[2011] UKPC 5
Privy Council Appeal No 0051 of 2009

JUDGMENT

Nigel Sookram *v* The Queen

From the Court of Appeal of Grenada

before

Lord Phillips
Lady Hale
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Brown
ON

23 February 2011

Heard on 19 January 2011

Appellant
Michael Grieve QC
Anslem Clouden
Matthew Slater
(Instructed by Simons Muirhead & Burton)

Respondent
James Guthrie QC

(Instructed by Charles Russell LLP)

LORD BROWN

1. Shortly before 9 pm on 20 December 2005 John Joseph, a man in his thirties, was shot dead in the course of an attempted robbery by two masked gunmen at his place of work, the Tivoli Gas Station in St Andrew's, Grenada.

2. There is no dispute as to the identity of the two gunmen. One was the appellant, then aged 26; the other a man named Denzil Charles, known as Pappy. They were jointly charged with Joseph's murder and on 26 February 2007 were arraigned before Benjamin J and a jury at the local Assizes. On 1 March 2007, at the start of the second day's hearing of the Crown's evidence, Charles was re-arraigned before the jury at his counsel's request and pleaded not guilty to murder but guilty to manslaughter, a plea accepted by the Crown. He also pleaded guilty to an offence of robbery with violence in a separate case. Upon Charles being remanded in custody to be sentenced at a later date, the trial forthwith continued against the appellant.

3. On 7 March 2007 the appellant was convicted of murder by the jury's unanimous verdict and on 2 April 2007 sentenced to eighteen years' imprisonment with hard labour. On 12 March 2008 his appeal against conviction was dismissed by the Eastern Caribbean Court of Appeal (Denys Barrow SC, JA, Ola Mae Edwards and Errol Thomas JJA (Ag)). Following the grant of special leave to appeal on 17 March 2010, the appellant's further appeal was heard by the Board on 19 January 2011. The same day we indicated that we would humbly advise Her Majesty that it should be dismissed for reasons to be given later. These are the Board's reasons.

4. On 25 February 2006, some two months after the killing, the appellant was detained by Detective Sgt. Frame, and, on being questioned under caution in connection with John Joseph's death, said simply "Officer, I don't know anything about that". A month later, on 23 March 2006, having spoken to his lawyer, the appellant agreed to give a written statement under caution which he duly signed, which was put in evidence by the Crown at trial, and which, the appellant having elected not to give evidence, was ultimately adopted as his defence. As his counsel put it to the jury: "The statement . . . is his defence. He stands by it."

5. What the statement says is essentially this. The plan to rob the gas station was Pappy's (i.e. devised by Charles) and, although at first he told

Pappy that he didn't want to go, in the end he reluctantly agreed, albeit making plain that he wanted nothing from the venture. Having arrived by way of a bushy track at the back of the gas station, Pappy reconnoitred the scene and then produced from his bag and handed to the appellant a jersey, a black mask and a toy plastic gun (saying it was "just to scare the people"). He then covered the appellant's hands with some kind of material. Pappy himself was wearing socks on both hands and a dark mask and he too was carrying a gun. "I didn't know if it was a real gun", the statement added. Pappy then started fighting with "John" (the deceased), he himself being behind Pappy, at which point "Learie" (Learie Thomas, the gas station manager) threw some money on the floor – money which he, but not Pappy, saw and which he declined to pick up because, as he had said before, he wanted nothing from all this. It was then that he heard the gunshot and realised that Pappy's gun was a real one. Seeing that John was dying ("John's strength was leaving him"), he ran to the back of the building where Pappy very soon joined him and they left the gas station by the same bushy route they had come by. On their return the appellant complained about what had happened, saying that "John is my friend" and that he would go to the police. At this point, he said, Pappy fired a shot and said that he would kill him if he told anyone.

6. So much for the appellant's statement under caution. Whatever else might be gleaned from it, it established beyond question the identity of the two robbers and acknowledged that each had been masked (unsurprisingly given that both men were known to the gas station staff) and that each had been carrying a gun (one of which at least was real).

