27/81

IN THE PRIVY COUNCIL No. 25 of 1980

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN:

KIRKLON PAUL Appellant

- and -

THE STATE Respondent

CASE FOR THE RESPONDENT

Record

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., Corbin and Rees JJ.A.) dated 12th November 1976 dismissing the Appellant's appeal against his conviction for murder in the Supreme Court of Trinidad and Tobago (Scott J. and a jury of twelve) on 20th May 1975 when he was sentenced to death. p.176 pp.161-175

2. The relevant statutory provision is contained in section 16(1) and (2) of the Jury Ordinance which reads as follows:-

> "(1) On trials on indictment for murder and treason twelve jurors shall form the array, and subject to 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 nine jurors and no more."

Rule 3 of the Indictment Rules provides that:-

> "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment, if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

3. The Appellant was charged together with one Addonton Andy Thomas on an indictment containing 3 counts namely:-

(i) Murder, in that on 28th August 1973 at Diego Martin, in the County of St George, they did murder Austin Sankar; pp.1-3

(ii) Robbery with aggravation, in that on 27th August 1973 at Carenage in the County of St George being armed with offensive weapons, to wit, revolvers, they did rob Raymond John of a motor car;

(iii) kidnapping, in that on 27th August 1973 at Carenage in the County of St George, they stole and unlawfully carried away against his will Raymond John.

4. The trial took place between 1st and 20th May 1975 before Scott J. The Appellant was tried by an array of 12 jurors. Upon his arraignment before the learned trial Judge Counsel for the Appellant applied to have the second and third counts severed from the indictment. The learned Judge refused the application and the Appellant was tried and convicted on all three counts. pp.4-6

5. The evidence called on behalf of the prosecution consisted principally of the evidence of one Raymond John and of admissions made by the Appellant. Raymond John's evidence included the following facts:- pp.135-139 pp.68-78

(i) that at about 10.20 pm on 27th August 1973 he was plying for hire as a taxi when three men got into his car.

(ii) One of the two men in the back of the car held something cold at the base of his neck. He (John) looked for assistance to the man in the front seat but that man pulled a revolver from his waist, pointed it at him and said "Don't dig no horrors.".

(iii) While driving his car John had ample opportunity clearly to see the man in the front seat.

(iv) After some time John was made to get out of the car and he was shut in the boot.

(v) The car was then driven around for about an hour after which time it was stopped for petrol. It was then driven for about another hour when John heard three shots. They sounded to him like gunshots. Soon thereafter the car stopped and he was released.

(vi) At an identification parade on 11th September 1973 he identified the Appellant as the man who had sat in the front passenger seat of his car.

6. The Appellant made a statement to the police on 18th September 1973. At the trial the prosecution led evidence to show that the statement had been made voluntarily. Neither during the course of the trial nor in the Court of Appeal was the suggestion ever made that the statement was not a voluntary statement made by the Appellant. The Appellant's statement contained the following relevant admissions:- pp.135-139

(i) At about 11.00 pm on 27th August 1973 he went to the house of one Broko at Laventille. There he joined Brian Jeffers, Guy Harewood and two others. Three of them were armed with guns. He then travelled with them while they were so armed in a car driven to Carenage by one Lennie, after Jeffers had previously announced at the house, while standing with feet apart and in a 'very commanding position', "Ah scene must play tonight", meaning 'a job must be done tonight'.

(ii) On reaching Carenage, Paul, L and T left Lennie's car. L and T held up a green car, all three of them entered it at different points, and with L holding a revolver at the back of the driver, compelled him to drive to an appointed place. There L imprisoned the driver in the boot of the car, whereupon Jeffers and Harewood joined them. Paul continued thereafter in the company of his armed companions in the green car, which T was then driving. They travelled to several places and eventually to Diego Martin. There they came upon a police car. T drove the green car alongside the police car and from that position one of his companions fired two shots into the police car. Each of his other two armed companions fired shots thereafter into the police car. Following this the car sped away from the scene, dropped him off at one point and his three armed companions at another.

7. The Appellant called no evidence in his defence. He made an unsworn statement in the following terms:- p.123

"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 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."

8. The trial Judge (Scott J) summed up to the jury. pp.9-64
He summarized the case for the prosecution, he dealt with the jury's function, his own function and the burden of p.10
proof. He dealt with the substance of the Appellant's statement that we was not a party to any of the offences. The learned trial judge gave directions on the law of murder, p.12
robbery and kidnapping. pp.12-14

9. The jury returned a verdict of guilty of murder, robbery and kidnapping. p.62

10. The Appellant appealed to the Court of Appeal. The appeal was heard before Sir Isaac Hyatali C.J., Corbin and Rees JJ.A., judgment of the court being given on 12th March 1976. The Court of Appeal allowed the appeals against the pp.161-175
convictions for robbery and kidnapping but dismissed the appeal against the conviction for murder.

11. The judgment of the Court of Appeal was delivered by Sir Isaac Hyatali C.J. He said that the prosecution case against the Appellant was founded on (1) a statement which the Appellant conceded he had given voluntarily to Sgt. Villafarna and (ii) the sworn testimony of Raymond John. He set out the evidence shortly and said that it p.173
clearly established the Appellant as a joint adventurer not only at the time of the kidnapping but also at the pp.173-4
time of the murder. He thus disposed of the complaint that the Appellant was not on the evidence a party to any of the offences. In respect of the complaint that the trial was a nullity because of the non compliance with s.16 of the Jury Ordinance the learned Chief Justice concluded that it was not, but that the real question was whether the Appellant was prejudiced by the evidence admitted in respect of the counts of robbery and kidnapping. He concluded that the evidence was properly admitted in proof pp.174-5
of the charge of murder against him.

The final complaint was made on behalf of the Appellant with which the learned Chief Justice dealt was pp.174-5
that the learned Judge wrongly omitted to direct the jury on the value of the exculpatory allegations contained in the Appellant's statement to Villafarna and in his unsworn statement from the dock. The learned Chief Justice said that insofar as the statement contained admissions they were evidence of the truth of what was stated; insofar as the statement contained exculpatory matter it was not evidence of the truth of such matters but merely evidence of the reaction of the maker of the statement when charged. The learned Judge had adequately dealt with the matter.

12. On the 19th May 1980 the Appellant was granted special leave to appeal in forma pauperis to the Privy Council. p.176

13. The Respondent respectfully submits that the appeal should be dismissed. As to the ground raised that the trial was a nullity, the Board is respectfully referred to the cases of Cottle and another -v- The Queen (1977) A.C.323 and Gransaul and Ferreira -v- The Queen Privy Council Appeal No. 26 of 1978, (unreported). Those cases it is submitted are decisive against the Appellant unless evidence was admitted to prove the non-capital offences which should not have been admitted as part of the prosecution case of murder. It is submitted that the evidence of robbery and kidnapping would have been admissible if the only charge had been one of murder and that the Court of Appeal were correct in so finding.

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.

(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 of murder.

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

(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 of other reasons set out in the judgment of the Court of Appeal.

STUART McKINNON, Q.C.

JONATHAN HARVIE

No. 25 of 1980

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 STATE — Respondent

CASE FOR THE RESPONDENT

Charles Russell & Co
Hale Court
Lincoln's Inn
London
WC2A 3UL