27/81

IN THE PRIVY COUNCIL No. 18 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

ADDONTON ANDY THOMAS — Appellant

- and -

THE STATE — Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal by special leave in forma pauperis from a Judgment of the Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali, C.J., Corbin and Rees JJ.A.) dated 12th November 1976 dismissing the Appellant's appeal against his conviction for murder in the Supreme Court of Trinidad and Tobago (Scott J. and a jury of twelve) on 20th May 1975 when he was sentenced to death. p.176

2. The relevant statutory provision is contained in section 16(1) and (2) of the Jury Ordinance which reads as follows:-

> "(1) On trials on indictment for murder and treason twelve jurors shall form the array, and subject to subsection (3) hereof the trial shall proceed before such jurors and the unanimous verdict of such jurors shall be necessary for the conviction or acquittal of any person so indicted.
>
> (2) The array of jurors for the trial of any case, civil or criminal, except on indictment for murder or treason, shall be of nine jurors and no more."

Rule 3 of the Indictment Rules provides that:-

> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment, if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

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3. The Appellant was charged together with one Kirklon Paul on an indictment containing 3 counts namely:- pp.1-3

(i) Murder, in that on 28th August 1973 at Diego Martin, in the County of St. George they did murder Austin Sankar.

(ii) Robbery, in that on 27th August 1973 at Carenage, in the County of St. George, being armed with offensive weapons, to wit, revolvers, they robbed Raymond John of a motor car.

(iii) Kidnapping, in that on 27th August 1973, at Carenage in the County of St. George, they stole and unlawfully carried away against his will Raymond John.

4. The trial took place between 1st and 20th May 1975 before Scott J. and a jury of twelve. pp.4-6

5. The evidence called on behalf of the prosecution included the following material matters:

IGNATIUS WILLIAMS gave evidence that on 27th August 1973 he was working at a gas station in Port of Spain. He identified the Appellant as the driver of a Falcon motor car registration number PJ 5454 which had stopped for petrol. The identification had been made at the Magistrates Court. He had written down the number because he thought the car suspicious. In cross examination he was shown a statement which he had previously given to the police which described the Appellant as dark and which contained no reference to the Appellant being bald as stated in Williams' sworn oral evidence. pp.80-83 pp.140-141

COLVIN COX, a sergeant of police, fingerprint branch, gave evidence that he took fingerprints from the Falcon car, PJ 5454 and that he came to the conclusion that certain finger impressions found on the car were made by the same person who made a right ring finger impression indicated on a finger print slip signed Addomton Thomas. pp.92-97

LUCIEN VILLAFANA, a sergeant at C.I.D., Port of Spain gave evidence that on 12th November 1973 at Carenage Police Station he saw the Appellant. He gave evidence that having been cautioned the Appellant gave a statement which he reduced into writing. He said that he used no threats or force and made no promises or inducements to the Appellant to give the statement. When he was about to produce the statement, Counsel for the Appellant objected to it on the basis "that it was extracted from accused by fear, force, fraud,

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menaces and oppression". There followed a trial within a trial during which Villafana was cross examined. In addition MATTHEW TOUSSAINT (an immigration officer), RUDOLPH LEACHE, (Corporal C.I.D. Port of Spain), MICHAEL MONTOUTE (Corporal C.I.D. Port of Spain) and CARLOS JAMES (member of Medical Board of Trinidad and Tobago) were called by the prosecution on the issue of voluntariness and were cross examined. — p.104, pp.145-148, p.149, pp150-151, pp.151-153, pp.153-154

6. Thereafter the Appellant affirmed and gave evidence that he had not made the statement voluntarily but had affixed his signature to it under threats of a violent death. The Appellant called to give evidence ANDREW JOSEPH (police constable in Flying Squad) and his father FRANCIS THOMAS — pp.154-157, pp.157-159, p.159

7. After hearing argument on the admissibility of the statement the learned trial Judge admitted the statement in evidence and told the jury that the "weight and value of the statement remain a matter for them". — p.160

The Appellant's written statement disclosed the following facts: — pp.125-126

(i) About 8.30 to 9.00 pm on 27th August 1973 Brian Jeffers, Guy Harewood, two other persons ('P' and 'L') and himself went to one Broko's house at Laventille, and "decided that there should be a form of retaliation as there was a shoot out on the N.U.F.F. at the Valencia Forest by the police and the Regiment";

