ANTIGUA

IN THE COURT OF APPEAL

MAGISTERIAL APPEAL:

CRIMINAL NO. 1 of 1976

BETWEEN:

PATRICK DAVIS

VS.

THE QUEEN

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

Appearances: Claude Francis for appellant

C. Kennard, D.P.P. and Roger Davey for respondent.

1976, July 20, 26

J U D G M E N T

DAVIS, C.J. delivered the Judgment of the Court:

The appellant was convicted on the 31st January, 1976, for the murder of Wilmouth Benjamin and was sentenced to death by hanging.

On the same indictment he was also convicted on a second and third count for possession of firearms without a licence and possession of ammunition without a licence respectively. On each of these counts he was sentenced to three years imprisonment with hard labour to run concurrently.

The grounds of appeal are -

(1) That the verdict is unreasonable and unsafe having regard to the evidence.

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(2) That the learned trial judge erred in law in that he directed the jury that the case was one were there were only two possible verdicts, that is to say, that the jury could either return a verdict of guilty of murder or not guilty of murder and thereby exoluded the possibility of a verdict of manslaughter.

(3) That the indictment upon which I have been arraigned and tried is bad in that I was charged thereon with offences other than that of murder.

(4) That the accused is not guilty.

At the hearing Counsel sought and was granted leave to argue the following additional grounds -

(5) The Learned Trial Judge misdirected the jury as to the burden of Proof when he told them:-

(i) "Now, although as I said there is no onus on the accused in law, the accused has put a statement of his own before you and he has put the testimony of witnesses and asked you to analyse them. If you find that when you analysed all that has been urged, the crossexamination, the Prosecution's witnesses and the statement of the accused and in the testimony of his witnesses, if you find that he has raised a sufficient doubt in your mind about his guilt or he has establised his innocence, then the verdict would be not guilty." Page 148 Lines 3 - 11 of the Record of Appeal.

(ii) "But as I indicated she was not cross examined and you should have little difficulty with her evidence. In addition to that it would seem that if Patrick Davis did in fact have such a licence then he could have produced it or have accounted for not being able to produce it if you find that he used a gun that night. In his statement to you he did not specifically deal with whether or not he is the holder of a firearm user's licence." Page 227 Line 20 -228 Line 4 of the Record of Appeal.

(iii) "If you can say you feel sure that Patrick Davis was involved the did he unlawfully kill Benjamin with malice aforethought. The Prosecution invites you to find as a fact that the killing of Benjamin was unlawful. You are asked to say that on the evidence which you heard here you can say you feel sure that the killing was unlawful, that is to say

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it was neither excusable nor justifiable and I think it must be clear to you from the manner in which the case was being conducted that there has been no dispute. And if you believe the facts and circumstances to be those related to you by Francis the gas attendant at the station by Dorsett the last customer at the station that Saturday night and Allen Clarke then it is clear that the killing was unlawful." Page 154 Line 16 - Page 155 Line 6 of the Record of Appeal.

(iv) "If you believe that Patrick Davis went to the gas station to rob and that as an intruder with that intention carried a loaded gun with him and used it then there can be no question of accident or self defence." Page 153 Line 20 -Page 154 Line 2 of the Record of Appeal.

(v) "There is no dispute in this case that the gun was a firearm." Page 226 Lines 16 - 17 of the Record of Appeal.

The brief facts are that on the 17th May, 1975, at about 10.45 p.m. the deceased, Wilmouth Benjamin, was at his service station at the junction of Queen Elizabeth Highway and Camacho Avenue when a car drove up to the station. Charlesworth Francis, an attendant at the station, saw Benjamin sell gasoline to one Dorsett, the driver of the car, and after the sale Benjamin and Dorsett remained near to the pump speaking. At that stage someone dressed in a gown with a mask over his head ran up with a gun pointing it towards Benjamin and Dorsett. He heard the explosion of a gun shot and saw Benjamin 'back away' and hold his stomach. The man then ran in the direction from which he came. Benjamin was taken to the hospital where he died on the following day from injuries of a gun shot wound.

There was also evidence from one Allan Clarke that he assisted the appellant some days before in obtaining a gun and ammunition in preparation for a robbery at the service station. Clarke also said he was in hiding near to the service

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station and saw when the shooting took place.

The defence was an alibi.

