KILINDO AND PAYET v REPUBLIC

(2011) SLR 283

N Gabriel for appellant one
S Freminot for appellant two
D Esparon for the defendant

Judgment delivered on 2 September 2011 by Domah J

The two appellants stood trial for murder under section 193 of the Penal Code before a judge and a jury who returned a verdict of guilty against both. They were each sentenced to life imprisonment. They appealed against their conviction.

THE APPEAL OF JEAN-PAUL KILINDO

Appellant Jean-Paul Kilindo has put up the following grounds of appeal:

1. The trial judge erred in that he did not put to the jury sufficiently or at all the case of the appellant.
2. The trial judge did not put to the jury the fact that the appellant could be convicted to a lesser charge of manslaughter.

Both grounds were taken together in course of argument of counsel for the appellant. The main thrust of his argument was that appellant Kilindo had joined his confederate in crime not for the purposes of causing anybody's death but simply for the purposes of burglary: i.e. looking for, breaking a safe and stealing therefrom. At one stage, appellant Kilindo insisted that they should leave. He, indeed, was getting ready to leave when he saw the lights of an approaching vehicle. In the circumstances, counsel for Kilindo urged before us, it was the duty of the judge to dwell upon the limited participation of appellant Kilindo in the *actus reus* of the killing as well as his lack of *mens rea* which fell short of the malice aforethought required by law for murder. He pointed out that in his out of court statement the appellant had stated that he was not responsible for the death of the lady.

We would agree with counsel had the facts on the evidence been as he presented it. However, the facts do not show that his client's “only role that night of 31 October 2007 was to tie the hands of the victim whilst Payet did the rest." Admittedly, the two appellants stole into the premises for burglary. But, by force of circumstances, they became engaged in the more serious offence with the requirements of *actus reus* and *mens rea.* From the moment they saw headlights in the driveway and were surprised, they could well have taken flight. Neither did so. As far as Kilindo is concerned, he had elected to leave earlier but he chose to stay with his acolyte in his assault and participate in the immobilisation of the old lady. The active participation of both led to her death. In the circumstances, Kilindo cannot be heard to argue that he was a mere burglar. He became a co-author in the demise of the victim by his actions. The facts show that he Kilindo tied the 65 year old woman to a chair even while she struggled. The FSl report shows that she had been assaulted at several places. She bore fatal injuries at the head resulting in a skull fracture. She was also

strangulated. The participation of both Kilindo and Payet was concomitant. The inevitable death was the result of the simultaneity of action and reciprocal assistance which Kilindo gave to his acolyte in the actual grievous bodily harm, the tying up and the abandonment of her overnight in that state with serious injuries and helplessness.

Indeed, the above amply answers the question why the issue of alternative plea could not be raised and was not raised by the Judge for the determination of the jury. The facts and circumstances did not warrant it: *R v Hoareau (*1975) SLR 31; *Republic v Vel & Ors* (1978) SLR 124; *Paniapen v R* (1981) MR 254 cited in Venchard *Law of Seychelles Through the Cases* (Best Graphics, Mauritius, 1977).

On the issue of co-authorship in an offence, reference may be made to the French jurisprudence which, along with English decisions, has by and large influenced the law of Seychelles as well as that of Mauritius. In *DPP v Mudhoo & Anor* (1986) SCI 23 this is what we read:

> there must be a common object (and this may legitimately be inferred from the separate acts of the different accused parties); there must also be *'simultaneite d'action' and 'assistance reciproque'* (again this may legitimately be inferred from the acts of the different participants), the overaU principle being the degree of participation of an accused party in the offence.

As was held in the case of *Paniapen & Anor v The Queen* (1981) MR 254 -

> To constitute a common purpose, it is not necessary that there should be a prearranged plan. The common purpose may be formed on the spur of the moment, and even after the offence has already commenced. Thus, if A assaults B, and C, who passes by and had no previous intention of assaulting B, rushes in to join in overpowering he becomes a co-author in the assault.

