Privy Council Appeal No. 19 of 1972

Philip Farquharson – – – – – – – *Appellant*

v.

The Queen – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE BAHAMA ISLANDS ON ITS CRIMINAL SIDE

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER 1972

Present at the Hearing:

LORD PEARSON

LORD KILBRANDON

LORD SALMON

[*Delivered by* LORD KILBRANDON]

At the conclusion of the hearing of this appeal, their Lordships announced that they would humbly advise Her Majesty that the appeal be dismissed. Their Lordships now give their reasons.

The appellant is one of three men who were convicted in the Supreme Court of the Bahama Islands upon charges, brought under the Penal Code of the Bahamas, of murder, attempted murder, armed robbery and burglary. All appealed, unsuccessfully, to the Court of Appeal of the Bahamas. One, Farquharson, appeals by leave against the judgment of the that Court; the other two men do not.

It is necessary to state the facts upon which the convictions proceeded only in the broadest outline, since they are not now disputed. In the early hours of the morning of 21st April 1971 the three men, Pinder, Darling and the appellant, broke into a dwelling house. Pinder had a ·22 calibre pistol in his hand, while Darling carried a cutlass. The appellant was unarmed. The object of the break-in was theft, and there was evidence that the appellant stole some property. The inhabitants of the house were disturbed. Pinder fired two shots, one of which killed the householder, the other of which wounded the householder's wife. There was inconclusive evidence of slight injury by the cutlass to the householder's daughter. The planning of the break-in and its execution were described in a statement made by the appellant to the police. The clear effect of that statement is that before the weapons were used the appellant knew that they were in the possession of his associates. The

appellant does not claim that the statement was obtained from him by unfair or unlawful means, but he says that he never made or signed a statement. It is plain that the jury must have rejected his evidence as to this. In short, it is not now disputed that there was ample evidence which the jury were entitled to accept to the effect that the appellant's part in the events of that morning was in all respects as alleged against him by the prosecution.

The first count of the indictment was in the following terms:

> " Murder, contrary to section 337 of the Penal Code (Ch. 48).
>
> *Particulars of Offence*
>
> Philip Farquharson, Alexander Pinder and Bernard Darling, on the 21st day of April, 1971, at New Providence, being concerned together, murdered Anthony Alexiou."

Section 337 provides, " Whoever commits murder shall be liable to suffer death:"; there follows a proviso relating to persons under eighteen years of age. Murder is defined by section 336 in the following terms:—

> " Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in this Title hereafter mentioned ".

It is common ground, in the present case, that the appellant did not by his own hand do any unlawful harm to the deceased. This is one of the class of cases in which several persons have joined together in a criminal enterprise, one or more of the persons being armed with a lethal weapon, in circumstances in which it may be inferred that there was an intention common to all the participants that a lethal weapon would be used, if necessary, in furtherance of the common purpose for which the persons were associated. In these circumstances it became necessary for the learned trial judge to direct the jury as to the law applicable to the appellant on the facts alleged against him, as the jury should find them proved, and this he did in the following passages of his summing up:—

> " As regards the offence of murder—if you come to the conclusion in this case that the death was caused unlawfully and intentionally as I have tried to explain, so as to constitute the offence of murder, by one of the persons in the house on that night, then the question arises of the responsibility of the others for that offence. One only of them actually fired the shot which proved fatal, but in law, if two or more persons combine to effect a common object as for instance, in this case, the breaking and entering of the Alexiou household and if their common design or the plan as they each understood it included the use of whatever force was necessary to achieve that object including their escape if resisted, even if this force involved killing or doing grievous harm, then if one of them in pursuance of this common design uses such force with fatal results they are each and all responsible for the consequences. So in this case you must firstly consider whether one or other of the accused fired the fatal shot that night. If on the evidence you are satisfied as I have previously tried to explain, that that act amounted to the offence of murder on his part you may convict him of murder but as regards the others you should not convict them even if you are satisfied that they were present that night, unless you are also satisfied that they were all acting with a common purpose, that that common purpose or the furtherance of that common purpose involved the use of force if necessary of extreme force to effect it and that the firing of that shot—the force in this case, was an act in pursuance or furtherance of

that common purpose. In other words that there was in their minds at the time an intention to use whatever force, however extreme, to secure their object or their safety."

. . . . . .

" When you are asked in due course to find a verdict in the case of each, you will bear in mind what I have said about the onus of proof—that each one must be proved to be guilty before you return a verdict against him. Again, you will bear in mind the absolute necessity of considering the case of each one separately, and to ask yourselves whether you find it proved, for sure, that each was participating in a common design, in committing these crimes as I have already directed you in the earlier part of my summing-up. If that common design is not proved then that person only, whoever it was who fired the shot, would be guilty of murder—if you are satisfied that his act constitutes murder—and you should acquit the others and the same principle applies as regards the charge of attempted murder."

After the jury had retired, they returned into court in order to ask for further direction. They asked " 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 learned judge gave the following direction:—

" 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 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."

