IN THE COURT OF APPEAL

DOMINICA

CRIMINAL APPEAL NO.1 of 1974

BETWEEN: DESMOND TROTTER APPELLANT

AND

THE QUEEN RESPONDENT

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice B.L. St. Bernard
The Honourable Mr. Justice N. Peterkin

E. Mottley and B. Alleyne for the appellant.
I.I. Austin (Attorney-General) and Miss I. Shillingford (Legal Assistant) for the respondent.

1975,
February 13 & 14,
March 19

J U D G M E N T

PETERKIN, J.A.(Ag.) (St. Bernard, J.A. concurring):

The appellant was tried jointly with one Roy Mason for the murder of John Albert Jirasek on 27th February 1974 at Roseau, in the parish of St. George, Dominica. Mason was acquitted by the jury, but the appellant was, on 1st November 1974, convicted of the murder and sentenced to hang. He has appealed against this conviction.

Despite the number of witnesses called and the length of the trial, the facts and circumstances may be stated in short compass. The evidence presented to the Court on behalf of the Crown established that the Carnival celebrations in Dominica in the year 1974 fell on the 25th and 26th February. John Albert Jirasek, an American citizen, arrived in Dominica on 24th February. On the night of 26th February he left his hotel at about 9.15 p.m. Sometime between then and 10 p.m. the explosion of a firearm was heard in the vicinity of the Bay Street public convenience, and three men were seen running from that area. One Eric Philogen testified to having seen shortly afterwards a man sitting on the road in that area screaming for help. He stopped a passing car, entered it, and drove to Police

Headquarters where he made a report. This report was received by Assistant Superintendent of Police Blanchard at about 10.20 p.m. He was then driving his car north on Victoria Street. He proceeded to the vicinity of the Bay Street public convenience where he saw the deceased Jirasek holding his abdomen with one hand and waving with the other. There was a blood-stain on his shirt in the region of the abdomen. He took him to the Princess Margaret Hospital, arriving there between 10.25 to 10.30 p.m. There he was seen to have a punctured bullet wound on his right side. On the following day an operation was performed by the surgeon specialist Mr. Desmond McIntyre and a bullet was removed from his left upper femur. It was handed to Station Sergeant Toulon. Despite further efforts to save his life the deceased had been mortally wounded and died on that same night following the operation. The cause of death was given by the doctor who performed the post-mortem examination, Dr. Edward Watty, as a combination of the injury referred to and an inflammation of the lower lobes of the lungs. In short, his injury had led to pneumonia of which he had died.

The prosecution had by this evidence given proof of the corpus delicti. The evidence established that the offence charged had been committed by someone. It was now necessary only to establish its authorship. Bearing in mind that the defence raised was an alibi, the onus now remained on the Crown to identify the appellant with the crime alleged. To do so, the prosecution led evidence: (i) that the spent shell found at the scene of the crime on the following morning, and the bullet extracted from the body of the deceased were fired by an automatic pistol belonging to the appellant and found in his possession some eight days later, i.e., on 6th March 1974, and (ii) that the appellant had made an oral admission shortly after the incident to the effect that he had shot the deceased.

First, the evidence is that the spent shell found by Corporal Corriette at the scene of the crime on the following morning, and the bullet handed to Sergeant Toulon by Mr. McIntyre, and later to Corporal Corriette, were both delivered to Mervyn

Holder, an Inspector of the Barbados Police Force with nineteen years experience and specialised training in the study and method of identifying firearms by means of the shells and bullets discharged therefrom. The sum total of his evidence was that they were both fired by the automatic pistol which had been handed to him, along with them, by Corporal Corriette on the 12th March 1974, in Barbados. This automatic pistol, according to the evidence of Corporal Jacob, was found in the possession of the appellant on the morning of 6th March, 1974, at Antrim Valley. His reply to the police implied that he did not have a firearm. When it was found and he was asked how he came by it, the appellant said, "I have it to protect myself." At the trial he denied that he ever had possession of the firearm, and the allegation made there was that he was "framed" by the police.