In *Hunpraz and R v Hunpraz* (1970) MR 74 the Court referred to the following extract from *Traité Théoique et Pratique du Droit Penal Français*, t. 3. p.4 by Garraud -

> Une situation plus pratique est celle des délits commis en réunion, mais sans entente préalable. La participation criminelle suppose une coopération de force et d'activités en vue d'un résultat commun: des individus se réunissent pour commettre un délit, un vol, un assassinat, un empoisonnement

The issue of primary act from which emerged the secondary act which escalated from the lesser crime to the greater is well illustrated in what follows the above citation:

> Il y a, Ia plupart du temps, entre eux, une sorte de convention d'association où s'il est difficile de la dégager, si les coparticipants ont agi sous l'empire d'une inspiration subite, du moins ils ont eu l'intention commune de favoriser, par leur propre activité, celle de leurs compagnons.

Accordingly, where a party develops a common intention to enable or *favoriser* another to commit the offence, it does not matter whether the more serious offence which followed came out of the blue. Did the activity of one enable the other to bring

the misdeed to its logical end? If that is the case, the requirements of the law as regards the *mens rea* and the *actus reus* for the later offence are satisfied.

The question of the meaning of malice aforethought required for the offence of murder has been laid down in our law and very well exposed by Twomey J.A. in her judgment. For the sake of completion, I have already referred to the continental and Mauritian case law above. More to add on this matter would be simply redundant. She has shown that while section 193 provides for what constitutes murder in our Penal Code which is the causing of the death of another by an unlawful act or omission with malice aforethought, section 196 defines what amounts to malice aforethought. It reads:

> Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances -
>
> (a) an intention to cause the death of or to do grievous bodily harm to any person, whether such person is the person actually killed or not;
>
> (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not although such knowledge is accompanied *by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.* (emphasis ours}

In accordance with our law, there was evidence of more than indifference from the part of the two appellants. There was actual grievous bodily harm intended and inflicted on the state of the evidence.

The position in comparable jurisdictions has been well expounded by Twomey J and I subscribe to that. English law as argued by counsel for the respondent is not far different. English authorities establish that -

> a defendant D, could be guilty of murder on the basis of joint enterprise liability if he participated in the joint enterprise of crime X and foresaw that, in the course of it, P whether identified or not, might commit murder, ie. act with an intention to kill or to do grievous bodily harm. In many such cases, foresight of P's act would almost inevitably carry with it foresight of an intention to kill or to cause serious injury.
> *R v A* [2010] EWA Crim 1622; (2011) 2 WLR 647 (Crim Div)
> .

As rightly pointed out by Twomey J, the foreign authorities need to be looked at from the special provision of our own law and the hybrid nature of our jurisdiction on the matter. That is found in section 23 of the Penal Code which provides:

> Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

As regards the issue of circumstantial evidence, it is worthy of note that, after a *voire dire,* the judge ruled that the confessions were admissible. We have gone through

the proceedings and we agree with the judge that he was right in so ruling, for the reasons he gave. He stated that the myriad of omissions and accusations alleged against the police were grossly exaggerated for any court to believe and he found no evidence of oppression or threats. Once the statements where each appellant spoke of his participation were admitted, even if the issue of weight was yet to be considered by the jury, the question of circumstantial evidence became a redundant consideration.

We find no merits in the grounds of appeal raised by appellant Jean-Paul Kilindo. We dismiss his appeal.

THE APPEAL OF GARRY PAYET

Appellant Garry Payet has appealed against his conviction only and put up the following grounds of appeal:

1. The conviction of the Appeal Court (sic) was wrong in all the circumstances of the case.
2. The learned trial Judge erred in admitting the three confessions of the Appellant. The confessions were so intertwined that it was rather unsafe for any conviction.

The grounds of appeal as given above are certainly not models of what grounds of appeal should be. However, we were prepared to hear counsel who, appointed *in forma pauperis* in special circumstances, offered to do justice to his profession by going through the complete proceedings comprising five volumes of transcript and conjure up some ground of appeal.

He submitted on both grounds together. In his heads of arguments, he advanced the following point: the scientific evidence showed that the victim only died around 4 am long after the two appellants had left the scene which could most probably be around 10 pm. At the moment they left, therefore, the victim had not died. The appellants could not be held guilty of murder if the victim had not actually died at the moment they left her but died many hours later. In his view, inasmuch as the judge failed to direct the jury to this aspect of the case, a conviction obtained with such an omission could not be safe.

