

1976, 12

O N A P P E A L

FROM THE COURT OF APPEAL

WEST INDIES ASSOCIATED STATES SUPREME COURT (SAINT VINCENT)

B E T W E E N :-

JUNIOR COTTLE and LORRAINE LAIDLAW Appellants

- and -

THE QUEEN Respondent

C A S E FOR THE RESPONDENT

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1. This is an appeal from a judgment and order, made the 20th May, 1974, of the Court of Appeal, West Indies Associated States Supreme Court (Lewis, Ag. c.J., St. Bernard, J., Peterkin, Ag.J.). The Appellants had been tried in the High Court (Berridge, J., and a jury of twelve) on a indictment containing three counts, and had, on the 17th October, 1973, been convicted on the first and third counts. The Court of Appeal quashed the convictions on the third count but upheld the convictions and sentences on the first count.

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pp.36-55

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2. The three counts were : murdering one Cecil Rawle (a capital offence); attempting to murder one Allenby Gaymes (a non-capital offence); and, discharging a loaded firearm at Allenby Gaymes with intent to cause him grievous bodily harm (a non-capital offence). The Jury had been unanimous in their two convictions.

pp.1-2

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3. The relevant statutory provisions are as follows :

The Jury Ordinance, Title II, Ch 5 of the Laws of St. Vincent, 1966 Edn.

"Section 13. A jury in a criminal trial other than for a capital offence shall consist of nine persons to be selected by ballot whose verdict

Record

shall be unanimous if delivered within two hours of its consideration but if delivered more than two hours after the consideration the verdict of seven jurors shall be received as the verdict in the cause."

"Section 14. A Jury in a criminal trial for a capital offence shall consist of twelve persons to be selected by ballot whose verdict shall be unanimous:

Provided that in trials for murder after two hours of its consideration a verdict of ten jurors convicting the accused of any offence less than murder of which they are entitled by law to convict him shall be received as the verdict in the cause."

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The Criminal Procedure Ordinance, Title IV Ch.4 (as amended by the Criminal Procedure (Amendment) Act, No. 9 of 1970).

Section 2A "Where not otherwise provided for in this Ordinance, or in any other law or rules of court for the time being in force, the practice and procedure of the Court in criminal cases shall be according to the forms, practice and procedure for the time being in force in England, so far as the same are not repugnant to any law in force in Saint Vincent, and with variations as local circumstances shall require."

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Section 10 (3) "Where, before trial, or at any stage of a trial the Court is opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment."

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First Schedule

Indictment Rules

Rule 3 "Charges for any offence, whether felonies or misdemeanours, may be jointed 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."

4. Evidence was led for the prosecution as follows:

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(a) Errol Russell said that, at about 7 p.m. on the 11th May, 1973, the two accused and a man nicknamed Racan (James) had approached the car in which he (the witness) was sitting. The driver of the car had put the three men down, above

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the drawbridge at Fort Road, at 7.10 p.m.

Record

(b) Marlene Smith said that she lived at Fort Charlotte. Just before 7.30 p.m. on the 11th May she heard a cry: "Help, murder". She telephoned her neighbour, Henry Williams. The deceased, Rawle, lived just below. The cry came from that general direction.

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10 (c) Henry Williams said he lived at Fort Charlotte. He was entering his house at about 7.30 p.m. on the 11th May when the telephone rang. He drove down the hill and, as he was passing Fort Cottage (where Rawle lived) he heard a cry for help. He went up the steps of the Cottage and, at the top, found Rawle lying on his back. Rawle was naked from the waist, had blood on his torso, and seemed in great pain. Rawle said that he was having dinner when there was a knock on the door. He went to the door and found three people there. They shot him. They were the first Appellant and two others who he (Rawle) would recognise again. Rawle said that "they" had cut the telephone. The telephone handset was off. The witness got some help and then helped lift Rawle into a car. On the way to hospital Rawle kept repeating that the first Appellant and two others had shot him. Later at the hospital Rawle made a statement to Sgt. Bacchus repeating what he had said to the witness. When the witness had first gone to the Cottage, Rawle had said: "I am dying, take me to hospital."

