

IN THE PRIVY COUNCIL

NO. 19 of 1972

O N A P P E A L
FROM THE COURT OF APPEAL OF THE BAHAMA
ISLANDS ON ITS CRIMINAL SIDE

B E T W E E N :

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

PHILIP FARQUHARSON

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

- 10 1. This is an appeal by special leave against the dismissal by the Court of Appeal of the Bahama Islands on its Criminal Side by its Judgment delivered on the 23rd day of March, 1972 of the Appellant's appeal against convictions of murder, attempted murder, armed robbery and burglary and sentence of death and terms of imprisonment imposed by the Supreme Court of the Bahama Islands on the 3rd day of November 1971. Record
pp. 220-235
- 20 2. The Appellant was brought to trial jointly with Alexander Pinder and Bernard Darling in the Supreme Court of the Bahama Islands on the 3rd day of November, 1971 on the Information of the Solicitor-General of the Bahama Islands and at the said trial pleaded not guilty to the following charges: p.218
pp. 1-2
- (a) Murder, contrary to Section 337 of the Penal Code (ch. 48);
- (b) Attempted murder, contrary to Section 338 of the Penal Code (ch. 48);
- 30 (c) Armed robbery, contrary to Section 383(2) of the Penal Code (ch. 48); and
- (d) Burglary, contrary to Section 406 of the Penal Code (ch. 48);
- set out in the said Information.

Record
pp. 1-2

3. The particulars of the offences of murder, attempted murder and armed robbery in the said Information alleged that the Appellant was "concerned together" with the said Alexander Pinder and Bernard Darling in the commission of the said offences and, in addition, in respect of the offence of armed robbery that the accused were armed with offensive instruments, to wit: a .22 revolver and cutlass.

4. The case for the prosecution, stated shortly, was that at about 5 a.m. on the morning of the 21st day of April 1971 the house of Mr. Anthony Alexiou was broken into by three intruders who gained access through the bathroom window leading to the bedroom of his son Emmanuel and daughter-in-law Sandra who woke up to find two of the intruders in their room. One armed with a cutlass penetrated further into the house and in the corridor encountered Mr. Anthony Alexiou who was joined by his wife Ypapanti and their daughter Katherine. The three struggled with this man and both Mrs. Ypapanti Alexiou and her daughter received cuts from the cutlass. Another intruder, armed with a revolver, standing at the doorway of the bedroom fired at Mrs. Ypapanti Alexiou wounding her in the chest. This shot was followed by another which killed Mr. Anthony Alexiou. The three intruders then left the house taking with them money and some other articles from the bedroom of Mr. Alexiou's son and daughter-in-law.

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p. 7

5. At the commencement of the trial the prosecution's case (as the learned Solicitor-General's opening shows) was that the second accused (Alexander Pinder) fired the gun. It is clear from the evidence led at the trial that the Appellant was not armed with any weapon and did not fire either the shot which killed the deceased or the one which wounded his wife because not one of the eye-witnesses, namely, the widow, her son, daughter or daughter-in-law stated that the Appellant carried any weapon or fired either of the two shots; and the widow positively identified the second accused as the person who carried the gun and fired both shots, and her son and daughter-in-law identified the third accused (Bernard Darling) as the person who carried the cutlass.

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pp.17, 18, 22

pp. 27, 36

6. At the conclusion of the Judge's summing up the Jury asked for a further direction as follows:

"(JURY RETURN AND ASK FOR FURTHER DIRECTION)Record

The question asked by the Foreman is this -

"Can all accused persons be found guilty of murder if two of them have gone outside the room, one is still in the room, that one being the person who fired the shot".

The further direction I gave on this point was as follows:

FURTHER DIRECTION

10 If when Pinder, if indeed on the evidence
you find it was him, shot Mr. Alexiou in the
circumstances described by Mrs. Alexiou you feel
that he did so in order to effect the escape of
all or prevent them in pursuit, then this act
of his would be in furtherance of the common
purpose - if you find there was a common purpose.
If, on the other hand, he shot in panic or for
some other purpose of his own - unconnected
20 with the common purpose previously agreed
between the three to rob with whatever force is
necessary - in those circumstances he would
alone bear responsibility for the consequences
of the fatal shot.