The argument is ingenuious. However, we are unable to accept it. The question to ask is whether when they were leaving the victim, they had left her as dead or indifferent to the probability that death would ensure in the light of the injuries they had inflicted upon her and the conditions in which they had left her. For death to occur in the offence of murder, there is no rule that says that death should occur on the spot or within a space of a number of hours. In fact the rule that applies at common law is the 100-day rule. So long as the actions of the perpetrator were such that death was the inevitable consequence thereof, the fact that it occurred the next day is immaterial. We have stated above that with the type of injuries they had inflicted on her - a 65-year old lady living alone in her house, and, in the condition in which the two appellants left her - tied and immobilized to a chair and gagged at 10 pm. in the night, they knew that they had left her either for dead or dying. Appellant Kilindo was no less to blame in the death of the victim than appellant Payet on

account of the "simultaneité d'action et assistance reciproque" in their engagement with the old victim which brought about her death.

On the question of the intertwining nature of the confessions, we are at a loss to follow what this ground means. The heads of arguments do not expatiate on this ground either. However, if the meaning is what counsel for the respondent gives it, that is that the confessions contained matters related to both the appellants, he rightly referred to the decision of *Lobban v R* [1995] 1 WLR 877 and *Jefferson* [1994] 1 All ER 270. As the Court has no power to order the editing out of otherwise admissible evidence contained in an accused's statement, for the purpose of avoiding the risk of injustice to a co-accused, at least without the consent of the prosecution and the accused who made the statement. The only obligation of the Court is to properly direct the jury on the matter which, in the circumstances, was done. We find no merits in the grounds of appeal raised by appellant Gary Payet. This aspect of the law has been properly analyzed and explained by Peter Murphy, *Evidence,* (11th ed, Oxford University Press) at 354 and relied on by counsel for the respondent.

Since, in the foregoing, we have found that the appeals of both Jean-Paul Kilindo and Garry Payet have no merits, we dismiss them both.

TWOMEY J:

I have read my brother's judgment with which I concur. However I am minded, given the circumstances of this case and the lack of clarity of the law in the areas of foresight and common intention in Seychelles to add the following observations.

Foresight

The argument of the two appellants in this case with regard to this issue is that their only intention was to enter the home of the deceased and to steal and that if in that enterprise they did gag her, tie her up and cause her harm they should not be charged with murder as they had not intended to kill her.

This argument finds commonality with the concept of murder as deliberate and intentional killing. This paradigm does not sit comfortably with another concept driven mostly by public opinion that ruthless risk takers should also be deemed murderers. However, in general, the two concepts, namely intention and the relationship between intention and foresight of consequences are difficult to define with accuracy. In this respect I have surveyed approaches in common law jurisdictions to this issue.

In England, the issue of whether the forseeability of one's actions can be equated with intent is still in a state of flux. The first of the series of cases on the subject was *DPP v Smith* [1961] AC 290, which was eventually decided in the House of Lords; Viscount Kilmuir exponing that:

> ...it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions... On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and

> voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.

Smith was followed by a number of cases on this precise issue namely, *Hyam v DPP* (1975) AC 55, *R v Moloney* [1985] AC 905, *R v Nedrick* [1986] 1 WLR 1025, *Scalley* (1995), *R v Woollin* [1998] 4 All ER 103 culminating in *Matthews and Alleyne* [2003] 2 Cr App R 30.

Nedrick (1986) gave the House of Lords the opportunity to clarify the apparent confusion in law. In *Nedrick* the defendant poured paraffin through the letterbox of a house and set fire to it. A child died in the fire. The defendant claimed that his intention was to scare the occupants of the house, not to kill anyone. The jury was given a direction, which equated foresight of consequences with intention, and the defendant was convicted of murder. Lord Lane CJ stated that equating foresight with intention was not correct, and that Lord Bridge of Harwich (speaking in reference to *Moloney*) had been correct in saying that foresight of consequence was part of the law of evidence, not the substantive law. Nedrick had his murder conviction quashed and substituted with a conviction for manslaughter, and the "Nedrick direction" was written as follows:

> Where the charge is murder and the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty as a result of the defendant's actions, and that the defendant appreciated that such was the case.