7. The case for the Crown consisted principally of the evidence of five eye-witnesses. Three of these were employed at the gas station: Learie Thomas (the manager), Colette Jeffrey (a cashier in the gas station office) and Desline Albert (a gas attendant, like the deceased). These three all gave their evidence before Charles's change of plea. The other two eye-witnesses, whose evidence followed Charles's change of plea, were Samuel de Coteau, a bus driver who had just driven into the gas station, and Nicholas John, a security officer who was at his cousin's shop across the road from the gas station. Before considering their respective accounts of this killing, it is worth noting that the two accused were of very different heights, the appellant being substantially taller than Charles. This was clearly established on the evidence as a whole and, of course, something which the jury were well able to see for themselves.

8. Only one of the witnesses was able actually to identify either of the robbers. This was Samuel de Coteau, who knew the appellant (and, indeed, identified him as the actual killer). He said that he had known the appellant for some five or six years and was able to recognise him in part from seeing the side of his face (exposed, he said, when the deceased grabbed his mask during

their struggle) and in part from the appellant's distinctive walk which he described as a "bump and walk" and demonstrated in the courtroom. "The other masked man", he said, "was short – about five feet". It is important to have this height differential in mind when considering the evidence of the other eye-witnesses, evidence we can now take quite shortly.

9. Colette Jeffrey saw two men wrestling with the deceased. They both had masks and each had a gun. One of the men, she said, was about six feet tall, the other five feet two inches or five feet three inches. She heard John saying "Leave me alone! Leave me alone!" and she heard "a large explosion". The killing occurred shortly before the gas station was to close for the night at 9 pm and whilst it remained brightly lit.

10. Learie Thomas said that his attention was caught by a noise near the door and by Colette "bawling". He saw John "wrestling with someone in front of the [open] shop door". The man had a gun and was masked and "was about the same height as John" (which he put at six foot – six foot one inch and which the pathologist later stated to be approximately six foot two inches). Having watched for "ten – fifteen seconds", he retreated just before hearing the gunshot. He said he knew both accused (although not, of course, being able to recognise them on the night and, indeed, himself seeing only one of them).

11. Desline Albert saw two masked men trying to kill John outside the door. He was resisting and said "Leave me alone, boy!" She saw a gun, froze, heard a gunshot and then saw John holding his chest, blood pumping out of it as he approached her, before falling into the shop.

12. Samuel de Coteau, having driven up to the gas pump, saw two masked men, one inside and one outside the building. "The one inside was wrestling with John." They were "grappling" together and the man had a "gun pointing at John. John grabbed his mask from his face. I heard a shot go off." Some ten-fifteen seconds later the gunman came out of the building and met up with the other masked man. As the man came out, the witness was able to recognise him from the left side of his face ("the mask came down") and his walk (as already described). It was the appellant. At the time of the gunshot, he said, "the short one [the other masked man, 'about five feet' tall] was on the outside." Defence counsel's attempts to cast doubt upon Samuel de Coteau's evidence of having recognised the appellant at the scene of this crime were in truth risible. Given both the appellant's admission that he was there and that Mr de Coteau knew him, why should he not have recognised him? It was never suggested to Mr de Coteau that he was lying about this, only that he was mistaken. And, indeed, as the appellant's counsel later came to establish when

cross-examining Detective Sgt. Frame, it was "principally upon the evidence of Mr de Coteau" that the appellant came to be arrested.

13. Nicholas John saw "two [masked] men wrestling with John. John and the taller individual held on. The shorter one was pushing from behind. This was by the pump." He said that, as the men were advancing towards the office door, he threw a bottle (from a distance of some 60-70 ft) at the short one who then went "round the building. The tall one and John were still struggling and almost entering the building." He then looked for something else to throw whereupon he heard "an explosion". At that point he "saw the tall one just pushed the door and run where the short one went. I saw John was trying to go in the office door and he slid down inside the building." When cross-examined he repeated: "After I heard the explosion I saw the tall one run in the same direction as I saw the short one had run."

