14/79

Privy Council Appeal No. 26 of 1978

Robby Gransaul and Winston Ferreira – – – *Appellants*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH APRIL 1979

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SALMON
LORD FRASER OF TULLYBELTON
SIR WILLIAM DOUGLAS

[*Delivered by* LORD SALMON]

The appellants were tried in February 1975 on an indictment charging them jointly with murder and robbery with aggravation. The jury found them guilty on both counts, and they were sentenced to death on the first count and to fifteen years imprisonment on the second. They each appealed to the Court of Appeal, but solely against the conviction for murder. That appeal was dismissed, and the appellants now appeal by special leave to this Board.

It is necessary briefly to state the evidence adduced at the trial, before considering the points of law raised on this appeal. The uncontradicted evidence revealed the following relevant facts.

In 1973 Mrs. Khan owned a cafe, in which, amongst other things, she sold cigarettes. Her wholesale suppliers sent one of their vans containing cigarettes, manned by a driver and salesman, to call on her once a week.

On Monday the 27th August 1973 at about 1.30 p.m., the van which had a right-hand drive pulled up in front of the cafe on the gravel verge between the cafe and the road. When the van stopped, its right hand side was the nearer to the cafe and the wheels on its left hand side were on the extreme edge of the road. The van was about eight yards away from the cafe. The salesman went into the cafe and asked Mrs. Khan how many cigarettes she required, and then returned to the van to fetch the cigarettes. Mrs. Khan told her daughter to go upstairs and get the money to pay the salesman. Miss Khan did as

she was told. When the salesman returned to the cafe with the cigarettes, Mrs. Khan paid him the money and the salesman proceeded to count it. Mrs. Khan and her daughter heard a voice outside the cafe saying: " Stick up your . . . hands ". They then both looked towards the van and saw the first appellant, who was a neighbour of theirs, standing on the left hand side of the van with his back to the road and another man standing by the driver's seat with his back to the cafe. The mother said that the man by the driver's seat, whom she had never seen before, was clutching the driver's right forearm and holding down his right hand which was resting on the open window next to his seat: she then saw the first appellant shoot the driver. The daughter said that she had seen the man, standing on the driver's side of the van, earlier that day in the company of the first appellant. She later picked him out on an identity parade. According to her, he was holding down the driver's hand on the open window, and she demonstrated how he was doing it. The daughter said that the first appellant was pointing two revolvers inside the van through the left hand window and that she heard an explosion " like gun shot ". The mother and daughter said that the first appellant then immediately came into the cafe with a revolver in each hand and told the salesman to put up his hands. The salesman obeyed that command whereupon the first appellant transferred the revolver from one hand to the other and put his free hand into the salesman's pocket and took something out of it. They said that the first appellant then ran out of the shop and joined the second appellant and both of them then ran north along the road together.

The salesman said that whilst he was counting his money he heard a shot. He then turned round and saw the two men by the van, one on each side of it; the one on the left hand side of the van ran into the cafe with a revolver in each hand pointing at him and told him to raise his hands. He did so. The man then transferred the gun in his right hand to his left hand and took out of the salesman's left hand pocket the proceeds of the day's sales amounting to about $300. The man then ran out of the shop. The salesman followed him and saw the two men running down the road northwards. He denied that the man standing next to the driver had asked him for a cigarette before the shot was fired or at any other time. The salesman said that he usually carried a ·38 calibre revolver for protection when he was on duty selling cigarettes, but that he had left his revolver in the left hand pocket of the van before entering the cafe. When he went back to the van after the shooting, his revolver had disappeared and he found his driver sitting slumped behind the steering wheel and bleeding from his mouth and nose. The driver was dead. The medical evidence showed that he had been killed by a ·22 calibre bullet which had penetrated the driver's chest horizontally and downwards through his left lung, heart and right lung.

Another witness who lived in the same house as the first appellant said that he saw the second appellant come to the house at about 9.30 a.m. on 27 August 1973 and join the first appellant. Later in the morning the appellants left the house together but returned to it in about half an hour. This witness, who was not cross-examined, went out at about mid-day and left the appellants together in the first appellant's room.