In regard to the oral admission, Camilla Francis, an Antiguan who had travelled to Dominica for the Carnival celebrations, testified that at about 10 p.m. on the night of 26th February 1974 she was standing at the corner of Queen Mary Street and River Street in the company of three others when the appellant and two other young men came up to them. Her evidence continues:

> "Whilst I was at the corner I saw three young fellows come up and they were speaking to Theodore. We were about 3 ft. apart. They were not speaking loud so I could not hear everything they were saying. The tallest one was speaking to Theodore. I know that one. I see him here today, that one, Desmond Trotter. I hear him tell Theodore he just did a wonderful job. He shot a white man. Theodore replied, "You lie". Trotter tell Theodore, "If you think I lie, feel it". Trotter put his right hand to his pant waist and pulled out a gun and put it on Theodore's hand to feel it. I saw the gun. It was about 6 inches long and appeared black to me. Theodore pulled away his hand and all of them

started to laugh. Then Trotter said to Hyacinth, "Sisters, you see". Then he pulled out the gun again and put it on Hyacinth's hand. She pulled away her hand and she moved away from them. He put back the gun in his pant waist. Then after they began to talk again."

The witness then stated that the three men went away leaving them there.

The defence was that of an alibi. The appellant alleged that he was ill in bed at his home at the time the offence was committed and so could not have committed it. Further to this, in his unsworn statement from the dock, the appellant claimed that his case was nothing more than " a vicious frame up designed to deform the beliefs and practices of those of I and I who are dedicated to a life of truth and righteousness", a philosophy to which he adhered.

Among the witnesses called by the appellant was his sister Kathleen who testified in support of his alibi.

The grounds of appeal are:

"1. The verdict of the jury was unsatisfactory and should be reversed or a new trial ordered: because the defence of the accused was not fairly and/or adequately put to the jury in that:

(i) The trial judge did not deal rightly with the evidence of the Prosecution witnesses Camilla Francis, Mervyn Holder, Charles Jacob and Clement Corriette;

(ii) The possibility that the deceased might have died from an accidentally inflicted injury was not left to the jury;

(iii) The learned trial judge did not deal rightly with the evidence of the defence witnesses Charlesworth Smith and Tim Kendall

2. The learned trial judge erred in not allowing cross examination of the witness Camilla Francis as to the contents of the statement alleged to have been made by her on the 19th August 1974 in Antigua.

3. The learned trial judge erred in improperly admitting statements allegedly made by the accused at Antrim Valley on the 6th March 1974 to Cpl. Clement Corriette.

4. That the learned trial judge misdirected the jury on the quantum of proof required in criminal cases (pp.192 - 195).

5. That the learned trial judge misdirected the jury by not giving them any or any sufficient direction in relation to the identification of the person who is alleged to have made the statement in the presence of Camilla Francis on the night of Tuesday the 26th day of February 1974.

6. That the learned trial judge misdirected the jury by not giving them a clear direction on the burden of proof of alibi.

7. That the learned trial judge misdirected the jury by telling them that the accused should have gone into the witness stand to give evidence.

8. That what took place at the visit of the locus in quo is an irregularity of sufficient importance to vitiate the trial.

9. That the learned trial judge did not assist the jury in pointing out to the discrepancies or inconsistencies or contradiction in the evidence of Camilla Francis.

10. That the learned trial judge did not direct the jury on the way to approach the case if

evidence of Camilla Francis was rejected. Was there sufficient evidence on which to ground a conviction if the jury rejected her evidence?

11. That the learned trial judge in dealing with the evidence of the visit of Camilla Francis to Time Kendall's office and the recording of the statement went beyond the realms of comment into the realm of judicial persuasion.(pp.234 - 240)."

Of these grounds, number 1 (i) and (ii), and number 3 were subsequently abandoned. We propose to deal with the grounds in the order in which they were argued.