14. Unsurprisingly in the light of that evidence the Crown's case from first to last was that it had been the appellant who actually shot John, the killing having taken place during the course of an attempted robbery by the two men, a robbery that had gone fatally wrong. Inevitably there were discrepancies in the details of the accounts given by the various eye-witnesses but not merely had Samuel de Coteau actually recognised the appellant as the killer; this was confirmed by Nicholas John who made plain that it was the taller of the two gunmen (obviously, therefore, the appellant) who shot John; and to a degree was confirmed also by Learie Thomas who, although he saw only one of the two gunmen, must plainly have been referring to the appellant ("about the same height as John") whom he saw wrestling with John almost immediately before the fatal shot was fired. And Colette Jeffrey's and Desline Albert's evidence was perfectly consistent with this view. The DPP prosecuted the case on behalf of the Crown. As he put it to the jury in his closing speech: "All the evidence of all the witnesses are [sic] perfectly consistent with the prosecution's case, the prosecution's theory of the case, that it was Nigel Sookram and no one else who shot the deceased."

15. Two grounds of appeal are pursued before the Board. First it is said that upon the Crown's acceptance of Charles's change of plea the judge had no alternative but immediately to discharge the jury so that the appellant could be tried afresh before a new jury. Secondly it is said that the judge erred when he came to direct the jury upon the law of joint enterprise criminal liability.

The co-accused's change of plea

16. Mr Clouden, the appellant's counsel at trial, recollects that upon Charles's plea of guilty to manslaughter being accepted by the Crown he applied to the judge in his chambers to discharge the jury on the ground that they "would naturally paint Sookram with the same brush", an application which the judge refused. Not merely is there no record of this, let alone a note of whatever discussion took place, as counsel acknowledges there clearly should have been, but it is the DPP's recollection that no such application was in fact made. No matter. Mr Grieve QC who appears for the appellant on this appeal rightly accepts that the only basis on which this ground of appeal could succeed would be if the Board were persuaded that the only course open to the trial judge when Charles changed his plea was to have discharged that jury and empanelled a new one for the appellant's trial to start afresh. On that basis, of course, it matters nothing whether or not the judge was actually asked to exercise his discretion. Rather it is said that in reality he had no discretion: a fair trial process demanded a fresh jury.

17. In the Board's judgment, there is nothing in this argument. To suggest that the jury would "paint [the appellant] with the same brush [as Charles]" makes no sense at all. What brush, one wonders, was being suggested? It is quite immaterial on the facts of this case that Charles's plea placed him (and inferentially the appellant too) masked and armed at the scene of this attempted robbery. So much was plain and undisputed, indeed asserted as part of the appellant's case. Mr Grieve suggests that perhaps a better way of putting this ground of appeal would be to say that the Crown's acceptance of Charles's plea to manslaughter meant that the jury would be more likely to accept that it was Charles who in the event played only a secondary role in the enterprise, leaving the appellant himself as the sole candidate for the primary role of the actual killer. But there is nothing in this suggestion either. It was always (and, as already remarked, unsurprisingly) the prosecution's case that the appellant was the killer and their acceptance of Charles's plea in no way advanced that case nor compromised the appellant's attempt to cast Charles instead in this unwanted role. Quite the contrary: the appellant was much better off with Charles out of the dock than had he remained at trial to pursue his cut-throat defence – very likely giving evidence that it was the appellant, not him, who fired the gun and perhaps asserting in addition that it was the appellant rather than him who planned this robbery in the first place.

18. Before passing from this ground of appeal it should perhaps be noted that when later the judge came to sum up the case he very properly directed the jury that they must disregard Charles's guilty plea:

> "You have heard Denzil Charles plead guilty. The fact that he has pleaded guilty, which you know, has no bearing on the guilt or innocence of Nigel Sookram, whose guilt or innocence you will have to determine. You are not trying Denzil Charles. You must concentrate on the case in respect of Nigel Sookram, and Nigel Sookram alone, and decide whether the evidence before you makes you sure of his guilt. If you are not sure of the guilt of Nigel Sookram, your duty is to acquit him. The prosecution has to prove its case against this accused so that you are sure of his guilt just as if Denzil Charles had not pleaded guilty."

And later still the judge added:

> "You must not speculate on what role Pappy would have played, but you must concentrate on what the accused said he did."

