

Kumar and others v. R.

Court of Appeal

Speight V.P., and Mishra and O'Regan J.J.A.

13 March 1987

Criminal law – joint enterprise – whether beating within contemplation of appellants – section 22 of Penal Code.

10 *Criminal law – murder – malice aforethought – whether beating would probably cause grievous harm to victim – section 202 of Penal Code.*

The three appellants, Abendra Kumar, Manoa Naquase and Sivorosi Raikali, were found guilty of murder after a trial in the Supreme Court and sentenced to life imprisonment. The appellants had laid an ambush for a shopkeeper in order to steal money from his premises. The ambush involved waylaying the victim by night outside his house, beating him unconscious and leaving him securely tied while they stole the money. The beating was severe and the victim was found dead a few hours later by his son. The cause of death was "haemorrhagic shock" arising from a beating administered with great force. The mens rea for murder, under section 202 of the Penal Code includes knowledge that the act causing death "will probably cause grievous harm" to the victim. The appellants' main grounds of appeal related to the judicial summing up on joint enterprise and on the requisite state of mind. Other grounds of appeal related to the admission of statements, the issue of self-defence, and the admission of prejudicial evidence.

HELD: The appeal of each appellant was dismissed.

- 30 (1) The triers of fact could conclude on the evidence that the assault was within the contemplation of each participant, per section 22 of the Penal Code: *l.* 200.
- (2) The plan, as contemplated and executed, necessarily involved an act which would probably cause grievous harm to the victim: section 202 of the Penal Code: *l.* 210.
- (3) Although the interrogation, combined with trial, involved a long time, that factor in and of itself, was not sufficient to exclude the statements. *Priestley (a note)* (1965) 51 Cr. App. R. 151 applied: *l.* 310.
- (4) There was no credible evidence to go to the assessors on the defence of self-defence: *l.* 330.

Other cases referred to in judgment:

- 40 *Chan Wing-Siu v. R.* [1985] A.C. 168; [1984] 3 W.L.R. 677; [1984] 3 All E.R. 877; 80 Cr. App. R.117
R. v. Grant (1954) 38 Cr. App. R. 107
R. v. Hamilton [1985] 2 N.Z.L.R. 245

R. v. Nathan [1981] 2 N.Z.L.R. 473

R. v. Prager [1972] 1 W.L.R. 260; [1972] 1 All E.R. 1114; (1971) 56 Cr. App. R. 151

R. v. Vickers [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741

R. v. Wilson [1981] 1 N.Z.L.R. 316

Legislation referred to in judgment:

Penal Code sections 21, 22 and 202

50 Homicide Act 1957 (U.K.)

J. Cameron for the appellants

I. Mataitonga for the respondent

MISHRA J.A.

Judgment of the Court:

The three appellants were convicted by the Supreme Court at Labasa of murder and sentenced to imprisonment for life. One Subhash Chandra who was jointly charged with them was acquitted of murder at the end of the prosecution case but was eventually convicted of robbery with violence, another charge laid against him. 60 Two other persons were also tried on the same information for other related offences but nothing arising out of their trial has any bearing on these appeals.

The appellants appeal against convictions.

The deceased Yee Chin Hing had a store at Dreketi in Vanualevu at which he also operated a bakery. He generated his own electricity from a power plant located outside his house. A string running from his kitchen window to the power-house enabled him to switch off the engine at night without leaving the house.

In 1982/83 the first appellant, Abendra, was engaged in carting logs for a logging company in the area and frequently purchased bread and groceries at the store. He had also discovered that the deceased kept large sums of money in a safe in his house. At the end of 1983 he moved back to Suva and became friends with the appellants Manoa and Sivorosi both close neighbours. He told them of the deceased's habit of keeping money in the house and they together hatched a plan to remove it. They travelled to Dreketi and enlisted Abendra's brother-in-law Subhash's help in obtaining transport. On Sunday 22 April 1984, a rental car was obtained at Labasa in Subhash's name and they left for Dreketi in the evening. The plan was for Subhash to drop them at the store and wait in the car some distance away. The three appellants were to enter the compound, cut the string leading from the engine room to the house and wait outside in the dark. Unable to use the string, the deceased would have to come out before retiring for the night to switch off the engine and would be pounced upon, overpowered and tied up by the appellants. The three would then enter the house, steal the money and leave the premises. Subhash who was to drive past the store at short intervals would pick them up to make their getaway. 80

Everything went according to plan. They, however, made one omission for which they had made no allowance in the plan; after the deed they omitted to switch off the engine and the lights remained on. The deceased's son who had been lying awake in bed for some time had heard no scream or noise suggesting anything untoward but as the night wore on he considered it odd that his father should fail to switch off the lights by 10 p.m. He went out to check. His father was not in his office, not in the

90 kitchen, not in the bedroom. He went outside to the engine-room and found him lying near a concrete drain, his hands and feet tied up with a nylon rope, his mouth with a thick piece of cloth. He was dead.

