The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 6 of 2010

Between:

KELLAN JEAURREAU LEWIS

Appellant

-V-

THE QUEEN

Respondent

Before: **Zacca, President**
Ward, JA
Auld, JA

Appearances: John Perry Q.C. and Mr Craig Attridge for the Appellant
Mr Rory Field, DPP and Mr Robert Welling for the Crown

JUDGMENT

Date of Hearing: Mon/Tues, 30 & 31 May 2011
Date of Judgment: 17 June 2011

ZACCA, PRESIDENT

1. The Appellant was charged on an Indictment containing two counts; the first charged the offence of murder and the second having a bladed article in a public place. The Jury returned a majority verdict of not guilty of murder but unanimously guilty of manslaughter and guilty of having the bladed article in a public place. He was sentenced to 12 years imprisonment on the manslaughter verdict and five years on Count 2, the sentences to be concurrent. He has appealed against these convictions and sentences.

2. The prosecution case was based on the following facts: on the evening of Saturday, 9th August 2008 a going away party was held at Elbow Beach by a fourteen year old girl, Crenisha Joyiens. The party was open to all.

3. The appellant along with Zharrin Simmons, Devon Hairston, Gary Hollis, Chanell Weeks, Latania and Xenia Anderson and Jasmine Smith travelled by bus to the party having boarded the bus at a bus stop near White Hill Field, Sandys Parish.

4. Chanell Weeks testified that while waiting on the bus she observed a black handle and part of the blade of a knife in the waist of the appellant's pants. The group was seen drinking from a bottle which was passed around. Jasmine Smith stated that the drink was a rum swizzle.

5. Another group including Kevin Warner, Jamiko Benjamin, Tionae Jones, Coeshae Cann, Joanne Jones and Daneiro Tacklyn arrived at the party a little later, having set off from Hill View in Warwick. It is said that these two groups were friends.

6. Tionae Jones described the appellant as acting in an excited mood at the party. She stated that while in the car park area she heard the appellant say, "All these guys around here, somebody is going to get beat up." However, she did not think that he was serious when he said it. She saw the appellant walk up the hill with Gary Hollis and Zharrin Simmons.

7. Tristan Martin saw the deceased fighting with Hollis. Others including the man with the cane, Warner, the appellant and Hairston Simmons were involved in the attack. Helmets were used and the deceased was hit in his head with the cane. Simmons had a screw driver. She came from the back and stabbed at the deceased. He crouched over holding his side and fell. At that

time Hollis, the appellant and Hairston were around him. After Simmons stabbed the deceased she and the others ran down the beach. After the incident he saw the screw driver on the ground. He did not see Lewis stab the deceased. However, he did see the handle of a knife in the waist of the appellant.

8. Kennysha Simons saw the appellant attacking the deceased with his fists. Hollis and Simmons were also attacking the deceased. She saw the deceased fall to the ground bleeding from his left chest. She saw Simmons with a metal object stabbing the deceased who was struck in his head with a cane just before he fell. She did not see the appellant stab the deceased. Lewis was wearing a yellow shirt when she saw Zharrin stab the deceased. The appellant was in the crowd fighting.

9. Chanell Weeks witnessed Gary Hollis talking to the deceased who was seated on his bike. Hollis hit the deceased on his head with a helmet. Simmons and the appellant were seen hitting the deceased with fists. Gary Hollis hit the deceased in his head with a helmet. The appellant ran at the deceased and stabbed him in the right side of his stomach area with a knife which he got from his waist. He stabbed him more than once. The appellant, Gary Hollis, Zharrin Simmons and Devon Hairston then ran. Under cross examination, Weeks stated that at the time of the incident she never told the police that she saw the appellant with a knife at the bus stop. She only said this in her statement to the police on 22nd May 2009, on the eve of the first trial. She accepted that at the previous trial she said that the person who stabbed the deceased was wearing a white shirt. She had also at the previous trial said that she did not see the appellant or Zharrin, but that was not true. She saw both of them. The evidence disclosed that she had travelled in the bus with them to the party.