(ii) one Lennie then took them all to Carenage in a car after letting out Jeffers and Harewood at Dean's Bay;

(iii) The Appellant, P and L left Lennie's car at Carenage, stopped a Falcon car and ordered its driver to drive to Dean's Bay where Jeffers and Harewood had been dropped off earlier;

(iv) at Dean's Bay, the driver was imprisoned in the trunk of the car and he, the Appellant, took over as its driver;

(v) with Jeffers, Harewood P and L in the car, he drove around several places and eventually to Diego Martin, after taking gasoline from a gas station opposite the General Hospital, Port of Spain;

(vi) at Chrystal Stream Avenue, Diego Martin, they came upon a police motor car and followed it;

(vii) as he drove past the police car shots were fired into it from his car;

(viii) he then drove away, dropped off the men with him, released the driver and abandoned the car.

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8. Thereafter the jury heard substantially the same evidence as had been given for the prosecution before the learned Judge in the trial within a trial. pp.105-116

9. At the close of the prosecution case Counsel for the Appellant submitted that there was no case of murder or robbery to go to the jury. The learned trial Judge rejected that submission. pp.116-117

10. The Appellant made an unsworn statement from the dock and called two witnesses. pp.117-121 pp.121-122

11. The trial Judge summed up to the jury. He dealt with the burden of proof, the jury's function and his own function He directed the jury on the law of murder, robbery and kidnapping. He summarized the evidence both for the proseuction and defence and he gave a direction concerning common design. Of the identification evidence of Ignatius Williams, he said that the weight the jury attached to it was a matter for them. He did not see fit to tell the jury of the effect on oral evidence of a previous inconsistent statement. He did however comment upon the evidence "You may well consider that not very satisfactory evidence". pp.9-64 pp.10,53,59 pp.12-14 pp.12and 60 p.30

In summing up to the jury on the way they should approach the admissions contained in the Appellant's statement the learned trial judge said on more than one occasion that the weight and value of that statement were matters for the jury. However, having himself dealt with the question of admissibility, he nonetheless apparently left the issue of voluntariness to the jury when he said "the weight and value of that statement remain a matter for you ... but again I must warn you that this statement of (the Appellant), provided you accept it as a voluntary statement is evidence as against only the accused Thomas,... p.44

12. The jury returned a verdict of guilty of murder, robbery and kidnapping. p.62

13. The Appellant appealed to the Court of Appeal. The appeal was heard before Sir Isaac Hyatali C.J., Corbin and Rees JJ.A., judgment of the Court being given on 12th November 1976. The Court of Appeal allowed the appeals against the convictions for robbery and kidnapping but dismissed the appeal atainst the conviction for murder. pp.161-175

14. The judgment of the Court of Appeal was delivered by Sir Isaac Hyatali C.J. The complaints advanced on behalf of the Appellant arose first out of the contravention of s.16 of the Jury Ordinance. The learned Chief Justice set out the arguments advanced on behalf of the Appellant and referred, inter alia, to the decisions of the Court of Appeal of Trinidad and Tobago in Singh, Andrews and Clement -v- The Queen Nos. 12, 14 and 16 of 1975 (unreported) and of the Privy Council in Cottle and Laidlaw -v- The Queen (1977) AC 323. In the light of these decisions he held that the pp.161-175 pp.165-166

trial for murder was valid but the trials for robbery and kidnapping were not. The learned Chief Justice further found that, as the evidence led against the Appellant in respect of all three counts would have been admissible to prove the murder count standing alone, the Appellant had suffered no prejudice. p.166

15. The learned Chief Justice also listed the other complaints made on behalf of the Appellant. They were complaints (1) against the trial Judge's direction on common design (2) against the trial Judge's direction on intent to murder (3) concerning the previous inconsistent statement made by Ignatius Williams (4) against the direction in relation to the Appellant's statement to the police in that (a) the tiral Judge had failed to direct the jury that the wieght they attached to the statement depended on all the circumstances in which it was taken, and (b) in suggesting to the jury that the question for them to decide was whether the statement was voluntary. pp.169-170

