Hon the Justice Peterkin (

IN THE COURT OF APPEAL

GRENADA

CRIMINAL APPEAL NO.13 of 1974

BETWEEN CHARLES FERGUSON Appellant

AND

THE QUEEN Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Allan Alexander and E.De Freitas with him for appellant.
D.J. Christian, Attorney-General, and J. Penney with him for respondent.

1975, May 27 & 28, June 2

J U D G M E N T

DAVIS, C.J. delivered the judgment of the Court:-

The appellant was convicted at the October Assizes, 1974 for the murder of Roy Donald on 6th April 1974 at La Poterie, St. Andrew, and was sentenced to death by hanging.

The evidence led by the prosecution disclosed that, on 6th April 1974 at about 9.15 p.m., the deceased was driving a van in the direction of the River Antoine bridge. With him were his wife, Louise, Lynette Rock and Angela Drakes. As they got to the bridge they observed some stones in the path of the vehicle. The deceased stopped the vehicle and got out along with Angela Drakes to clear the road. Louise Donald remained in the vehicle. At that stage a man wearing dark clothing and a cap slightly pulled over his forehead jumped from behind the bridge with a revolver and demanded money from Louise Donald, who handed him a bag containing the money collected from the sales at her shop on that day. On seeing this, Lynette Rock called out to the deceased who turned and approached the van. The man fired a shot in the direction of the deceased who continued to walk towards the van. A second shot was fired which fatally wounded the deceased. The man then turned and ran through a trace in a banana cultivation owned by one Ramdhanny. Louise Donald who deposed that she knew the appellant for some six years was able to identify him with the aid of the headlights of the vehicle and the fact that it was a bright moonlit night.

Arlan Philip, a witness at the trial, stated that he heard the report of a gun, ran towards the bridge and on his way saw the appellant who was wearing dark clothes coming out of the trace at a distance of abou

75 yards from the bridge. He had known the appellant for about four to five years before.

Ann Romain, who was at her home, also heard the shots and ran towards the bridge. On her way through Ramdhanny's cultivation, she saw the appellant dressed in black and wearing a cap going in the opposite direction. She too had known the appellant for about four years.

The defence was an alibi. The appellant, who gave evidence on oath, stated he was at the home of his girlfriend Petra Joseph at the time the offence was committed. He called witnesses in support.

Five grounds of appeal were argued on behalf of the appellant but for the purposes of this appeal it is necessary to deal with two only, namely:-

"1. The learned trial judge misdirected the jury by directing them that:-

(b) in order to act upon the evidence of the appellant and his witnesses with respect to the appellant's whereabouts at the material time, that evidence must be of such a standard as to make them feel sure and/or to raise a sufficient doubt in their minds;

(c) there was an onus on the appellant to disprove the prosecution's case, the standard of which was satisfaction to the point where they should feel sure;

5. The learned trial judge misdirected the jury in the evidence in the following ways:-

(c) "The evidence of the removal of the picture of the accused should be disregarded" and/or "has no value in this case" and/or there was "no evidence on which you (the jury) can draw a reasonable and logical inference" and/or "it was a vague suggestion". "

We will deal with ground 5 (c) first.

Counsel submitted on behalf of the appellant that the wife of the appellant gave evidence that a photograph of herself and the appellant was taken by the Police during the search of their home, that it was suggested to Arlan Philip in cross-examination that he had been shown this photograph to enable him to identify the appellant at the identification parade and that, although the Police denied the taking of the photograph and the

showing of it to the witness, it was an issue for consideration by the jury and the learned trial judge was wrong in directing them that the evidence of the removal of the picture of the appellant should be disregarded and was a vague suggestion which they should not accept.

In our view the identification of the appellant was the real issue in the trial and any evidence relevant to that issue could not be disregarded by the jury. It was for them to make a finding as to whether or not the photograph had been taken and to infer the purpose for which it was taken or any use that might have been made of it by the Police. The judge was therefore wrong in directing them as he did, as the weight to be attached to that evidence was a matter entirely within their province.

The burden of the appellant's complaint, however, was ground 1 (b) and (c). The contention was that the appellant having put forward the defence of an alibi, the trial judge ought to have given special care in his summing up to the direction on the onus of proof. Counsel referred the Court to the direction given by the judge at pages 82 and 83 of the record which reads as follows -

> "The other witnesses called on behalf of the defence clearly lent support to those facts elicited or given in evidence by the accused, in support of his whereabouts between about half-past eight and ten o'clock on the night of the 6th of April. This witness lent support to the other witnesses, who explained his presence and his actions at the home of Petra Joseph from about half-past eight. It is a matter for you, after seeing and hearing them, to decide what you accept from the accused and his witnesses.....
> but it is for you to ask yourselves whether you are satisfied that they told the truth, or whether you feel sure that they have raised sufficient doubt in your minds about where Charles was between 9.15 and 9.30 that night. If they have satisfied you to the point where you can feel sure, then the prosecution's case fails. The accused asks you to believe himself and his witnesses as to his whereabouts on that night of the 6th April."

He then submitted that this was a misdirection in law. Counsel for the respondent conceded that this direction was wrong. The Court is of the same opinion.

In the case of R. v Johnson (1961) 3 All E.R. 969, the appellant was charged with robbery with violence and put forward the defence of alibi. The judge in his summing up directed the jury that, when the defence of alibi was put forward, there was a burden of proof on the accused person to satisfy the jury that the defence which he had set up had, on the whole been established. In quashing the conviction, the Court of Appeal commenting on such a direction stated as follows -

> "If a man puts forward an answer in the shape of an alibi or in the shape of self-defence he does not in law thereby assume any burden of proving that answer."

In the instant case although the learned trial judge in the earlier parts of his summing up directed the jury that the burden of proving the guilt of the appellant remained throughout on the prosecution yet in the passage quoted above in which he dealt specifically with the alibi he clearly directed the jury that there was a burden on the appellant to satisfy them to the point where they can feel sure. In our view this direction was clearly wrong and the error of such a fundamental nature that the conviction should not be allowed to stand.

Accordingly the appeal will be allowed, the conviction quashed and sentence set aside. Upon a review of the whole case, however, the Court is of the opinion that the interest of justice would be best served by order a new trial upon a fresh indictment. Order accordingly. The accused must remain in custody pending the retrial.

MAURICE DAVIS
CHIEF JUSTICE

E.L. ST. BERNARD
JUSTICE OF APPEAL

N.A. PETERKIN
JUSTICE OF APPEAL