10. Jasmine Smith saw the appellant hitting and kicking the deceased. Gary Hollis was hitting deceased on his head with a helmet. She also stated that while she was observing the fight, she saw Zharrin in a fight with a boy called Tag. She did not see the appellant with a weapon in his hand nor did she see him stab the deceased.

11. Xenia Anderson saw Hollis hitting the deceased with a helmet and he fell. She saw blood on his shirt in the area of his abdomen.

12. Andrew Williams saw a screw driver on the ground with what appeared to be blood on the tip.

13. Dr. Rao the forensic pathologist stated the cause of death was a stab wound to the heart. There were three stab wounds, the fatal one to the left side of the chest, one to the inner aspect of the left forearm and one to the outer aspect of the left forearm. The fatal wound might not have incapacitated the deceased immediately, and that he may have been able to move some distance before he collapsed. It was the opinion of Dr. Rao that the implement likely to have been used was a single edged knife. None of the wounds were consistent with being caused by a screwdriver. They could have been caused by more than one knife. A 'v' shaped injury to the head was consistent with being struck by a cane. The wounds to the arm were consistent with defensive wounds.

14. Candy Zuleger gave DNA evidence which disclosed a match from the deceased's blood in the inside pocket of Hollis' jeans. The deceased's DNA was also found on the cane and on the handle of a screwdriver recovered from the scene of the incident. Zharrin's DNA was not found on the handle of the screwdriver. However, a partial profile from the handle matched the deceased's DNA. Jamiko's shorts had the deceased's DNA on it and blood found at the front bottom part of the appellant's yellow T-Shirt matched the DNA of the deceased. The blood on the appellant's shirt was very weak. It was more in the nature of a smear and not a very dark stain. If it had been a blood spatter, it would be more concentrated and a dark red colour. The knife which had a black handle recovered was not identified as the knife allegedly used as no blood was found on it.

15. No evidence was led by the defense as to how the deceased's blood might have gotten on the appellant's T-shirt. However, it was suggested by Counsel that it could have gotten on the T-shirt from Jamiko Benjamin's shorts, who was in the taxi with the appellant after the incident and who was seen by the police sleeping in a room at the appellant's house. However, the appellant stated that when he got to Coral Beach, he heard someone say "you've got blood on your clothes": and Gary Hollis and Kevin took their shirts off and threw them away. No blood was detected on the blade of the screwdriver. Again it was being suggested by Counsel that Zharrin Simmons might have used a knife to stab the deceased instead of a screwdriver as suggested by the prosecution witnesses. The police also stated that they saw a trail of blood which led from where it was alleged the deceased fell going down the hill. This blood was

not tested for DNA evidence. Neither the appellant, nor any of those named as participants in the attack on the deceased had injuries which could have accounted for that blood.

16. In his defense the appellant admitted that he had grabbed at the deceased's shirt to pull him off his bike after the deceased spat at him. His own chain broke and he began looking for it as others including Hollis were fighting with the deceased. The fight moved towards him when the deceased grabbed him. He then punched the deceased twice in his head. The fight then moved back up the hill and he had no further involvement in the fight. The appellant denied that he had a knife in his waist and denied that he had stabbed the deceased. He ran to the beach along with the others after the incident and went through the grounds of Coral Beach Club. They then split up and met later at the entrance. He denied having any contact with the security staff.

17. The defense called two witnesses, Johnny DeShields and Kevin Warner. On the Sunday or Monday following the incident, DeShields testified that he visited the home of Chanell's mother and Chanell told him that she didn't know who did the stabbing as she was too far away to see anything. Kevin Warner testified that the following morning after the incident, Chanell Weeks told him that she could not see the fight. They admitted that they had not gone to defense Counsel with this information during the last trial despite the fact that they are related to the participants involved in this incident.