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p.8 1.4

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p.138 1.6

30 (d) Hugh Toney said he had gone to Rawle's house with Henry Williams. He gave a similar account of events.

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40 (e) Sgt. Bacchus said that he took a statement from Rawle at the hospital. In the statement, which Rawle was unable to sign, the latter said that the first Appellant and two others had shot him. Rawle was weak and was saying he was dying. On the 12th May the witness went to Rawle's house. He found three pieces of spent bullets in the living room. Later he received two more bullets from Corporal da Silva. In cross-examination on behalf of the first Appellant he said he knew that Allenby Gaymes was also shot on the 11th May. He first heard of the Gaymes incident a few minutes before nine p.m.

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(f) Venita Sergeant said that at about 7.45 p.m. on the 11th May she saw three men standing near the

Record

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Low Budget Supermarket. One was the first Appellant; she did not know the others. She went into a house and heard two shots. She jumped through the window and saw Allenby Gaymes holding his right side.

(g) Allenby Gaymes said he was the manager of the Low Budget Supermarket. He closed the supermarket at 8.30 p.m. As he came out, the first Appellant emerged from an alley, seized with his left hand a black bag the witness was carrying, put a revolver against his (the witness's) chest, and shot him. When the first Appellant approached him, the second Appellant was behind him (the first Appellant). He knew both Appellants, having seen them previously in the shop.

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(h) Albert Ross said he worked at the supermarket. He left at 8.30 p.m. on the 11th May with Gaymes. Gaymes was walking towards his car while he (the witness) was preparing to lock the shop door. He heard a voice, looked around, and saw the first Appellant pointing a pistol at Gaymes. The second Appellant was standing next to the first Appellant. The first Appellant shot Gaymes. Then there was another shot from a different pistol. He had seen both Appellants on previous occasions, but did not know their names. Cross-examined on behalf of the second Appellant he said there was a third man besides the two Appellants. The third man fired the other shot. He had not seen the third man previously. All three men ran away.

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(i) Benjamin Morgan said that Marcus James (Racan) called him at about 11.25 p.m. on the 11th May. He went with James (who was not dead) and picked up the Appellants in his car. He dropped them at Green Hill. Later he went to Green Hill at the request of the police, to get the first Appellant. He did not take the first Appellant to the police after seeing the set-up the police had down the road. He opened his car door and told the first Appellant to run for his life. Marcus James had a gun.

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(j) A.S.P. Felix Constantine spoke of visiting Rawle's house on the 11th May. Later that night he instituted a search for the Appellants and Marcus James. On the 21st May he found the body of Marcus James in some bushes overlooking the sea. On the 26th May he saw the second Appellant and on the 28th arrested and charged him. The second Appellant made three statements,

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	on the 28th, 29th and 30th May respectively (the voluntariness of the first and third statements was challenged. The learned trial judge held that they had been made voluntarily, and they were admitted). On the 4th June, 1973, the witness arrested and charged the first Appellant. On the 11th May he had collected various articles including 12 revolver cartridges, from Benjamin Morgan's car. From the drawbridge on Fort Road to Rawle's house was about 75 yards. From Rawle's to Williams's house was 70 to 75 yards. From Rawle's to Marlene Smith was about 30 yards. From Rawle's house to the Low Budget Supermarket was about 1¼ miles by the shortest walking route. In cross-examination the witness said that, from his investigations, he was satisfied that Morgan was not with the two Appellants and James before 11 p.m. on the 11th May. He had not held an identification parade because he found there was no need for one.	<u>Record</u> p.66 1.3 p.68 1.3 p.76 1.17 p.77 1.19
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	(k) Bertram Richards said he was a headmaster and a J.P. He had been present when the second Appellant made his statements of the 28th and 30th May.	p.82 1.15
30	(l) Alfred Edwards said he worked at the Low Budget Supermarket. At about 8.45 p.m. on the 11th May he had seen the first Appellant, whom he knew, shoot Allenby Gaymes. There were two other men, whom the witness did not recognise, with the first Appellant. After the shooting the three men ran away down an alley. The witness was himself shot in the right leg.	p.88 1.2
40	(m) Hugh Antoine said in cross-examination that he went to Rawle's house on the 11th May with Williams and Toney. Rawle was on his porch shouting: "Help, help I am dying take me to hospital." Rawle had said he was having supper when there was a rap on the door. When he (Rawle) went to the door he discovered the first Appellant and two others, whom he would recognise if he ever saw them again. Rawle said he had been shot by the first Appellant and the two others.	p.94 1.8
50	(n) Two depositions of Dr. Manjeri Sunderam were read. From the first it would appear	pp.71-79 p.71 1.12

