

IN THE COURT OF APPEAL

SAINT CHRISTOPHER

Criminal Appeals

Nos. 2 and 3 of 1973

Between: LEROY WARNER AND EDWIN DUPORTE Appellants
and
THE QUEEN Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

Mary Moore for appellants

W. MacIntyre, D.P.P., for respondent

1973, June 22

JUDGMENT

The judgment of the Court was delivered by -
ST. BERNARD, J.A.

These are two appeals which are taken together by consent. The appellants were tried together and convicted of the offence of attempted arson on 24th May, 1973, and each sentenced to two years imprisonment. They now appeal against the conviction and sentence on five similar grounds, two of which are withdrawn. The main issue at the trial was the question of identification of the appellants by one Alvarine Dennis, the complainant.

The facts of the case may be briefly summarised as follows: On 18th February, 1973, Alvarine Dennis owned a small house at Half Way Tree where she lived with her children. She went to bed about 8 p.m. She stated that about five minutes to 12 o'clock she heard the sound footsteps of more persons than one in the yard. The footsteps appeared to her to be getting closer to the house and so she got up and went by a window and in about five more minutes she heard an explosive sound "puff" and felt as if the house would fall. She looked out of the window and saw two men running from the
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into the main road and into one Fraser's yard. Fraser is sometimes called Willie George. She shouted Willie George and spoke. She stated that when the two appellants were running into Fraser's yard, Fraser's dogs were loose and rushed them, and the yard above Fraser's had dogs also and they rushed out and the appellants "turned back round and she saw them to their face part." She knew both appellants for some time before that night. The other occupants of the house awoke and Alvarine and others went outside and she observed the house was on fire. The fire was put out. There was slight damage to the house by burning. There was a crocus bag underneath the house and this smelt strongly of gasolene or diesel oil. The same night a report was made to the police at about 12.25 a.m. and Sgt. Dudley Williams and P.C. Salters went to her home the same morning. On arrival the sargeant observed the crocus bag under the sill and there was a strong odour of diesel oil. He left with Alvarine, Alfred Percival, Alvarine's boyfriend, and P.C. Salters for the home of Duporte, the second appellant. He called and knocked several times but received no answer. The time was about 2.15 a.m. They left and went to the home of Julian George and there he saw the appellant Warner lying across a bed wearing a dark pair of pants, a pair of brown shoes, and a white T shirt under a blue shirt. He called Warner and told him that Alvarine stated her house was on fire and she saw him and Duporte running away from the yard. Warner said nothing at the time. He was taken to the police station and Warner made a statement the same morning at about 4 a.m. The same day at about 1 p.m. Duporte went to the police station and he too made a statement. Duporte was arrested on the 1st April and Warner on the 9th April.

The defence of both appellants were alibis. Warner stated that he went to spend the week-end with his friend Julian George, and on 18th February - a Sunday, they went

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to play dominoes at Godwin's ghut. They played until about twenty-five past 5 o'clock p.m. From there they went to the home of Pansy Warner and watched television until about one quarter to 10 o'clock. Then he went to George's home and went to sleep in a white T - shirt and a white under pants. While he was sleeping Julian George awoke him and he saw Sgt. Williams standing at the door. The sargeant spoke to him and he went to the police station and there he made a statement. The witness Julian George supported this story.

Duporte stated that on the 18th February, after he awoke he went to his mother's home. After breakfast one James Norford and himself started to drink rum. About 6.30 p.m. he left his mother's home drunk and went to his home and straight to bed. Next morning, Warner and Julian George called him and told him the police were looking for him.

The witnesses for the appellants stated that on the 9th May, 1973, Alvarine Dennis told them that it was Josephine Merbert who told her that she had seen the appellants run out of her yard. Josephine who gave evidence for the prosecution denied this.

Counsel*relied mainly on the first ground of appeal which was as follows -

"The learned Trial judge erred in admitting evidence of an incident which had no relevance to the offence charged in this indictment and which did not directly tend to the proof of the matter in issue, and which evidence was prejudicial."

She stated that at the trial she objected to the admissibility of the evidence given at the preliminary hearing about a conversation which took place between Alvarine Dennis and Duporte on the morning of the 18th February as being prejudicial and of no probative value. She

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was overruled by the trial judge and the evidence was admitted.