In the final case on this issue, in *Matthews and Alleyne* [2003] 2 Cr App R 30 the Court of Appeal upheld convictions for murder despite the direction given by the trial judge equating foresight of consequences with intent. The defendants had pushed a man off a bridge into a river and he drowned; the defendants knew that he could not swim but nonetheless claimed that they had not intended to kill him. The judge directed the jury that if "drowning was a virtual certainty and they [the defendants] appreciated that then they must have had the intention of killing him."

The Irish Law Reform Commission in 2001 whilst surveying the law around the world on the subject summarized the position thus:

> the mens rea of murder has varied with the underlying conceptions and objectives of the criminal justice system. In early law, when the objective of the criminal justice system was to restrict and supplant the bloodfeud, the mental element was of relative unimportance. As malice aforethought came to represent the mens rea of murder it was given a technical meaning by the courts in order to circumvent clerical exemption, and ensure that defendants who deserved to be punished as murderers were so punished. Thus, the phrase was interpreted (and reinterpreted) in order to fit the exigencies of the time, and to conform with what was felt to be the proper scope of the mental element of murder.

The present Irish position is less stringent than that in England and is set out in *People v Douglas & Hayes* [1985] ILRM 25: Foresight of death as a natural and

probable consequence of one's actions does not amount to intention per se, although it may be evidence from which intention can be inferred.

Recent proposals in Australia and New Zealand have defined intention in terms of knowledge of the probability of a result occurring, similar to the Irish position.

In Canada, in the case of *R v Buzzanga and Durocher* [1980] 25 OR (2d) 705, the Ontario Court of Appeal held that nothing less than foresight of a result as substantially certain could constitute intent.

The common law of the United States provides that the mens rea for murder comprises (a) intention to kill, (b) intention to cause grievous bodily harm and (c) unintentional killing under circumstances evincing a depraved mind. With regard to the third element, 'the essential concept was one of extreme recklessness regarding homicidal risk'. [American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)*, 1980 2nd ed. Part II, Vol.1, at p 15]

Hence, if there was a classification of foresight necessary for murder to be established, in those jurisdictions the approaches are dissimilar:

a. moral certainty is necessary to constitute intent (the English and Canadian positions)
b. probability of consequence or natural consequence is enough to constitute intent the Irish, Australian ,New Zealand and the United States positions)

In Seychelles the approach to foresight and intent is even less stringent. Malice aforethought is defined in the Seychelles Penal Code as:

> (a) an intention to cause the death of or to do grievous bodily harm to any person, whether such person is the person actually killed or not;
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

Hence, in Seychelles there is no uncertainty in relation to foresight and intent. The law categorically states that if one is indifferent as to whether death is caused by one's actions, then that indifference is sufficient to prove intent.

In *Denis Barra v R* (2001) SCA 4, an attempted murder charge, the Court of Appeal held in attempted murder cases the intention must be to cause the death of another. In that case the remoteness of the consequence of the defendant's action was enormous. The respondent and the complainant did not know each other. The appellant, a soldier who was trained to fire with precision had been firing at some bushes and trees and was also under the influence of alcohol at the time he shot the complainant. His conviction was therefore quashed.

In the present case the two appellant's intent can be inferred from the evidence adduced to conclude whether they either intended or were indifferent to the death of the victim. Hence when the second appellant states inculpatorily in his second

statement "... I came and hold her..." and when the first appellant in his statement, also inculpatorily states "I tied both her legs and hands" -

> I tied her at the bathroom...we tied her some more, both legs and hands... the lady struggled with us... there is a possibility that she has hit (sic) her head on the floor when she was struggling...

That is evidence of intent. At the very least, the fact that both were conscious of the fact but careless of the consequences that there was some serious risk posed by the victim being left gagged and tied proves further intent. See also the first appellant's statement in his confession: "I also told him (the second appellant) that we should release the lady...". These incriminatory statements are corroborated by the circumstantial evidence adduced in this case namely, the medical report and evidence of Drs Xiang Lei and Brewer, and the Burkes concerning the way they found the victim and the injuries she had sustained.