It was conceded by counsel for the appellant, and there can be no doubt, that, had the incidents described formed the subject matter of equivalent charges under the law of England, the directions given by the learned judge would have been not only adequate but unexceptionable. The question is, whether they were appropriate to a charge of murder under the Penal Code. It was submitted on behalf of the appellant that there is no provision under the Penal Code for the concept of joint responsibility as known to the common law, and that in directing the jury upon the basis of joint responsibility, the trial judge fell into fundamental error in law. Attention was directed to the concession made by the learned Attorney General in the Court of Appeal, that Bahamian legislation had abrogated the distinction in English law between principals in the first and second degree, and had made separate and distinct provision for such persons. It was said that that provision was to be found in section 86 of the Code, of which the head-note reads, " Abetment of offence, and trial and punishment of abettor," and of which subsections (1) and (2) are as follows:—

" 86.—(1) Whoever directly or indirectly, instigates, commands, counsels, procures, solicits or in any manner purposely aids, facilitates, encourages or promotes, whether by his act or presence or otherwise, and every person who does any act for the purpose of aiding, facilitating, encouraging or promoting the commission of an offence by any other person, whether known or unknown, certain or uncertain, is guilty of abetting that offence, and of abetting the other person in respect of that offence.

(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."

Assuming that the appellant could have been charged with abetment of murder under section 86 (1), and, if convicted, deemed guilty of murder and punished accordingly under section 86 (2), he was not so charged. Having been charged under section 337, it would be incompetent to convict him under some other section.

Their Lordships do not find it necessary to decide whether in the circumstances of the present case the appellant could properly have been indicted under section 86. They agree that since he was not so indicted, it is impossible to support the jury's verdict by an application of the provisions of that section. If such an application had been the purpose of the Crown, it would have been necessary, in the Particulars of Offence attached to the Count charging murder, to have given notice that the accused was charged as an abettor under section 86. Alternatively, the charge might have been framed as one of abetment of murder; after verdict the legal and penal provisions of section 86 (2) would have been applied. Their Lordships, having heard no argument upon the correct method of framing charges resting upon abetment of murder, have come to no concluded opinion thereon. They are, however, satisfied, first, that a conviction for abetment of murder could not follow upon an indictment in the instant form, and, secondly, that in relation to a charge of abetment, the learned judge's summing-up would have been inadequate. It was argued that, in the actual circumstances proved, the abetment having taken the form of participating in a common design, the summing-up provided a sufficient direction. Their Lordships, however, would not regard as adequate, whether the charge proceeded upon or was in substance one of abetment, a summing-up which did not refer the jury to the actual provisions of section 86 (1), and relate those provisions, or such as were relevant, to the facts which had been given in evidence before them. Their Lordships are, accordingly, unable to accept the argument put forward by the learned Attorney General and held by the Court of Appeal to be well founded, to the effect that the conviction could be justified by 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 their trial together.

One of the reasons for dismissing the appeal as pleaded in the respondent's case is " Because the appellant was guilty of murder under the common law ". This raises an interesting question as to the scope of the Penal Code. It is plain that the Penal Code, which came into force on 1st January 1927, is not intended to furnish a complete and exclusive statement of the criminal offences justiciable in the Islands, and of the doctrines of the criminal law therein to be applied. The long title of the Act chapter 48 is, " An Act to Establish a Code of Crimes Punishable on Indictment, and of Certain Similar and Other Offences Punishable on Summary Conviction "; much of the every day administration of the criminal law will be outside that scheme of codification. By section 11 it is provided that " Nothing in this Code shall affect (1) the liability . . . of a person for an offence against any statute other than this Code . . . (7) the liability of a person under the common law." The latter sub-section was added to the Code by an amending statute, No. 13 of 1929 s. 2.

Granted that the Penal Code is in some respects an incomplete statement of the criminal law, their Lordships are of opinion that section 11 (7) cannot reasonably be taken to mean that the whole common law continues

