27/81

IN THE PRIVY COUNCIL No 19 ~~18~~ of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN

ADDONTON ANDY THOMAS Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment dated the 12th of November 1976 of the Court of Appeal of Trinidad and Tobago dismissing the Appellant's appeal against his conviction for the murder of Austin Sankar on the 28th day of August 1973. The Appellant was convicted of the said murder in the Supreme Court of Trinidad and Tobago, before Mr Justice G. Scott and a jury of twelve persons, after a trial which lasted twelve days. He was on the 20th May 1975 sentenced to death for the said murder. p.161

2. The questions arising on this appeal are:

(i) Whether the Appellant was prejudiced by reason of the improper inclusion in his trial of counts of robbery and kidnapping;

(ii) Whether the learned trial judge misdirected the jury as to the law relating to a joint enterprise and its application to the evidence given at the trial;

(iii) Whether the Appellant was prejudiced by errors in the summing up of the learned trial judge with regard to the evidence of one Ignatius Williams;

Record

(iv) Whether the Appellant was prejudiced by reason of a misdirection of the learned trial judge as to a statement alleged to have been made voluntarily by the Appellant to Police Officers.

3. On the 1st May 1975 the Appellant was brought before The Honourable Mr Justice G Scott in the Supreme Court of Trinidad and Tobago, to stand trial on an indictment containing three counts. p.1

The First Count of the indictment charged the Appellant with Murder, the particulars of the offence being that on the 28th day of August 1973, at Diego Martin, in the County of St. George acting together with other persons, he murdered Austin Sankar.

The Second Count charged the Appellant with Robbery with Aggravation, the particulars of the offence being that he on the 27th day of August, 1973, at Carenage, in the County of St. George, being armed with offensive weapons, to wit, revolvers, together with others robbed Raymond John of a motor car Registration No. PJ 5454.

The Third Count charged the Appellant with kidnapping, the particulars of the offence being that on the 27th day of August 1973, at Carenage, in the County of St. George, he stole and unlawfully carried away against his will the said Raymond John.

The Appellant was arraigned together with two co-defendants, Kirklon Paul and Michael Lewis, both of whom were charged with the same Counts on the same indictment. All the Defendants pleaded not guilty to each of the Counts on the indictment.

4. An application was made on behalf of the Defendant Lewis for his case to be adjourned. This application was not opposed by the Crown and the trial proceeded as against the Appellant and Kirklon Paul alone. p.7

5. Counsel for Kirklon Paul made an application for Counts 2 and 3 of the indictment to be severed from Count 1, and for the trial to proceed on the Murder Count alone. The application was refused and the trial proceeded on all three Counts. An array of twelve jurors was then sworn in to try the Appellant and Kirklon Paul upon the said indictment p.7-8 p.4

6. The case for the Crown against the Appellant in relation to Counts 2 and 3 of the

Record

indictment, was that, at approximately 10.30 p.m. on the evening of the 27th August 1973, he was a party to the robbing, from Raymond John, of his car registration number PJ 5454, together with two other persons. The Crown's case was that thereafter the Appellant assisted in the kidnapping of the said Raymond John by placing him in the boot (trunk) of this vehicle, where he was forcibly detained until his release approximately three hours later. In relation to Count 1, the Crown's allegation was that the Appellant was present in the vehicle, together with four other persons, when at approximately 1.00 a.m. on the morning of the 28th August 1973, shots were fired from it as it passed a police vehicle, that the Appellant was a party to the firing of these shots, and that they killed the victim Austin Sankar.

