a culpable failure to direct on provocation, no verdict more favourable to Lowe could have been returned. Neither self defence nor accident was available on the evidence.

Ground 4: There is no danger whatever that the jury may have been misled on the burden of proof.

Ground 5: The jury would have returned the manslaughter verdict on the basis of the following directions:

"If on the other hand you find that you are not satisfied that there was an intention to kill, you are satisfied that there was an intention to cause harm, serious bodily harm, or, as I read to you, some kind of harm would result from the unlawful act of assault, or whether or not the harm was intended, it is immaterial and dangerous and whether the accused knew that the act was unlawful and dangerous and whether or not he intended harm. If you accept what was said, that they were going to take Tito, if you accept that evidence, and if you accept that the accused were part of that plan, you find that there was such a plan, then you will bear in mind what I have said in relation to joint enterprise in relation to involuntary manslaughter. In other words, if you think that the accused intended some harm which all sober and reasonable people would inevitably recognize subjected the deceased to at least the risk of some harm resulting then in those circumstances you would consider a verdict of manslaughter..."

There is no merit in this ground.

Ground 8: Objection having been taken to the admission of the statement, the jury should have been

informed that a matter had arisen which required their withdrawal and the objection should have been heard in their absence. If the objection was overruled the case should have continued without reference to what had taken place in the jury's absence. It appears therefore that the current practice was not followed.

Ground 9: There is no substance in this ground. The case for the Crown was that there was a common design or joint enterprise by Lowe and Willoughby to rob Skinner and Skinner was killed in the execution of that design or enterprise.

Ground 10 to 12: These grounds are without merit.

Willoughby's appeal

It is unnecessary to deal with the grounds seriatim.

In essence the case against Willoughby was in the evidence of the civilian witnesses Alleyne, Walkes and Sobers and the jury had to determine whether they accepted the evidence of these witnesses or Willoughby's statement to the police. The summing up made it quite clear that Willoughby's defence was that he was not implicated in Skinner's killing.

It is evident that the jury rejected the unsworn statements of the appellants of non-participation in the robbery and death of Skinner and acted upon the evidence of the police officers and the civilian witnesses that they carried out an armed robbery on Skinner who died from injuries inflicted in the robbery.

The sentences are not excessive and both appeals are dismissed and the sentences affirmed to run from November 23, 2000.

Chief Justice

Justice of Appeal Justice of Appeal.