*Privy Council Appeal Nos. 19 and 25 of 1980*

**Addonton Andy Thomas** – – – – – – *Appellant*

*v.*

**The State** – – – – – – – – *Respondent*

AND

**Kirklon Paul** – – – – – – – – *Appellant*

*v.*

**The State** – – – – – – – – *Respondent*

FROM

**THE COURT OF APPEAL OF TRINIDAD AND TOBAGO**

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# REASONS FOR THE DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 22ND JUNE 1981, DELIVERED THE 28TH JULY 1981

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*Present at the Hearing:*

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD ROSKILL

SIR JOHN MEGAW

SIR OWEN WOODHOUSE

[*Delivered by* LORD EDMUND-DAVIES]

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In May 1975 the appellants were jointly tried in the Supreme Court of Trinidad and Tobago before Mr. Justice Scott and a jury of twelve persons on an indictment containing three counts. The first count charged them that on 28th August, 1973, they " acting together with other persons murdered Austin Sankar ", a police officer who was travelling in a police car when he sustained fatal gunshot wounds. The second count charged them with the aggravated robbery of a motor car belonging to Raymond John (a taxi driver), and the third with kidnapping him. Both accused were convicted on all three counts, the mandatory death sentence being passed on the first count, and sentences of 10 years' and 2 years' imprisonment respectively being passed on the second and third counts. Both appealed against conviction, and in November 1976 the Court of Appeal dismissed the appeals against the murder conviction, but held that the trial, convictions and sentences on the robbery and kidnapping counts were nullities and must therefore be quashed. These appeals accordingly relate solely to the murder convictions. At the conclusion of the hearing before this Board on 22nd June last, their Lordships announced the dismissal of both appeals and that their reasons for so holding would be given later. It is in fulfilment of that intimation that this judgment has been prepared.

The relevant parts of the Jury Ordinance of Trinidad and Tobago, Ch. 4, No. 2, provide as follows:—

> "16. (1) On trial 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 of any case, civil or criminal, except on indictment for murder or treason, shall be nine jurors and no more."

The legal consequence of misjoinder of capital and non-capital offences in the same indictment and trial has been considered by this Board on two occasions, their Lordships holding in *Cottle v. The Queen* [1977] A.C. 323 and *Gransaul and Ferreira v. The Queen* (Privy Council Judgment No. 14 of 1979) that, in the light of the Jury Ordinance, non-capital offences may not be tried by a jury of more than nine, and that convictions by a jury of twelve on such charges are nullities. On the other hand, the fact of such misjoinder does not of itself nullify the capital conviction *unless* the evidence admitted on the non-capital count would be inadmissible in respect of the murder count and was of such a character as to be prejudicial to a fair trial on that charge. Since *Gransaul* remains unreported, it is desirable to quote the salutary remarks of their Lordships in that case. Giving the judgment of the Board, Lord Salmon said:—

> "Their Lordships wish to add that if an accused is charged with murder (a capital offence) it is highly desirable that the indictment should include no other count. Any other counts should be included in a separate indictment which must await trial until the indictment for murder has been finally disposed of. If an indictment does include a count for murder and counts for other crimes, the count for murder must be tried by itself alone. If there is an acquittal on the count of murder, the accused may then be tried on the other counts in the indictment. If there is a conviction for murder, any other count in the indictment should remain in abeyance until after the final appeal against the conviction for murder has been decided."

In the light of such observations, their Lordships now turn to consider the facts giving rise to these proceedings, pausing only to say that learned counsel for Paul properly but unsuccessfully applied at the outset for severance of Counts 2 and 3 from Count 1 and for the trial to proceed on the murder count alone; that statements alleged to have been made to the police by each accused were admitted in evidence, thus rejecting the objection of learned counsel for Thomas alone that his statement had not been made voluntarily; that both accused elected not to give evidence; and that each made an unsworn statement from the dock.

The principal evidence against Thomas consisted of (*a*) expert evidence that his finger prints had been found on the Falcon motor-car owned by the taxi-driver (Raymond John); (*b*) the evidence of the taxi-driver; and (*c*) Thomas's statement made to the police, the contents of which may be summarised in the following manner: About 9 p.m. on 27th August, 1973, he and four other men went to the home of one Broko, and there they 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". They set off by car and after proceeding some distance they stopped a Falcon motor-car and ordered the driver to take them to Dean's Bay, where they put the driver in the boot and Thomas took over as driver. When they reached Diego Martin they saw a police car. As they overtook it shots were fired from the Falcon at the police car. They

then drove away and, after all his companions had left the Falcon, he released the taxi-driver from the boot and allowed him to make off, but not before one of his companions said, " This was retaliation for a raid police carried out to-day ".

Thomas's unsworn statement from the dock consisted of a denial of any knowledge of the matter alleged against him, and of an assertion that, after subjection to physical and other maltreatment by the police, he dictated to them, and signed on their instructions, the statement attributed to him by the prosecution.

