

17/81

ON APPEAL
FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

SEERAJ AJODHA

Appellant

- and -

THE STATE

Respondent

CASE FOR THE RESPONDENT

Record

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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. Phillips and Rees JJ.A), dated the 18th July 1977 which dismissed the Appellant's appeal against his conviction of murder and sentence of death at the San Fernando Assizes (McMillan, J. and a jury of twelve) on the 17th January, 1975.

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2. The Appellant was jointly charged together with one Gangadeen Tahaloo ("Tahaloo") in an indictment containing three counts, namely, that on the 9th January, 1973 at Phillipine in the County of Victoria they (1) murdered one Krishendath Gosine, (2) robbed one Angela Dowlath of \$10 in cash and a wrist watch valued at \$29 and (3) had carnal knowledge with the said Angela Dowlath without her consent.

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3. After the trial lasting 8 days between the 8th and 17th January, 1975 the Appellant was convicted of murder and sentenced to death: he was found not guilty of robbery and rape. Tahaloo was acquitted of murder but convicted of rape and robbery.

4. On the 8th January, 1975, at the San Fernando Assizes before McMillan, J. a jury of twelve were sworn and the Appellant and Tahaloo were put in their charge. No application was made for a separate trial of any count or counts in the indictment. The prosecution called material evidence to the following effect:-

(a) Angela Dowlath said that on the 9th January 1973 she was with her boy-friend, Krishendath Gosine, in his van at about 12 noon. They drove to Phillipine and parked on a gravel road inside the canefield. After about 5 minutes, she saw two masked men, one with a handkerchief over his face with two holes for his eyes and the other with a black vest also with

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- two eyeholes. They were Indians and bare-headed. The two masked men pulled Krishendath from the van through the driver's door. Krishendath struggled with them as if to get away. The man with the black vest chopped Krishendath on his head with a cutlass. Krishendath ran a little distance but the man with the cutlass ran him down. The witness then lost sight of them. The man with the handkerchief mask who had an ice-pick in his hand approached the witness who was trying to lock herself in the van: he aimed a blow at the witness with the ice-pick which caught her on the left breast. She got out of the van. She was afraid. The man with the ice-pick took her handbag which had \$10 and a wrist watch in it from the van, searched it and took out the money. He then had sex with the witness on the ground by the van for about 10 minutes. While the man with the ice-pick was having sex, the man with the cutlass still wearing the black mask stood there looking and asked the other man "if he can't come". The man with the ice-pick said "let us go": he got up off the witness and both men ran off in an easterly direction. Krishendath appeared to the witness to be dead. The witness then gave evidence of the police's arrival at the scene, identified certain clothing and how she went to hospital to be examined. In cross-examination, she said that she had made a mistake in saying that her watch was missing after the incident.
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- (b) Police Sergeant Lionel Reid gave certain evidence concerning the taking of a written statement from Talahoo. Counsel for Talahoo said that objection would be taken to the admissibility of the statement. The jury was then sent out. After some discussion in the absence of the jury, Counsel for Talahoo said that he was not contending that the statement was obtained by force but that Talahoo was forced to sign a statement which he did not give and that the matter was one for the jury. The jury was recalled. The witness then gave certain evidence concerning Talahoo and a handkerchief mask. He denied in cross-examination on behalf of Talahoo that he beat up Talahoo. Under cross-examination on behalf of the Appellant, he denied that the Appellant was beaten by him on the 11th January, 1973 whether for the purpose of asking him to sign a statement or otherwise.
- (c) Corporal Darlington Lewis gave evidence concerning his search of the Appellant's premises.
- (d) Corporal Raymond Scott gave evidence of his arrest of the Appellant on the 11th January, 1973. He denied in cross-examination that he or any of the police officers with him struck the Appellant.
- (e) Borough Constable Lincoln Grant gave evidence of seeing the Appellant on the 9th January, 1973 walking in an easterly direction on the Extension Road at about 1.00 p.m.