BY THE JURY: That satisfies our query.

JURY RETIRE AGAIN"

7. The jury returned a verdict of guilty in respect
of the offences of murder, attempted murder, armed
robbery and burglary against all three accused and
in respect of the said offences each of them was
30 sentenced to death on count one, and imprisonment
for twelve years, ten years and seven years on
counts two, three and four respectively, the periods
of imprisonment to run concurrently. p. 218

8. The Appellant and the other two accused appealed
to the Court of Appeal of the Bahama Islands on its
Criminal Side against their convictions and sentences p. 218
and their appeals were consolidated and heard
together.

40 9. Among the Appellant's grounds of appeal set out
in an Amended Notice of Appeal were the following:

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(i) Ground (b) - that the Learned Judge was wrong in law in directing the jury that the Appellant and others in company could commit murder.

(ii) Ground (c) - that as regards counts one, two and three of the Information the learned Judge ought to have withdrawn the case from the Jury because the Penal Code does not create the offences of murder, attempted murder or armed robbery by two or more persons in company.

(iii) Ground (f) - that the convictions were not supported by the evidence. 10

p. 235

The Court of Appeal delivered judgment on the 23rd day of March, 1972 dismissing the consolidated appeal.

10. The portion of the judgment of the Court of Appeal dealing with grounds of appeal (b) and (c) set out above reads as follows:-

p. 226

"The next two grounds were argued together. They amounted to a complaint that, as Section 86 of the Bahamian Penal Code had, in effect, abolished or abrogated the English distinction between principals in the first and second degree and accessories before the fact, and had created a separate and distinct offence of abetting the substantive offence set out in the sections in the Code, the first Appellant, who had not himself fired the fatal shot, could not be charged and convicted jointly with the Appellants of the murder or indeed of the other offences charged. In answer to this, the learned Attorney General accepted that Bahamian Legislation had abrogated the distinction in English Law between principals in the first and second degree etc. and had made separate and distinct provision for such persons. He argued, however, that, reading the Penal Code as a whole, and more particularly Section 86(2), as well as Section 73 of the Criminal Procedure Code, which makes provision for the joinder of two or more accused in one charge and for their trial together, the course adopted by the prosecution in the present case was correct and appropriate. 20 30 40

We think the Attorney General's argument is well founded. Section 86 of the Bahamian

Penal Code makes a very comprehensive provision for dealing with participants in a crime. It lists in Section 86(1) a large number of activities as falling within the expression abetment and goes on to say in subsection (2):

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"(2) Whoever abets a crime or offence shall, if the same is actually committed in pursuance or during the continuance of the abetment, be deemed guilty of that crime or offence."

This in itself, quite apart from any other argument, would seem fully to justify the preferment of the charges of murder etc. against the first Appellant in the form adopted in the present case."

11. The portion of the judgment dealing with the ground of appeal (f) set out above reads as follows:

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"Finally counsel argued that the conviction is not supported by the evidence and submitted that the participation alleged against the first Appellant, who was himself unarmed, did not involve him in the killing which, according to the evidence of the Prosecution, was ascribable to the second Appellant In so far as the participation was concerned, we are satisfied that, if the jury believed the facts alleged by the prosecution, these were sufficient to show a common design and a fatal act of violence in pursuit of that design, viz. the use of a revolver, which was not outside the scope of the concerted action (see R. v. Anderson 1966 2 A.E.R. 644)."

pp. 230-231

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12. (a) Under Section 336 of the Penal Code "Murder" is defined as the offence of "intentionally causing the death of another person by any unlawful harm". It is submitted that the Appellant did not commit murder or attempted murder or armed robbery and should not have been convicted of any of those offences.

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(b) Although it was clear on the evidence that the Appellant was not armed and did not fire either of the shots, he was convicted of murder, attempted murder and armed robbery on the basis of constructive liability or joint responsibility for acts done by

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the other two accused in pursuance of an alleged common design.

13. It is submitted that constructive liability or joint responsibility on the part of participants in a criminal adventure for acts done by one or more of them in pursuance of a common design may arise under the common law where, a principal in the first degree being a person who commits a crime with his own hands, a principal in the second degree is a person who has a community of purpose with the party actually committing the crime at the time when the crime is committed or, where the common law has been replaced by a Penal Code, under some express provision in that Code.

