

ANTIGUA:

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 1977

BETWEEN:

PATRICK DAVIS APPELLANT

AND

THE QUEEN RESPONDENT

Before: The Hon. Sir Maurice Davis Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: C. Maundy for the Appellant
Williams (D.P.P.) and Miss Noseworthy
for Respondent

1978; Dec. 4 and 8

J U D G M E N T

PETERKIN, J.A. delivered the Judgment of the Court:

The appellant, Patrick Davis was, on the 16th July 1977, convicted for the murder of Wilmoth Benjamin on the 18th May 1975. He was sentenced to death by hanging and now appeals against conviction.

The grounds of appeal appear at pages two and three of the record.

The facts are that on 17th May, 1975, at about 10.45 p.m. the deceased, Wilmoth 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 gasolene to one Dorsett the

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driver of the car. 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 approached with a gun pointing it at Benjamin's abdomen and saying "stick em up".

Dorsett and Francis then heard an explosion from the gun and Benjamin was seen to stagger backwards.

The masked man with the gun then ran back in the same direction from which he had come. Benjamin was seen to hold his stomach. He was put to lie on the ground and was observed to have a bullet wound in his stomach. He was taken to the Hospital where he died on the following day.

A postmortem examination was performed by Dr. Kalidindi Raju on the same day. He stated that there was a penetrating wound to the mesentery and intestines and traced a small bullet lodged between the bodies of the third and fourth lumbar vertebrae. In his opinion death was due to internal haemorrhage caused by injury to the mesentery and intestines. He further stated that the bullet which he removed and handed to the police could have caused the wound which he saw.

In addition there was the evidence of Allan Clarke called on behalf of the Crown. He began his evidence by stating that he was a friend of the appellant. He said,

"I remeber Wednesday 14th May 1975 about 10.00 a.m. I was by my house. Blackboy came to me. He said Herring he would like to get some money if I know any place he could rip off. When he used the words "rip off" I understood him to mean "steal". I said "No". He said he have a place to rip off, he have a piece but he want some shots. When he said he had a piece I understood him to mean a gun. He asked me if I could get some shots for him and I told him I would try. He went away."

The appellant was also known as "Blackboy" and Clarke as "Herring".

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According to Clarke, the appellant again came to his home on Friday 16th May and asked him to accompany him in search of one Huddy whom he said would give him some shots. As Huddy was unable to produce any shots they then went in search of one Lashley. The shots which Lashley produced were too small and they later spoke to one Bill Abbott whom the appellant asked for some shots and told him that he would bring his gun on the following day for him to see.

Clarke continued in his evidence as follows:-

"On the Saturday, the 17th about five o'clock in the p.m. I was up Ottos inside of a games-house. This was a different gameshouse. While I was there the accused called me, he was by the door. I went to him. He told me to follow him down by Girlie. I know Girlie. We went down by Girlie. That is in Ottos. He went in the yard by Girlie. I was on the side walk. He came out about five minutes after. When he came out of the yard he had a plastic bag - a kind of whitish, bluish bag. (Witness indicates bag about eighteen inches square). I didn't observe what was in the bag. I did not see Girlie around. He told me to follow him down Point. This was now night. We passed by Blackman Light House. The accused went in in the lighthouse. He took the bag with him. I did not go in the lighthouse with him. He came out of the lighthouse about a minute or so later. When he came out of the lighthouse he did not have the bag with him. The lighthouse is near to Benjamin's gas station. (I didn't know at the time it was Benjamin's gas station. We went down Point. We had to pass Tanner Street. We made a stop by Gwen Simon's bar in Tanner Street. The accused told me to check out Toby. I had known Toby before. He told me I must check out Toby for shots. I went to Toby. Toby was by a Bridge by Simon's bar. I spoke to Toby. The accused was from where I am to the wall behind me from Toby. I am not too sure accused could have heard what I said to Toby. We spoke. I did not get any shots from Toby. While I was speaking to Toby I observed a kerchief in accused's hand. It seemed as if he had something in the kerchief. We went going down Point. We reach by Lashley's bar. The accused called Bill, Bill was by Lashley's bar - by the door, the same front door. Accused and I were by the Bridge. The accused showed Bill a gun. The accused pulled the gun out of his side. Bill said to him "ah good sudden man", and then accused and Bill went across the road to Lashley's bar and after the accused called me, I went to him. They were a little