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- (f) Prison Officer Rawlston Stewart gave evidence of receiving the Appellant and Talahoo into the Royal Gaol on the 13th January, 1973 and said that he noticed no marks or violence and that neither of them complained to him. In cross-examination on behalf of the Appellant, he said that it was not brought to his knowledge that the Magistrate had requested that the Appellant and Talahoo should be examined by the 17th January, 1973. pp.21-23
pp.21-22
- 10 (g) Police Sergeant Modest Estrade gave evidence first concerning Talahoo. The witness then gave detailed evidence of the giving by the Appellant of a written statement to Assistant Superintendent Gordon on the 11th January 1973 and how Mr Gordon summoned a Justice of the Peace, Mr Titus who after seeing the Appellant, speaking to him and reading the written statement aloud attached his certificate to the statement. Under cross-examination on behalf of the Appellant, the witness denied that he had treated the Appellant with violence to induce him to make a statement. pp.23-28
pp.23-25
20 pp.25-27
- (h) Rupert Titus, Justice of the Peace, gave evidence of his visit to Assistant Superintendent Gordon's office on the 11th January, 1973 and how he came to attach his certificate to the written statement which he read aloud to the Appellant. pp.28-29
- (i) Assistant Superintendent Jeremiah Gordon, gave evidence of his visit to the scene and of Dr. Baird's visit there, pronouncing the body of Krishendath dead. The witness then dealt with the giving by Talahoo of his written statement. The statement was tendered, whereupon Counsel for Talahoo said that he wished to object formally to its admissibility. McMillan, J. asked what the formal objection was as he understood Talahoo's case to be that the statement was not made by Talahoo but that he signed a prepared statement as a result of force. Counsel for Talahoo said that was so and agreed that the matter was one for the jury, indicating that Talahoo did not admit that the statement was made. After the statement of Talahoo had been admitted in evidence, the witness then gave detailed evidence of the giving by the Appellant of his written statement and how Mr Titus, the Justice of the Peace, had attended. The Appellant's written statement was tendered in evidence without objection, marked J.G.4. In the statement J.G.4 the Appellant described how he with cutlass and black mask and Talahoo with ice-pick and handkerchief mask went to the gravel road where the deceased's van was parked and how Talahoo went to the driver's door of the van (in the statement he calls him "Gangadeen"). The statement J.G.4 continues: pp.29-39
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30 pp.31-32
40 pp.32-33
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50 p.53

"..... he jumped on top of Gangadeen. The two fellows fall to the ground. The man was on top of Gangadeen. Ah make a lash at the

man with my cutlass. It catch the man
 somewhere on his head. The man and Gangadeen
 get up and start to scramble, so I make a
 next lash at the man with my cutlass. It
 catch the man somewhere on his back. The
 man run a little distance along the gravel
 path towards the Main Road and he fall on
 the edge of the gravel road so I went and
 stand up on the side of the Gravel Road by
 the cane, facing the van ah see an Indian
 girl bawling and running about inside the van.
 Gangadeen open the left door of the van. He
 hold the girl hand and pull she out of the
 van and he had sex with the girl on a piece
 of mat on the gravel road at the back of the
 van. When he pull out the girl I see
 Gangadeen with a purse at the back of the
 van. He searched the purse and he throw it
 to me. I catch the purse, open it but I
 did not see any money in it and I throw it
 by way Gangadeen was having sex with the
 girl. After Gangadeen finish having sex
 with the girl he get up and come to where
 I was on the side of the gravel road and
 said, hand me the cutlass. I hand him the
 cutlass and I take my bag and ah run a
 little along the gravel road into the
 canefield".

Under cross-examination, the witness denied that
 statement J.G.4 was a prepared statement or that any
 of the police officers beat the Appellant to force
 him to sign it. It was not true that the witnesses
 Reid and Estrada had told the Appellant before
 Mr Titus arrived that they would beat him up "if he
 did not answer suit". It was not true that the
 Appellant was beaten several times to affix his
 signature to a prepared statement.

(j) Assistant Superintendent Hamilton Bridgeman, gave
 evidence concerning proceedings before the Magistrates'
 Court on the 12th January, 1973.

(k) Certain other witnesses whose evidence is not
 reproduced in the Record were called. In particular
 Dr. Baird gave evidence of his post-mortem examination
 of the deceased, Krishendath.

5. The Appellant gave evidence on oath. After denying
 that he had anything to do with the "alleged murder, rape or
 robbery at Phillipine", the Appellant's evidence in chief
 dealt with events from the time of his arrest on the 11th
 January, 1973. He gave evidence that he was treated with
 violence by the police with the object of forcing him to
 sign "a few sheets of paper with writing on it". Under
 cross-examination, the Appellant denied that he made any
 statement. He did not recall seeing Mr Titus after he had

signed the statement. The statement J.G.4 was already written when he was asked to sign it.

