

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

CrA No. 15 of 2001

BETWEEN

**ANTHONY NEVADA  
JOHNSON**

**APPELLANT**

AND

**THE STATE**

**RESPONDENT**

**PANEL:**

R. HAMEL-SMITH, J.A.

A. LUCKY, J.A.

W. KANGALOO, J.A.

**APPEARANCES:**

Mr N. King and Mr L. Gokool appeared on behalf of the Appellant

Mr D. Rampersad appeared on behalf of the State

**DATE DELIVERED: 26<sup>th</sup> July 2002**

## **JUDGMENT**

### **Lucky J.A.**

The appellant was charged with murder. He was found guilty of manslaughter and sentenced to seven years imprisonment with hard labour. He has appealed against his conviction and sentence.

### **The Case for the Prosecution**

The evidence adduced by the prosecution against the appellant is as follows: The deceased, Michael Hercules, was the Commissioner of Prisons in Trinidad and Tobago. At about 9.20pm on the evening of 14<sup>th</sup> August 1993 he parked his car on the road at Ninth Avenue, Barataria in front of the house of Catherine Crichlow. He got out of the car and handed Mrs Crichlow a parcel which she took into the house and returned to her front gate. Mr Hercules stood on the road beside the open door of his car where he was having a conversation with Mrs Crichlow. Mrs Crichlow saw two men walking towards them. The men walked past and soon after when Mr Hercules was about to get back into his car to leave, Mrs Crichlow heard the sound of running coming from behind Mr Hercules' car. The men were similarly dressed to the two men who had walked past a few minutes before but were now wearing masks as they ran towards Mr Hercules. That area of the street was brightly lit with street lights and security lights from private dwellings and business places. One of the men

Glen Mitchell ran to the front of the vehicle and pointed something silver, which looked like a gun, at Mr Hercules. The appellant was standing behind Glen Mitchell with his hands cupped in the form of a gun pointed at Mr Hercules, but he did not have a gun. Shooting began and Mrs Crichlow ran back into her house and as she ran she saw the appellant with his mask removed running away. Both Mr Hercules and Glen Mitchell died in the shooting. Mr Hercules sustained four bullet wounds to his body fired by the revolver carried by Mitchell and Mitchell sustained three bullet wounds fired from the semi-automatic pistol carried by Mr Hercules.

At about 9.30pm that night while on mobile patrol along Ninth Avenue, Sergeant Brereton saw the appellant walking fast with a limp and what appeared to be bloodstains on his clothing. Sergeant Brereton shouted “*police, stop*” but the appellant ran off. He was pursued and apprehended. When questioned the appellant said he was passing by when a black car passed and started shooting, he received bullet wounds and was taken to the Port-of-Spain General Hospital where he received treatment for bullet wounds.

An identification parade was held two days after the incident with two witnesses in attendance, Mrs Crichlow and Seeram James in attendance. James was a security guard on the evening of 14<sup>th</sup> August 1993 at business premises on Ninth Avenue close to the scene of the shooting. Between 8.00pm and 8.30pm he saw two men walking on the street, one was wearing a black T-shirt and the other a white T-shirt (Mrs Crichlow described the shirts she had seen the men wearing

similarly but in some more detail). Shortly before 9.30pm he saw the same two men pass by but in the opposite direction, within minutes he heard gunshots. Both witnesses identified the appellant as the man they had seen on Ninth Street in the white jersey that night.

### **The Defence**

At the trial the appellant testified that on the night of 14<sup>th</sup> August he went with his uncle in the uncle's car to search for his aged grandmother who was reported missing. After searching for some time he and his uncle decided to split up and he began walking on his own. While walking along Ninth Avenue he saw a man and a woman talking near the car. The man was standing in the open doorway to the car and the woman was nearby. Some people came running up behind him and two persons ran past him. He heard gunshots. He felt a burning in his foot and back. He got up and started to run. He fell and a police officer came up and took him from where he lay to the hospital, and then subsequently to the police station from where he participated in an identification parade. He said he did not know Glen Mitchell.

Counsel filed two grounds of appeal:-

### **Ground 1 reads:**

“The Learned Trial Judge erred in law in directing the jury that on the facts of this case the accused could only be guilty of manslaughter, if having first considered the issue of murder,

you have come to the conclusion that he is not guilty of murder, but you find that he was there with Glen, he knew Glen had a gun and it was loaded, and whilst not foreseeing that Glen might use that gun to kill or cause serious injury that night, nevertheless had he given it some thought, he must have realized that in the excitement or in the heat of the taking of the car something may happen which will cause Glen to use the gun resulting in injury to Hercules, not killing or causing death, but some level of injury, in those circumstances, he will be guilty of manslaughter when the proper direction should have been that if the appellant is not guilty of murder he will also be not guilty of manslaughter.”