Neither appellant gave evidence but each gave an unsworn statement from the dock. The first appellant said:

> " I really want to hold up the driver and while holding him up . . . he trapped my hand in the van pocket and unfortunately a shot went off and he got shot. Then after I came out from the van I took the

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

The second appellant said:

"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 it 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 ".

In a statement in writing which the first appellant signed after dictating it to the police and which was put in evidence at the trial without any objection, the first appellant confessed that he went to the van and pointed a ·22 pistol at the driver as he was sitting in the driving seat and commanded him to hand over all the money he had. The driver said that he had none and the first appellant then began to search the van. In the pocket of the van he discovered a pistol. As he seized it, the driver trapped the first appellant's hand inside the pocket of the van. There was a struggle between them and while the first appellant was trying to wrench his hand out of the pocket, the pistol in his other hand went off and shot the driver. The learned judge was careful to explain to the jury that the statements made by the first appellant were not evidence against the second appellant and that the jury had to disregard those statements so far as the second appellant was concerned.

At the trial, the case for the Crown was

(1) that the appellants had engaged in a joint venture to hold up the van and rob those in charge of it of the money collected from the sale of cigarettes

and

(2) that the first appellant, with the assistance of the second appellant, who was then holding down the driver's right arm, had deliberately or accidentally shot and killed the driver when pointing a loaded revolver at him.

In the Court of Appeal, the first argument on behalf of the appellants was that the learned trial judge had erred in his summing up in that he had directed the jury that even if the first appellant, whilst engaged in a robbery which involved violence, had accidentally shot the driver, he would in law be guilty of murder. According to this argument, the learned judge ought to have directed the jury that if the shooting had been accidental, they should return a verdict of manslaughter. The Court of Appeal, rightly, in their Lordships' opinion, rejected that argument.

In England the common law relating to murder has been amended by the Homicide Act 1957, section 1(1), which abolished "constructive malice".

In Trinidad and Tobago however the law relating to murder is still solely the common law; and the common law relating to murder is well settled. A person who commits a felony involving personal violence, does so at his own risk, and is guilty of murder if the violence results, even inadvertently, in the death of the victim. See *R. v. Betts and Ridley* (1931) 22 Cr. App.R. p. 148 and *R. v. Jarmain* [1946] K.B. 74. In the latter case, the accused, engaged in robbery, pointed a loaded and cocked pistol at a cashier who was counting the day's takings. He said in evidence that he was thinking what to do but had no intention of pressing the

trigger when the gun went off and killed the cashier. Pointing a loaded pistol at a person with your finger on the trigger, in the course of committing a felony, is indubitably an act of violence. The trial judge in *R. v. Jarmain* directed the jury that if they accepted the facts deposed to by the accused they should find him guilty of murder. The jury convicted the accused of murder and the Court of Criminal Appeal dismissed the appeal. In both those cases the Court of Criminal Appeal relied upon *D.P.P. v. Beard* [1920] A.C.479. In that case the accused raped a girl aged thirteen whilst he was drunk, and in doing so, placed his hand over her mouth in order to stop her screaming but without any intention of injuring her. He did however cause her death by suffocation, and was convicted of murder. In the Court of Criminal Appeal, it was argued on behalf of the appellant that the trial judge had misdirected the jury on two points. The first point (which is the only point relevant to the present appeal) was that the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional, but only accidental, they should return a verdict of manslaughter.

Lord Birkenhead, L.C., with whose speech the other seven noble and learned Lords agreed, said at p. 493:

> ". . . the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court [of Criminal Appeal] held that by the law of England such an act was murder. No attempt has been made in Your Lordships' House to displace this view of the law and there can be no doubt as to its soundness".

Accordingly, in their Lordship's opinion there is no substance in the first argument on behalf of the appellants.

The second argument on behalf of the appellants was that the shooting of the driver did not occur in the furtherance of the felony of robbery because at the time the driver was shot, the money had not been found or stolen. Having failed to find the money in the van, the first appellant immediately rushed into the cafe and held up the salesman and robbed him in the manner which has been described earlier in this judgment. The shooting and the taking of the money by the first appellant must have taken place within minutes if not seconds of each other.

Counsel for the appellants however contended that the shooting of the driver and the robbery of the revolver which the salesman had left in the van in the care of the driver, was an entirely independent incident from the robbery which occurred in the cafe. Their Lordships consider that this argument is impossible to accept for it is obvious that what happened outside the cafe and inside it was all part of one transaction.