- 10 6. The trial Judge (McMillan, J.) summed up to the jury. After summarizing the case for the prosecution, the trial Judge dealt with the jury's function, his own function and the burden and standard of proof. The trial Judge then summarized the evidence given on behalf of the prosecution and dealt fully with the statement J.G.4 and the challenge made upon it by the Appellant. The trial Judge gave directions on the law of murder and on robbery and rape. pp.55-103
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7. The jury returned a verdict of guilty of murder but not guilty of robbery and rape against the Appellant who was sentenced to death. pp.104-105
8. The Appellant appealed to the Court of Appeal. The appeal was heard before Sir Isaac Hyatali, C.J. Phillips and Rees JJ.A., judgment of the Court being given on the 18th July, 1977 dismissing the appeal. p.106
- 20 9. The Judgment of the Court of Appeal was delivered by Sir Isaac Hyatali, C.J. After reciting the charges, convictions and facts of the prosecution's case, the learned Chief Justice said that the only evidence connecting the Appellant with the commission of the offences charged was a confessional statement in respect of which the prosecution had led evidence to establish that the same was given voluntarily. He summarized the contents of the statement and then said (although the fact was that the only objection was made by Counsel for Talahoo and none being made on behalf of the Appellant) that Counsel objected to its admissibility on the ground that the Appellant had not made it and that he was beaten and forced by police officers to sign a prepared statement. The learned Chief Justice said that the trial Judge admitted the statement in evidence without conducting a trial within a trial, taking the view that no issue had been raised as to the voluntariness of the statement. He said that no complaint was made against the summing-up but that the Appellant's Conviction was attacked on two grounds. The first concerned the alleged nullity of the trial arising out of non-compliance with s.16 of the Jury Ordinance Ch.4 p.108-111
pp.108-109
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pp.109-110
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- 30 on the ground that the Appellant had not made it and that he was beaten and forced by police officers to sign a prepared statement. The learned Chief Justice said that the trial Judge admitted the statement in evidence without conducting a trial within a trial, taking the view that no issue had been raised as to the voluntariness of the statement. He said that no complaint was made against the summing-up but that the Appellant's Conviction was attacked on two grounds. The first concerned the alleged nullity of the trial arising out of non-compliance with s.16 of the Jury Ordinance Ch.4 p.110
- 40 No.2. The second concerned the trial Judge's failure to hold a trial within a trial. As to the first ground, the learned Chief Justice did not accept that the whole trial was a nullity but said that the question arose whether the Appellant was prejudiced by the reception of the evidence tendered in proof of the Counts charging him with the robbery and rape of Angela Dowlath the deceased's friend. He concluded that the evidence was relevant to and probative of the prosecution's case that the deceased was murdered pursuant to a common plan which included as an essential part the robbery and rape charged against both accused. It could not be said that its prejudicial effect outweighed its probative value. If the charge of murder stood alone, the evidence of p.110
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of robbery and rape would have been relevant and admissible to prove that they were acting in concert in the murder. As to the second ground, the learned Chief Justice said that a similar point was raised in Chandree & Others -v- The State No. 28, 29 and 37 of 1976 (unreported): that case was decisive of the point against the Appellant.

10. On the 27th March, 1980, the Appellant was granted special leave to appeal in forma pauperis to the Privy Council.

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10. 11. The Respondent respectfully submits that this appeal should be dismissed. No complaint was made to the Court of Appeal in respect of the summing up which, it is respectfully submitted, dealt properly and adequately with both the facts and law.

20 12. As to the first ground raised in the Court of Appeal, the Board is respectfully referred to the cases of Cottle and another -v- The Queen (1977) A.C. 323 and Robby Gransual and Winston Ferreira -v The Queen Privy Council Appeal No.26 of 1978 (unreported) where the Board decided that non-compliance with s.16 of the Jury Ordinance (and similar provisions in Cottle) did not invalidate the trial of the count for murder. It is respectfully submitted that those cases are decisive against the Appellant on his contention that because the counts for robbery and rape were tried together with the count for murder contrary to s.16 of the Jury Ordinance the trial of the Appellant on the count for murder was a nullity. In Robby Gransaul (supra) the Board referred to Cottle (supra) in considering whether evidence concerning a count, which should not have been tried together with a count for murder, should have been before the jury at all and stated the test as follows: "would all the evidence which was called before the jury have been admissible if the indictment had consisted only of the count for murder?" It is respectfully submitted that the Court of Appeal was right in its conclusion that the evidence of robbery and rape would have been admissible, if the sole charge had been one of murder, for the purpose of establishing that the two accused acted pursuant to a common plan to murder.

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40 13. As to the second ground raised in the Court of Appeal, it is respectfully submitted that, the prosecution having led evidence to establish prima facie the voluntariness of the Appellant's statement J.G.4 and there being no objection taken on behalf of the Appellant as to its admissibility, the trial Judge was right in permitting the statement J.G.4 to be admitted in evidence. Alternatively, even if objection had been taken on behalf of the Appellant to the admissibility of the statement J.G.4 (and it is respectfully submitted that the only objection in this case to the admissibility of a statement was made on behalf of Talahoo), such objection in the circumstances could only have taken the form of the objection made by Counsel for Talahoo, that is to say, that the Appellant contended that he had been forced to sign a

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statement concocted by the police in the preparation of which he played no part. It is respectfully submitted that Counsel for Talahoo rightly conceded that an objection in that form did not give rise to the need for a trial within a trial but raised an issue properly to be determined by the jury as to whether the accused in question had in fact ever made any statement at all. It is respectfully submitted that it is not necessary for the Respondent in this appeal to rely upon the decision in Chandree & Others -v- The State (supra). Alternatively, if and insofar as it may be found necessary for the Respondent to rely upon Chandree & Others -v- The Queen, it is respectfully submitted that that case was correctly decided.

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14. 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 the trial Judge correctly directed the jury both on the facts and the law.

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(2) BECAUSE the irregularity involved in trying a count for murder together with a 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.

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

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(4) BECAUSE 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 Ordinance.

(5) BECAUSE in all the circumstances the Appellant's statement J.G.4 was properly admitted in evidence.

(6) BECAUSE in all the circumstances there was no call for the trial Judge to hold a trial within a trial.

(7) BECAUSE of the other reasons set out in the Judgment of the Court of Appeal.

STURAT MCKINNON, Q.C.

JONATHAN HARVIE

IN THE PRIVY COUNCIL

O N A P P E A L
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CASE FOR THE RESPONDENT

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