The gist of learned Counsel’s complaint was that the trial judge ought to have directed the jury that if the appellant was not guilty of murder he should be acquitted not only of murder but of manslaughter. The direction on this issue reads:

*“I want to consider, before I deal with the case for the accused, the issue of manslaughter, as it arises on the facts of this case.*

*Members of the Jury, on the facts of this case as already outlined, the accused could only be guilty of manslaughter if, having first considered the issue of murder, you have come to the conclusion that he is not guilty of murder, but you find that he was there with Glen, he knew Glen had a gun and it was loaded, and whilst not foreseeing that Glen might use that gun to kill or cause serious injury that night, nevertheless had he given it some thought, he must have realized that in the excitement or in the heat of the taking of the car, something may happened which might cause Glen to use the gun, resulting in injury to Hercules, not killing or causing death, but some level of injury, in those narrow circumstances, he will be guilty of manslaughter.”*

We think that Counsel’s complaint is linked to the second ground which will be dealt with in due course. The learned judge directed the jury that they had to consider the question of murder but that before they could find him guilty of manslaughter it was open to them to determine whether the appellant knew Glen had a gun; whether it was

loaded and whether he foresaw that Glen might use it to injure Mr Hercules not causing death but some level of injury. The issue was quite properly left for the jury to determine. The judge said *“You must be satisfied to the extent that you feel sure he was part of a plan to steal a car and that he knew Glen Mitchell was carrying a loaded gun;”*.

In *Chan wing-Sui v The Queen* [1985] A.C. 168., the principle stated in *Reg. v Smith (Wesley)* 1963 1 W.L.R. that:

*“everything which was within the ambit of the concerted arrangement was the responsibility of each party who chose to enter into a criminal purpose”*.

The appellant took part in a concerted attack. In fact the trial judge was extremely fair and generous to the appellant when he directed the jury that it was open to them to find whether the appellant knew the gun was loaded when it was never his case that he did not know the gun was loaded.

The evidence which the jury apparently accepted was that the appellant was a few feet behind Glen Mitchell who had a gun and he himself had his hands cupped as though he was holding one. In these circumstances it must have been within his contemplation that Glen Mitchell might use the gun, which he knew Mitchell was carrying and pointing to Mr Hercules. It seems to us that the jury found that there was no intention to kill or cause grievous bodily harm but to cause some level of harm.

Accordingly we find no merit in this ground.

**Ground 2 reads:**

“The non-direction by the Learned Trial Judge of the evidence of Catherine Crichlow that as Glen Mitchell approached the deceased Michael Hercules he requested that Hercules should hand over the keys amounted to a serious misdirection which resulted in a miscarriage of justice since this bit of evidence coming, as it does, from the key witness of the prosecution showed that the principal offender use of the gun was only to frighten Hercules so that he would hand over the keys in order to drive away the car and not to kill or cause him serious bodily harm.”

Counsel submitted that the evidence of Catherine Crichlow was that when Glen Mitchell approached Mr Hercules he requested the keys to his (Hercules’) car. Counsel contended that this bit of evidence indicates that the gun was used to frighten Mr Hercules to hand over the keys and he did not foresee that Mitchell might fire the gun.

This issue was properly and adequately addressed by the trial judge when he summed up the arguments for and against the inferences that may be drawn on this issue. He said:

*“Questions were asked of the police officer how people take cars. He has expressed his opinion, that is his opinion, that sometimes - - and you may have to use our own experiences in life - - people go for cars, firearms may or may not be used. If used, is it the intention to cause death or serious bodily injury or is it, as the defence is saying, more likely that what the bandit wants if to instill fear and terror, so that you will hand over the keys? You know your society. That is why we have you, twelve persons of different experiences, backgrounds, everything, to determine these issues.”*

We can find no fault with this direction. In fact in its judgment in *Anthony Nevada Johnson v The State* (unreported) (21/7/99) at p.9 the Privy Council stated:

*“Their Lordships are also aware that in Trinidad and Tobago firearms carried by criminals are frequently loaded and that loaded firearms are frequently fired to kill or wound in the commission of crimes.”*

Clearly, it was a matter of inference for the jury and we are satisfied that the jury had been properly directed as to the need for the appellant to contemplate the firing of the revolver by Mitchell with intent to kill, cause grievous bodily harm or injury.

Accordingly, we find no merit in this ground.

For the reasons set out above the appeal is dismissed and the conviction and sentence are affirmed.

R. Hamel-Smith  
Justice of Appeal

A. Lucky  
Justice of Appeal

W. Kangaloo  
Justice of Appeal