

**BARBADOS:**

**[Unreported]**

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

**Criminal Appeal Nos. 6 & 7 of 1999**

**BETWEEN:**

**JUNIOR CHRISTOPHER LOWE**

**DAVID ONEAL WILLOUGHBY**

**Appellants**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, and The Honourable Mr. Justice Colin Williams, Justices of Appeal**

**2000: February, 17th, 18th & 21st.**

**2000: April, 3rd.**

**Mr. R. Thorne for Appellant Lowe.**

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

**Mr. Charles Leacock in association with Mr. Anthony Blackman for Respondent.**

**DECISION**

On March 15, 1999 the appellants Junior Lowe and David Willoughby were convicted of the murder of Tito Skinner and sentenced to death. According to the medical evidence Skinner died from blood and air in the chest cavity as a result of a firearm injury.

The evidence disclosed that in the afternoon of February 20, 1998 a group of young men were gathered at an old house at Belair Road, Eagle Hall, St. Michael. Some of these men testified as to the circumstances in which Skinner met his death.

According to the evidence of these men Skinner was alone in a room at the house. The two appellants, Willoughby with a gun, entered the room, a voice was heard to say "pass the thing", two explosions followed and the three men left the room, Willoughby running and pushing something between his shirt and his pants as he ran, Skinner trying to run behind Willoughby but very soon afterwards collapsing on the road where a doctor later saw him and pronounced him dead at 5.12 p.m., and Lowe with knife injuries about his body.

Two bullets were removed from Skinner's body one of which according to the evidence, had been fired from a .38 gun and the other from a .32 gun. One of the bullets had caused Skinner's death but the evidence did not disclose which bullet had killed him or who had fired the gun that discharged that bullet. In short the evidence did not disclose who killed Skinner.

The case for the prosecution was that Skinner went to the old house to buy a gun; that Lowe, Willoughby and one Rodney Worrell, since deceased, planned to rob Skinner of the money he brought to buy the gun; that Lowe and Willoughby, each armed with a gun, went to a room where Skinner alone was; that one of them in furtherance of the plan fired the shot that killed Skinner; and that it mattered not which of them fired that shot, both as parties to the unlawful enterprise in which the use of guns was contemplated, were criminally responsible and guilty of murder.

The case against Willoughby was based entirely on circumstantial evidence and that against Lowe was supplemented by a written statement which the police testified they had recorded from him and which was admitted in evidence after a voir dire.

The evidence for the prosecution

Linwall Walkes, aged 15 at the time of the incident, testified that it seemed to him that Skinner had come to the house to see Rodney Worrell known as Early Blacks. He heard Worrell ask Skinner if he knew what sort of gun it was. Skinner said he did not and asked if it was a .45. Worrell said it was not. Skinner then asked if it was a 347. Worrell said no. Skinner asked him what it was and Worrell told him it was a .32. Worrell subsequently had a talk with Willoughby and later Worrell, Willoughby and Lowe went outside. Skinner was getting ready to leave and Willoughby and Lowe came back inside the house and went into the room where Skinner was, Willoughby with a gun in his hand. He heard a voice say "pass the thing" and then two explosions. He heard Lowe shout "aie" several times and then everybody in the room got out of it. He saw Willoughby running in the gap and he still had a gun in his hand. He saw Skinner trying to run behind Willoughby and later he saw Lowe with stabs all over his body.

Detron Alleyne testified that he went to the house about 2.30 p.m. Skinner was sitting on a bicycle in front of the entrance to the door but eventually he moved to the bedroom further in the house. Lowe and Willoughby went into the bedroom and about ten seconds later he heard a shot. He ran and got out of the gap, never looking back. Subsequently he saw Skinner lying on the road and Lowe sitting down hurt.

Wendell Sobers testified that when he arrived at the house Skinner was sitting in a window but he moved from there and sat on the witness's bicycle. Later he moved from the bicycle and went to the bedroom. Lowe and Willoughby entered the house through the side door and went into the bedroom. He heard gunshots from directly behind him where the bedroom was and everyone scampered. He ran and forgot his bicycle and on his way back to collect it, he saw Willoughby behind him running. He was pushing something between his waist and pants. He saw Skinner walking very slowly behind Willoughby and then he dropped to his knees. He saw Lowe on the step in front of the house.