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p.76 1.19 that Rawle had been struck by seven shots. There were two wounds in the left forearm, two in the left upper arm, one in the back of the right shoulder (the bullet lodging in the spinal column) and one in the abdomen. Abrasions in the chest indicated that a seventh bullet had streaked across the skin. Four wounds were $\frac{1}{4}$ " in diameter and two were $\frac{1}{6}$ ". Death (on the 13th May) had primarily been caused by heat failure aggravated by shock from the gunshot wounds. 10

p.78 1.18
p.76 1.41 The assailants would have been in front of Rawle and slightly to one side. From the second deposition it appears that Allenby Gaymes had a $\frac{1}{6}$ " diameter wound in the chest on the right, near the inner end of the right clavicle. There was an exit wound at the back at the level of the fifth rib.

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p.138 1.17 (o) Statements made by the two accused at the committal proceedings were read

(p) As to the three statements by the second Appellant, 20 tendered by A.S.P. Constantine :

pp.58-64 First statement, 28th May The second Appellant had spent part of the 10th and 11th May in the company of the first Appellant and James. On the 11th James had a gun; the first Appellant had the gun he always had. At about 6 p.m. they were sitting in the "Ghetto". The second Appellant made to leave and was told by the others to hurry back because they were going on a scene. On his return the three took a hired car. They were going up a hill when James told the driver to stop. The three got out and walked up the hill. When they got up the hill the two others told the Appellant to stand watch and warn them if he saw a light coming. The other two crossed a yard, a door opened and they went into a house on the left. He heard a shot and the first Appellant ran out of the house, a .38 revolver in his hand. There were more shots and then James, also holding a gun, ran out and joined them. They ran through the bush to the road and then walked to the Low Budget Supermarket. The second Appellant stood in the alley and sheltered from the rain; the other two stood in another alley where they were joined by Benjamin Morgan. The second Appellant started to walk away but the first Appellant ran after him and, gun in hand, stopped him. He was frightened and turned back. The first Appellant told him to watch for a man coming out of the supermarket with a bag. The first Appellant returned to his alley and the 40 50

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second Appellant watched the supermarket from a position opposite and below it. In due course a man carrying a black bag came out of the supermarket. James also saw the man. The first Appellant, James and Morgan surrounded the man with the bag, the first-named seizing the bag. A shot was fired. The first Appellant, gun in hand, ran to him and told him to run. All four ran to Morgan's car, and they drove off. Morgan told the second Appellant that, if ever he ran from the first Appellant, he would kill him. Thereafter James and the Appellants took to the hills to avoid capture.

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Second Statement 29th May This contained little that was directly relevant to either shooting incident. The second Appellant said that he, James and the first Appellant went around together. James had told him that two men named Cato and Veira were getting guns to be used to shoot Rawle. The first Appellant and James had spoken about "a big man" who wanted to get rid of "the whole P.P.P. side," and they had further told the second Appellant that, if he told anybody what they had told him, he would be killed. The second Appellant was frightened and stayed with the other two all the time.

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Third Statement 30th May This contradicted the first statement as to the events in the vicinity of Rawle's house. The second Appellant said that when the three men left the hired car on the hill, he heard someone whistle in the bush. He went to investigate and found Benjamin Morgan sitting in a car. Morgan told him to sit in the car and blow the horn if he saw a light coming. Morgan and the other two had then gone to the house where James knocked on the door. It opened and all three went in. He heard a shot and the first Appellant ran out and joined him in the car. Then there were more shots after which James and Morgan ran to the car. Morgan (who, like the other two, had a gun) drove them round the town and to the supermarket. The supermarket incident was then described in much the same way as in the first statement.

