14/79

IN THE PRIVY COUNCIL No. 26 of 1978

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

ROBBY GRANSAUL and WINSTON FERREIRA — Appellants

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANTS

RECORD

1. This is an Appeal from a judgment dated the 25th of July, 1975 of the Court of Appeal of Trinidad and Tobago (Sir Isaac E. Hyatali, C.J., Phillips J.A. and Corbin J.A.) which dismissed the Appellants' appeal against their convictions on the 24th February, 1975 in the High Court of Justice for Trinidad and Tobago (The Hon. Mr. Justice K.C. McMillan and Jury) for murder, in respect of which they were sentenced to suffer death. — P.64 and pp.59-64

2. The Appellants were tried on an Indictment containing two Counts. — PP. 1-2

The First Count alleged murder, the particulars of which were that the Appellants "On the 27th day of August, 1973, at Cunupia in the County of Caroni, murdered Harold Maharaj." — P.1 PP. 20-25 and P.2 P1.

The Second Count alleged robbery with aggravation, the particulars of which were that the Appellants "On the 27th day of August, 1973, at Cunupia in the County of Caroni being armed with two weapons to wit, two revolvers, together robbed Samlal Raghubair of three hundred dollars in cash". — P.2 PP.2-13

3. The trial took place in the High Court of Justice for Trinidad and Tobago at the Port of — PP.3-59

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Spain Assizes on the 20th of February, 1975.
The Prosecution called material evidence to the following effect :-

P.9 PP.4-7
P.9 PP.8-15
P.9 PP.21-23
P.9 P.26
P.10 P.27-28

(a) SAMLAL RAGHUBAIR on 27th August, 1973 worked as a salesman selling cigarettes with the deceased, a van driver. On the said day at about 1.30 p.m. he delivered cigarettes to the cafe of one Rasheedan Khan in Southern Main Road, Warrenvilla, Cunupia. The deceased sat in the driving seat of the delivery van. Whilst in the cafe he Raghubair heard a shot and immediately afterwards someone say "Don't leave the parlour".

He gave evidence as follows :

P.9 PP.27-43

"I turned around and saw two men by the van - one on either side. The one on the left side of the van came running into the cafe. The vehicle was parked on the righthand shoulder of the road. The man entered the parlour and pointed two revolvers - one in each hand at me and said, "Raise your f..... hands". I raised hands above head. I was afraid. He then rested gun in his right hand and the other gun in his left and put his right hand in my left shirt pocket and took out the proceeds of day's sales. I had therein about $300.00. He then went out towards the van and he and the other man ran up the road."

He later in his evidence said:

P.10 PP.10-16

"I usually carry a .38 revolver when out on sales for protection. On 27th August, 1973 I had it but left in it pocket of van when I entered parlour. When I returned to van after the incident it was not there. I had left it on the left panel pocket."

P.19 P.27

He was later recalled and sworn and said:

P.20 PP.7-10

"I had a pistol in left panel pocket. It has a lid but it was not locked. The left window glass was down."

P.11 PP.30-40

(b) RASHEEDAN KHAN gave evidence that at the time of the incident she was in the cafe with her daughter Yasmin Khan and Samlal

Raghubair. She described the transaction with the salesman concerning the cigarettes and said: P.11 PP.40-41 and P.11 PP.1-4

"My daughter and I were checking the money when I heard a shout: "Raise your fucking hand". P.11 PP.4-30

I had already handed the money to the salesman when I heard the voice.

I kept watching the van and I saw Robby Gransaul, my neighbour (No. 2 accused) and a strange fellow by the van. One on each side of van. Robby was on left side of van and the other on right side holding the van driver's hand.

Driver's hand was resting on window of door (demonstrates)and the strange man held that hand, like this (demonstrates by holding right forearm down with his right hand). I was then about 25 feet (short distance) away from van. I have known accused since he was a baby. He is my next door neighbour. I then saw Robby shoot the driver. Robby was still on the left side of van. He then entered the parlour with two guns one in each hand. Raghubair, my daughter and I were in parlour. He then told the salesman: "Raise your f..... hand"."

