~~LORD BRIDGE OF HARWICH~~ Appeal no 25 of 1980

J.N. 27/81

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
OF TRINIDAD AND TOBAGO

B E T W E E N :

KIRKLON PAUL Appellant

- and -

THE GOVERNMENT OF TRINIDAD
AND TOBAGO

Respondent

THE CASE OF THE APPELLANT

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1. This is an appeal from a judgement 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.

2. The main issues which arise on this appeal are as follows:-

(i) Whether the learned trial Judge misdirected the jury as to the law relating to joint enterprise and its application to the evidence given against the Appellant at the trial, and alternatively whether in the circumstances of the case the directions on the law relating to joint enterprise were sufficient.

(ii) Whether the Appellant was prejudiced by reason of the unlawful inclusion in his trial indictment of counts of robbery with aggravation and of kidnapping.

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

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.

(P.7.) The Appellant was arraigned together with two co-defendants, Anderton Andy Thomas 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.

(P.7 L.8) 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 Anderton Andy Thomas alone.

(P.7 L.8 - P8 L.25) 5. Counsel for the Appellant 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

(P.64 and P.4.L 19-26) in to try the Appellant and Addonton Andy Thomas.upon the said indictment.

6. The case for the Crown against the Appellant in relation to Counts 2 and 3 of the 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 No. 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 his being placed 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. In support of this case, at the trial the Crown called a number of witnesses. The essential allegations against the Appellant are contained in the evidence of the following witnesses:-

(PS. 68-78) (i) Raymond John

This witness stated that having returned home at approximately 10.20 p.m. on the

(P.68 Ls.28-30) 27th August 1973, he went out to work his car "P.H." (Public Hire). He was flagged down by one of two men, one of

(P.68 L.32) whom had a paper bag in his hand. Both men got into the rear of his car. Approximately 20 yards further on another man stopped his car, and opened the front door and let him in. This man the

(P.69 L.5) witness later identified as the Appellant.

After passing Pool Beach Recreation Club

(P.69 L.2) he felt something hard on the back of his neck. He looked to the Appellant, who, he says, then produced a revolver from

(P.69 L.4) his waist and pointed it at him. The Appellant said "Dont'd dig no horrors".

(P.69 Ls.6-7) The man behind told him to do as he was told. The Appellant gave further instructions, as did the man behind, and eventually the

(P.69 LS.12-20) car was stopped and the lights extinguished. The witness was ordered from the car and

(P.69 Ls.25-35) told to get in the boot (trunk) of the vehicle, which he did. The vehicle was driven off and after about one hour it was

(P.70 Ls. 16-19) stopped at a petrol station. AFter some more driving at approximately 11.55 p.m.

(P.70 L.30) the vehicle was stopped and he was given some air. The vehicle was driven around for a further hour, sometimes on a smooth surface, and sometimes on a rough surface.

The vehicle came onto a smooth surface
(P.71 Ls.1-6) and the witness heard three shots, and
then the vehicle was driven off at speed.
At approximately 1.30 a.m. on the morning
(P. 71 Ls.10-22) of the 28th August 1973, the witness was
released from the vehicle. Later on the
11th September 1973 he attended an
(P. 72 Ls.4-10) identification parade and identified the
Appellant as the person who had sat in
the front of his car.

(PS.78-80) (ii) Keith St. Louis

This witness stated that at approximately 11.30p.m.
on the evening of the 27th August 1973 he
(P.78 Ls.20-31) had seen the Appellant seated directly
behind the driver in the vehicle PJ 5454.
He stated that when the light of his
vehicle shone directly into the vehicle
PJ 5454 all its occupants, save for the
(P.79 Ls. 5-8) Appellant, attempted to withdraw from view
by pulling back in their seats and lowering
their heads.
(P.79 L.19) He further stated that the men who did this
appeared to be suspicious. On the11th
(P.79 Ls.10-12) September 1973 he identified the Appellant
as the person whom he had seen.

(PS.80-84) (iii) Ignatius Williams

This witness claimed to have been the person who filled up the car, while the witness John was in its boot. He failed to pick out the Appellant at an identification parade as being one of the persons in the vehicle.

(PS.97-100) (iv) Alec Heller

This witness conducted the identification parades at which the Appellant was identified by the witnesses John and St. Louis.

(PS.102-110) (v) Sgt. Villafana

On the 18th September 1973 this witness interviewed the Appellant. He told him

(P.102 L.17 - P.103 L.13) of the allegations against him, cautioned the Appellant, and then the Appellant elected to make a statement, which was reduced into writing. The statement was

(P.103 L.20) admitted and read in evidence at the trial.

