

IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

CR-AP 4, 5, 7, 8, 11/2018



BETWEEN

KIRK DELANCY

EVANSON CAPRON

LORVENSKY JOSEPH

CHARLIE BOTTEX

WOODY BAPTISTE

APPELLANTS

AND

REGINA

RESPONDENT

BEFORE:

Sir Elliott Mottley, President

The Hon. Mr. Justice Adderley, Justice of Appeal

The Hon. Mr. Justice Hamel-Smith, Justice of Appeal

**Finbar Grant for Kirk Delancy
Oliver Smith for Evanson Capron
Keith James for Lorvensky Joseph
Glenda Clarke for Charlie Bottex
Lara Maroof for Woody Baptiste**

Heard: 9th September 2019

Delivered: 30th January 2020

Sir Elliott Mottley, P.:

1. Following a trial before Joyner J. and a jury, the appellants were convicted on 22nd May 2018 of manslaughter and on 17th July 2018 were sentenced to a term of 7 years' imprisonment.
2. The appellants were each charged with manslaughter, that acting together with others caused the death of Kenley Walters by unlawful harm with the use of a weapon of offence.
3. Kenley Walters was stabbed in his chest whilst at Club 2005 in Providenciales on 27 December 2014, he subsequently died as a result of his injuries. The Crown accepted that they did not know who had stabbed Kenley Walters. Indeed, the case for the prosecution was that none of the appellants stabbed the deceased, but that they had assisted or encouraged an unknown principal in the attack.
4. The prosecution's case was that a group of young men, including all of the appellants and at least one other not before the court, had approached Walters in the courtyard of Club 2005 and stood in front of him. A fight ensued during which punches were thrown although none of the witnesses was able to state who did what. One of their witnesses, Adrian Capron, stated that he saw the appellant Woody Baptiste throw one punch at the face of Walters. At some point Kenley fell to the ground. None of the witnesses other than Jim Kelly Joseph saw when Walters had been stabbed or saw a weapon in the hand of any of the appellants at any time. As stated, one of their witnesses, Jim Kelly Joseph stated that he had seen one male on his own wearing an orange shirt and cargo pants holding Walters in a headlock/lock position and punching towards his chest. None of the witnesses had heard anything being said during the course of the confrontation.
5. As stated, the prosecution conceded that the person who inflicted the injury on the deceased that caused his death was not before the court. Indeed, the prosecution's case as given in evidence by Jim Kelly Joseph was that some person, not one of the

appellants, had the deceased in a headlock and at that time was making a striking motion towards his chest or torso. This incident took place about 6 feet from the witness Joseph. It is significant that Joseph made no reference to the presence of any of the appellants when this particular incident was taking place.

6. Also of significance, and of which the judge was required to remind the jury, was that none of the other eye witnesses gave any evidence of seeing the deceased being held in a headlock by a person who was making motion in the direction of his torso.
7. The prosecution's case was that at the time when the deceased was being held in a headlock by this unknown individual the fatal injuries which eventually caused his death were inflicted on the deceased. It was accepted by the prosecution that none of the appellants inflicted the injury which eventually caused the death of the deceased.
8. In order for the appellants to be convicted of manslaughter it was incumbent on the prosecution to show or demonstrate that the appellants and the unknown person were acting pursuant to a joint enterprise to cause some harm to the deceased from which he subsequently died. It was not sufficient to find an agreement between these appellants.
9. It was essential for the judge to tell the jury that before they could convict the five appellants or any of them of manslaughter they had to be satisfied that each of the appellants and the unknown person were acting in concert or together pursuant to plan to cause or inflict some harm to the deceased.
10. In dealing with the prosecution's case, the judge told the jury:

"Now the prosecution is saying that these men were acting together, so I am going to tell you what is joint criminal enterprise, common purpose and what is participating by encouragement or assisting, because that is what the prosecution is relying on to anchor its case, yes, participation by encouragement.

No mention is made that the jury, before they could convict, had to find, not only that each of the appellants was acting together with each other, but that each of the

appellants was acting with the unknown person who the prosecution were alleging was the person who did the stabbing and who was not before the court.

11. The judge continued:

"The defendants' agreement to act together need not have been expressed in words, it may be the result of planning, or it may be a tacit understanding reached between them on the spur of the moment. Their agreement may be inferred from circumstances."

12. These two statements amounted to a clear misdirection as to what the prosecution was required to prove in order for the jury to return a verdict of guilty of manslaughter. The judge made no mention that they must find an agreement between any of the appellant and the unknown person and each acting together and with the unknown person not before the Court.