(c) YASMIN KHAN gave evidence that she was eighteen years of age and said: P.16 P.5.

"Mother ordered cigarettes and sent me upstairs for money. I went and got it and returned to parlour and was counting it. Then I heard a voice outside saying: "Raise your fucking hands". I looked out towards van. I saw two young men - one was Robby Gransaul (No.2). I did not know the other man then but it is No. 1 accused. Robby was on left hand side of van and No.1 was on the right hand site. Robby had two revolvers in his hand pointing inside the van through the left window. No. 1 was holding the driver's hand. Driver had his right hand on window (like this) and No. 1 held it like this (demonstrates). Driver was behind steering wheel. /Witness demonstrates in same fashion as mother/. I then heard explosion like gun shot. Then Robby rushed into the parlour with two P.16 PP.14-27

revolvers one in each hand. The other man remained standing by van. Robby told salesman to raise his fucking hand."

In cross-examination on behalf of the accused Ferreira she said

P.17 PP.37-END and P.18 PP.1-2 "... the other man turned towards parlour and asked salesman for a cigarette. The salesman was in parlour. The salesman said "O.K. pal, I am bringing it." That happened. Then suddenly I heard a shot and Robby rushed into the parlour." 10

P.4 PP.30-38 (d) DAVID EDWARD a member of the Medical Board and Pathologist at Port of Spain General Hospital gave evidence that on 28th August, 1973, he performed a post mortem on the deceased. He said:

P.5 PP.3-6 "He was 5ft 7 ins. and clad in light blue shirt, black stained with circular vent 2/16 inch situated 1 inch above left breast pocket." 20

Of the injuries he said:

"Circular bullet entrance wound 2/16 in diameter situated over front of left chest 1 inch below the anterior ascillary fold. (Indicates). It showed an abrasion colour. No singeing or blackening of the area immediately around the wound. Depth of wound was directed horizontally and downwards 12 inches deep towards the right."

In cross-examination he stated: 30

P.5 PP.43-END and P.6 PP.1-7 "In my opinion the assailant faced front of deceased at time the firearm discharged, but this is an assumption that a right handed person discharged firearm.

TO COURT: Blackening of shirt and vest indicates that firearm discharged at close range - within 2 feet."

P.20 PP.15-END and P.21 PP.1-15 (e) HOLLISTER LEWIS gave evidence of association between the two appellants on the morning of 27th August, 1973. 40

P.25 PP.17-20 (f) POLICE INSPECTOR SARSTON GRIFFITHS gave evidence that on 27th August, 1973 he went to Southern Main Road.

P.25 PP.24-26 He described how he observed the body

of the deceased slumped in the seat behind the steering wheel of the van.

He also gave evidence of the arrest of the Appellant Ferreira on 29th August, 1973 when the Appellant denied any knowledge of the events of 27th August at Cunupia. P.26 PP.6-19

(g) POLICE SERGEANT LUCIEN VILLAFANA gave evidence of the arrest of the Appellant Gransaul on 13th December, 1973. The Appellant elected to make a voluntary statement which was later certified by a Justice of the Peace. In this statement the Appellant said (inter alia) P.23 PP.39-END and P.24 PP.1-16 P.23 PP.30-36

"Jinks stand up on we bridge watching the fellar that went inside the parlour. I pointed my pistol at the driver and tell him to hand over all the money. I start to search up the van. In the van pocket I see a pistol and I raff it, the driver kick me hand inside the van pocket and me hand get trap - the both of us start to struggle at the same time ah trying to pull me hand from inside the van pocket my pistol went off and shoot the driver, the driver let me go, and ah see how bow his head, I then take the pistol from the van pocket an ah went to the other man in the parlour and ah tell him to hand over the money." P.31 PP.35-END and P. 32 PP1-2

4. Both Appellants made unsworn statements from the Dock:

STATEMENT OF No. 1 (FERREIRA) P.29 PP.2-11

It is true I was there standing by the van. I asked the driver for a cigarette. He told me to ask the salesman in the shop. I turned and asked the salesman for a cigarette. He said "O.K. pal, I am bringing ot just now". I heard a shot - when I realise what was taking place I got in a state of shock and I ran away from the scene. I am sorry that is all.