On ground 8, counsel referred the Court to the following passage from the trial judge's summation:

"You will remember, members of the jury, that we visited three spots in Roseau, the first by the Bay side, the next by Hamlet or Cool Breeze or whatever it was, and the third was the former residence of the accused Trotter in Great Marlborough Street. Something happened at Great Marlborough Street that should not have happened. After we had finished or as I thought we had finished, I went downstairs as far as I am aware, so did the accuseds and to my certain remembrance three members of the jury. Six remained upstairs and it transpired that six of you were shown by the witness Garner Trotter where certain items of furniture were in the room of Kathleen Trotter.I must ask you to forget all that was said about the items of furniture in Kathleen's room for a number of reasons. Among those, the accuseds were not present and we do not try cases in this Court or any part of a case in this Court in the absence of the accused.

I certainly wasn't present and some of you were not present. I am not critising anyone, I am simply asking those of you to whom this was shown to disregard it because it is not evidence properly adduced before you."

He submitted that the significance of the visit to the appellant's home at Great Marlborough Street was that the witness Kathleen Trotter had given evidence that she could see from where she was sitting on the night of 26th February anyone entering or leaving the house, and that whatever was alleged to have been pointed out by the witness Garner Trotter was evidence in the absence of the trial judge, and, whether relevant or not, was sufficient to vitiate the trial. In support of his contention, he cited the case of Tameshwar & another v Reginam, 41 Cr.App.R.161.

We were told that whatever is alleged to have occurred was brought to the knowledge of the trial judge for the first time when counsel for the appellant was addressing the jury at the closing stages. The record shows that Garner Trotter, who was a witness for the accused Mason and not for the appellant, was later cross-examined by counsel for the appellant as to what he had pointed out at Great Marlborough Street. Nothing whatever was asked by him about the furniture in Kathleen's bedroom. There is nothing on the record to show that the demonstration complained of had ever occurred. The trial judge seems, in directing the jury to disregard it, to have acted ex abundanti cautela, merely on counsel's word which may have itself been the result of rumour. In the case of Martin and Webb (1872) L.R.I.C.C.R.378, after the judge had summed up, there was a view by the jury in the absence of the judge and prisoners. A case was stated for the opinion of the Court on the ground that there had been a mistrial in that (inter alia) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the Court below into the facts of what took place at the view. The

alleged reception of evidence out of court might be a mere rumour without foundation. The conviction was therefore affirmed. In the instant trial there had been an examination in the Court below into what took place at the view at Great Marlborough Street and the witnesses were tendered for cross-examination. The record shows nothing whatever of such a nature as is alleged to have occurred.

In any event, if the demonstration had in fact occurred it would have been irrelevant to the defence of the appellant in view of the fact that the witness Garner Trotter on his own evidence had left the house between 8.30 to 9.00 p.m. and had returned at about 11.00 p.m. He was not therefore in a position to have pointed out where his sister Kathleen was sitting during this time, if indeed she was, or where any item of furniture of a moveable nature was at the relevant time. The witness is not alleged to have made any communication to the jury except to give a simple ocular demonstration. If considered, it could not possibly have prejudiced the appellant's defence. It was not a visit to the locus in quo in the true sense, in that it had nothing whatever to do with the scene of the shooting, or the test of opportunity afforded any witness for identification of the appellant, and so could not in any way have assisted the jury. Nothing else is alleged to have occurred. Other than stated, everything was done in the presence of the judge, who throughout was in control of the proceedings. There has been no suggestion of impropriety on the part of the witnesses or jury or anybody else at the view.