Kirk Francis testified that he was in the yard when he heard two gunshots. He had seen Lowe with a gun earlier in the day but had seen Worrell with it last.

Anthony Hewitt testified that he heard two gunshots and someone saying "aie aie". He saw Skinner lying on the ground afterwards.

#### Lowe's statement

Evidence was led of a written statement recorded from Lowe which was admitted in evidence after a voir dire. In this statement he told of going "up Alkins" in the morning, of spending some time out there, of his going back home to cook for his mother, of his meeting someone who told him that he brought the thing for him and of his telling that person "alright" because he knew what he meant. He said that later he passed by the old house and collected the thing from the person and carried it home, keeping it in his pants pocket so that "his old lady" would not see it. He told of going to the old house later and of Worrell (Early Blacks) calling him one side and telling him he got a man from St. Lucy who wanted to buy a gun "but we teking he money and make he left the place, no gun ent passing". He said he saw the man in the house sitting down upon a bicycle. He then told of what transpired when Skinner was shot:

"..... and Blacks went off in de yard and talk and then them come back in ..... call me and me and he went by the side door and he tell me that the man got de money pun he and he got the 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 thirty eight. He pull back the 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 pun 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 did 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 stumble 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 de thirty two I had. I stumble and went up de road and fall down by a wall. I see de man walk pass me and then he fall down in the road and ain't get back up. My mother and sister and some other people come down dey by me til de ambulance come. I ain't see where ..... and Early Blacks went. I feel sorry fuh de fella now. I ain't know that you does feel so bad when a man get kill and you mix up in it. I let them come and mek me get in trouble".

#### Willoughby's statement

Willoughby gave a written statement to the police which was admitted without objection.

"On Friday, February the 20th, 1998 about 3 p.m. afternoon I was at the house where the fellas lime at Belair Road, Alkins, St. Michael. While there I saw a lot of fellas including Problem Child whose name is Junior Lowe and a guy I later heard was Tito Skinner. I heard his name on the news. 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 look round I saw the fellow making stabbing motions at Problem Child with something nickle in his hand. Then I heard a shot lick. Problem Child drop down and the fella sit down 'pon he and start to stab he. I then heard two more shots - two more shots lick and I run to the door like everyone else. I never had any gun. I didn't shoot nobody or take part in shooting anybody. I came to the station willingly having spoken to my attorney Mr. Andrew Pilgrim but I feel the police want me to confess to something I have not done. Problem Child is my acquaintance. I was told of my rights of an attorney only in the presence of my attorney Mr. Andrew Pilgrim. I was not told about my rights to an attorney before that time. I have already advised my attorney about the treatment I have received at the station before he came and I have asked him to make a complaint for me on my behalf. That is all".

#### The unsworn statements

Both Lowe and Willoughby made unsworn statements when told of their rights. Lowe said that about two weeks before the incident he was in Alkins and Rodney Worrell brought him a haversack with about five pounds of marijuana and told him that a man brought it for him to sell but he told the man that he, Lowe, could get it off quicker. So Worrell gave him, Lowe, the weed so that he could dish it out to certain people who would get it off for him: on the day of the incident he went by the house and saw Worrell and some other fellas there. Worrell called him one side and told him that the fella come for his money. He told Worrell that he didn't have the money right now and he'll have to wait. Worrell told him that he was going to talk to the fella and he was going to come back to him. Worrell come back and told him that the fella said that he wanted the money and that he wanted to talk with him. He, Lowe, entered a room and went to speak to the fella who asked him about the money for the weed. He told the fella that right now he didn't have the money and he would have to wait. The fella got angry and told him that he had a girl pregnant and he wanted the money to do some things with. He told the fella that he didn't have the money and was not going to rob, steal or get into trouble to