18. After the jury retired to consider their verdict, they posed the following question to the learned Chief Justice:

> *Can we convict on murder if we believe the defendant caused grievous bodily harm to the victim, but not the fatal wound?*

Chief Justice's answer:

> *The short answer to that is "no". You can only convict of murder if you are either sure that the defendant himself inflicted the fatal wound or that you are sure that he did something to enable or aid one of the others to kill or to do grievous bodily harm to Kellan Hill, knowing that the other had a knife and knowing that he or she intended to use it to kill or to inflict grievous bodily harm upon the victim.*

19. Counsel for the appellant John Perry Q.C. relied on the following grounds in support of his submissions:

1) That the appellant's conviction for manslaughter is unreasonable and/or cannot be supported having regard to the evidence, in that there is no proper evidential foundation in particular having regard to the question posed by the jury and their verdict based upon the direction of the judge.
2) That the appellant's conviction for manslaughter is unreasonable and/or cannot be supported having particular regard to the evidence of Chanell Weeks, Kennysha Simons and Tristan Martin. In the circumstances there then remains a lurking doubt as to the safety of the conviction.
3) The Learned Judge erred in that he failed to direct the jury adequately and/or properly on the basis of the appellant's requisite state of mind.
4) That the appellant's conviction is unreasonable and cannot be supported having regard to the evidence and in the circumstances there remains a lurking doubt as to the safety of the conviction.

Grounds 1 and 2 may be taken together.

20. As to Ground 1, Mr Perry submitted that there was a conflict in the prosecution's case as to who stabbed the deceased. On the one hand, it was alleged that Zharrin Simmons stabbed the deceased with a screwdriver. On the other hand it was alleged that the appellant stabbed the deceased with a knife. It was further submitted that the evidence of Chanell Weeks was so discredited that the jury could not reasonably come to the conclusion that the appellant had stabbed the deceased.

21. As stated above the evidence was that the appellant was seen with a knife in his waist by Chanell Weeks and Tristan Martin. The deceased was being attacked by several persons including the appellant with fists, a cane, two helmets; and one of those persons must have stabbed the deceased. The appellant was the only person in possession of a knife. The medical evidence was that the injuries would have been caused by a single edged knife and that a screwdriver could not have caused the fatal injury.

22. Mr Perry submitted that having regard to the question posed by the jury and the direction given by the learned trial Judge, the only inference to be drawn from the jury's verdict was that the appellant did not inflict the fatal blow. In the event the jury returned a unanimous verdict of manslaughter.

23. The jury's verdict could support a finding that the killing was as a result of the appellant stabbing the deceased but that he did not have the intention of causing grievous bodily harm. Secondly, they may have come to the conclusion that the appellant played a secondary role but must have had the knowledge that one of the persons attacking the deceased was in possession of a knife and there was no intention to kill or to cause grievous bodily harm.

24. Mr Perry also argued that if the appellant did not stab the deceased, there was no evidence led by the prosecution to show knowledge in the appellant that any of the persons involved in the attack on the deceased had a knife. He was only liable to be convicted if he had that knowledge and that the knife would be used in the attack.

25. Mr Perry relied on the evidence of Tristan Martin and Kennysha Simons that it was Zharrin who stabbed the deceased; this evidence was inconsistent with the medical evidence that the injuries could not have been caused by a screwdriver. In addition, the DNA evidence was to the effect that no blood was seen on the blade of the screwdriver, and that DNA on the handle matched the DNA of the deceased.

26. We are of the view that the evidence of Chanell Weeks was such that it was open to the jury, despite any contradictions or inconsistency, for them to accept her evidence and that it was the appellant who stabbed the deceased. The jury would have also taken into account the medical and DNA evidence in coming to this conclusion. In fact, on the evidence the appellant was the only person seen with a knife.

27. We are not of the view that the only interpretation of the jury's verdict having referred to the question posed by the jury was that the appellant did not do the stabbing. There were three Jurors who dissented in the murder verdict, and we are unable to speculate as to the reasons for their verdict.

28. As to Ground 2, was there sufficient evidence on which the jury could convict the appellant if he did not inflict the fatal wound?