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away from the bar. I and the accused and Bill went in a yellow jeep. We went up St. John's Street. The jeep was driven by Bill. We go across Fort Road. We make a turn by Barrymore Hotel after the van turn around the corner and stand up. I remained in the van. Bill speak to the accused. Bill told the accused he ain't got no shot for that gun. I will give you mine and you can give me yours. They made the switch. They exchanged guns - the accused and Bill. After that the accused told Bill to drop him up Ottos. Bill dropped us by Ottos. We came out of the van and I went into Merchant's shop. I bought something and come out of the shop. The accused said "let's go. We went back by the same lighthouse. The accused went into the lighthouse. He bring outside the plastic bag which he put inside. He said "we nar go bother move from this side." I and him went across the road. Benjie's gas station was around there. We went to the northern side of Benjamin's gas station. I went on a rock where the old Girls school used to be. Accused went to an old toilet for the Girls' school. That was east of where I was. He took the bag with him. Around five to seven minutes after he returned to me. He have on a long jacket with something like a long frock underneath. He have something like a tan cover his face. It had two holes in it. He told me I must tie something behind his head. I tied two pieces of cloth, string. He had a gun in his hand. He said to me "when the man see me with this, the man going to hand up all the money". It was a kind of blackish gun about six - to eight inches long. This was about eleven o'clock at night. The lights of the gas station were on at that time. I could have seen clearly to gas station from where I was. I was from here to Jury further that western wall from him from gas station. He went from where I was and went across towards Benjamin's gas station. There were two men by the gas station. They were just a little in front the pumps. Near to these two men I saw a car. He went in front of the two men. He got from here to policeman from the two men (6ft). He had gun in his hand pointing in front of him. The two men draw back. I hear a noise. I ran away going west. I went home. I stayed home about ten minutes. I went down by 46 North Street. There was a dance there. I usually go there when they have dances. I was outside on the eastern step. Half an hour from that time I saw the accused going up the steps to the dance. I called him. He came. I asked him if the man got shot. He said "yes in the belly". I said to him. I would rather the man to live than to die. He said he too, but "wha happen ah the first man that go dead?" I asked him what he did with the things them that he did got. He said he had them hide round the place. We went into the dance hall. Bill was up there. The accused spoke to Bill. The accused left me and went to Bill. I went downstairs. While I was downstairs Sgt. Smith came and hold my hand. He take me in a car to police station."

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There is evidence from three other witnesses, viz, Assistant Superintendents Walker and Goodwin and Sergeant Smith, that the appellant, after he was cautioned at the station, had replied, "Me na me mean fo shot he. He pull at me first". When asked what he had done with the gun the appellant replied "Me cant tell you that now the man done dead already"..

There is no gainsaying the fact that Allan Clarke is an accomplice. It is conceded, however, that the trial judge gave a proper warning to the jury of the danger of convicting on his evidence unless it was corroborated. After defining corroboration the trial judge went on further to tell the jury that the oral admission alleged to have been made by the appellant viz, "Me na me mean fo shot he. He pull at me first", if believed, was capable of amounting to corroboration of Clarke's evidence.

The defence of the appellant was an alibi. He elected to give evidence at the trial and alleged that he had gone to North Street at about 10.30 p.m. where he attended a dance at the Union Hall and that he had remained there until the Police arrived and took him to the station. He denied ever having said to any one the words "Me na me mean fo shot he. He pull at me first". He claimed in his evidence that he had been beaten by the police but that despite that he had given no statement to them.

The appellant had previously been tried for and had been convicted of murder. He had, however, appealed against his conviction, and the Court of Appeal had quashed the conviction on the ground of a misdirection and had ordered a new trial.

On ground one, Counsel for the appellant referred to the plea in Bar made on behalf of the appellant by Counsel. He submitted that there were five grounds on which the plea was made and that they should all have been left to the jury as the entire

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matter was one for them to decide. He contended that failure to leave all five grounds to the jury was a material irregularity and that the conviction should not be allowed to stand.