Counsel argued ground 3 first. On this ground he submitted that the indictment was bad in law since it contained counts for capital and non-capital offences, and that the state of the law in Antigua is the same as it was in England before the passing of the Homicide Act, 1957 and is covered by the ruling in R. v. Jones (1918) 1 K.B. 416. He referred to Section 5 of the Indictments Act, Cap.37 and rule four of the Indictment Rules and further submitted that the offences charged although founded on the same facts were neither the same nor of a similar character. He admitted, however, that no objection to the joinder was taken in the court below nor was any application made for a separate trial. Counsel referred to the case of Connelly v. Director of Public Prosecutions (1964) 2 A.E.R. 401 and submitted that although this case decided that the ruling in R. v. Jones was not a ruling of law but was one of practice and procedure yet it is clear that the judgments delivered in that case are to the effect that the trial judge has a descretion where there is a joinder to order separate trials where there is a likelihood of prejudice or oppression.

In reply to the submissions on this ground of appeal counsel for the respondent submitted that the joinder was permitted by section 5 of the Indictment Act Cap. 37, and with rule 4 of the Rules. All the charges were founded on the same facts and therefore the appellant could not be prejudiced in any way. He conceded that the onus of proof on the second and third counts rested upon the appellant but that the learned trial judge dealt adequately with this issue on the summing up and there could possibly be no confusion created in the minds of the jury. In any event

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the question of the joinder had been discussed in chambers and there was no objection by counsel for the defence and no application was made for a separate trial. Counsel for the appellant should not now be allowed to raise this issue as a ground of appeal.

Although section 5 of the Indictment Act and rule 4 of the Rules give authority for the joinder of charges founded on the same facts yet there must be cases in which such joinder will create prejudice and oppression. As Lord Morris of Borth-y-Gest said in Connelly's case at page 409,

> "While, as I will endeavour to show there has never been a rule that the same facts may not form the basis of successive charges, there is inherent in our criminal administration a policy and a tradition that even in the case of wrong-doers there must be an avoidance of anything that savours of oppression."

The court is unable to say that the indictment in this case was bad in law but what the court does say is that care should be taken when joining offences to see that the burden of proof in each offence is the same so as to avoid confusion in the mind of the jury and also to see that the joinder does not lead to an absurd result as in this case.

Counsel for the appellant then argued ground 2 but having regard to the course which the court intends to adopt in this appeal it would be undesirable for us to express any view thereon.

We now turn to the ground regarding the onus of proof. Counsel directed the court's attention to page 148 of the record where the judge directed the jury as follows -

> "Now, although as I said there is no onus on the accused in law, the accused has put a statement of his own before you and he has put the testimony of witnesses and asked you to analyse them. If you find that when you analyse all that has been urged, the cross-examination, the prosecution witnesses and the statement of the accused and in (sic) the testimony of his witnesses, if you find that he has raised a sufficient doubt in your mind

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> about his guilt or he has established his innocence then the verdict will be not guilty."

He then submitted that this constituted a grave misdirection in law as to the onus of proof.

In reply to the submission counsel for the respondent referred to Lobell's case (1957) 1 A.E.R. 735 and R. v. Roberts (1965-6) 9 W.I.R. 64. He read the following passage from the judgment of Lord Goddard in the Lobell's case -

> "A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the Prosecution but that they must also consider the evidence for the defence which may have one of these results: it may convince them of the innocence of the accused or it may cause them to doubt in which case the defendant is entitled to an acquittal, or it may, and sometimes does strengthen the case for the Prosecution",

and submitted that this passage can be equated with the passage complained of above. He then went on to show that the learned trial judge corrected the mistake (if mistake it was) at a later stage in the summing up. He further submitted, on the authority of R. v. Roberts that it was not the particular form of words that matter; it was the effect of the summing up.

We agree that no particular form of words are necessary to be used in directing a jury on the onus of proof but if it can be said that it has been made to appear from the form of words used that any burden was cast on the defence to prove their innocence then clearly such a direction must be wrong. In the instant case if the learned trial judge had followed the example given by Lord Goddard in the Lobell case nothing could be urged against it but when he used words which clearly indicated, that there was an onus on the appellant to establish his innocence or which may have created confusion in the minds of the jury as to whether there was such an onus, then the court feels it would be

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unsafe to allow the conviction to stand.

Accordingly we would allow the appeal and set aside the convictions and sentences. However, the court in the interests of justice will order a new trial on a fresh indictment. Order accordingly. The accused to be kept in custody pending the new trial.

(Sir Maurice Davis)
CHIEF JUSTICE

(E.L. St. Bernard)
JUSTICE OF APPEAL

(N.A. Peterkin)
JUSTICE OF APPEAL