(PS.135-139) In the statement, the Appellant states that between 10.00 p.m. and 11.00 p.m. he was called to the house of one Broko at Laventille East Dry River. There, he states he met Jeffers, Harewood, Lewis and Thomas. At one stage Jeffers entered the room with his legs apart and said "Ah seen must place tonight" to which he received no reply. A car arrived, and the Appellant stated that he got into

(P.136 L.7) it with the others, but that he was unarmed. The car was driven towards Carenage.

The Appellant got out, as did Lewis and Thomas. Lewis told the Appellant to take the same car as they did. A private taxi came, which stopped for the Appellant. When he entered it
(P. 136 L.30) Lewis had his revolver to the back of the driver. The car eventually stopped, and Lewis put the driver in the boot. They were then joined by Jeffers and Harwood. The Appellant stated that he then got out of the front seat of the
(P.137 L.11) vehicle because he was scared. He stated that the car was driven about and then
(P.137 L.20) stopped at a petrol station. A police car was spotted, Jeffers told Thomas to follow it. When the two cars were level Jeffers fired two shots into it, and Lewis and Harewood also fired shots. When this happened the Appellant stated that he was
(P.138 Ls.8-12) afraid, and so opened the door to run from the car, but he was asked by Lewis where he was going, so he closed the door again. He stated that he then remained where he was in the car, but eventually left to go home by taxi at approximately
(P.138 L.20) 2.00 p.m. on the 28th August 1973.

8. The Appellant did not call or give evidence in his defence, but, upon having the choices explained to him, chose to make
(P.123) an unsworn statement.

In his unsworn statement he said that he had not taken part in the kidnapping of John or in the robbery of the car. That he had not pointed a gun at Raymond John; that he had not known it was the intention of anyone present to shoot at anybody, and that his was an unwilling presence in the car brought about by fear because some of those present were armed.

9. The Learned Judge summed the case up to the jury, who on the 20th May 1975 convicted the Appellant and his Co-Defendant on each of the counts of the indictment. The Appellant was sented on Count 2 of the indictment to 10 years hard labour, on Count 3 of theindictment to 2 years hard labour, and on Count 1 of the indictment to death by hanging.

(P.62)

(P.6 L.22)

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 Judgement of the Court of Appeal
(PS.161-175) 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
(P.166 L.30) Jury Ordinance (ch. 4. No. 2).

The Court of Appeal upheld the Appellants conviction for Murder on the basis that the trial on the Murder count was not a nullity. They stated "it cannot be maintained in the instant case a trial for Murder took place together with a trial for Robbery with aggravation and kidnapping since the
(P.166 Ls.14-24) proceedings in relation to the latter was not a trial but a nullity. Having regard therefore to the principle that each count in an indictment is the equivalent of, and falls to be treated as though it were a separate count .... it would be illogical and unreasonable to hold that because the latter was a nullity, the former was also a nullity even though it was a trial by a properly constituted array of jurors". The Court further held that there was evidence upon which the jury could have found that the
(P.174 Ls.11-16) Appellant was a party to the joint enterprise to Murder. They held that the evidence
(P.175 L. 1) on the two non-capital charges had been properly admitted, and that the unlawful

(P.175 L.3) joinder of the two non-capital charges had not prejudiced the Appellant.

12. The Appellant respectfully submits that the Court of Appeal of Trinidad and Tobago erred in not quashing his conviction for Murder. The Appellant firstly contends that his conviction for Murder should be quashed because the Learned trial Judge's directions to the Jury on the question of joint enterprise were inadequate and were a misdirection. He secondly contends that he was gravely prejudiced by the unlawful inclusion of the counts for robbery with aggravation and kidnapping.

13. As to the issue of joint enterprise the Learned Trial Judge in his directions to the jury in relation to the Appellant said

"As far as the Law is concerned, mere presence is never enough. You have further to find that as far as these counts are concerned, he

(P.12 Ls.8-13) was acting together with this common design, this common purpose; he was participating in the kidnapping, robbing John of his car, and in the murder of a policeman."

And later in his summing up stated

(P.61 Ls. 1-32) "I mentioned earlier mere presence is never enough, and while Paul has admitted that he was there and there throughout, what he has stated was that he was a person who was here and there unwillingly. In other words he

took no part, he was not even aware of what the plans were.