STATEMENT OF No. 2 (GRANSAUL) P.29 PP.16-24

I really want to hold up the driver and while holding him up and thing he trapped my hand in the van pocket and unfortunately a shot went off and he got shot. Then after I cam

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out from in the van and I took the money from the next fellow and ran up the road. I don't know the other accused. That's all.

PP.33-57 P.36 PP.6-END and P. 37 PP.1-12 P.49 P.50 and P.50 PP. 1-6 P.50 PP.10-26

5. The learned trial Judge began his summing-up by dealing with the burden and standard of proof and reviewed the evidence. The learned Judge went on to direct the Jury on the law in cases of murder and began with the case of an accused who shoots another with the intention to kill.

The learned Judge then directed the Jury in the following terms:

P.50 PP.38-END and P.50 PP.1-30

"But more than that, members of the Jury, a person who uses violent measures in the commission of a felony involving personal violence, and robbery is a felony involving violence and the use of a firearm in those circumstances is a violent measure, does so at his own risk and is guilty of murder if those violent measures result even inadvertently in the death of a victim. So that when Gransaul tells you when he took up the firearm which was in the pocket of the van and the driver locked his hand or trapped his hand in the pocket, the gun accidently went off, even if you were tempted to believe that, and I have grave doubts as to whether in the light of the evidence of Mrs. Khan or her daughter that at the time had two guns in his hand pointing inside the van, I doubt very much if you will have believed him when he says his hand was trapped in the pocket and it went off, and even if you were tempted to believe that, the fact that his gun accidentally went off when Jaharaj the driver was, in Gransaul's own words "attempting to rescue it", or even if his hand accidentally stuck in the pocket because he was not looking carefully and the gun may have lodged itself as he tried to pull it out, whatever the reason, the mere fact that he was using a loaded firearm in committing what was then robbery and death inadvertently ensued because the gun went off, the result is murder, and that is what he told you he did when he made his statement from the dock. And in this case, members of the Jury, however odd you may think the law is, the only verdict you can return in this case in respect of Gransaul is guilty of murder."

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6. Later in his summing-up the learned trial Judge dealt with the case of the Appellant Ferrerira and dealt with questions of law relating to his case; P.51 PP.52 and PP.53-54 P.32

"Well members of the Jury, it is a matter for you. You cannot convict Ferreira unless you believe they went out there to effect a robbery, and a robbery with a firearm. Members of the Jury, that means rejecting his innocent presence there. But rejecting his innocent presence does not mean automatic guilt. You will have to re-examine the case for the Crown and see whether you are satisfied on the totality of the evidence that you will deduce from the circumstances that he knew Gransaul was going to rob, that he went there with him intending to assist and did in fact assist by, at any rate, holding down the driver's arm or going there with the purpose of making him look to the right while Gransaul rifles the left pocket. P.54 PP.33-END and P.55 PP.1-22

No, if that is what you believe on the evidence to be the case, that the accused Ferreira knew Gransaul was going to rob and he went there to assist him knowing that, then the law is: where several persons are engaged in a common design and another is killed, whether intentionally or unintentionally by the act of the one done in prosecution of a common design, the others are guilty of murder if the common design was to commit a felony involving violence. And as I have told you, robbery is a felony of violence. And if that was the common design between them, and if that is what you are satisfied about, then not only is Gransaul guilty of murder, but Ferreira is guilty of murder as well, and also guilty of robbery with aggravation. If you are not satisfied that there was a common plan, then he is not guilty of anything at all.

7. After referring on certain matters already touched upon in the summing-up the learned Judge invited the Jury to retire to consider their verdict. P.57 PP.19-21

8. The Jury returned verdicts of guilty of murder and of robbery with aggravation in respect of both Appellants. Both Appellants were sentenced to suffer death in respect of their convictions for murder and further, to sentences of fifteen P.57 PP.24-28 P.59 PP.13-14 P.58 PP.26-34

years hard labour in respect of their convictions for robbery with aggravation.

