Privy Council Appeal No. 15 *of* 1958

Surujpaul called Dick - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - *Respondent*

FROM

THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 24TH JULY, 1958

Present at the Hearing:

LORD TUCKER

LORD SOMERVELL OF HARROW

LORD DENNING

[*Delivered by* LORD TUCKER]

The appellant was convicted at the criminal assizes for the County of Berbice in British Guiana on 29th July, 1957, of being an accessory before the fact to the murder of Claude Allen and was sentenced to death. His appeal to the Court of Criminal Appeal of British Guiana was dismissed on 8th January, 1958. He appealed in forma pauperis by special leave to Her Majesty in Council and this appeal was heard by the Board on 22nd, 23rd and 24th July, 1958.

The appellant was charged with four other men in one count with the murder of Claude Allen on 9th March, 1957. The other four men will be referred to as accused Nos. 2, 3, 4 and 5. At the end of the case for the prosecution accused No. 2 was on the direction of the trial Judge acquitted by the jury. Owing to uncertainty as to which, if any, of the remaining accused was actually present and taking part in the murder and which, if any, might have been accessories before the fact the jury were quite properly asked with regard to each accused whether they found him guilty or not guilty of being accessory before the fact to murder and whether they found him guilty or not guilty as principal. They found the accused guilty as an accessory before the fact to murder and not guilty as principal, accused Nos. 3, 4 and 5 they found not guilty as accessories and not guilty as principals.

The appellant contended that these verdicts were contradictory and inconsistent and accordingly his conviction should be quashed. The Court of Criminal Appeal rejected this contention on the ground that the jury must have come to the conclusion on the evidence legally admissible against the appellant that he was accessory before the fact to murder committed by the other accused, although they were not satisfied on the evidence legally admissible against each of the other accused considered separately that the Crown had discharged the burden of proving the guilt of any one of them.

Sections 24 and 25 of the Criminal Law (Offences) Ordinance, Chapter 10 of the Laws of British Guiana, are as follows:—

Sec. 24. "Everyone who becomes an accessory before the fact to any felony, whether it is a felony at Common Law or by virtue of any statute for the time being in force, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

Sec. 25. "Everyone who counsels, procures, or commands any other person to commit any felony, whether it is a felony at common law or by virtue of any statute for the time being in force, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

These sections are for all practical purposes identical with Sections 1 and 2 of the English Accessories and Abbettors Act, 1861, which in their turn had previously appeared respectively in the Acts of 1826 and 1848.

It may be convenient at this stage to refer to a passage in Russell on Crime (11th Ed.) at pages 134 and 135 which shortly and accurately states the nature of this crime. It is as follows: "A simple but important point is sometimes overlooked, namely, that when the law relating to principals and accessories as such is under consideration there is only one crime, although there may be more than one person criminally liable in respect of it; if there are more than one person, then the question arises as to the category in which each one is to be placed, that is whether he is accessory before the fact, a principal in the first or second degree or an accessory after the fact. There is one crime, and that it has been committed must be established before there can be any question of criminal guilt of participation in it. It is true that one who procures, advises, solicits or instigates in any way another person to commit a crime is himself guilty of the common law misdemeanour of incitement whether or not the offence solicited is carried out; but incitement is a different offence from the one which is solicited; if and when the latter offence is committed then, and not until then, the inciter becomes a party to it, and if it be a felony, he is classed as an accessory before the fact, the fact being the crime which the incited person, has, in the character of principal in the first degree, carried out".

In the present case it was essential to the conviction of any one of the accused as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused persons to murder Claude Allen and that such person or persons had in fact murdered the said Allen. By their verdict the jury have found that murder by any one of the accused has not been proved, but none the less the appellant was guilty of having counselled one or more of them to commit murder and that one or more of them, unspecified, in fact committed it. This certainly appears, at first sight at any rate, an inconsistent and contradictory verdict.

In the course of the argument their Lordships were referred to several authorities, some dealing with the law as to conspiracy, which was said to be analogous for present purposes, and to the history and origins of the law with regard to principals and accessories, but it is sufficient to refer to the only two cases which really throw much light on the present question.

The first is *R.* v. *Hughes* (1860) Bell 242. This was a case reserved by the Recorder of Manchester for the opinion of the Court of Queen's Bench. The prisoner Hughes had been charged together with one Hall in the first two counts of the indictment with larceny and in the third count alone with receiving. Both prisoners pleaded not guilty and were put in charge of the jury, whereupon Counsel for the prosecution intimated that he did not propose to offer any evidence against Hall and

applied that he should be acquitted in order that he might be called as a witness for the prosecution against Hughes. The Recorder acceded to this request and Hall was acquitted. He was called as a witness and testified that he had stolen the goods in question and sold or given them to Hughes. The jury returned a general verdict of guilty against Hughes. The question reserved for the Court was "whether, as the facts showed that Hughes, if guilty at all of the larceny was guilty only as an accessory before the fact, and Hall, the principal, having been acquitted, I ought not to have told the jury that Hughes was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only". The judgment of the Court was delivered by Erle, C.J. He said that 11 & 12 Vict c. 46, s. 1, had made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory had been done away with. He added that the accessory, "*whether tried before or at the same time as the principal may be found guilty*", although the principal be acquitted.

In the report of this case in 1 L.T. 450 at 452 instead of the words italicised above the sentence reads: "Whether the principal be tried before or at some time after the accessory before the fact, still there may be guilt in the accessory".

The variation is perhaps of little importance since in the case with which the Court was dealing the principal had been acquitted on the same indictment and by the same jury, albeit the acquittal of the principal was reached in the absence of any evidence of the commission of the felony, whereas there was ample evidence of such commission in the evidence adduced on the trial of Hughes.