In the case of Tameshwar & Another v Reginam cited by counsel, there was an entire view of the locus in quo by the jury in the presence of prosecution witnesses who gave evidence there in the absence of the trial judge. The main contention in that appeal was that the view was part of the trial and that to deprive a prisoner of the right to have the judge in possession of all the testimony so that he might charge the jury in the light of all the evidence was to deprive [illegible]

wholly improper procedure which vitiated the trial. In the circumstances of that case we entirely agree. A reference to p.164 of the judgment shows what took place of importance at the locus in quo viewed in that trial. We feel it should be allowed to speak for itself. It is as follows:

> "The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police-Sergeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy scout pointed out the spot where he was standing when he said he saw the two men running south. The barber pointed out the spot where he saw accused No.2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No.1 going south. The carpenter showed the bridge on which he was standing when he saw accused No.1. It appears that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No.2's alibi that he was in his hammock), showed where Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (an engine driver who lived on the same estate as the two accused) showed where he was living. A witness for the defence (who had given evidence in support of No.1's alibi that he was in the boat) indicated the koker south of the estate. Sergeant Adams indicated the house where a witness for the prosecution named Bacchus lived."

We are of the view that this is very far removed from what is alleged to have occurred in the instant trial, and that it is a matter of little surprise that their Lordships saw fit in that case to state that it was too disturbing a precedent to be

allowed to pass. For the reasons stated we have concluded that this ground of appeal should fail.

Counsel's submission on ground 5 was to the effect that the trial judge, in dealing with the question of identification by the witness Camilla Francis, did not go far enough in assisting the jury. He referred to parts of the evidence which he termed discrepancies. These he said had not been put to the jury. He also pointed out that there had been no direction to the jury on the question of light. Learned counsel conceded, however, that the trial judge's directions to the jury on the issue of the identification parade were adequate.

The trial judge dealt exhaustively with the evidence of Camilla Francis and commented on it, leaving the questions of its credence and weight to the jury. Finally, he directed them as follows:

> "You have to decide whether having seen a person for the first time on Carnival Tuesday night for a few minutes at the angle of Queen Mary Street and River Street she would have been able to recognise that person again. You have to look at her evidance with extreme care."

Most of the instances of discrepancies referred to by counsel were instances where the witness had corrected herself and so were not discrepancies in the true sense; but the trial judge did deal specifically with the question of discrepancies. He directed the jury as follows at p.208 of the record:

> "... so that when you see there are discrepancies, you will first of all say to yourself are these discrepancies important? Are they important? Then if they are important, you will say to yourself, is the discrepancy due to human failing? Where, however, you find that the discrepancies aren't important and you find that the discrepancies are due to a lack of frankness,

> then, you must look at every single thing
> that witness says, analyse it carefully and
> determine for yourselves whether you can
> believe, or what you can believe, of what
> that witness said."

It should also be pointed out that there had been no cross-examination on the question of light at the trial. This ground of appeal accordingly fails.

Ground 4 is to the effect that the trial judge misdirected the jury on the question of proof required in criminal cases. The submission here is that, after directing the jury that the Crown must prove the guilt of the appellant beyond reasonable doubt, he went on to equate the standard of proof required with the personal conduct of the jurors by telling them that,

> "If the conclusion to which you are conducted
> be that there is that degree of certainty in
> the case that you would act upon in your grave
> and important concern, that is the degree of
> certainty which the law requires and which will
> justify you in returning a verdict of guilty
> against the accused."

Counsel also complained of the trial judge's reference at p.194 of the record to the words:

> "the degree of cogency need not reach certainty;
> but it must carry a high degree of probability."

In regard to the first passage cited, the trial judge did not tell the jury that it was the sort of doubt which might affect them in the conduct of their everyday affairs, as was done in the case of Reg. v Gray, 58 Cr.App.R.177, but rather he told them that it required that degree of certainty in the case that they would act upon in their grave and important concern. The Court of Appeal in the case mentioned expressed the following view:

> "If the learned judge had referred for example
> to the sort of doubt which may affect the mind

> of a person in the conduct of important affairs, there could be in the view of this Court no proper criticism."

In Walters v Reginam (1969) 2 A.C.26, the trial judge told the jury as follows:

> "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other."

This direction has been approved by the Privy Council.