The police were informed and Abendra and Manoa were picked up at Savu Savu Airport trying to catch the first flight out. They were carrying large sums of money later traced to the deceased. The two made statements to the police admitting the plan and their participation. A similar statement was later made by Sivorosi also. These statements formed the basis of the prosecution case against them.

100 Abendra in his statement admitted helping tie up the deceased but denied hitting him. Manoa admitted punching him once in the abdomen. Sivorosi admitted administering only two blows with his fist, both to the head.

The post-mortem examination of the body, however, told a different story. No less than ten injuries were found on the face and head – including one "black eye". Ten ribs had been fractured, some in front, others at the back. The spleen and the liver had both been ruptured.

Cause of death was "haemorrhagic shock arising out of all those injuries".

Injuries described were caused by application of blunt force, such as punches or kicks, some administered with great force. According to the doctor who conducted the examination the deceased, when he was tied up with rope, was already unconscious or dead.

110 According to Manoa's statement to the police he was then unconscious but breathing.

At the trial each of the appellants made a brief statement in which he stated that his sole intention was to steal, not to kill the deceased. Manoa added that the assault occurred because the deceased was carrying a knife. A long-handled knife and the deceased's sandals were found 5 or 6 yards away from the body.

Causation

The main ground of appeal relates to causation and questions the adequacy of the Judge's summing-up on malice aforethought in the special circumstances of this case.

120 The prosecution presented the case on the basis firstly, that the appellants had all taken part in the assault each being present and aiding and abetting the others and, secondly, that, in any case, the three appellants were engaged in a joint enterprise with a common intention to prosecute an unlawful purpose when the death of the deceased was caused.

The relevant part of section 21 of the Penal Code which deals with the first basis is:

- 130 21. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
- (a) every person who actually does the act or makes the omission which constitutes the offences;
 - (b) ...
 - (c) every person who aids or abets another person in committing the offence;

Section 22 which deals with joint enterprise in the following terms:

- 140 22. 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 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.

Section 202 defines malice aforethought:

202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
- 150 (a) an intention to cause the death of or to do grievous 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.

160 In case of aiding and abetting each aider must be shown to have, at the time the injuries were inflicted, malice aforethought either as in (a) or as in (b) of the definition. In case of joint enterprise, however, it suffices if each participant can be shown to have in contemplation the probability of infliction of serious harm on the deceased in the execution of the planned unlawful purpose. Dealing with the latter the Privy Council in *Chan Wing-Siu v. The Queen* [1985] A.C. 165, 175; [1984] 3 W.L.R. 677, 682; [1984] 3 All E.R. 877, 880-881; 80 Cr. App. R. 117, 121, stated the principle thus:

170 It [the principle] turns on contemplation or, putting the same idea in other words, authorization, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

180 There was no evidence suggesting any specific intent to kill or even to cause harm likely to result in death. The Learned Judge so directed the assessors and invited them to infer absence of such an intent from the use of rope and cloth calculated to prevent the deceased from seeking help or raising an alarm during the robbery and after their departure. The case turned entirely on paragraph (b) of the definition of malice aforethought i.e. whether the assessors were satisfied beyond reasonable doubt that each appellant knew that the kind of assault to which they were subjecting the deceased would probably cause serious harm to him. In case of joint enterprise whether they were satisfied that each appellant knew that, of the violence they contemplated inflicting upon the deceased to silence and tie him up before robbery, serious bodily harm would be a probable consequence.

Robbery was indeed their main aim. What was the nature of violence within their contemplation? They did not carry any lethal weapon; only ropes and cloth. The plan, however, contemplated inflicting of punches. Sivorosi said in his statement:

When we were going inside the car we were discussing to assault, punch the Chinaman and then steal his money.

The kind of assault contemplated by the plan, however, can be best assessed by

190 the circumstances proposed to be created by the planners for its execution. It was never the plan to engage in a noisy fight with the deceased. Nor was it planned to chase him screaming around the compound and throw him to the ground to tie him up. There is ample evidence to show that the planners knew his son lived in the same house. The element of surprise was crucial to their plan – hence the cutting of the string leading to the engine room.