get it. The fella started to get more aggressive and he cursed him. He turned away, and felt a cuff in his back. He turned back and saw the fella with a knife in his hand. As he turned to leave the room he was stabbed in his neck. He dropped to the floor at the same time. He saw Worrell come through the front door and he heard gunshots. The fella got up off of him and he left the house. He was stabbed up very badly and stumbled up the road and sat next to a wall. An ambulance came and the last thing he remembered he was on his way to the hospital. He got up the Saturday morning and there was a man in normal plainclothes sitting beside the bed. Two officers come to him and told him that they wanted to talk to him and they took him downtown to C.I.D., Central Station. Later in the evening going on to night time he was taken to District A Police Station. He was taken to a holding cell and then some officers came and helped him out to a room where there were other officers. He was in great pain, like catching for a breath, that sort of thing. There were about five to six officers in this room. An officer put him to sit down on a chair and he told the officer that he felt bad, those sort of things. The officer started telling him that he had shoot a fella. He told the officer that he never had a gun, that he never shot anybody. The officer gave him a paper to sign. He told the officer that he was spitting blood. The police took him back to the C.I.D. The next morning he complained to some officers and showed them how much blood he was bringing up all the time. They took him back to the hospital where he had to have blood drawn off his chest. Later he was taken back to C.I.D. and on the Monday he was taken back to District A where the police had him there sitting down.

At the end of his statement he reiterated that he never had a gun and never shot anyone.

In his unsworn statement Willoughby said that the statement he gave to the police on March 3, 1998 was true, that everything he said to the police was true.

The summing-up

The learned judge defined murder (p.437 of the record) and told the jury that before a verdict of guilty can be returned against the two accused or either of them the prosecution must make them feel sure that they killed Tito Skinner, that the killing was unlawful and that the killing was accompanied by malice. Malice, he told them, can be proved by establishing an intention to kill or an intention to cause grave serious bodily harm. He went on to tell them:

"Intention is one of the essential ingredients in the crime of murder and so the prosecution must prove the intention of the two accused like any other ingredient of the charge beyond reasonable doubt. Intent, however, is not capable of positive proof but can only be inferred from what a person says or does. You will look at the weapon used and the part of the body injured by the weapon in seeking to determine the intention of the person inflicting the injury. If a person shoots another person with a gun through the heart, you will ask yourself what reasonable inference can be drawn from that act".

Shortly afterwards he told the jury that the Crown's case against Lowe was based on the principle of joint enterprise and under such a doctrine a person who is a party to a joint enterprise, the pursuance of which results in the causing of another's death, may be criminally liable for that death either on the basis he is guilty of murder or on the basis he is guilty of manslaughter; and that it was fundamental to a conviction for either offence that the accused must have been a party to the act which caused death. He went on to say:-

"Therefore, madam foreman and members of the jury, if after consideration of all the evidence, in particular the statements of accused Lowe, oral and written, you feel sure on the evidence that the accused Lowe participated with another in an unlawful act which he knew could kill or cause serious injury to Tito Skinner, then you will find him - then you will find accused Lowe guilty of murder. If, however you find that accused Lowe participated in an unlawful act that he did not know that the act would kill or cause serious bodily harm to Tito Skinner, but that he participated in an unlawful act which all sober and reasonable people would recognise as one which must subject the victim Tito Skinner to at least the risk of some harm, albeit not serious harm it is open to you to find accused Lowe guilty of manslaughter. Manslaughter is the unlawful and felonious killing of another without malice".

He went on to state the principles applicable to a case where someone is killed during an attack by a number of men to be thus: "where several persons jointly attack a victim in circumstances which show that they intended to inflict serious harm, and as a result of the attack the victim sustained fatal injury, they were jointly liable for murder. But if such injury inflicted with that intent was shown to have been caused solely by the actions of one participant of a type entirely different from the actions which the others foresaw as part of the attack, only that participant was guilty of murder". After discussing these principles, he continued ( p.441):-

"Therefore, madam foreman and your members, if you accept that the accused Lowe made the oral and written statements, and that he armed himself with a gun together with another man armed with a gun, and they planned and they as planned attacked Skinner and the other man shot and killed Skinner, then on the basis of what I have told you above, you would find the accused guilty of murder or manslaughter dependent on the view you have taken of the evidence and that will be so even though accused Lowe did not fire the fatal shot. If you are not sure and you have any doubt you will resolve that doubt in favour of the accused Lowe".