29. The evidence was that the deceased was being attacked by several persons including the appellant. Fists, helmets, a cane and a knife were the objects used in the attack. This was a concerted attack at the time the deceased was stabbed. Following the stabbing they all ran

down to the beach together and ended up at the appellant's house. The appellant is alleged to have been in possession of a knife. It was suggested that the appellant was the leader of his group. All of these are signs of giving support to the person who did the stabbing. Could knowledge be imputed to the appellant that he must have been aware that a knife might be used in the attack? Was the appellant a party to the act of stabbing in that he was there and present, aiding the commission of the offence by another member of the group?

Ground 3

30. It is necessary first to consider the directions given by the learned Chief Justice on manslaughter commencing at page 49 of the Summation. Page 49 line 8 to page 54 line 8; again at page 229, line 10 – page 230 line 23; page 231 line 20 – page 232 line 18.

At page 49, line 8 – page 54, line 8)

> What is manslaughter? The Criminal Code says: "A person who unlawfully kills another person under such circumstances as not to constitute murder is guilty of manslaughter."

The big difference between that and murder is that it contains no reference to a specific intent, whether it be to kill or to cause grievous bodily harm. In other words, manslaughter is unlawful killing, without intent to kill or cause really serious bodily harm. Apart from that, the elements of the offence are the same as for murder; in other words, for it to be manslaughter, all the crown has to prove is that the Defendant did an unlawful act which caused the victim's death.

Now, I've already said that the intentional application of force to another, without their consent, is an unlawful act, unless there is something that makes it lawful. Any amount of force will do for these purposes, however slight. The law regards each person's body as inviolate and the law protects all of us from any physical -- not only from physical injury but also against any form of deliberate physical molestation.

Now, if it was left there, Members of the Jury, your task would be relatively straightforward. But the prosecution also rely on an alternative approach if you reach the position where you are not sure that it was this Defendant, Kellan Lewis, who, in fact, stabbed Kellon Hill. In such a case they rely upon section 27 of the Criminal Code which, in so far as it's relevant to our purposes says this:

> "When an offence is committed, each of the following persons is deemed to have taken part in

committing the offence, and to be guilty of the offence, and may be charged with actually committing it -

(a) every person who actually does the act or makes the omission which constitutes the offence;" but I've already dealt with that.

But then,

(b) every person who does any act...for the purpose of enabling or aiding another person to commit the offence; and

(c) every person who aids another person in committing the offence;"

And what the prosecution say is that if Mr. Lewis was not the person who actually stabbed Kellon Hill, then he was a party to that act in the sense that he was there and present, aiding the commission of the offence by another member of his group.

Now, in order to establish guilt on this basis, the prosecution must prove to your satisfaction, beyond reasonable doubt, each of the following things:

First, that somebody committed the offence;

Second, that the Defendant did an act or acts for the purpose of enabling or aiding that person to commit the offence;

Third, that the Defendant did so with the intention to aid the perpetrator to commit the offence; and

Fourth, that the Defendant had actual knowledge or expectation of the essential facts of that offence; that is, all the essential matters which make the acts done a crime, including the state of mind of the perpetrator, when that person committed the offence.

Moreover, because everything turns upon the Defendant's knowledge of the actual perpetrator's intension, there is one further qualification. Before you could convict on this basis, you have to be sure that the Defendant knew that the perpetrator might use a knife or a similar weapon.

If you thought that all that the Defendant was signing up for was an attack with fists and cane and helmets, and unknown to him the actual perpetrator went beyond that by bringing a knife or a similar weapon to the fight and using it, then the Defendant would not be responsible for the consequences caused by that.

Now, applying that to the facts of our case. For the prosecution to establish criminal responsibility for murder on this alternative basis of aiding, it is necessary for the prosecution to prove that the Defendant committed his act to enable or aid one of the others to kill or to do grievous bodily harm to Kellon Hill, knowing that that other had a knife or a similar instrument, and knowing that he or she intended to use it to kill or to inflict grievous bodily harm upon the victim, or at least realising that he or she might use it with that intention.