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5. The first Appellant made a statement from the dock. He spoke of James, the second Appellant and himself going up the Fort Road by taxi. They were going to ask Rawle if they might borrow his car. He, the first Appellant, was a particularly close friend of Rawle, who had loaned his car on many previous occasions. He had stopped the hired car short of

Record

p.141 1.1 Rawle's house because he did not want to be seen calling there: people would say he and Rawle were very friendly, and that was why Rawle always let them off in court. He had told James to go and ask for the loan of the car, while he and the second Appellant waited. This was partly because he had, that day, asked for and been given \$10.00 by Rawle, and he did not like to make a second request so soon after the first, and partly because Rawle had said he liked James very much and would like, one day, to have a chat with him. James had gone to the house and knocked on the door while the other two waited. As the door opened, light flashed into the faces of the two of them and his eyes and those of Rawle came into focus. He and the second Appellant moved to one side. They watched Rawle and James talking but could not hear what was said. Then, to his surprise, he saw James pull a gun from his pocket and heard a shot. He wanted to run to Rawle, but was too shocked to move. Rawle moved back into the house followed by James. Then there were more shots. James ran to them and the first Appellant asked what had happened. James said: "Let us run". He could not stop to explain. Again the first Appellant wanted to go to the assistance of Rawle, but he reflected that, if Rawle did not recover, the police might wonder why he was there. So, when James pulled him again, he ran with the others. Later he thought of going to the police and telling them what had happened, but he met a friend who said the police were looking for him. He got the friend to get a gun for him, thinking he could point it at the police and persuade them to listen to him. In the event he never got a chance to do this. James fetched Morgan and his car, and Morgan drove them to Green Hill. Morgan told them to run, lest the police kill them, so they took to the hills. They pressed James to give himself up but he would not, and decided to kill himself. He (the first Appellant) knew nothing about the shooting of Gaymes.

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6. The second Appellant also made a statement from the dock. His account of the Rawle incident agreed broadly with his first statement, save that he said the three went to Rawle's house to borrow his car. His account of events thereafter broadly agreed with the statement from the dock of the first Appellant. He made no mention of the Gaymes incident. The police had beaten and threatened him.

7. The learned trial judge summed up to the jury His Lordship first defined murder, and then said that the murder case revolved largely around a dying declaration, and the issues of common design, cause of death and identification. He dealt with the

circumstances in which a statement of a victim, since deceased, would be admitted, and then dealt with common design, stressing that there must be conscious participation, and that mere presence would not suffice. Then, after dealing with the place of motive in a charge, he directed the Jury to keep separate and distinct the evidence in relation to each accused, pointing out that statements made otherwise than on oath by one accused could not be used as evidence against other accuseds. Next, after mentioning attempts, and intention (as it related to the third count) he directed upon the onus of proof.

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8. His Lordship then considered the cases against and for the Appellants on each count. As to the first count against the first Appellant, the prosecution were relying upon Rawle's dying declaration, saying that, regardless of who had fired the fatal shot, the first Appellant was equally responsible. Two bullets were found in Rawle's body and there were three on the ground. This, according to the prosecution, was inconsistent with a mistake by James (as the first Appellant appears to have said in his statement on committal). As to the first count against the second Appellant, the prosecution relied on the statements in which he admitted being present and on circumstantial evidence as showing that he had the requisite intent. This included his admission, that within a short period of time he was in the company of the other two at the supermarket, and thereafter was with them for several days. As to the second and third counts against the first Appellant the prosecution relied on the identification by Sergeant, Gaymes, Ross and Edwards. As against the second Appellant they relied upon identification by Gaymes and Ross. The defence of the first Appellant was: to the other counts, an alibi. As to the second Appellant, his defences were the same as the first Appellant's. In connection with the first count there was a 'veiled attempt' to rely upon duress, but duress was no defence to a murder charge.

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9. Finally the learned judge directed the jury that, their verdict on the capital charge must be unanimous; on the non-capital charges the Jury Ordinance permitted a majority verdict, with two jurors dissenting after two hours.