P.59 and P.60 PP.6-10 — 9. The Appellants appealed solely against their convictions for murder to the Court of Appeal of Trinidad and Tobago (Sir Isaac E. Hyatali, C.J., Phillips J.A., and Corbin J.A.). Their appeals P.64 PP.36-40 were heard on the 25th of July, 1975 upon which day both their appeals were dismissed.

PP.60-64 — 10. The judgment of the Court was delivered by Sir Isaac E. Hyatali C.J., who began by dealing with the case for the Crown against P.60 PP.10-18 Gransaul which the learned Judge stated "was that he deliberately shot and killed the deceased in the course of executing a plan to rob "a cigarette van" of which the deceased was the driver; and against Ferreira that he was present, at the scene and actively assisted Gransaul in executing that plan".

P.60 PP.19-36 — The learned Judge went on to summarise the cautioned statement made by the Appellant Gransaul to the police and dealt with the P.61 PP.8-16 argument of Counsel for the Appellant Gransaul "that the learned Judge was wrong in law in omitting to direct the Jury that a verdict of manslaughter was open to them if they believed that Gransaul's gun went off accidentally and unintentionally in the course of the struggle he described both in his confession and in his unsworn statement from the dock".

In rejecting the argument of Counsel the learned Judge stated:

P.60 PP.44-50 — "The witnesses for the Crown did not in their evidence on oath support the contention of Gransaul that his automatic pistol went off accidentally or unintentionally as he struggled to retrieve his trapped hand from the pocket of the van".

Later in the judgment of the Court the learned Judge added:

P.61 PP.19-39 — "It is clearly the law of this country which this Court has enunciated and confirmed repeatedly (and by which the learned Judge guided himself in directing the Jury) that a person who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if these measures

result even inadvertently in the death of his victim ; and that for this purpose, the use of a loaded firearm in order to frighten the victim into submission is a violent measure. It is only necessary to refer in this conexion to R v. Ramserran (1971) 17 W.I.R. 411. The conduct and activities of Gransaul on his own admission fell squarely within those principles of law and the submission made to the contrary must accordingly be rejected."

11. The learned Judge then dealt with the submission of Counsel for the Appellant Ferreira and dealt with the statement which the latter made from the Dock. p.61.PP.40-44 P.62 PP.13-25

The judgment of the Court continued in these terms:-

Counsel conceded that Ferreira's unsworn statement from the dock raised no issue as to his intent in relation to the crime of murder but he submitted that on the evidence for the Crown it was possible to say that Ferreira was a party to the use by Gransaul of his pistol to threaten but not to shoot the deceased for the purpose of effecting the robbery in question. On the footing that it was possible to say so Counsel argued that the issue of manslaughter should have been left to the Jury. In support of that proposition he quoted the case of R v. Larkin (1943) 1 All E.R. 217 and a passage from Smith & Hogan, Criminal Law, 3rd Edn. 103. P.62 PP.42-END and P.63 PP.1-24

In our opinion however no such issue was raised by or arose on the evidence of the Crown. The evidence in support of the case for the Crown was that at the time when Gransaul shot the deceased from the left window of the van, Ferreira was holding the arm of the deceased while it was resting on the right window of the van. One would have to resort to sheerspeculation to hold that it is possible on that evidence to say that Ferreira was a party to the use of the pistol by Gransaul to threaten and not to shoot."

12. The Court also rejected submissions made on behalf of the Appellant Ferreira by Counsel concerning the learned trial Judge's summing-up as to the question of knowledge on the part of

Ferreira as to whether or not the latter knew that the Appellant Gransaul was in possession of a gun.

The Court indicated where the learned Judge directed the Jury as follows :

P.63 PP.34-38 "You cannot convict Ferreira unless you believe they went out there to effect a robbery and a robbery with a firearm".

PP.65-66 13. The Appellants were granted special leave to appeal in forma pauperis to the Judicial Committee of the Privy Council on the 21st March, 1978.

14. The Appellants respectfully submit that they have not been tried according to law in that the learned trial Judge directed the Jury that as the crime of robbery was by definition a crime of violence, if death ensued in the course of the robbery, even if inadvertently, those who
P.61 PP.19-39 were party to the robbery were guilty of murder. (This direction was approved by the Court of Appeal of Trinidad and Tobago, as referred to in paragraph 10 above).