So that Mr Foreman, Members of the Jury, if you accept what he said from the dock here and what he told the Police shortly after he was arrested, and he said he gave this voluntary statement, well in those circumstances, as in law, mere presence is not enough to convict any person of a crime, because there must be participation, there must be an acting in concert and acting with a common design, because as long as you act with a common design and one man shoots and a person dies, the act of that man is the act of all. But he has told you that while he was there he did not take part in this plan was no part of this plan and was not aware of the plan .. If having weighed, considered and assessed the whole of the evidence, the entirety of this evidence, you are satisfied that while he was there he actually was part of this plan was acting together, was combining with the others that he held up this car, flagged this car down, that he had this revolver and that he was the one who gave directions to John where he should drive this car, and where these three other persons were, well then, clearly, he would be guilty on the count of kidnapping and the count of robbing with aggravation. If, having formed the view

that he was armed with this revolver, and as far as the count of murder is concerned. that he was acting in concert, that he was combining with those others to carry out this plan, well in those circumstances Mr Foreman, Ladies and Gentlemen of the Jury your duty would be to return a verdict of guilty as charged on all these counts against the accused Kirklon Paul."

14. It is submitted that in these passages the Learned Trial Judge has misdirected the jury in that:

(i) He has invited the jury to convict the Appellant on the count of murder if they conclude that he had merely been a party to a joint enterprise to rob and to kidnap.

(ii) Further the constant use of the words "this plan" will have confused the jury as to which plan was being referred to, and as to what plan they had to be satisfied the Appellant was participating in before they could convict him on the count of Murder.

15. It is also submitted that the Learned Trial Judge further misdirected the jury in that:

(i) He did not direct them to consider their verdicts separately in relation to each count of the indictment.

(ii) He did not direct them separately in relation to each count of the indictment in relation to joint enterprise.

(iii) He did not direct them to consider the issue of joint enterprise separately in relation to each count;

(iv) He did not warn the jury that should they conclude that the Appellant had been a party to the robbing and kidnapping, they should not then automatically conclude that he was a party to the murder.

16. As to the unlawful joiner of the the counts of robbery with aggravation and kidnapping the relevant statutory provision is the jury ordanance (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 of any case civil or criminal except on indictment for murder or treason shall be of none jurors and no more"

17. The Appellant respectfully submits that he was gravely prediced by reason of the unlawful inclusion of the counts of robbery with aggravation and kidnapping in his trial, contrary to the provisions of the said ordinance in that :-

(i) Evidence was given before the jury which was admissable to prove the counts of robbery with aggravation and kidnapping, which would not have been admissable in a trial on the count of murder alone. In particular it is contended tha t the evidence of the details of the execution of the alleged robbery with aggravation and the kidnapping was inadmissable on the count of murder.

(ii) Alternatively the Appellant was deprived of the opportunity of submitting to the trial judge, that in the exercise of his discretion he ought to have excluded that evidence on the ground that its probative value was outweighed by its prejudicial effect.

(iii) The deliberations of the jury were unnecessarily complicated by the unlawful inclusion of the said counts. It is submitted that purpose of the said Jury Ordinance (Ch 4. No.2) is to ensure that the deliberat ions of a jury upon a capital

charge are not diverted or complicated by the consideration of other less serious charges. In this case the dangers of errors and confusions of the type which the provisions of the Jury Ordinance sought to avoid are particularly prevalent. The jury had to consider a total of six verdicts instead of two, for different offences, which took place at different times. In relation to each of these offences the case for the prosecution was similar in that it was alleged that the Appellant was participating in a joint enterprise. The jury, when considering their verdicts, should have been considering the question of joint enterprise seperately in relation to each of these offences. In this respect the matters complained of in the summing up of the learned trial judge in paragraphs 14 and 15 above, should the Appellant be wrong in his contention that they amounted to misdirections, were particularly prejudicial. The Appellant was entitled to have the juries sole consideration on the issue of whether he participated in a joint enterprise to murder, and was prejudiced in that their delibertaions were unnecessarily complicated and may have been confu sed by reason of the unlawful inclusion of the two counts.

(iv) when called upon at the trial to answer all three counts of the indictment the Appellant chose only to make an unsworn statement to the jury. Had the Appellant been tried on the capital charge of murder alone, the considerations as to whether he made an unsworn statement or gave evidence on oath to the jury would have been different. The Appellant could then have decided to give evidence on oath.

18. On the 27th March 1980 the Judicial Committee of the Privy Council made an order granting the Appellant leave to appeal from the judgement of the Court of Appeal of Trinidad and Tobago.

19. The Appellant respectfully submits that the judgement of the Court of Appeal of Trinidad and Tobago was wrong and ought to be reversed, and this appeal ought to be allowed for the following reasons (amongst others)

REASONS

(i) Because the learned trial judge misdirected the jury on the issue of joint enterprise.

(ii) Because the Appellant has suffered prejudice by reason of the unlawful inclusion of the counts of robbery with aggravation and kidnapping at his trial.

James Wood.

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OF TRINIDAD AND TOBAGO

B E T W E E N

KIRKLON PAUL — Appellant

and

THE GOVERNMENT OF TRINIDAD AND TOBAGO — Respondent

THE CASE OF THE APPELLANT

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