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10. The judgment of the Court of Appeal was delivered by Lewis, Ag.C.J. His Lordship, said it had been contended on behalf of the first Appellant that, as a jury of twelve persons had purported to try the Appellant on both capital and non-capital charges, the

pp.37-55

Record

	indictment was bad to law, and the trial a nullity. In their Lordships' view the indictment for murder could not be attacked on this ground. Rule 3 of the rules for Indictment permitted the joinder of charges if they formed part of a series of offences of the same or a similar nature. The offences charged were part of such a series. The law of St. Vincent as it related to criminal practice and procedure was the same as the law of England, where it was no longer the rule that homicide should not be charged with other offences. So far as concerned the capital charge, the jury consisted of twelve persons and was properly constituted. However, trying non-capital offences with a jury of twelve was something that went beyond mere irregularity; it was contrary to the provisions of the Jury Ordinance. The non-capital convictions could not stand and must be quashed.	10
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	11. Of the other grounds argued, their Lordships could see no merit in the complaints: that the defect of either accused was prejudiced by there having been a joint trial; that the trial Judge's directions on burden and standard of proof was inadequate; that manslaughter ought not to have been withdrawn from the jury; that the directions as to the cause of death, and liability therefor, were wrong or inadequate; and that the learned Judge had wrongly admitted Rawle's statements. As to the last of these, the learned trial Judge had ruled the statements to be admissible both as dying declarations and as part of the res gestae. In their Lordships' view they were rightly admitted under each principle. Their Lordship also rejected the submission, made on behalf of the second Appellant, that his statements to the police were not made voluntarily and were therefore inadmissible.	20
p.45 1.27		
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p.54 1.20	12. Finally, their Lordships considered a point that had not been raised before them. This was whether the joinder of several offences in one indictment was prejudicial to or embarrasses the accused. The fact that evidence is admissible upon one count but inadmissible on another was not of itself a ground for ordering the counts to be tried separately; the distinction could often be made clear in the summing up. In the present case there was no difficulty in distinguishing the evidence relating to the respective counts and the trial judge had summed up quite separately in respect of each count.	40
	13. It is respectfully submitted that the learned trial judge erred in directing that duress provided no defence for the second Appellant to a charge of murder, but it is further submitted that the point	50

was not of relevance because there was in fact no evidence of any duress, at least in so far as the charge of murder was concerned.

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10 14. It is respectfully submitted that the Court of Appeal erred in concluding that the learned trial judge directed the jury on the basis that Section 14 of the Jury Ordinance applied, and erred further in concluding that the convictions on the third count were bad by reason of being in contravention of that Ordinance. The learned trial judge, it be submitted, directed the jury by analogy with Section 13 of the Ordinance, and, as the practice and procedure of St. Vincent follows England, and as the non-compliance with Section 13 of the Ordinance was, at most, a mere irregularity, the trial on the non-capital counts was not bad, and the convictions on the third count were sound.

20 15. It is submitted, respectfully, that if the foregoing submission is incorrect, and if the Court of Appeal were right in holding that the convictions on the third count were bad, for the reason given, then the Court of Appeal were also right in holding, for the reasons given, that the joinder of several offences in the Indictment was not prejudicial to the Appellants. The Respondent further submits that it was not necessary for the Court of Appeal to give the reasons they gave because all the evidence before the Court would have been admissible had the Appellants been charged and tried on the first count only.

30 16. It is further submitted, respectfully, that the other conclusions of the Court of Appeal were right, for the reasons given.

17. It is submitted that the judgment of the Court of Appeal, insofar as it related to the first count, ought to be affirmed, and the said judgment, insofar as it related to the third count, ought to be set aside, and the convictions and sentences restored, for the following among other

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- (1) BECAUSE there was no duress.
- (2) BECAUSE, contrary to the view of the Court of Appeal, the convictions on the third count were not bad.
- (3) BECAUSE, in any event, the Appellants were not prejudiced by the joinder of more than one offence in the Indictment.

Record

- (4) BECAUSE, in all respects save (2) above, the Court of Appeal was right and ought to be affirmed.

GERALD DAVIES

No. 27 of 1975

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL

WEST INDIES ASSOCIATED STATES
SUPREME COURT (SAINT VINCENT)

B E T W E E N :-

JUNIOR COTTLE and LORRAINE LAIDLOW
Appellants

- and -

THE QUEEN Respondent

C A S E FOR THE RESPONDENT

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