We do not agree. When one looks at the document it is manifest that there was only one issue to be tried by the jury viz whether or not the appellant had been previously acquitted. The record shows that a jury was empanelled to try this issue and that they had rejected the appellant's plea.

On ground two Counsel contended that though an accomplice was a competent witness the Court had a residual discretion whether or not to admit his evidence and that in the instant case the trial judge ought not to have admitted the evidence of Allan Clarke. Counsel's argument on this ground in our view is based on a misconception and appears to be confused with the position which relates to the practice to be adopted when an accomplice is jointly charged with another accused. The name of Allan Clarke has never appeared on this indictment, and the Crown was in our view, free to call him as a witness, and the trial judge obliged to hear his evidence.

On ground three Counsel argued that the trial judge had exercised his discretion wrongly in admitting to evidence what amounted to an oral confession of guilt and referred to the requirement in the judge's Rules for notes to be taken.

The appellant had given no written statement to the Police although he claims to have been beaten, and he denied having said "Me na me mean fo shot he. He pull at me first". In our view the issue whether or not he said so was one of fact for the jury to decide.

Grounds four and five may be dealt with together. Counsel

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argued here that the trial judge was wrong in withdrawing self-defence and provocation from the jury in the event that they may have accepted that the appellant had in fact said the words "Me na me mean fo shot he. He pull at me first". It should be borne in mind that the evidence concerning this given by the three police witnesses did not amount to evidence of the truth of what had occurred during the incident but was merely evidence of what the appellant was alleged to have replied. Further to this there was no evidence whatever of any nature, whether in cross examination or otherwise, to foreshadow self defence or provocation. In our view the trial judge was right in withdrawing self-defence and provocation.

Grounds six and seven concern the allegation that a .25 shell was found at the locus in quo. Counsel contended that it was relevant evidence because the bullet removed from the body of the deceased was, according to the doctor and ^{Sgt.}Quinland, of .22 calibre. He also contended that a ballistic report should have been produced to prove the calibre of the bullet that caused the death of the deceased. In our view this was not necessary. There was no evidence regarding the .25 shell to make it relevant to the case in hand. The only evidence concerning it is that of Assistant Superintendent Goodwin who stated in cross examination that he "understood" that a .25 shell was recovered from the gas station. Further to this, no gun was ever recovered and neither the doctor nor sergeant Quinland, neither of whom was a ballistic expert, was competent to state positively the calibre of the bullet extracted from the body of the deceased.

Ground nine was not argued. In any event the cause of death has been positively stated by Dr. Raju at page 62 of the record. He had removed the bullet from the body of the deceased, had

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described the external and internal injuries, and had concluded that the bullet could have caused them.

Last of all, Counsel for the appellant submitted on ground eight that the verdict is unsafe and unreasonable having regard to the evidence and should not be allowed to stand. We do not agree. In our view there was an abundance of evidence on which the jury could have arrived at their verdict. There can be no doubt whatever but that the deceased, Wilmoth Benjamin, was shot at his service station by a masked gunman, during the course of an attempted robbery, at about 10.45 on the night of the 17th May, 1975, and that he died on the following day from the bullet wound. To connect the accused with the shooting the Crown called the evidence of Allan Clarke. This witness testified how he assisted the appellant some days before in obtaining a gun and ammunition with which to commit a robbery at the service station, and how he remained in hiding and saw the appellant shoot the deceased. He even went so far as to describe how he assisted the appellant in tying the mask over his face before he approached the gas station. His evidence was corroborated by the evidence of Assistant Superintendents Walker and Goodwin, and by that of Sergeant Truehart Smith, when they deposed that the appellant had made what amounted to an oral admission of guilt namely, "Me na me mean fo shot he. He pull at me first." In our opinion it left no doubt whatever but that the appellant was the author of the crime, and we find nothing unsafe or unsatisfactory about the verdict of the jury.

In the result, this appeal is dismissed, and the conviction and sentence affirmed.

(N.A. Peterkin)
JUSTICE OF APPEAL

(N.A. Berridge)
JUSTICE OF APPEAL (AG.)

(Sir Maurice Davis)
CHIEF JUSTICE