13. Again the judge did not tell the jury that an agreement between each of the appellants and the person not before the court who did the stabbing was essential before they could convict the appellants. Further, the judge told the jury:

"The prosecution's case falls under participation by encouragement or assistance. So in order to safely convict any of the defendants, the prosecution must make you feel sure that he was involved in a joint enterprise an agreement to participate in an assault on Kenley Walters on the early morning of 27th December 2014. The prosecution must also prove so you feel sure that the defendants participated in the assault by giving encouragement or rendering assistance in this assault, the assault being by itself, and unlawful fact."

14. It is significant in the directions referred to above, that the judge made no mention of agreement between the appellants and the unknown person. She told the jury that the prosecution is saying that *"these men acting together."* The judge went on again to refer to that these men acting together. That was not the prosecution's case. The evidence from Jim Kelly Joseph was that a man who has not been identified held the deceased in a headlock making stabbing motions in the area of the chest of the deceased. Again, it must be remembered that the prosecution stated that the person who did the stabbing which caused the death was not before the court.

15. The judge continued her direction to the jury and, for the first time, mentioned an agreement between the five appellants and the person not before the court. She told the jury:

"The prosecution needs to prove that the five together encouraged or assisted the principal, who is not before you, in stabbing Kenley Walters."

16. The judge continued her summation:

"The prosecution needs to prove so you can feel sure that (1) a defendant encourage (sic) or assisted the assault of Kenley, and the prosecution also needs to prove so you feel sure that the defendant intended to encourage or assist the assault on Kenley."

17. All reference to the appellants acting together could have had the effect of misleading the jury as to what was the prosecution's case. In order for the defendants to be guilty, it was necessary for the prosecution to prove that each of the defendants had an agreement among themselves and with the unknown man not before the Court, who did the actual stabbing. The judge was required to put before the jury the evidence which showed that each defendant encouraged or assisted the person not before the court and who, according to the prosecution, did the stabbing. It appears that the only evidence relating to the person, not before the court, who did the stabbing came from Jim Kelly Joseph who said that this unknown man had the deceased in a deadlock. No evidence was led to show that "this unknown person" had a connection with any of the appellants. No suggestion was made that this "unknown man" was part of what some of the prosecution witnesses called an entourage. None of the other prosecution witnesses gave evidence which supported the evidence which Joseph gave.

18. That the jury were left with two directions which were inconsistent with each other. Initially, the judge told the jury about an agreement between the appellant themselves to cause harm to the deceased. The judge later told them that the prosecution's case was that these men were acting together pursuant to an agreement among themselves. No reference is made to an agreement between each of the appellant and with the person not before the court.

19. The judge clearly made an error when she referred to an agreement between the defendants. While the judge later mentioned an agreement between the defendants and the unknown person, the judge was required to correct her earlier mistake. The judge was required to repeat the incorrect direction and tell the jury that it was a mistake and wrong and then correct it by telling them that the agreement has to be between each of the defendants and the unknown person. Not having done this the jury would have been left in a confused state as to what was the agreement they had to find before they could convict the defendants.
20. In reviewing the evidence of Jim Kelly Joseph, the judge told the jury that the importance of his evidence was that he saw an unknown person holding the deceased in a headlock and that he appeared to be punching him in the torso. The witness gave no evidence surrounding the circumstances which led to the person holding the deceased in a headlock. It is also significant that no mention was made of the appellants being present when this was happening.
21. In as much as the person who the prosecution alleged did the stabbing was not before the court, the summation to the jury required a careful analysis of the facts on which the prosecution was relying. It was not sufficient, as the judge did, to refer to an agreement between the appellants that was not the agreement on which the prosecution was relying to establish the guilt of the appellants. It was also not sufficient to show that the appellants encouraged or assisted each other. Evidence that the appellants and "an entourage" came and surrounded the deceased was certainly not sufficient. No evidence was led to show that the unknown person who did the stabbing was part of that entourage.
22. The judge invited the jury to look at the evidence. However he judge did not assist the jury by pointing to the evidence to show what part each defendant played and which amounted to encouragement or assistance of the unknown person. Having directed the jury on the law relating to joint enterprise, the judge in our opinion ought to have reminded the jury of the evidence being relied on by the prosecution to show that each defendant encouraged the unknown person who did the stabbing.

23. It was for these reasons that the court allowed the appeal, quashed the conviction of each appellant set aside the sentence and entered a not guilty verdict in respect of each appellant.

24. In order to do this, the judge was required to repeat the earlier misdirection and tell the jury that it was wrong and then give them the correct direction.

25. The failure of the judge to direct the jury as set out above in our view amounted to a serious miscarriage of justice.

Sir Elliott Mottley, P.



Adderley, JA

Hamel-Smith, JA