The second, and more recent case, is *Rex* v. *Rowley*, 32 Cr. App. R. 147.

In this case the appellant had been charged at Birmingham City Quarter Sessions in one count together with two other men with breaking and entering and stealing, and in a second count together with the other two with receiving. In a further count the appellant was charged alone as an accessory after the fact to the felonious receiving by the other two.

At the trial the appellant's plea on this last count was taken first. He pleaded guilty and was sentenced. The trial of the other two men proceeded and they were acquitted on all counts.

On appeal to the Court of Criminal Appeal (Lord Goddard, L.C.J., Humphreys and Singleton, J.J.), counsel for the Crown conceded that the procedure adopted had been quite irregular. Mr. Justice Humphreys in delivering the judgment of the Court quashing the conviction said: "In the result there is an error on record which cannot be cured by amendment. Writs of error have been abolished since 1908 by the Criminal Appeal Act, but this Court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there is no means of amending the record so as to make it consonant with the proved facts of the case and where the record is inconsistent with itself, as it is here, the only course which this Court can take is to quash the conviction." The judgment then proceeded to comment on the undesirability of the course which had been adopted at the trial of taking the plea of the accessory before the trial of the principal felons.

It is to be observed that the case of *R.* v. *Hughes* (supra) was not cited to the Court and it is true that counsel for the Crown did not seek to support the conviction. Nonetheless, whatever the true view may be with regard to the technicalities, the course which had been adopted by the Recorder of Manchester in the last mentioned case would now be regarded with even greater disapproval than that of the Assistant Recorder of Birmingham in Rowley's case.

Their Lordships do not consider it necessary in this case to decide whether writ of error would have lain by reason of error on the record which could not be cured by reference to the evidence. They are content to deal with the case on the basis upon which counsel for the Crown

sought to uphold the conviction namely by looking at the evidence to see if the inconsistency on the record is real or only apparent.

The case for the Crown was that the accused men had engaged in a plot to rob the overseer of an estate of the wages of the estate workers, and that on 9th March, 1957, Walter Cameron, the overseer, was in a land rover driven by a man named Ashroof together with a police escort, Claude Allen, near a place called New Dam, when two of the accused wearing masks and armed with a stick and a double barrelled shotgun held them up. Cameron threw the wages to the man with a stick, a shot from the rear of the vehicle was fired and Allen was wounded. Five masked men were seen running away, and Allen died later in the day.

The case for the prosecution rested largely upon the evidence of a man named Dhajoo whom the jury were rightly told to treat as an accomplice. His evidence went to prove the existence of a plot by the accused to rob the payroll and to make use of masks and to hide guns in preparation for the robbery. If believed there could be little doubt of the existence of the plot, and there was material in all the circumstances from which they might have drawn the inference that the plan was carried out by all or some of the accused and that in the course thereof the murder was committed. But the jury, whatever they may have thought with regard to the evidence of the plot, evidently did not consider it sufficient to warrant the conviction of any of the accused as a principal. But it is said on behalf of the Crown that as against the appellant they may have found something in his statement to the police which would amount, with Dhajoo's evidence, to sufficient evidence and admissible against him that the crime was committed by one or more of those who had been " counselled or procured " by the accused so to do. This necessitates a close examination of the statement, but it may here be observed that although such statement may afford very strong corroboration of Dhajoo's evidence with regard to the part taken by the appellant in the plot and as to his counselling or inciting the others to commit robbery or murder it is difficult to see how it can afford any evidence as to the actual commission of the crime at which by their verdict the jury have found he was not proved to have been present and assisting. A voluntary statement made by an accused person is admissible as a " confession ". He can confess as to his own acts, knowledge or intentions, but he cannot " confess " as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an " admission " of this nature.

The passage in the statement of the accused relied upon by the Crown is as follows:

> " When Chandee, No. 2 accused, came back Sunday morning 10-3-'57 about 5 o'clock, he and Jagolall (No. 5) begin to gaff, and Jagolall ask Chandee why he shoot the man, and Chandee say when I say stick it up the man put he hand pon the revolver foh draw am out, and then Chandee and Battle Boy (No. 4) shoot am."

A statement of this nature cannot in their Lordships' opinion be regarded as equivalent to evidence by witnesses of the acts spoken to in this conversation and as sufficient to warrant as against the appellant a finding that Chandee (No. 2), and/or Battle Boy (No. 4), both of whom the jury acquitted, in fact committed the murder.

Their Lordships find it difficult to believe that in any event the jury applied this process of reasoning in arriving at their verdict. They consider it much more likely that the jury failed to appreciate the distinction between incitement to murder or conspiracy and being an accessory before the fact and that the passage in the trial Judge's summing up dealing with the appellant's case at page 194, l. 26, may have contributed to this result. He there said: " If you feel sure that the evidence does not prove that he was there on the dam, but that he conspired with others to rob this pay-roll money and to commit this crime of robbery with violence with loaded guns, then you may convict him of the offence of being an accessory before the fact to murder." In so saying their Lord-

ships do not desire to be unduly critical of the learned trial Judge's summing up taken as a whole. This was a most difficult and troublesome case to deal with and was not made easier for Judge or jury by the numerous objections which were taken at various stages, none of which are now relied upon.

Whatever may have actuated the jury in coming to these inconsistent verdicts their Lordships are satisfied on an examination of the evidence that there was no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at.

Their Lordships have accordingly humbly advised Her Majesty that this appeal be allowed, the verdict against and sentence upon the appellant be quashed and a verdict of not guilty entered.

(39517) Wt. 8021—25 100 10/58 D.L

In the Privy Council

SURUJPAUL CALLED DICK

v.

THE QUEEN

DELIVERED BY LORD TUCKER

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1958