In this case it's not necessary to prove that the Defendant himself had such an intention, it is sufficient and necessary that the Defendant knew that one or more of the others had it and that, knowing this, did an act to aid or enable that one to kill or to do grievous bodily harm.

If you're unsure of that intention on the part of the perpetrator, or of the knowledge of it on the part of the Defendant, then you would acquit of murder on this basis as well, but then you should go on to consider manslaughter on this basis. It would be manslaughter if the perpetrator, the person who actually did it, intended to use a knife to inflict some unlawful force, and the Defendant knew or realised that he or she might use a knife in that way.

Similarly, it would be manslaughter if, even though the perpetrator intended to use a knife to kill or cause really serious bodily harm, the Defendant did not realise that, but only thought that the perpetrator intended to use it to inflict some unlawful force.

Page 229, line 10 to 230, line 23

Manslaughter. And I had said to you before, what if you get to the position where you're sure that the Defendant did an unlawful act which killed Kellon Hill, but you're not sure that he intended to kill him or to cause him really serious bodily harm? In other words, if you were not sure of the question of intent.

In such a case, you should acquit of murder but go on and consider the offence of manslaughter. That's not expressly included on the indictment, but it is a verdict which is always is open to a jury on a charge of murder.

The Criminal Code says: A person who unlawfully kills another person under such circumstances as not to constitute murder is guilty of manslaughter.

The big difference between manslaughter and murder is that it contains -- the definition contains no reference to a specific intent, whether be it to kill or to cause grievous bodily harm. In other words, for it to be manslaughter, all the Crown has to prove is that the Defendant did an unlawful act which caused the victim's death. And I said that the intentional application of force to another without their consent is an unlawful act and that there's nothing in this case to make it lawful.

And I then said to you that if that's where it stops, your task would be relatively straightforward, but that the prosecution rely on an alternative approach, if you reach the position where you are not sure that this Defendant, Kellan Lewis, in fact stabbed Kellon Hill.

The prosecution say that if Mr. Lewis was not the person who actually stabbed Kellon Hill, that he was then -- then, they say, he was a party to that act in the sense that he was there and present, aiding the commission of the offence by another member of his group.

Page 231, line 20 to page 232, line 18

As to manslaughter, if you are unsure, if you are unsure of that intention on the part of the perpetrator, or the knowledge of it on the part of the Defendant, then you would acquit of murder but you should go on to consider manslaughter.

It would be manslaughter if the perpetrator intended to use a knife to inflict some unlawful force, and the Defendant knew or realised that the perpetrator might use the knife in that way.

Similarly it would be manslaughter if, even though the perpetrator intended to use a knife to kill or cause really serious bodily harm, the Defendant did not know or realise that, but only thought that the perpetrator intended to use it to inflict some unlawful harm. And the difference between the two, again, relates to the need for specific intent for murder and the absence of that need for manslaughter.

I should say also, Members of the Jury, that when considering, if you get to it, this alternative basis, if the Defendant did not know that the perpetrator brought a knife or a similar weapon to the fight with the intention of using it, he wouldn't be guilty of either murder or manslaughter.

31. In the case of R v Powell, R. v English [1999] 1 A.C. 1, a House of Lords decision, at page 11, Lord Hutton said:

> *There is therefore a strong line of authority that participation in a joint criminal enterprise with foresight on contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise.*

32. In R v Jeffrey [2001] Q D. R 306. A Court of Appeal decision, at page 31 McPherson J.A. said:

> *The reason why it was sufficient here to prove no more than that is that the acts of all four of them were done in the presence of and in full view of all the others. Each of them was helping the others to carry out their assaults. Hence if, as the appellant suggested in his answers in the interview, the major share in the assault was contributed by Pascoe, or by the other three apart from himself, the appellant nevertheless did an act or acts aiding Pascoe, or some or all of the others, to commit the offence of murder by causing the death with intent to do grievous bodily harm. He admitted to having kicked and punched the man about ten times in the lower back, the legs, and the head; and even if, as he claimed in the*