In regard to the second passage cited, the trial judge went on immediately to state,

> "The case is proved beyond reasonable doubt, but nothing short of that will suffice."

He had already directed them at p.192 of the record that:

> "the standard of proof required is proof to your satisfaction so that you can feel sure. Proof beyond reasonable doubt."

We are of the view that when the trial judge used the word "certainty" in the passage complained of he could only have meant beyond the possibility of doubt, in view of the sentence which immediately followed it.

Ground 6 concerns the alibi of the appellant. The gravamen of the complaint here is that in dealing with the alibi the trial judge said nothing about how the jury should act if they believed the evidence or were left in doubt by it. At a very early stage in his summation the trial judge had directed the jury as follows:

> "Now, it does happen and in this case it has happened, that evidence has been given for the defence, and the evidence for the defence may have one of three effects on your minds. In the first case, the evidence for the defence may convince you of the innocence of the accuseds or either of them; if it does so, you acquit them.

> Secondly, the evidence for the defence may cause you to doubt, not to feel sure whether they be guilty or not. If it so does, you also acquit because it means that the prosecution would not have discharged the burden of proof which rests on them and never shifts,...."

Then, at a later stage in the summation, when dealing specifically with the alibi, the trial judge very carefully directed the jury in the following terms:

> "If you are not satisfied about their alibis and consequently you reject their alibis, you are not to then say that because you do not believe their alibis you believe that they are guilty. You are not to do that. If you reject the alibi of either or both, then you still have to go on to say, have the prosecution proved the guilt of either or the guilt of neither?"

And again at p.256:

> "Let me again remind you that even though you do not believe the alibi, you cannot say that because I don't believe their alibis then they are both guilty. If even you discard their alibis you must then say, have the prosecution proved the guilt of either or both of them to your satisfaction so that you can feel sure?"

We regard these directions as being adequate.

Ground 7 alleges that the trial judge misdirected the jury by telling them that the appellant should have gone into the witness stand to give evidence. Throughout the trial, the defence of the appellant, as put forward by counsel in his cross-examination and address, was that there had been a conspiracy on the part of the police to "frame" the appellant. No witnesses were called by the appellant nor had the appellant himself elected to give evidence on oath in support of this. The learne

trial judge in the course of his summation commented as follows:

"It has always been my view that if you give a person an option and he exercises that option you should not comment adversely on the fact that he exercised the option which he was given. You will remember that I told each accused individually that he could give evidence on oath if he wished and make himself an ordinary witness in the trial, or make an unsworn statement from the dock, or say nothing. They each elected to make an unsworn statement but I feel that I am justified in making two comments. One is that the entire defence has been that there was a conspiracy on the part of the police and some of the witnesses to frame the two accuseds. It was put so openly. As I understand it, the position is that when allegations of this nature are made and they are persisted with, that is, they form part of the closing address of counsel, it is wrong to do it unless the accused himself goes into the witness box. I will read from a decision called Daken's case. It says this:

"Having suggested that the statement was dragged by violence at the hands of the police in cross-examination, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the court has no hesitation in saying that this is not the proper practice. It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police, or against any other witness, by way of defence, if he does not intend to call his client to give evidence to support his charge."

In the circumstances, we feel that it was not an improper comment to make, and that it was directed rather to the conduct of counsel than to the failure of the appellant to give evidence on oath. At no stage did the trial judge tell them that the appellant should have gone into the witness stand in so many words. Indeed, at a later stage, he said this:

> "It is exclusively for you, members of the jury, to make up your minds whether the unsworn statement given by either accused had any value, if so, what weight should be attached to it. It is for you to decide whether the evidence for the prosecution has satisfied you of the accuseds' guilt beyond reasonable doubt, and in considering your verdict you should give the accuseds' unsworn statement only such weight as you may think it deserves

Ground 9 alleges that the learned trial judge did not assist the jury in pointing out the discrepancies or inconsistencies or contradictions in the evidence of Camilla Francis. We feel that there is no substance in this ground of appeal and it has already been dealt with under ground 5 above.