The execution of the plan envisaged an assault – sudden, unexpected and overpowering, eliminating any possibility of noise. This is exactly what the appellants did. The deceased's son lying awake in bed heard only a slight croaking sound which he thought might have come from children on the street. He did not even associate it with the deceased. The tying up of the deceased followed the act of silencing him.
200 He had stopped struggling and was unconscious before they proceeded to tie him.

Was such an assault within the contemplation and authorization of each participant? This, in our view, was a matter for the assessors. Had a lethal or unusual weapon been used by one of the assailants (*R. v. Hamilton* [1985] 2 N.Z.L.R. 245) that would, under the circumstances of this case, constitute a departure from the plan. None was used. Had the death been caused by some isolated minor blow, not consistent with foresight of serious harm, inflicted by only one of the participants (*R. v. Nathan* [1981] 2 N.Z.L.R. 473) without which death would not have occurred, individual culpability would be difficult, if not impossible, to identify. Here, however,
210 all the blows indicated punches or kicks and the cause of death was haemorrhagic shock resulting from the combined effect of the multiple serious injuries.

The Learned Judge directed the assessors in the following terms:

But the prosecution do not have to prove an intent to kill, or indeed to do grievous harm. It suffices for the prosecution to prove no more than knowledge on the part of the accuseds that their joint acts would probably cause grievous harm to the deceased, even though they were indifferent thereto, or even wished that the deceased might not suffer grievous harm.

This, in our view, was a correct statement of the law on joint enterprise. There was no need, in the circumstances of this case, for additional directions on departure
220 from the scope of the unlawful purpose or on isolated cause of death.

We do not accept the proposition that where a group of men cause the death of a person by attacking him with the intent or foresight of serious harm the prosecution must identify the principal offender before others can be treated as aiders and abettors. Under section 21 of the Panel Code they may all be charged and convicted as principal offenders provided there is evidence of participation with the necessary malice aforethought. The present case, however, was one of joint enterprise under section 22 of the Penal Code where death had been caused during the execution of a plan to commit robbery with violence and the point for decision was whether or not murder was a probable incident of the execution of that plan.

230 The Learned Judge in his summing up said:

The fact that not one of the three departed the scene, or even just passively remained there, but instead admitted to assisting the others in the assault, and the subsequent theft indicates, you may consider, that all three acted in concert in execution of their unlawful joint enterprise.

And again

240 You might consider in particular that the deceased was assaulted, whether by the direct application of force or indirectly by suffering falls to the grounds, in such a manner and with such force, as to rupture his spleen and to cause twenty three fractures to his ribs, so that his assailants, you might consider, must in the least have known that grievous harm would probably result, even if they were indifferent thereto or wished that it would not. That is the test to apply. I remind you that you must consider the evidence separately in respect of each accused. You may only render an opinion that an individual accused is guilty of murder as charged, if you are satisfied beyond reasonable doubt that he knew that grievous harm would probably be caused to the deceased, even though he was indifferent thereto or even wished that it might not be caused. If you consider that, or you are in reasonable doubt that, an accused did not have such knowledge, then you must render an opinion that he is not guilty of murder.

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In the latter case you must then consider the offence of manslaughter.

He then went on to describe the ingredients of manslaughter. The directions were, in our view, correct and the ground must, therefore, fail.

260 Mr Mataitoga for the respondent cited the case of *Grant* ((1954) 38 Cr. App. R 107) in support of the proposition that intent required for robbery would in such a case become malice aforethought for murder if death ensued during the execution of the plan to rob. Though the facts there were somewhat similar, that case was decided in 1954 on the basis that the appellants had caused the death of the deceased in furtherance of a felony and in such a case the principle of constructive malice would come into play making the degree of violence irrelevant. That principle was abolished by the Homicide Act 1957 and today, to support a conviction of murder in such a case, specific directions on the nature of violence and foresight of serious harm would be necessary (see *R. v. Vickers* [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741).

Confessions

In the case of *Abendra* and *Manoa* it is contended that the circumstances surrounding the taking of statements by the police required the exercise of the Judge's direction in favour of exclusion on the ground of oppression and unfairness.

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Both had made allegations of threats and assault which the Learned Judge had no hesitation in rejecting. There was, however, evidence produced by the prosecution themselves, of travelling involved between their apprehension at Savu Savu Airport and taking of the statements, and the length of time taken by the interrogation itself.