Mr Gabriel for the first appellant also advances the argument that the trial judge did not address this issue with the jury in his summing-up and in so doing did not allow them the option of convicting on the lesser charge of manslaughter as opposed to murder. I do not believe this argument has any merit in view of the fact that in his summing-up the trial judge devoted much time to addressing precisely the issue of malice aforethought and quoted section 196 of the Penal Code in its entirety and then commented by again paraphrasing the provision:

> It therefore follows that the prosecution must adduce evidence to prove that the accused persons had intended or foreseen the death or grievous bodily harm as the possible or probable result of this act or omission or had the knowledge that the act or omission causing death of Mary Anne (sic) Hodoul even though such knowledge was accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

He expounds further giving examples of the "indifference." He also addresses the issue of manslaughter stating that none of the counsel "has suggested the slightest basis of manslaughter as opposed to murder..."

For these reasons I see no merit in that ground of appeal.

Common Intention

It is the submission of both appellants that the trial judge did not address the issue of common intention in his summing-up. His failure to do so they argue caused a miscarriage of justice since both accused were charged with murder as read with section 23 of the Penal Code. It is their contention that the evidence does not evince such a common intention between the parties to murder the victim and that at the very most their only common purpose was the robbery of a safe inside her home.

Section 23 of the Penal Code states:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such

> purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed an offence.

The question to be asked in relation to the circumstances of this case and the initial intention of the two appellants (purely to rob the victim) is whether it was a probable consequence that in their act to rob the home of the victim they may have found her on the premises or whether she could have arrived there subsequently. If that question is answered in the affirmative, which I contend it must, and their resulting act of tying her up, gagging her and injuring her and leaving her to die is the probable consequence of the robbery, each of them are deemed to have committed her murder.

The two authorities cited by Mr Esparon, counsel for the respondent, are to point. In *Benstrong* (1976) SLR 1 Sauzier J quoting the case of *Merriman* [1972] 3 All ER 6 rightly stated the law when he said that Merriman was stating the law as it existed already under the Seychelles Penal Code, so that

> whenever two or more defendants are charged in the same count of an indictment with any offence which men help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary intent.

In *Mein v R* SCA 12/1995, 13/1995 (unreported) the Court of Appeal stated that it was erroneous to argue that common purpose entails a pre-arranged plan. It may be formed on the spur of the moment and even after the offence has commenced. Hence, although both accused claim that there is no evidence that either of them caused the death of the victim all the jury had to find was whether either appellants or either of them caused her death in their endeavour to carry out the robbery. It is sufficient that evidence was adduced that either or both of them admit some part in their engaging and struggling with the victim, that both share the ultimate responsibility for her death. In this respect the trial judge cannot in any way be faulted. He extensively dealt with the issue of common intention in his summing up vide:

> Common intention does not necessarily, and in all cases, imply an express agreement and pre-arranged plan before the act. The act may be tacit and common design conceived immediately before it is executed on the spur of the moment. There need not be proof of direct meeting or combination nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common plan to carry out the unlawful design.

Mr Gabriel, for the first appellant, has cited *R v A* [2011] 2 WLR 647 (Crim Div). The English law on the issue of common intention or design involves the establishment of a further elevated intent as opposed to the agreed intent. It appears that in England, in cases involving joint enterprise it is not sufficient to show that a secondary act took place as a result of the agreed first act. It must also be shown that the co-accused who committed the secondary act had intended the secondary act. *R v A* comes as a

result of the attempt by the House of Lords in the case of *R v Rahman* [2009] AC 129 to clarify the law relating to joint enterprise or common intention.

As I have pointed out this distinction does not arise in Seychelles because of the wording of section 23 of our Penal Code. If we are to use the same terminology as the English cases quoted above, then to put it simply the law in Seychelles is that it suffices to show that a secondary act took place as a probable consequence of the agreed first act intended. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first act which they had agreed upon.

In my view this disposes of all the substantial grounds of appeal. In the circumstances these appeals are dismissed. I wish to thank all counsel concerned both in undertaking the case before the Supreme Court and before this Court. I know that this crime was particularly heinous and resulted in much difficulty for members of the Bar especially in defending the appellants against the murder of the deceased, the sister of an esteemed member of the Bench. I commend the duty you carry out above all as officers of the court.