to exist independently of the Code, thus providing an additional or alternative body of criminal offences upon which prosecutors can at will bring charges without regard to the parallel provisions of the statutory code. This would imply a highly unusual limitation imposed by the legislature upon one of its own acts; it is hard to see what purpose could be served by a code which did not supersede but merely competed with an uncodified system operating in an identical field. That such a situation is truly irreconcilable with the nature and purpose of codifying legislation was pointed out long ago by Lord Herschell in *Bank of England v. Vagliano Bros.* [1891] A.C. 107 at p. 144. Nor have the Bahamian courts considered themselves at liberty to appeal even to common law doctrines, as distinct from substantive statements of offences, for the purpose of overriding doctrines expressly laid down in the Code. In *Ferguson v. Regina,* Criminal Appeal No. 13 of 1966, the Court held that the English common law doctrine relating to the presumption of intention, as then laid down in *D.P.P. v. Smith* [1961] A.C. 290, was not applicable in the Islands, being incompatible with the definition of "intention" contained in section 12(3) of the Code—to which further references will be made later. Again, in *Rolle v. Regina,* Criminal Appeal No. 14 of 1966, the Court, while expressing dissatisfaction at the omission from the Code of the offence of being an accessory after the fact, did not suggest that the lacuna could be filled by the importation of some common law substitute for a statutory crime. However that may be, where the Code makes actual provision for the declaration and definition of an offence, as here, the proposition that some competing, and possibly not altogether consistent, provision of the common law is also available for the prosecution of the same offence, seems to be unjustifiable. It would also appear to be contrary to the intention of the Declaratory Act, ch. 2 of 1799, which provides by section 2, "The common law of England, in all cases where the same hath not been altered by any of the Acts or Statutes enumerated in the Schedule to this Act or by any Act . . . is, and of right ought to be, in full force within the Colony." The Penal Code is one of the Acts by which the common law has undoubtedly been altered, in as much as it makes a re-statement of the law of murder. The Declaratory Act seems to envisage that in such a case the common law should lose its force. Their Lordships are of opinion, accordingly, that if the conviction cannot be supported upon the provisions of the Penal Code, it cannot be saved by reference to a common law crime of murder as being an offence with which the appellant could have been, but was not, charged.

Counsel for the appellant attacked the argument for the Crown as to the common law on the ground that it was being raised for the first time before the Board, and that upon the authorities which he cited it would not be in accordance with the practice of the Board that the argument should, in the circumstances, be attended to. Their Lordships are not satisfied, on an analysis of the proceedings, that the argument is in fact being advanced *de novo,* but since they rejected it on other grounds, it is not necessary to consider that question.

The basis of murder, as defined by section 336 of the Penal Code, is "intentionally" causing the death of another. Provisions as to the meaning of "intent" are, as has been pointed out, made by section 12 of the Penal Code, of which sub-section (3) reads as follows:

> "(3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

A man's intent can only be gathered from his acts, including his words. If a man uses reckless violence which may cause death, such as discharging a fire-arm at close range, and death ensues, then it may be inferred, in the absence of any indication to the contrary, that if he had used reasonable caution and observation, it would have appeared to him that the discharge would probably cause the death. If such an inference be drawn, the man is to be presumed to have intended to cause the death, unless it be shown that he believed the shot would probably not cause death. In finding Pinder, who fired the shot, guilty of murder, the jury must have inferred that he intended the death of the deceased, in the sense in which the meaning of " intent " is explained in section 12 (3). A proper direction on intent, together with a quotation of sub-section 12 (3), was given by the learned trial judge at the conclusion of his summing-up.

The jury, following the direction of the learned judge, must have found that the three men combined to effect the common object of breaking and entering the house: that the common design as they each understood it included the use of whatever force was necessary to achieve that object: even if that force included killing or doing grievous harm: that one of them in pursuance of the common design used such force, with fatal results, as to lead to the inference, under section 12 (3), that he intended the fatal result to follow the use of the force. In such circumstances the law is that as all join in the common purpose, so all join in the intention to carry out the common purpose. As all join in the understanding that force is to be used, so if force be used all join in the intention to use force. If the use of force leads to an inference, under section 12 (3), that the consequence, namely death, of that use of force was intentional, then all join in the intent to cause death, and are guilty of murder.

In the opinion of their Lordships, accordingly, the learned judge correctly directed the jury as to the law applicable in a charge of murder under the Penal Code where there is evidence of common design, as in the present case. The joint responsibility of the participants in such a crime as the present is imposed by the Penal Code itself, and does not depend upon considerations of the law relating to principals in the first and second degrees, or of the common law of murder, although the liability of persons jointly responsible in terms of the Bahamian Code does not differ from that under the common law. Nor is the responsibility of persons in the situation of the accused in the present case primarily attributable to the provisions of section 86 relating to abetment. It would be unfortunate were that to be the law. Not uncommonly, in cases where a joint criminal enterprise results in death, there are no surviving victims, as there are here, to identify the actual user of the weapon, although circumstantial evidence may conclusively prove the participation of all. It would be very unsatisfactory were it to be the practice in such a case to charge all with murder or abetment in the alternative, inviting a jury to say that all were guilty of one or other. The doctrine of joint responsibility for the carrying out of a common intention is necessary both for the protection of the public and for the fair trial of accused persons.

The above conclusions point equally to the dismissal of the appeals under the second and third counts, namely, the convictions of attempted murder and armed robbery. No appeal was argued on the fourth charge of burglary, which was supported by, *inter alia*, finger-print evidence and the evidence of an eye-witness.

It was for these reasons that their Lordships humbly advised Her Majesty that the appeal be dismissed.

3137111—2 Dd. 178189 75 2/73

In the Privy Council

PHILIP FARQUHARSON

v.

THE QUEEN

DELIVERED BY

LORD KILBRANDON

Printed by HER MAJESTY'S STATIONERY OFFICE
1973