Abendra had, that day spent five hours sitting in two police stations and had spent six hours travelling in police vehicles before he made the statement. During this period he had had some sleep. The statement, in the form of questions and answers running into eighteen pages, took almost seven hours to record, from 10.54 p.m. to 3.40 a.m.

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Manoa had, in addition, been taken from Labasa to Dogotuki, a distance of 50 miles, and back to Labasa. The Learned Judge found that he was free to sleep in the police vehicle and at the two stations if he had wished to do so.

He, like *Abendra*, so the Judge held, had been provided meals and other refreshments at intervals. The statement from him was recorded between 1 a.m. and

4.50 a.m.

In the case of Abendra the Judge said:

I am satisfied that, although the accused was physically tired, the surrounding circumstances were such that no oppression arose. I am satisfied beyond reasonable doubt that the accused was not in any way deprived of his free will in the matter, and that the statement made by him was voluntary and is hence admissible and I rule accordingly. Further, in the exercise of my discretion I do not see that any circumstances arise whereby the strict rules of admissibility would operate unfairly against the first accused and I decline to exclude the statement.

He made a similar ruling in the case of Manoa.

Learned Counsel submits that in the circumstances the discretion not to exclude the statements was wrongly exercised and cites *R. v. Wilson* [1981] 1 N.Z.L.R. 316. There are, however, significant differences. Wilson was a boy of seventeen. In this case Abendra was thirty four and Manoa twenty five, both tough men who had planned, and travelled to Vanualevu for the sole purpose of carrying out a daring piece of robbery involving considerable violence. As was said in *R. v. Priestley* (1965) 51 Cr. App. R. 1:

Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is of a tough character and an experienced man of the world.

See also *R. v. Prager* [1972] 1 W.L.R. 260; [1972] 1 All E.R. 1114; (1971) 56 Cr. App. R. 151) where inclusion of a confession after prolonged interrogation was upheld on appeal.

We see no reason to interfere with the exercise of the Judge's discretion.

Self-Defence

In his third ground the appellants submit that the Judge erred in not leaving the defence of self-defence to the assessors.

The evidence no doubt showed that the deceased, when he went out of the house, was carrying a long-handled knife. Manoa in his unsworn statement said:

Our sole intention was to steal. The assault on the Chinaman came up when we saw the knife on him. We did not plan that before we leave. Our intention was to tie and to steal. That is all.

This, says Counsel, was sufficient to raise self-defence on behalf of the appellants.

There is nothing in Manoa's statement to the police, or in those of the other appellants, to suggest that the knife was ever used or that there was any real risk of its being used. The appellants, according to these statements, waited for the deceased in the dark near the engine-room door. He was knocked to the ground as

soon as he arrived and was punched again as he tried to get up. The assault, thereafter, continued unabated until he became unconscious. The knife was found 6 yards away from his body, unused. They had been watching him as he came out of the house, and, had they feared danger to life or limb, nothing was easier than for them to retreat into the dark, for he was then not even aware of their presence. But they remained where they were and carried the assault through in accordance with the plan. There was, therefore, no credible evidence on which, in our view, the defence of self-defence could properly have been left to the assessors.

Inadmissible Evidence

340 The last ground relates to a piece of evidence which, counsel submits, was inadmissible on the ground of being hearsay and more prejudicial than probative. The evidence was given by a woman Maria Ana who had met Sivorosi and one Peter four days after the death of the deceased. Among other things she said:

Peter said this thing was already planned. He told me Kumar (Abendra) had already planned this to come and murder the Chinaman at Dreketi.

Peter had no personal knowledge of the exact plan which certainly did not specifically include murder. The evidence, therefore, was prejudicial and inadmissible.

350 Maria's evidence, however, was only of peripheral significance. The Learned Judge did, in addition, warn the assessors against placing reliance on it except for what Sivorosi himself had said to her i.e. "I didn't realise that this thing would happen." Again, "He [Sivorosi] said he didn't realise the Chinaman would die".

In view of this and of the Judge's own clear and forceful direction that there was no evidence at all of any common intention to kill we are satisfied that there could have been no confusion in the minds of the assessors on the issue of mens rea and no miscarriage of justice can possibly have resulted from the admission of the impugned evidence.

360 The ground, therefore, fails and the appeal of each appellant is dismissed.

Reported by: P.T.R.