> *interview, his kicks or punches were only mild or modest blows, he nevertheless did an act or acts which aided one or more or all of the others to do the act of killing their victim or of inflicting grievous bodily harm on him. Where four assailants together attack a person, each succeeding blow, whether great or small, aids the others in bringing about the death or grievous bodily harm that ensues. Even a moderate blow helps to subdue the victim and diminish his ability or will to resist or survive, and so paves the way for a later and more severe blow, or blows and so on, until grievous harm or death results from the combined impact of their joint efforts. By assisting in the combinations of assaults that led to the death of Timms, the appellant was, always assuming he had the requisite state of mind, deemed by the first sentence of section 7 "to have taken part in committing the offence and to be guilty of it.*

Section 27 of the Bermuda Code is similar to section 7 of the New Zealand Code.

33. Mr Perry submitted that the principle in Powell's case founded on "foresight," "contemplation" or "might" is not applicable to the law in Bermuda whether it be in relation to murder or manslaughter and is not applicable to secondary liability. Section 27 Criminal Code.

34. In Denis Alma Robinson v The Queen, Privy Council Appeal [2011] UK PC 3, at paragraph 8, Sir Anthony Hughes said:

> *Section 28 of the Code provides for the particular form of secondary liability which arises when D1 and D2 embark together on crime A, and in the course of it crime B is committed by D1. In the Common Law this kind of secondary liability is described in the line of cases whose familiar landmarks include Chan Wing-Sin v The Queen* [1985] AC 168*, Hui Chi-Ming v The Queen* [1992] 1 A C 34, *R v Powell and English* [1999] 1 A C *and R v Rahman* [2008] UKHL 45, [2009] A C 129*. It differs from other forms of secondary liability in that it may exist even where D2 does not wish D1 to commit Crime B. It arises because lending himself to Crime A he may have sufficiently involved himself also in Crime B. Section 28 provides as follows:*

> *When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, then each of such persons is deemed to have committed the offence.*
>
> *It is to be observed in passing that the test for this form of secondary liability is somewhat wider than is the common test of actual foresight by D2 of crime B. No more, however, needs be said about this form of secondary liability. Whether or not this case might have been presented within it, the Crown understandably limited its case to aiding within section 27 (1) of the Code.*

At paragraph 9, Sir Anthony Hughes said:

> *The Board agrees that in a jurisdiction governed by a Code the starting point is the language of the Code, rather than the Common Law. So far however, as aiding within Section 27(1) is concerned, there is no difference of any significance between its provisions and the Common Law. The omission of the word 'abet' is of no significance, for its meaning is encompassed in any event within "counsel' or procure' and it may be also within 'aid'. The Chief Justice's simple direction that 'aid' means 'assist' was a helpful and accurate rendering of the essence of this form of secondary liability, whether under the Code or at Common Law.*

35. We can find no fault with the trial Judge directions on manslaughter. We therefore reject the submission of Mr Perry that the English cases are not applicable to the law in Bermuda as it relates to section 27 of the Code.

Ground 4

36. The case before us raised what are preeminently jury questions. What was the proper conclusion to be drawn about what the appellant did, and whether he did it along with others in order to assist the person who inflicted the fatal wound? This is on the basis that it is not the accused who inflicted the fatal injury.

37. However, we are satisfied that there was sufficient evidence for the jury's consideration and for the jury to reasonably conclude whether it was the appellant who inflicted the fatal injury. In the final analysis the jury convicted the appellant for the offence of manslaughter. If the verdict was based on the finding that the appellant inflicted the fatal injury, the jury must have concluded that there was no intention to kill or to cause grievous bodily harm. Such a verdict was open to them based on the directions of the Judge.

38. In the circumstances the appeal against conviction is dismissed and the conviction affirmed.

Sentence

39. We have considered the submissions of Counsel for the appellant and the Crown and having regard to the facts of this case, and the guidelines as to sentence with respect to similar cases, we are of the view that the sentence of 12 years is not manifestly excessive. The appeal against sentences is dismissed and the sentence is affirmed.

Signed

Zacca, President

Signed

Ward, JA

Signed

Auld, JA