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14. It is submitted further that the common law principle of constructive liability or joint responsibility finds no place in the law applicable to the Bahama Islands because the common law has been replaced by a Penal Code and, as the learned Attorney General rightly conceded before the Court of Appeal, "Bahamian legislation has abrogated the distinction between principals in the first and second degree etc. and has made separate and distinct provision for such persons"; and there is no provision in the Penal Code which recognises, or gives effect to, any such principle of liability.

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15. It is submitted further that there is no provision in Bahamian legislation which warrants the preferment of charges of murder, attempted murder or armed robbery against persons "being concerned together" and that the trial of the Appellant on such charges was illegal and a nullity; or, in the alternative, if the charges were valid in the form in which they were framed, at the conclusion of the trial the Appellant should have been acquitted of murder, attempted murder and armed robbery because on the evidence he had not committed any of those offences, whereas he was wrongly convicted on the basis of constructive liability or joint responsibility for the acts of the other two accused alleged to have been done in pursuance of a common design.

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16. The fact that abetment of an offence is itself an offence under the Penal Code did not justify the Appellant being charged with and convicted of the substantive offences of murder, attempted murder and armed robbery (and the Court of Appeal was wrong

in so holding) because, it is submitted,,

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- (i) abetment is a distinct and separate offence, as the Attorney General rightly conceded;
- (ii) there were no charges of abetment against the Appellant;
- (iii) a person cannot be convicted of an offence with which he was not charged and, equally, cannot be convicted of the offence with which he was charged on the basis that there was some other distinct and separate offence with which he could have been, but was not, charged;
- (iv) to make out the offence of abetment it must be established that the accused wilfully or purposely encouraged the commission of the substantive offence and so aided and abetted it, mens rea being an essential element of the offence of abetment, whereas liability under the "common design" principle at common law is constructive and arises irrespective of mens rea on the part of the accused in respect of an act committed in pursuance of the common design by a member of a group engaged on a criminal adventure;
- (v) while Section 86(2) prescribes that, as far as punishment goes, an abettor is deemed to be guilty of the offence abetted it does not relieve the prosecution of the burden of charging a person with abetment, and proving him guilty of it, if that is the offence he actually committed, and it does not justify the bringing of charges and convictions of murder, attempted murder and armed robbery on the ground that the offences actually committed may turn out to be abetments of those offences;
- (vi) in any event, before Section 86(2) can apply a person must be found guilty of abetment, and he cannot be found guilty of that offence if he was not charged with it.

17. It is submitted that Section 73 of the Criminal Procedure Code does not support the Appellant's convictions because it is a section dealing with procedure, not substantive law; it does not lay down any principle of constructive liability or joint responsibility; and it supports the

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Appellant's contention by showing in subsection (b) thereof that a distinction is drawn, in terms of charges, between an offence and abetment of that offence.

18. The Appellant therefore prays that this appeal be allowed, the judgment of the Court of Appeal of the Bahama Islands on its Criminal Side reversed, and that his convictions and sentences on counts one, two and three of the Information be set aside for the following, among other,

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R E A S O N S

(1) BECAUSE on the evidence it was not established that the Appellant had committed the offences of murder, attempted murder and armed robbery according to the definition of those offences in the Penal Code of the Bahama Islands.

(2) BECAUSE the common law principle of constructive liability or joint responsibility on the part of all participants in a criminal adventure for acts done by one or more of them in pursuance of a common design does not obtain under the law applicable to the Bahama Islands, there being no provision to that effect in the Penal Code.

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(3) BECAUSE there is no provision in Bahamian legislation which warrants the preferment of charges of murder, attempted murder and armed robbery against persons "being concerned together" and that the trial of the Appellant on such charges was illegal and a nullity.

(4) BECAUSE the trial Judge misdirected the jury on the question of liability for acts done in pursuance of a common design, especially in answer to the jury's request for a further direction on the matter referred to in paragraph 6 above.

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(5) BECAUSE the Court of Appeal was wrong in dismissing the Appellant's appeal on the grounds set out in that portion of its judgment set out in paragraphs 10 and 11 above.

L. KADIRGAMAR

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