19. There are, of course, cases where, upon a co-accused (*B*) changing his plea, justice requires the jury to be discharged and the accused (*A*) to be tried afresh by a new jury. Wherever an appeal has succeeded on that basis, however, it has been possible to point to a particular unfairness which could be seen to result from *A* continuing to be tried by the same jury. It may be, for example, that the trial having begun with *A* and *B* both steadfastly maintaining their innocence, *B's* subsequent acceptance of his guilt necessarily carries with it the inference that *A* too is guilty – as in *R v O'Connor* (1986) 85 Cr App R 298 where *A* and *B* were jointly charged with having conspired together (and with no one else) to obtain property by deception (although in the event the proviso was applied); or as in *R v Fedrick* [1990] Crim. L.R 403 where the prosecution had opened the case on the basis that *A* and *B* were "in cahoots" (although no conspiracy charge was laid); or, indeed, because *A* and *B* had been seen (or had admitted being) together at or near the time and place of the crime. Or it may be that, before *B's* change of plea, evidence had been led against him which was not admissible against *A* but nevertheless highly prejudicial to him.

20. Unless in such cases as these the Court could in any event properly hold *B's* plea of guilty to be admissible in evidence against *A*, or can by appropriate directions to the jury substantially nullify its prejudicial effect on *A's* case or there is other good reason not to discharge the jury, (as here, because Charles's presence at the scene intent on robbery was in any event being asserted by the appellant) a failure to do so may well (subject always to the proviso) result in a successful appeal. As already indicated, however, the appellant here was occasioned no prejudice at all and, in cases such as this, it is not merely unnecessary but would involve a great waste of time and money and great

inconvenience to witnesses who had already given their evidence to start *A's* trial all over again.

The joint enterprise direction

21. Given that the account given in the appellant's statement under caution constituted his entire defence, the judge clearly had no option but to direct the jury on the law of joint enterprise liability. This he did twice in the course of his summing up. The first time he gave what may be described as the standard directions on the law including that:

> "Even if there was a plan to rob the gas station, if what the other person did went beyond what was agreed or what might have been contemplated, or . . . , as in this case, the accused did not know that the gun was real, then the other person alone is responsible for the act and you must therefore find the accused not guilty."

He immediately then added, however, "When I come to examine the statement I will relate what's in the statement to that matter when I come to deal with it."

22. He then continued:

> "However, if you are sure that the accused knew that the other person might have had a real gun and that he might use the gun, the law is that by participating in the plan to rob the deceased with that knowledge, he is taken to have accepted the risk that the other person would act in that way so that he, the accused, adopts those acts and is equally responsible for them."

Just as before, however, he immediately then added: "Again, I will deal with that when I come to look at the statement."

23. The further directions on the law of joint enterprise came towards the end of the summing up after the judge had fully reviewed the prosecution evidence and reminded the jury in some detail of what the appellant had said in his statement. This part of the summing up (to which paragraph numbers will be added for convenience) it is necessary to set out almost in full:

(i) "Now there are a number of options that are open to you on this statement. You can accept it in its entirety. And if you accept it in its entirety, here is what it's in effect saying. [He] puts himself on the scene with Pappy, who has pleaded guilty. You must not speculate on what role Pappy would have played, but you must concentrate on what the accused said he did. And your task is to decide whether you believe what he told the police in the statement. Now, if you believe the statement, or you conclude that it can be believed, or you are in doubt whether you should believe it or not, your duty is to acquit the accused. Why? Because he could not have committed any crime based upon the statement; because in the statement, you can draw no conclusion of an intent to kill or an intent to rob. And based upon the statement, you could well conclude that the accused is saying that he didn't know that Pappy's gun was not a toy gun. The accused is also saying he did not pick up any money after having told the other person, Pappy, he didn't want anything. And what he is saying is that he played no part; all he did was stand around, masked. In law, mere presence, even if you are masked, is not enough to amount to an unlawful act. So if you accept everything in that statement then it is your duty to acquit the accused.

(ii) But there is another option open to you and that is what is being commended to you by the Director of Public Prosecutions if you are not to reject the statement entirely, which is the first thing he is putting to you. He is saying that the statement should be rejected entirely. But it is also open to you to accept the statement partially. Now if you believe that the accused was on the scene, and he did say that he was on the scene, and why else would he say he was on the scene if he wasn't? If you believe the accused was on the scene pursuant to a plan to rob, and he was indeed unsure as to whether the gun Pappy had was a real gun, then if you find that Pappy did use the gun to shoot the deceased, resulting in his death, then the act of the accused would amount to manslaughter. Of course this conclusion must be based upon a rejection of the eye-witness evidence of Samuel de Coteau. [The judge then repeated this direction, explaining that it would amount to manslaughter because the accused would on those facts have participated in an unlawful act.]