The learned judge then dealt with the case against Willoughby:-

"With regard to accused Willoughby, no one gave any evidence that he shot and killed Skinner. However the evidence against Willoughby is based on circumstantial evidence in that there are eye witnesses who saw him enter the room with a gun and shortly afterwards there was an explosion or there were two explosions coming from that room. If you accept this evidence and the evidence of Dr. Ramulu that two pieces of metal were removed from the body of Skinner and Inspector Annel that they were a .38 and a .32 bullet, you may conclude that the accused Willoughby discharged his firearm in that room and injured Skinner."

The learned judge then told the jury what circumstantial evidence is, referred to accident and stated what the defences were. He proceeded to recite all the evidence (pages 443 to 558 of the record) at the conclusion of which he reminded the jury what the defences were. Then he dealt with the possible verdicts with respect to each of the accused:-

"In the case of Willoughby if after considering the evidence you are not sure that when he went into the room and the shot went off, or there was

an explosion, he intended to kill Tito Skinner or cause him serious bodily harm. but you conclude - you will return a verdict of guilty of manslaughter if you found that it was he who shot Skinner. It is only if you are sure that Willoughby went into the room with his gun and shot Skinner with intent to do him serious bodily harm or kill him that you can find Willoughby guilty of murder. If you are not sure that Willoughby did anything to the deceased when he went into the room and you are not sure that Willoughby had a gun, you will find him not guilty of anything. If you find that he went into the room with a gun and he was engaged in an unlawful and dangerous activity and as a result of that Skinner was shot by him, you will find him guilty of manslaughter.

In the case of Lowe, if you accept that he planned to tek Skinner - and my understanding of tek is to rob but interpreting evidence is your exclusive function and not mine, you will have to see what you make of the word "tek" - and that he armed - and that he, armed with a gun, went into the room in a joint enterprise with another man armed with a gun and the other man shot Skinner with the intention to do him serious bodily harm or to kill, you will find Lowe guilty of murder. If you are not satisfied that the assailant had the intention to kill or do serious bodily harm to the deceased Skinner but to rob him or put him in fear then you will find accused Lowe guilty of manslaughter. If you are not sure that the accused Lowe is guilty of manslaughter, or you are in doubt, you will find him not guilty of anything".

The nature of the Crown's case

The Director of Public Prosecutions in his opening to the jury stated (p.5 of the record):-

"In a case of this nature where the two accused are charged, the prosecution will contend that they acted in concert or that this was a joint enterprise to commit this offence and so I will discuss joint enterprise more with you as the matter unfolds but just bear in mind that the case for the Crown in this matter will rely on the doctrine of joint enterprise in which the actions of one is regarded as the actions of the other".

Later (at p.387) he amplified this in response to s submission by Mr. Thorne on behalf of Lowe that there was no case for Lowe to answer:-

"So, my Lord, what you have before you is the evidence clearly showing these two men entering a room after which, pursuant to a plan to rob, which my learned friend correctly concedes, enters a bedroom, sorry, in which the deceased was, intending to rob him, which my learned friend ably concedes, and armed with lethal murderous weapons, a man ends up being shot within ten seconds of their entry into the room. With the greatest of respect to you Sir, that is not a question that you can determine, that is a question that raises the issue of murder for a jury".

Then (at p.409) in response to a submission by Mr. Pilgrim on behalf of Willoughby that there was no case for Willoughby to answer:-

"The evidence against .... Willoughby ... rests on the doctrine of joint enterprise, as I indicated from the outset, where that doctrine basically says, my Lord, that when two adventurers act in pursuance of a joint criminal enterprise, which means that when two adventurers embark on a joint criminal enterprise intending to use force as is necessary to effect the object of the enterprise ... and being armed with lethal weapons such as guns or knives, whenever death ensues, the action of one is the action of all in law. So, in short, it is immaterial and irrelevant as to who pulled the trigger in a case of that nature or who inflicted the fatal stab wound .... The action of one is the action of both. The essential principle in law is what grounds culpability, is the participation of the adventurers in the joint enterprise having contemplated the use of lethal force or weapons, if necessary. And that's the principle that has been stated so succinctly in Privy Council decision of Chan Wing-Su [1984] 3 All E.R. 877 .... Delivering the judgment of their lordships, Sir Robin Cooke referred to the principle:

"Whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. 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 the participation in the venture with that foresight".