The principal evidence against the appellant Paul was that of John, the taxi-driver, together with certain important admissions contained in his police statement. John testified that about 10.20 p.m. on August 27th he was plying for hire when three men got into his car. Two of these sat in the back, while the third (whom he picked out as Paul in an identification parade conducted on September 11th) got into the front seat. One of those at the back held something " cold " at the base of John's neck and Paul pulled out a revolver, pointed it at him and said " Don't dig no horrors ". After a while John was told to stop the car and get out and he was then shut in the boot. After further driving for about an hour he heard three shots; soon after the car stopped and he was released.

Paul having been identified on September 11th, he made a statement to the police a week later and at no stage was it suggested that it was other than voluntarily made. It contained the following admissions: At about 11 p.m. on 27th August he went to Broko's, where he joined up with four other men, three of them being armed. One announced " Ah scene must play tonight ", which the Court of Appeal took to mean that " A job must be done tonight ". They all drove off and after they had proceeded some distance two of their number held up a green car and compelled the driver to take them to an appointed place. They drove off and eventually reached Diego Martin, where they came upon a police car. Their driver then drove alongside the police car and his companions fired shots into it and then sped away and later dropped him off.

Paul, like Thomas, gave no evidence, but he made an unsworn statement from the dock in the following terms:

> " Mr. Foreman, members of the Jury, on the night of 27th August, 1973, I took no part in kidnapping of Raymond John, nor did I point any gun at him. I did not rob him of his motor-car nor was I aware that anything was going to be done. On the morning of 28th August, I remained in the car as I was afraid. I had no idea it was the intention of anyone in that car to shoot at anybody or do any act of violence. My presence in car at time of shooting was an unwilling presence brought about through fear as some of men in car were armed. My Lord, Members of the Jury, I am innocent of all the charges. That concludes my statement."

Of the several criticisms of the summing-up made before their Lordships by the appellants' counsel, only one had any substance in it, and it is therefore the only one they deem it necessary to deal with. It arises from the misjoinder in the same indictment of the murder charge with two non-capital charges. It is common ground that the Court of Appeal rightly quashed as null the purported convictions on the non-capital charges. But it is contended for the appellants that such a conclusion is by no means sufficient, as their inclusion (despite the application on behalf of Paul for severance of the charges) involved the calling of evidence of the alleged commission by the appellants of grave offences wholly unconnected with the capital charge and therefore highly prejudicial to their trial for murder. As to this submission, their Lordships

adopt the test of admissibility propounded by this Board in *Gransaul* (ante), *viz.* " Would all the evidence which was called before the jury have been admissible if the indictment had consisted only of the count for murder? " Had their Lordships considered that a negative answer was called for, they would undoubtedly have been obliged to allow these appeals against the murder convictions, since the evidence called to establish the robbery and kidnapping charges would inevitably have affected the jurors' minds most prejudicially.

But the position is quite otherwise, their Lordships being wholly satisfied that, even had the indictment contained only the murder count, the evidence as to robbery and kidnapping was clearly relevant and highly important to meet in advance the defence pleas that, although both appellants were in the company of a group of armed men for several hours, both of them knowing from the outset that one of the group had threatened that violence would be done that night, they made no demur and no attempt to leave the miscreants' company at any stage. Such behaviour bore directly on the murder charge, for the whole narrative of the evening's events went far to establish the appellants' participation from first to last in a common and murderous enterprise.

In this context their Lordships gratefully accept the following passage in the judgment delivered by Sir Isaac Hyatali C.J. which, though dealing at that stage with the appeal of Thomas alone, is no less applicable to the case of Paul:

> " The evidence against Thomas . . . left no room whatever, in our judgment, for any inference to be drawn that he was *possibly* involved in a common design which fell short of murder. On the contrary, the evidence proved beyond a peradventure, that he was a leading figure in the formulation and execution of the decision which resulted in the death of the deceased from gun shot wounds."

At several stages of his long and careful summing-up the learned trial Judge stated the necessity of proof that the two accused were not detached observers of the grave criminal misconduct of their companions over a period of hours, but that they were in their company pursuant to a common design to commit each and all three of the offences upon which they were later indicted.

The Court of Appeal held that the summing-up was not without a few blemishes, but expressed themselves as satisfied that these did not impair the fairness of the trial and its outcome.

Their Lordships respectfully concur in that view, and, in any event, they would have borne in mind the salutary observations of Lord Diplock in *Ragho Prasad v. The Queen* [1981] 1 W.L.R. 469, at page 471F–G, that " . . . courts of appeal composed of judges more familiar than members of this Board can hope to be with local conditions and social attitudes, are in a better position than their Lordships to assess the likely effect of any misdirection or irregularity upon a jury or other deciders of fact in a criminal case ".

In the result, their Lordships concluded that the appellants' complicity in the murder of Police Officer Sankar was so clearly established that they found it unnecessary to call upon learned counsel for the respondent. Such being their conclusion, they thought it right to announce at the conclusion of submissions on the appellants' behalf that the appeals were dismissed.

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**In the Privy Council**

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**ADDONTON ANDY THOMAS**

*v.*

**THE STATE**

**and**

**KIRKLON PAUL**

*v.*

**THE STATE**

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DELIVERED BY

LORD EDMUND-DAVIES

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