7. The evidence which the Crown adduced in order to prove that the Appellant was a participant in the commission of the offences charged was the following, namely:

(i) Evidence that the Appellant made a voluntary statement relating to the alleged offences, which was taken down in writing and signed by the Appellant. In this statement the Appellant allegedly confessed that he and four other men decided that there should be "a form of retaliation" in response to "a shoot out...by the Police and the Regiment"; that he and two other men stopped a motor car in that the driver of the car was ordered to go into the car trunk; that the Appellant drove the car, with the aforesaid four men in it; that a Police motor car was observed, and that the Appellant followed it; and that as the Appellant was driving past the Police car, shots were fired from the car driven by him on the Police car. The Appellant objected to the admissibility of this statement, alleging that it had been induced by the use of force and threats. After evidence heard in the absence of the jury, the learned judge ruled that the statement was admissible.

p.125

p.p.145-160

p.160

(ii) Evidence of Ignatius Williams who said that he was working at a Petrol Station at about midnight on the relevant night, and that the car PJ 5454 was driven into the Petrol Station. He said that the driver of the car was the Appellant. He had next seen the Appellant in the dock of the Magistrates' Court, many months after the relevant night and had

p.p.80-83

Record

identified him then. Counsel for the Appellant objected to this evidence of identification, but his objection was overruled. p.80

(iii) Evidence that a fingerprint found on the right front door of Raymond John's car was the fingerprint of the Appellant. p.p.92-94

8. The Appellant made an unsworn statement from the dock. He said that on the night of 27th/28th August 1973, he was at the residence of one James Millette. He said that prior to making a statement to the Police, he had been threatened in various ways by Police Officers holding revolvers and machine guns. He said that he had asked to see his lawyer, and had been refused. p.p.117-121

9. The learned judge summed the case up to the jury, who on the 20th May 1975 convicted the Appellant and Kirklon Paul on each of the Counts of the indictment. The Appellant was sentenced on Count 2 of the indictment to 10 years hard labour, on Count 3 of the indictment to 2 years hard labour, and on Count 1 of the indictment to the death sentence. p.p9-64 p.6

10. The Appellant appealed against his conviction on each Count of the indictment, on various grounds, to the Court of Appeal of Trinidad and Tobago. The appeal came on before Sir Isaac E. Hyatali, C.J., M.A. Corbin, J.A., and E. A. Rees, J.A.

11. The Judgment of the Court of Appeal was delivered by Sir Isaac Hyatali, C.J. on the 12th November 1976. The Court of Appeal quashed the Appellant's convictions for Robbery with Aggravation and for Kidnapping on the ground that they resulted from verdicts returned by an array of jurors that was incompetent to do so under the Jury Ordnance. On the Count of Murder, the Court of Appeal held that the trial on this Count was not a nullity, and that the unlawful joinder of the two other Counts had not prejudiced the Appellant. The Court of Appeal further held that the summing up on the issue of common design was not defective. p.p.161-175 p.169 p.170

12. The Court of Appeal further held that the summing up was defective in two respects, namely;

(a) in relation to the evidence of Ignatius Williams p.171

(b) in relation to the Appellant's alleged confession; p.172

but held that the Appellant did not suffer any prejudice by reason of these errors. Accordingly,

the Court of Appeal dismissed the Appellant's appeal on the Count of Murder.

13. As to the unlawful joinder of the Counts of Robbery and Kidnapping, the relevant statutory provision is the Jury Ordnance (Ch 4 No.2) which provides in Section 16 as follows:

> "(1) On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of 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 or any case, civil or criminal, except on indictment for murder or treason, shall be nine jurors and no more".

14. The Appellant respectfully submits that he was prejudiced by the inclusion of counts of robbery and kidnapping in his trial, contrary to the provisions of the said Ordnance, in that:

(a) evidence which was admissible on those counts but inadmissible in a trial of murder alone was given before the jury; in particular evidence as to the detailed execution of the alleged robbery and kidnapping which was irrelevant to the issue of murder;

(b) alternatively the Appellant was deprived of the opportunity of submitting that the trial judge in the exercise of his discretion ought to have excluded such evidence on the ground that its probative value was outweighed by its prejudicial effect;

(c) the deliberations of the jury were complicated by the necessity of returning six verdicts instead of two; there was thus a real danger of error or confusion of the kind that the provisions of the Jury Ordnance sought to avoid;

(d) such danger was particularly serious in a case where the prosecution's case was that the offences were committed at different times as part of a joint enterprise, (even if, contrary to the Appellant's contention below, the jury were properly directed on this issue).