And that is the principle that I've stated to you earlier. ... the essence of the doctrine of joint enterprise is this question of participation with the foresight or contemplation that lethal weapons would be used or force that is necessary to effect the object of the criminal enterprise will actually be carried out. And it doesn't matter if one of them only were to carry out the act, the action of one is the action of all. That is the principle".

We have quoted the above extracts from the Director's opening and his submissions to the learned judge to illustrate the nature of the Crown's case against Lowe and Willoughby. It was that they fired the shots that were removed from Skinner's body in furtherance of a plan to rob him, the plan contemplating the use of guns to carry out the robbery and that both were liable to be convicted of murder irrespective of which of them fired the shot that actually killed Skinner. The Crown's case was not based on a joint enterprise to kill or cause serious bodily harm to Skinner. It was, the prosecution alleged, a joint enterprise to rob Skinner and if the need arose, to use guns to carry out the robbery. According to the evidence led by the prosecution the plan was hatched by Worrell, Willoughby and Lowe and Willoughby and Lowe went forward to put it into execution, each holding a gun. Directions properly framed would have instructed the jury to return a verdict of guilty of murder against both Lowe and Willoughby if they were satisfied beyond reasonable doubt (1) that they were both engaged in the execution of a plan to rob Skinner (2) that the plan contemplated that guns would be used, if the need arose, to carry out the robbery and (3) that Skinner died when one of them, and it mattered not which one, shot and killed him in the execution of the plan. If they were not so satisfied, if they did not believe that Lowe and Willoughby were engaged in the execution of such a plan when Skinner was shot and killed, or if they were left in reasonable doubt, verdicts of not guilty were to be returned in respect of both of them.

As it transpired, the directions to the jury did not reflect the case as presented. For instance, the jury was told, in relation to Lowe, that if they accepted that he and Willoughby as planned attacked Skinner and the other man (Willoughby) shot and killed Skinner then they would find Lowe guilty of murder. However Lowe in his statement told of an intention to rob Skinner, not to kill or do serious injury to him and there was no evidence on which the jury could find that Willoughby had shot and killed Skinner. With respect to Willoughby the jury was told that it was only if they were sure that Willoughby went into the room with his gun and shot Skinner with intent to do him serious bodily harm or kill him, that they could find him guilty of murder. As to this it has to be repeated that it was not the prosecution's case that there was an intention to kill or cause serious bodily harm to Skinner, Lowe saying that he went to rob him, not to kill or do him serious injury; moreover, the evidence could not support a finding that Willoughby had shot and killed Skinner. There was no evidence that he had fired the fatal shot. Again, shortly before the jury was

asked to retire, they were instructed that if they accepted that Lowe planned to tek Skinner and that he armed with a gun went into the room in a joint enterprise with another man armed with a gun and the other man shot Skinner with the intention to do him serious bodily harm or to kill, they would find Lowe guilty of murder. But Lowe in his written statement told of an intention to rob Skinner, not to do him serious bodily harm or to kill him. Moreover this direction would have given the jury the impression that it was Willoughby who had fired the fatal shot when there was no evidence to support such a finding.

In summary, the possible verdicts which the learned judge left to the jury:-

(1) did not reflect the case as presented by the prosecution. The prosecution did not rely on a joint enterprise to kill or cause serious bodily harm to Skinner, indeed Lowe in the written statement told of a plan to rob, not to kill or cause serious injury to Skinner; and

(2) proceeded on the assumption that Willoughby had fired the shot which killed Skinner when there was no support for that in the evidence.

Lowe and Willoughby would both have defended themselves against the case as presented by the prosecution and were entitled to expect that the directions to the jury on the prosecution's case would reflect the case as actually presented.

In our view there is no alternative but to quash these convictions and order retrials for both the appellants. In the circumstances it is unnecessary to consider the other grounds of appeals filed.

Accordingly the appeals are allowed, the convictions are quashed and the sentences set aside. Retrials are ordered for both the appellants.

Chief Justice.

Justice of Appeal Justice of Appeal.