It is respectfully submitted that the felony murder rule, or the doctrine of constructive malice, does not operate as inexorably as was held by the Courts below.

It is respectfully submitted that the common law requires in such cases factual proof that death was directly caused by the intentionally violent act of the robber.

It is respectfully submitted that it is not all violence which comes within the rule, and that the violence in respect of which the rule applies is "real violence" intentionally inflicted in furtherance of a felony and not simply accidental violence.

It is respectfully submitted that it does not suffice to direct a Jury merely in terms of the rule. Where, as in the instant case, the question of violence is withdrawn from the Jury the Appellants have not been tried according to the law because the Jury has been precluded from finding a substratum of fact which would bring the rule into operation. The learned trial judge assumed the existence of violence in telling

the Jury that as a matter of legal definition robbery was a crime of violence. The Appellants respectfully submit that the learned Judge thereby usurped the function of the Jury.

15. The Appellants respectfully submit that they have not been tried according to law in that they were tried on Indictment in respect of both capital and non-capital offences together, namely those of murder and robbery with aggravation, when the Jury Ordinance for Trinidad and Tobago Chapter 4 No. 2 Section 16 requires that the offences should be tried separately.

16. The Appellants respectfully submit that they have not been tried according to law in that the learned Judge did not consider whether the evidence in respect of the alleged robbery was admissible in respect of the allegation of murder, and did not exercise his discretion to decide whether the evidential value of proof that, after the alleged murder, the Appellant Gransaul committed a separate robbery against a man other than the deceased, outweighed the undoubted and overwhelming prejudical effect of such proof.

The Appellants respectfully submit that the words of Lord Diplock in the case of Cottle and Another v. The Queen (1976) 3 W.L.R. 209 at p.213 apply to the instant case and that "in the case of evidence likely to be so prejudical to the accused, it is the duty of the Judge to exercise a discretion in deciding whether or not its degree of reference is so great as to make it in the interests of Justice to admit it, notwithstanding its prejudicial propensity."

The learned Judge admitted the evidence of the robbery alleged in the second Count charged in the Indictment as though the question of the exercise of a discretion did not arise and accordingly the learned trial Judge did not exercise his discretion.

17. The Appellants respectfully submit that they have not been tried according to law in that the learned trial Judge directed the Jury that the defence of accident was not available to the Appellant Gransaul.

18. The Appellants respectfully submit that they have not been tried according to law in

that the learned trial Judge failed to direct the Jury that in order to prove the allegation of murder the Crown had to prove that death was caused as a result of a voluntary act of the Appellant Gransaul and malice of the Appellant Gransaul.

It is respectfully submitted that the common law which applies to the instant submission is as stated by Viscount Sankey L.C. in the case of Woolmington v. D.P.P. (1935) A.C. 462.

It is respectfully submitted that had, in the instant case, the revolver been fired by accident, which was an issue raised by the Appellant Gransaul, the element of malice aforethought (even in the extended sense of the felony murder rule) would have been lacking and so there would have been an issue for the Jury to try.

R E A S O N S

1. BECAUSE the Jury were misdirected in law as to the doctrine of constructive malice.

2. BECAUSE the learned trial Judge withdrew the question of violence from the Jury.

3. BECAUSE the Appellants were tried in respect of separate alleged offences of murder and robbery in the same Indictment.

4. BECAUSE the learned trial Judge failed to exercise his discretion and did not rule as to whether the evidence in respect of the alleged robbery was admissible in respect of the allegation of murder.

5. BECAUSE the learned trial Judge misdirected the Jury in respect of the first Appellant's defence of accident.

6. BECAUSE the learned trial Judge failed to direct the Jury that in order to prove an allegation of murder the Crown must prove that death was caused as the result of a voluntary act of the Appellant Gransaul and Malice of the Appellant.

RODERICK M.T. PRICE

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SIMONS, MUIRHEAD & ALLAN.
40 Bedford Street,
London WC2E 9EN

Solicitors for the Appellant