Counsel submitted on ground 10 that the judge should have directed the jury that if the evidence of Camilla Francis was rejected they should ask themselves whether the remaining evidence was sufficient to ground a conviction. He submitted that it was not, and went on to cite the cases of (i) R.v Leonard Harris, 20 Cr.App.R.144, and (ii) R.v Michael Onufrejczyk, 39 Cr.App.R.1. We are of the opinion that these cases do not apply here and we know of nothing which compels or even authorises a judge to effect a dichotomy in the Crown's case in putting it to the jury. In any event, we feel that, even had the evidence of Camilla Francis been rejected, there still would have been compelling evidence against the appellant of such a nature as to warrant his conviction.

Ground 11 and ground 1(iii) were tied together. Here

counsel submitted that the trial judge was too harsh in his comments in dealing with the evidence of Time Kendall and his clerk, Charlesworth Smith, as compared with his treatment of the evidence of Camilla Francis. He referred to pp.234 to 240 of the record, and asked the Court to look at the totality of it. The learned trial judge may have commented strongly, but, in our view, not unfairly. The evidence of these two witnesses called by the defence was not to establish the innocence of the appellant. Rather it was directed entirely towards the destruction of the evidence of Camilla Francis by endeavouring to show that she had made statements in distinct conflict with her evidence on oath, thereby rendering her evidence negligible. Bearing this in mind, the trial judge went on to direct the jury as follows:

> "This document I recommend to you to read to see if you make sense of it remembering that it is not the truth of it that is at stake. You cannot when you look at this document say that it is true, all you can use this document for is to say that Camilla Francis, if you find she made this at all, that Camilla Francis has made previous inconsistent statements and since she has made them, then she is not a witness on whose word I can rely. That is the use to which this document may be put, no other use."

He had at an earlier stage told them this:

> "You have the identification parade but I think as important is the episode around Mr. Kendall's chambers in Antigua and it is said that on the 19th of August this year, Camilla Francis went to the chambers of Mr. Time Kendall in Antigua and there made a statement together with Hyacinth Francis and there admitted to the lawyer that what the statement contained was true and if that is so, then I don't have the slightest hesitation to tell you do not believe a single word that Camilla Francis tells you, not even

her name."

In short, the trial judge, notwithstanding the fact that he had commented on the evidence, was leaving the issue entirely to the jury.

Counsel submitted on ground 2 that the document in question was admissible under section 15 of the Evidence Ordinance and that the trial judge should have allowed cross-examination on it, i.e. as to its contents. It is necessary therefore to refer to sections 15 and 16 of the Evidence Ordinance (Cap.64 of the Laws of Dominica). They read as follows:

> "15. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but, before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.
>
> 16. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but, if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make use of it, for the purpose of the trial, as he shall think fit."

The record shows that counsel for the appellant sought to cross-examine the witness Camilla Francis on the contents of the document which he alleged was a written statement made by her. Examination of the document readily confirms that it is not a statement in writing made by the witness. It commences in the plural, lapses at a later stage into oratio obliqua and is not signed by anyone. The names Camilla Francis and Hyacinth Francis appear at the top of the document. In our view it would appear to have been jottings or notes taken by the maker of the document of an alleged conversation with Camilla Francis and/or Hyacinth Francis. In these circumstances, we concur in the ruli[illegible] of the trial judge. Counsel for the appellant conceded that there was nothing on the record to show that, after the trial judge had ruled on the matter, counsel had sought to cross-examine the witness on the basis of an alleged conversation between the parties. The fact that at a later stage the trial judge admitted the document to evidence does not alter the position in our view. The truth is that counsel for the appellant had at the trial clearly indicated that he was dealing with the document as an alleged written statement by the witness Camilla Francis.

On all grounds, therefore, this appeal fails. The conviction and sentence are accordingly affirmed.

PETERKIN, J.A.(AG.)

ST. BERNARD, J.A.