16. As to the complaint concerning the direction on common design, the learned Chief Justice found that the evidence left no room whatsoever for the inference that the Appellant was possibly involved in a common design which fell short of murder. Accordingly, the trial Judge could not be faulted for omitting to put such possibility to the jury. p.170

17. As to the complaint concerning the direction on intent in murder, the learned Chief Justice cited two passages from the summing-up which he said should be read together and concluded that the jury had been properly directed on the matter. pp.170-171

18. The learned Chief Justice found that the complaints concerning the identification evidence of Ignatius Williams and the leaving to the jury of the question of whether or not the statement was voluntary were valid complaints but he concluded in respect of both of them that the Appellant had not suffered thereby any real prejudice and that there had been no substantial miscarriage of justice. In the learned Chief Justice's view, it would have made no difference whatever had the jury been correctly directed in respect of Ignatius Williams' evidence and the Appellant's written statement. pp.171-172

19. On the 19th May 1980 the Appellant was granted special leave to appeal in forma pauperis to the Privy Council. p.176

20. The Respondent respectfully submits that this appeal should be dismissed. As to the ground raised that the trial was a nullity, the Board is respectfully referred to the cases of Cottle and Laidlaw -v- The Queen (1977)A.C. 323 and Gransaul and Ferreira -v- The Queen Privy Council Appeal No. 26 of 1978 (unreported). It was submitted that those cases are decisive against the Appellant unless evidence was admitted to prove the non-capital offences which should not have been admitted as part of the prosecution

case of murder. In this Appeal it is submitted that the evidence led to prove robbery and kidnapping would have been admissible if the only charge had been one of murder and that the Court of Appeal were correct in so finding.

21. It is respectfully submitted that following the submission by Counsel for the Appellant that the Appellant's statement to the police was obtained by 'fear, force, fraud, menaces and oppression', the learned trial Judge was correct to hold a trial within a trial. On the evidence he was further entitled to rule that the statement was admissible. The question of whether or not the statement was the Appellant's statement did not arise and the issue raised in the judgment of the Court of Appeal of Trinidad and Tobago in Chandree and Fletcher -v- The Queen Criminal Appeal Nos. 28, 29 and 35 of 1976 (unreported), does not arise in the existent Appeal. In any event Chandree and Fletcher -v- The Queen was correctly decided.

22. It is respectfully submitted that the Court of Appeal correctly dealt with the directions on common design and intent in murder.

23. The Respondent respectfully submits that this appeal should be dismissed and the judgment of the Court of Appeal of Trinidad and Tobago should be affirmed for the following, among other,

R E A S O N S

(1) BECAUSE subject to 2 and 3 below the trial Judge correctly directed the jury both on the facts and the law.

(2) BECAUSE insofar as the learned trial Judge left the issue of the voluntariness of the Appellant's statement to the jury and thereby failed to direct them in accordance with the decision in Chan Wei Keung -v- The Queen (1967) 2.A.C. 160, such misdirection was favourable to the Appellant or, alternatively, the Appellant suffered no prejudice thereby.

(3) BECAUSE insofar as the learned trial Judge in dealing with the evidence of Ignatius Williams omitted to direct the jury that the statement put in evidence to contradict his testimony did not constitute evidence on which they could act, no reasonable jury properly directed could have failed to convict having in mind the other evidence against the Appellant, and in the circumstances the Appellant suffered no prejudice by any such omission.

(4) BECAUSE the admissibility of the Appellant's statement to the police having been raised, subject to 2 supra, the trial judge dealt with the matter correctly in accordance with the law.

(5) BECAUSE the irregularity involved in trying a count for murder together with a count or ~~count or~~ counts for other

crimes contrary to the provisions of s.16 of the Jury Ordinance does not invalidate the trial of the count for murder.

(6) BECAUSE if the trial had been solely on the count for murder the evidence of the robbery and kidnapping would have been admissible and bound to be properly admitted therein.

(7) BECASUE the trial of the count for murder was a perfectly legal and valid trial and the Appellant has suffered no miscarriage of justice arising out of the non-compliance with the provisions of s.16 of the Jury
10 Ordinance.

(8) BECAUSE of other reasons set out in the judgment of the Court of Appeal.

STUART McKINNON Q.C.

JONATHAN HARVIE

No. 19 of 1980

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BETWEEN:

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- and -

THE STATE — Respondent

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CHARLES RUSSELL & CO
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