IN THE COURT OF APPEAL

SAINT VINCENT:

CRIMINAL APPEAL NO. 16 of 1976

BETWEEN: JUNIOR COTTLE APPELLANT

VS.

THE QUEEN RESPONDENT

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: C. Dougan for Appellant
O. Jack D.P.P. for Respondent

1977 April 20, 29

J U D G M E N T

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

The appellant was convicted on the 3rd day of November, 1976 on a charge of discharging a loaded firearm with intent to prevent his lawful apprehension, contrary to section 59(1) of the Indictable Offences Ordinance Cap. 24 of the Laws of St. Vincent, and was sentenced to fifteen years imprisonment with hard labour. He has now appealed against his conviction and sentence.

The facts which gave rise to this conviction were that some time during the month of May 1973, the late Eric Rawle, Attorney General, died under circumstances which amounted to unlawful homicide, and from that date the appellant was wanted by the Police on a charge of murder. Sgt. Francis Da Silva, who knew the appellant for several years, and who was known as a policeman to the appellant, along with a party of other policemen, went to Belair, Sharpes, Largo Heights, Fort Charlotte, and several other places in search of the appellant. One night, at Belair, Sgt. Da Silva saw the appellant and another man near

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a stone mill, and as he approached them they jumped into a river and escaped. Photographs of the appellant were distributed in various parts of the State, and radio announcements were made in this regard. On the 27th May, 1973, at about 3 p.m., Sgt. Da Silva led a party of policemen in search of the accused in the Lower Bay Street, Kingstown. His search took him into a yard where there was an unoccupied wooden building. He was armed with a .45 service revolver, and ascended the steps of the building which led to a closed door. He opened the door and peeped from the outside through the crevice, but saw no one. He decided to enter the building, and in order to do so, he stooped and opened the door. As he did so, he saw the appellant standing in a corner with a revolver in his hand pointing at him. The appellant was then about three or four feet away and fired immediately at Da Silva, who felt a stinging sensation as a blast of gunpowder on his face. He immediately closed the door and heard the report of a second shot. He took cover on the ground floor of the building. A detachment of police came to assist and there was a shoot-out between the appellant and the police. Later that evening, the appellant surrendered to the police. A .38 revolver was found near to the place where he had surrendered himself. He was found to be injured in the neck and taken to the hospital.

At the close of the case for the prosecution, counsel submitted that there was no case to answer. This submission was overruled and the appellant when called upon for his defence, elected to remain silent. The grounds of appeal including that against sentence are as follows:-

1. The learned trial judge erred in law in failing to uphold the submission made by counsel for the appellant that there was no case to answer as the Crown had failed to prove the necessary ingredient in the offence charged, that is, the intent to prevent lawful apprehension.
2. The learned trial judge misdirected the jury on the burden of proof by not giving them clear and specific directions that the prosecution must prove:

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(1) that the accused was lawfully to be apprehended;

(2) that the accused knew that he was to be apprehended;

(3) that the Crown must prove the particular intent as charged.

3. The punishment is excessive:

(a) No previous conviction for a similar offence

(b) The appellant is severely injured having a bullet lodged in his neck.

Counsel argued grounds one and two together and submitted that the trial judge was wrong in not upholding the submission of no case to answer. In support of his submission he argued that it was the duty of the prosecution to prove every fact or circumstance stated in the indictment as necessary to constitute the offence charged. In this regard he stated that there is no evidence that the police had gone to the building to arrest lawfully, the appellant, nor was there any evidence that they had a warrant to arrest. More important, the prosecution failed to prove the specific intent laid in the indictment. In support of his argument regarding arrest, he referred to section 15(1) of the Police Ordinance 1959 (No. 9). He went on to say that at no time that evening did the police bring to the attention of the appellant their intention to arrest him. On the question of intent he referred the Court to R. v. Steane 1947 1 AER Page 813, and to the passage at page 816 which reads as follows:

> "The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution proves an act, the natural consequences of which would be a certain result and no evidence or explanation is given, then the jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged; but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction and if on a review of the whole evidence they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

In the instant case, he argued that the circumstances were capable of giving rise to four instances as to intent, that is,

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(a) an intent to avoid apprehension

(b) an intent to frighten

(c) an intent to protect himself, and

(d) an intent to murder or to cause grievous bodily harm;

and what is more, the learned trial judge failed to direct the jury on this point nor did he tell them that if they were left in doubt as to the intent the appellant was entitled to be acquitted.

In reply, counsel for the respondent submitted that there was evidence that the appellant was wanted by the police for the offence of murder and that offence was one which was clearly arrestable without warrant. In regard to the appellant's knowledge that he was wanted by the police, his flight when seen at Belair and his subsequent hiding in an unoccupied house, showed clearly that he was aware that he was being sought by the police. He also submitted on the question of intent, that it could be inferred from all the circumstances disclosed by the evidence, that there was no evidence to show any intent other than the one charged.

In our view, there is evidence from which it could be reasonably inferred that the appellant must have known that he was wanted by the police on a charge of murder and in those circumstances it was unnecessary that the police was obliged to inform him on the afternoon of the 27th May, 1973, that they were about to arrest him. In this connection, it must be observed that if Sgt. Da Silva were minded to inform him that he would be arrested, he certainly gave him no opportunity to do so. We agree with counsel for the respondent that the appellant could have been arrested without a warrant. In regard to the question of intent we do not agree that there are four reasonable inferences which may be drawn from the evidence. There is no evidence from which it could be reasonably inferred that the appellant by his conduct intended to frighten anyone or to protect himself. The only two reasonable inferences which may be drawn from the evidence are both unfavourable to the appellant, namely, (a) an intent to murder, and (b) an intent to resist lawful arrest The offence of intent to

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murder was not charged in the indictment but the appellant could also have been so charged, and if the jury were not satisfied with that intent, they could have convicted on the charge of shooting with intent to avoid lawful arrest. The trial judge told the jury that in order to convict, they must feel sure that the appellant had shot at the police for no other purpose than to prevent his apprehension. The trial judge on the burden of proof directed the jury that the prosecution must prove their case to the extent that they must feel sure (and repeated this) of the guilt of the appellant before they could return a verdict, and stated that nothing short of this would suffice. He told the jury if they had any doubt, that doubt must be resolved in favour of the appellant. He specifically directed them that the Crown must prove every ingredient in the offence charged and that even if the Crown failed to prove even one ingredient of the offence, the Crown had failed, and the appellant must be acquitted. He later pointed out to them what the ingredients were of the offence charged.

Taking the summing-up as a whole, the Court is satisfied that the learned trial judge dealt adequately with all the issues raised in the case and the jury was left in no doubt as to what they had to decide. Accordingly, the appeal against conviction is dismissed.

Turning to the appeal against sentence, counsel for the appellant submitted that the sentence was excessive because the appellant had no previous convictions of a similar nature and the appellant was severely injured. He stated that the bullet was still lodged in his neck, and since he was incarcerated on another charge for some three years before he was freed, in consequence of the judgment of the Privy Council, this Court should set him free immediately. It has been brought to the attention of the Court that the appellant had four previous convictions, two of which were for offences involving violence and one of these two was for assaulting a police with a dangerous weapon. Quite apart from this, we feel that anyone who shoots at the police in the circumstances revealed by this case must expect, if convicted, a custodial sentence for a long period. The maximum period of imprisonment

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for this offence is life imprisonment, and we do not consider the sentence imposed by the learned trial judge as excessive.

The appeal against sentence is also dismissed.

(Sir Maurice Davis)
CHIEF JUSTICE

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

(N.A. Peterkin)
JUSTICE OF APPEAL