The evidence was as follows -

"I saw both accused on the morning of 18th February, 1973. They were underneath Fraser's mango tree. I spoke to one Joseph Reed who was under the tree with the two accused. Julian George was also present. I spoke to Alfred Percival in the presence of both accused and others. Accused Duporte appeared to be annoyed. Duporte called out to Julian George and said "Harry Harry, is you she mean". Then Duporte said to me "You Alvarine and Brown Boy and Reds, (Percival is called Brown Boy) you put police on Willie George with the rum. I called Percival's attention to what Duporte had said and I told Duporte I would make him prove it. Duporte repeat the same thing and said "you have to get out of Half Way Tree. I told him "O.K. tomorrow you will see when I go for you". Duporte said "You sure you going to live to see tomorrow?" I ask him how. Duporte said "I only ask you if you sure you going to live to see tomorrow". A bus came and I left for town. The two accused, Julian George and Reed were present."

Counsel submitted that this evidence was led by the prosecution to establish motive for committing the offence but in her view it had no evidential value and the manner in which the judge commented on it in his summing up by asking the jury to attach significance to it must have influenced them in arriving at their verdict.

Counsel for the respondent submitted that this evidence was relevant to prove spite or ill-will and the fact that it was prejudicial was no reason for its exclusion.

In our view, this evidence did not directly tend to prove or disprove the offence charged and was inadmissible. Even if it was admissible the manner in which it was treated by the trial judge in his summing up amounted to a misdirection. The words "you have to get out

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of Half Way Tree" allegedly used by the appellant Duporte did not tend to connect any of the appellants with the offence charged. The words "you sure you going to live to see to-morrow" were capable of different meanings. It is a common expression used in the different islands as meaning you have no control of your life. Where an expression is admissible and capable of different meanings the jury should be told to draw the inference most favourable to the appellant. The trial judge told the jury -

"They invite you to find that they have proved motive. They are not bound to; the prosecution never have to prove motive. But they are entitled to. They are inviting you to say that they have proved motive in this case."

and later in his summing up he stated -

"I spoke to Alfred Percival in the presence of both accused and others. The accused Duporte appeared to be annoyed. Duporte called out to Julian George and said 'Harry, Harry, its you she mean.' Then Duporte said 'to me, 'you Alvarine and Brown Boy and Red, you put police on Willy George with the rum.' I called Percival's attention to what Duporte had said and told Duporte I would make him prove it. Duporte repeat the same thing and said: 'You have to get out of Half Way Tree.'

Now I pause here because you will have to make up your minds whether that part of Alvarine Dennis's evidence is true, and if so whether there is any significance when she said Duporte told her 'you have to get out of Half Way Tree.' Then Alvarine Dennis said:

'I told him tomorrow we will see when I go to you, and Duporte said, 'You sure you going to live to see tomorrow' and I asked him how, and Duporte said 'I only ask you if you sure you going to live to see tomorrow'

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The accused Duporte told Alvarine Dennis that she has to get out of Half Way Tree and he also asked her twice 'you sure you going to live to see tomorrow?' You are asked to attach significance to those words and of course you will be entitled to attach significance to those words if you believe Alvarine Dennis that she actually saw the two accused running from her house when she said she did."

In these portions of the summing-up the trial judge was directing the jury to attach significance to the conversation on the morning of the 18th February as this evidence proved motive for the crime and connected the appellants with the offence committed that night. This was a misdirection by the judge and we do not know what weight the jury attached to this evidence. They may well have used it in assisting them on the issue of identification.

Towards the end of the summing up the trial judge told the jury -

"You have to feel sure of their guilt before you can find them guilty bearing in mind that the only evidence against them is this
* alleged evidence of the talk in the morning and their running away from Alvarine Dennis's house in the night. There is nothing else."

Here the trial judge was telling the jury that they could use the conversation between Alvarine and Duporte as evidence against Warner also. This was clearly an error as if this conversation was admissible it did not affect Warner in any manner.

We feel that the conviction of both appellants in these circumstances is unsafe and ought not to stand. The appeal is allowed and the conviction and sentence in each case is set aside.