Privy Council Appeal No. 27 of 1975

Junior Cottle and Lorraine Laidlow – – – – *Appellants*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL WEST INDIES ASSOCIATED STATES SUPREME COURT (SAINT VINCENT)

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 5TH APRIL 1976

Present at the Hearing :

LORD DIPLOCK
VISCOUNT DILHORNE
LORD SIMON OF GLAISDALE

[*Delivered by* LORD DIPLOCK]

In the evening of 11th May, 1973, two crimes of violence were committed at Kingstown in the Island of Saint Vincent. A Mr. Rawle was shot dead at his residence at about 7.30 p.m. An hour or so later a Mr. Gaymes was shot and wounded when leaving a supermarket, of which he was the Manager.

In a statement admitted at the trial as a dying declaration, Mr. Rawle had said that he had been attacked by three men of whom he identified one as being the first appellant, Cottle. One or more eye witnesses had claimed to have identified both appellants as having been present, with another man, at the shooting of Mr. Gaymes. The appellants were jointly charged with committing both offences, together with another person, Marcus James, whose dead body had been discovered, in circumstances which suggested suicide, before the appellants were arrested.

The appellants were charged in one indictment which contained three counts. The first was for the murder of Mr. Rawle, which is a capital offence. The second and third counts charged alternative offences arising out of the shooting of Mr. Gaymes. The second count was for attempted murder, the third for discharging a loaded firearm with intent to cause grievous bodily harm, maim, disfigure or disable. Neither of these is a capital offence.

By sections 12 and 13 of the Jury Ordinance 1938, provision is made for different modes of trial by jury for capital and non-capital offences:—*viz.*

> " 12. A jury in a criminal trial other than for a capital offence shall consist of nine persons to be selected by ballot whose verdict shall be unanimous if delivered within two hours of its considera-

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

13. 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."

It is thus unlawful in Saint Vincent for capital and non-capital offences to be tried together by the same jury. This is now conceded by the Crown.

As justification for joining in the same indictment both capital and non-capital offences the prosecution had relied upon section 2A which had been added to the Criminal Procedure Ordinance by the Criminal Procedure (Amendment) Act, 1970. This new section reads as follows:—

" 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 such variations as local circumstances shall require."

They regarded this as making applicable in Saint Vincent a practice direction which had been laid down by Lord Parker C.J. on 12th October, 1964, ([1964] 1 W.L.R. 1244) abrogating the previous rule of practice followed in England that counts of murder or of manslaughter should not be joined with counts for any other offence in an indictment.

This practice direction would, however, be repugnant to sections 12 and 13 of the Jury Ordinance which lay down different modes of trial in Saint Vincent for capital and non-capital offences.

At the trial of the appellants in the High Court by a jury of twelve members no objection had been taken to the joinder of counts arising out of the non-capital offence of shooting Mr. Gaymes with the count for the murder of Mr. Rawle. The learned judge did his best to overcome the difficulty arising from the different number of jurors required for the trial of capital and non-capital offences by instructing the jury that they must be unanimous in order to bring in a verdict of guilty on the count of murder, but that on either of the other two counts if all twelve of them were not unanimous after a period of two hours they could bring in a majority verdict of ten to two or eleven to one.

Each of the appellants was found guilty by the unanimous verdict of the jury both of murder under count one and of shooting with intent under count three, and were acquitted under the alternative count two. Both of them appealed to the Court of Appeal, West Indies Associated States Appeal Court (Saint Vincent), on a variety of grounds all of which the Court of Appeal rejected. The notices of appeal did not include any submission that the trial was irregular upon the ground that a capital and non-capital offence had been tried together by a jury of twelve persons. It was the Court of Appeal itself which took this point in the course of the hearing. They held, correctly in their Lordships' view, that the trial of the appellants by a jury of twelve on the non-capital counts was contrary to the provisions of the Jury Ordinance. They accordingly quashed the convictions of the appellants on count three. They did not, however, treat the whole trial as a nullity or interfere with the conviction on count one for the capital offence of murder.

No argument had been addressed to them by Counsel, as it has to their Lordships' Board, about the effect that their ruling that the trial upon counts two and three was a nullity should have upon the trial for murder upon count one.

At the conclusion of their judgment, they dealt briefly with the question whether the appellants had been prejudiced in their defences to the charge of murder by the admission of evidence relating to the charge of wounding Mr. Gaymes in a trial which ought to have been restricted to the charge of murdering Mr. Rawle. They pointed out that the judge in his summing-up had made it clear to the jury that they were to consider the evidence relating to each count separately. In the view of the Court of Appeal this removed any risk "that the jury when considering one count might have been unable to disregard the evidence relating to the others."

Evidence tending to show that the accused had committed another offence of violence with firearms would be highly prejudicial to them as suggesting to the jury that they were the sort of men who were likely to commit a murder. Unless there were grounds on which this evidence would have been admissible on the charge for murder of Mr. Rawle if it had stood alone, its admission would constitute a material irregularity in the course of the trial and the prejudice thereby inexcusably created would, in their Lordships' view, involve a serious risk that the jury's verdict would be unsafe or unsatisfactory.

The Court of Appeal did not consider whether or not all or any of the evidence adduced by the prosecution in support of the counts relating to the shooting of Mr. Gaymes would have been relevant and admissible evidence on the count relating to the murder of Mr. Rawle. It may be that some of that evidence would have been admissible against one or other of the appellants as showing them to be together in possession of a firearm and acting in concert shortly after the shooting of Mr. Rawle and thus of some probative value in rebutting a possible defence of mistaken identity or absence of common purpose. But in the case of evidence likely to be so prejudicial to the accused, it is the duty of the judge to exercise a discretion in deciding whether or not its degree of relevance is so great as to make it in the interests of justice to admit it, notwithstanding its prejudicial propensity.

At the trial in the High Court, because no objection was taken to the joinder of the murder counts with the other counts, no objection could be taken to the admission of the evidence which was clearly relevant to the counts relating to the shooting of Mr. Gaymes. It was accordingly never brought to the attention of the judge that there was any occasion for him to weigh the probative value of this evidence against its prejudicial propensity so far as the charge of murder was concerned. He never did so; nor did the Court of Appeal.

The assessment of the extent to which the minds of jurors are likely to be prejudiced by evidence tending to show that an accused has committed a crime additional to that with which he has been charged is a matter appropriate to be decided by judges familiar with local conditions and lies peculiarly within the province of the trial judge, who is in the best position to appreciate what kind of persons have been empanelled as the jury and to sense the general atmosphere of the trial.

As already stated the evidence admitted on the counts relating to the shooting of Mr. Gaymes was highly prejudicial to the appellants. Their Lordships have not, however, thought it necessary to consider in detail whether that evidence or any of it would have been relevant to the charge of murder. In the first place, this was not the purpose for which it was

adduced nor were the jury ever given any instructions as to its relevance to the charge of murder. In the second place, their Lordships do not regard it as appropriate that they should attempt to substitute their own discretion as to whether it ought to have been admitted, despite its prejudicial effect, for a discretion which neither the trial judge nor the Court of Appeal purported to exercise. It is for these reasons that their Lordships have humbly advised Her Majesty that this appeal should be allowed and the convictions of the appellants on the charge of murder quashed.

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In the Privy Council

JUNIOR COTTLE AND LORRAINE LAIDLOW

v.

THE QUEEN

DELIVERED BY
LORD DIPLOCK

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