It was further argued on behalf of the second appellant that there was no evidence upon which he could have been convicted of murder and that, in any event, the judge failed to direct the jury properly in respect of the charge against him. Their Lordships consider that there was ample evidence upon which the jury could have been satisfied beyond any reasonable doubt that the second appellant accompanied the first appellant to aid and abet him in effecting robbery with a loaded revolver and that he, in fact, did so. Moreover, it is plain that if the jury accepted the evidence that the second appellant was holding down the driver's arm at the time the first appellant was pointing the revolver at him, he must have seen what the first appellant was doing and recognised the risk that the gun might go off and wound, if it did not kill, the driver.

Their Lordships consider that no valid criticism can be made about the judge's summing up of the evidence or his direction as to the law relating to the charge against the second appellant.

The third argument on behalf of both the appellants was that the trial judge erred in law in allowing a count for murder and a count for robbery with aggravation to be included in the same indictment and be tried together; and that it follows that the conviction for murder should be quashed. This point was not taken either at the trial or before the Court of Appeal; leave however has been given for the point to be taken on appeal to this Board. In order to decide the point, it is necessary to set out section 16 subsections (1) and (2) of the Jury Ordinance of Trinidad and Tobago Ch. 4 No. 2. Those subsections read 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 nine jurors and no more ".

It is obvious that it would have been better not to include Count 1 and Count 2 in the same indictment and they certainly should not have been tried together. Murder and treason according to the Ordinance must be tried by twelve jurors and any other crime must be tried by " nine jurors and no more ".

It follows that the trial on Count 2 was a nullity and had there been an appeal from it, the conviction would necessarily have been quashed.

The appellants have relied strongly on *Cottle and another v. The Queen* [1977] A.C. 323. The circumstances in that case were however very different from those in the present case. A Mr. Rawle was shot dead at his residence at about 7.30 p.m. on the 11th May 1973. An hour or so later a Mr. Gaymes was shot and wounded when leaving a supermarket of which he was the manager. Cottle and his co-defendant were charged in one indictment which contained a count charging them for the murder of Mr. Rawle, which was a capital offence, and another count charging them for shooting Mr. Gaymes with intent to cause grievous bodily harm, which was not a capital offence. They were found guilty on both counts.

It is obvious that the crimes charged in these two counts (a) were entirely separate and distinct from each other and (b) that the evidence relating to the non-capital offence was highly prejudicial to the defendants on the count relating to the capital offence.

Moreover, as their Lordships' Board pointed out in that case, even if some of the evidence adduced in support of the count relating to the shooting of Mr. Gaymes might have been admissible on the count relating to the murder of Mr. Rawle, it would have been the duty of the judge, in the exercise of his discretion, to decide whether or not it should be excluded on the ground that its prejudicial propensity would have been far greater than its probative value. In these circumstances, their Lordships' Board quashed the convictions for murder, the conviction for the non-capital offence having been quashed in the Court of Appeal on the ground that the charge relating to it should have been tried by a jury of nine whereas it had been tried by a jury of twelve.

The present case is entirely different from the Cottle case. As already pointed out, what happened in the cafe and what happened outside the cafe were not separate incidents and distinct from each other but part of the same transaction. The evidence as to what the first appellant did in the cafe was direct evidence that he had killed the driver in the course and furtherance of robbery involving violence. There was no question of the judge having to exercise his discretion as to whether the evidence of what happened in the cafe was of greater prejudicial than probative value. That evidence was directly relevant to the charge of murder and, in their Lordships' view, the judge had no power to exclude it. The test must be: would all the evidence which was called before the jury have been admissible if the indictment had consisted only of the count for murder? Their Lordships have no doubt that if the count of robbery with aggravation had been omitted from the indictment, all the evidence which was called before the jury would have been admissible and could not have been excluded. It follows that the appellants cannot have been prejudiced by the inclusion of the count for aggravated robbery.

For these reasons their Lordships will dismiss this appeal.

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.

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In the Privy Council

ROBBY GRANSAUL AND
WINSTON FERREIRA

v.

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DELIVERED BY
LORD SALMON

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