15. As to the issue of joint enterprise, the learned judge in his direction to the jury said:

Record

"Now you have to bear in mind, in respect of each of these Counts, Thomas has told you he was not there. But even if you accept he was there, you have further to find that he was acting with others, acting in concern with others to do those acts complained of. If you find and accept this statement, well, clearly, he was part of a plan, because, "we decided that there should be so and so"; and as part of this plan, according to him, "we ordered the driver where to stop this car". "It was a Falcon motor car". "The driver was ordered to go into the trunk and I took over the driving". So that, Mr Foreman, Members of the Jury, as I repeat again you have to find even though he was present, you have to be satisfied that he was acting together, firstly in the kidnapping of this man; secondly, in the robbery with aggravation of this car; and thirdly and lastly, he was acting together in the murder of Austin Sankar. You have to be satisfied in your own minds that he was acting together with the others who shot and killed this man". p.60, l.4

16. The learned judge here misdirected the jury in treating the alleged plan as a plan which necessarily extended over the three offences which were charged. He did not at any time direct the jury to consider each Count of the indictment separately.

17. In the Appellant's respectful submission, The Court of Appeal erred in holding on this issue that there was no room for any inference to be drawn that the Appellant was possibly involved in a common design which fell short of murder. That was a matter which should have been left to the jury to determine.

18. As to the evidence of Ignatius Williams, the learned trial judge in his summing-up failed to deal adequately with inconsistencies in this witness' evidence with regard to his identification of the Appellant, and to instruct the jury that his written statement (which was admitted in evidence to contradict his testimony) did not constitute evidence on which the jury could act. The Court of Appeal correctly held that the summing-up was defective in these respects, but, in the Appellant's respectufl submission, it erred in holding that no prejudice thereby resulted to the Appellant. p.27-31 p.140-145 p.171

19. As to the Appellant's statement to the police, the learned judge gave the following directions to the jury:

"When you were recalled you were informed p.44, l.1

Record

that the Court had ruled that that statement was admissible. But as I told you then, and I again now repeat, that statement has been admitted into evidence - but that statement the weight and value of that statement remain a matter for you, Mr Foreman and Members of the Jury. That statement will now be read to you to refresh your memory; but again I must warn you that this statement of Addonton Andy Thomas, provided you accept it as a voluntary statement is evidence as against only the accused Thomas, and not evidence as against the accused Paul".

"The accused Thomas however, according to the Prosecution made a voluntary statement, as I repeat again, the weight and value of that statement remains matters for you and for you solely and wholly. So even though that statement has been admitted in evidence it is for you in the final analysis to decide whether you consider that statement voluntary. If you consider that statement voluntary, the accused, according to the statement on Monday 27th August, 1973 about 8.30 to 9.00 p.m. Brian Jeffers, Guy Harewood, Kirklon Paul, Michael Lewis and myself, but again I must warn you that even if you accept the statement of Thomas it is not evidence against Paul, but what he has said at Laventille, East Dry River Port of Spain, met and decided that there should be a form of retaliation as there was a shoot-out at the N.U.F.F. Camp at Valencia Four Roads by the Police and the Regiment". p.59, l.21

20. The learned trial judge erred in directing the jury that the issue for them was whether the statement was voluntary, and in not directing them that what weight they attached to the confession depended upon all the circumstances in which it was taken, and that it was their right to give such weight to it as they thought fit.

21. The Court of Appeal correctly held that the direction was defective in this regard, but in the Appellant's respectful submission, it erred in holding that the Appellant had suffered no prejudice thereby. p.172

22. On 27th March 1980 the Judicial Committee of the Privy Council made an order granting the Appellant leave to appeal from the judgment of the Court of Appeal. p.176

23. The Appellant respectfully submits that the judgment of the Court of Appeal was wrong and ought to be reversed, and this appeal ought to be allowed, for the following (amongst other)

IN THE PRIVY COUNCIL No 18 of 1980

O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N

ADDONTON ANDY THOMAS Appellant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

CASE FOR THE APPELLANT

Solicitors for the Appellant
Addonton Andy Thomas