(iii) Now the third option that is open to you is to reject the statement in its entirety. If you reject the statement in its entirety, you must then go back to the prosecution's case and examine it as a whole to determine whether you are satisfied to the extent that

> you feel sure that the accused is guilty of murder. What I am saying to you is that even if you disbelieve the statement, that doesn't mean that you rush to find the accused guilty; that is not how it is done. You go back to the prosecution's case, examine it carefully as a whole, and after a careful examination if you are satisfied that the accused is guilty, only then you can return a verdict of guilty. It is not for you to convict the accused because you believe that he presented a statement full of lies. You can only convict on the strength of the prosecution's case.
>
> (iv) I repeat to you, as I said to you over and over, if you are of the view that the prosecution has not established the guilt of the accused, then you have a duty to acquit him. If you are in doubt about it also, then, too, you must acquit. If, however, you are satisfied that the prosecution has established the guilt of the accused beyond reasonable doubt, that is to say so that you can feel sure about the guilt of the accused, then your duty is to find the accused guilty."

24. As the Board understand it, Mr Grieve's central, indeed sole, complaint about these various directions on joint enterprise liability is that the judge left to the jury the possibility of convicting the appellant of murder even on the supposition that Charles rather than he himself was the actual killer, namely on the basis of him having accepted the risk that Charles had a real gun and might use it with the intent to kill (the necessary mens rea of murder in Grenada) – the basis of liability described in the first part of the joint enterprise directions as set out in paragraph 22 above. A conviction of murder on this basis, Mr Grieve submits, was not open to the jury given the Crown's acceptance of Charles's plea of guilty to manslaughter: by accepting that plea, the argument runs, the prosecution had acknowledged that Charles was not the killer and thus disabled itself from asserting joint enterprise liability on the appellant's part on the basis that Charles *was* the killer.

25. The Board regard this argument as not merely wrong in law but, in the circumstances of this case, totally unrealistic on the facts. The initial joint enterprise directions, as already noted, were made subject to the further legal guidance to be given when the judge came to relate the law to the appellant's statement under caution. And when one comes to consider the lengthy passage in the summing up set out in paragraph 23 above, one could hardly imagine a set of directions more favourable to the defence. Here was a defendant who had chosen not to go into the witness box, relying instead upon what was substantially a self-serving statement made after taking legal advice. Option 1 (para (i) of the passage) offers the jury the opportunity to give the appellant the benefit of every possible doubt on every aspect of the case. Option 2

(paragraph (ii)) offers the possibility of a manslaughter verdict – obviously on the basis of Charles being the killer (earlier suggested by Mr Grieve to be impermissible but not in fact objected to with regard to option 2). Of course this was not the Crown's real case against the appellant which was rather that he himself was the killer and, indeed, paragraph (ii) begins by making that plain: the second option only arises "if you are not to reject the statement entirely, which is the first thing [the DPP] is putting to you". And that, one notes, is the explicit premise of paragraph (iii): the third option (murder) only arises if the jury *do* "reject the statement in its entirety".

26. In that event the jury were to "go back to the prosecution's case" and, of course, the prosecution's essential case, as already noted, was that the appellant himself was the killer. This is how the case had been put to the jury; it was entirely consistent with the Crown's acceptance of Charles's plea of guilty to manslaughter; and, as the Board have already sought to demonstrate, it was perfectly consistent with the evidence of all the prosecution witnesses. Although strictly, as a matter of law, it would have been open to the jury to convict the appellant of murder even had Charles been the killer (on the basis set out in paragraph 22 above), neither the Crown nor, when it came to option 3, the judge, actually invited them to do so. The Board entertains not the slightest doubt that the simple reason why this appellant stands convicted of murder is because the jury were quite satisfied on the evidence that he himself fired the fatal shot.

27. Mr Grieve at the outset of his oral argument abandoned what had earlier been advanced in writing as a third ground of appeal: that the Board should feel some lurking doubt about the appellant's guilt. He was wise to have done so. It is difficult to think of any less promising case in which to have mounted such an argument. The Court of Appeal disposed of this appeal in a commendably incisive judgment within a day of hearing the argument (possibly even ex tempore). The Board have similarly found it to be entirely without merit.