[2011] UKPC 3
Privy Council Appeal No 0104 of 2009

JUDGMENT

Denis Alma Robinson *v* The Queen

From the Court of Appeal of Bermuda

before

Lady Hale
Lord Mance
Lord Kerr
Lord Dyson
Sir Anthony Hughes

JUDGMENT DELIVERED BY
Sir Anthony Hughes
ON

9 February 2011

Heard on 15 December 2010

Appellant	*Respondent*
John Perry QC Craig Attridge (Instructed by Simons Muirhead & Burton)	Rory Field Howard Stevens Cindy Clarke (Instructed by Charles Russell LLP)

SIR ANTHONY HUGHES:

1. The appellant Robinson was one of two defendants convicted on 2 February 2006 before the Chief Justice of Bermuda and a jury of the murder of two twin brothers. The Crown case against him was that he had aided the other man, Burgess, to commit the offence. It was not the Crown case that Robinson had himself used any force upon either of the victims. Robinson's appeal against his conviction was dismissed by the Court of Appeal for Bermuda. He appeals to Her Majesty on grounds essentially the same as those advanced before the Court of Appeal. The principal grounds require the Board to examine the basis on which the Crown presented its case against Robinson, and the directions which the Chief Justice gave to the jury on the critical issue of guilt as a secondary party aiding the principal offender. If the conviction is upheld, there is also a limited appeal against sentence under which the Board is invited by the appellant to remit the matter to the court below with a direction that it be further remitted to the trial judge; on this sentence issue the parties are agreed that that is the appropriate order.

2. Burgess owned and operated a gambling den in Elliot Street, Hamilton. Robinson was a longstanding friend of his and had been since they had been at college together overseas ten or more years previously. The two deceased were twin brothers, called Jahmal and Jahmil Cooper. It was common ground that there had been a grievance, at any rate in the past, between Burgess and the twins, one or both of whom he accused of having robbed his father. Sometime around 0300 in the early hours of the morning of Saturday/Sunday 12/13 March 2005 the twins visited Elliot St. They left and rejoined a friend, Cann, in the street outside. They were shortly joined by Burgess and Robinson. Also present, although not necessarily arriving together, were three others, called Whitter ("Vat Vap"), Schraders ("Popeye") and Bartrum ("Springer"). It was the intention of the twins to go to a club called the "Ambassadors". Burgess and Robinson said that they would go too, and all 7 set off in Burgess' car and Robinson's van. Burgess, however, drove away from the club and to a house to which he had access in a different part of town. Robinson, carrying with him Cann and one of the twins, also drove there. Everyone got out of the vehicles. There was evidence, if the jury accepted it, that Burgess and Robinson then went inside the house, which was in the course of building work, and cleared away some of the contents of the downstairs room. Burgess then emerged and took the twins into the house. The evidence was that he had taken hold of them, at first apparently in a friendly fashion with an arm around their shoulders, but that this hold had rapidly been converted into aggressive headlocks or similar, forcing them into the room. Inside the room, Burgess had

first punched and beaten the twins and then had attacked them with a baseball bat which was already in the room. Neither was seen alive after that night. Their decomposing bodies were found a month later down a cliff in the north east of the Island. They both had severe fractures consistent with beating with the bat, and of a kind which would have been fatal.

3. Eye-witness evidence of what had occurred at the house was given by Cann and Whitter. Cann had left the room part way through what happened. He said that when he showed signs of discomfort or dissent Burgess had turned on him as if to hit him also and that he had then been put out by Robinson. There was evidence, if the jury accepted it, that Robinson had stood inside guarding the door to the room where the attack on the twins was being carried out by Burgess, both before and after putting out Cann, and indeed that the door needed to be held shut. Cann said that he heard Burgess ordering Robinson to go to see where he (Cann) had got to. According to Whitter, a time came a little later when he announced that he "could not handle it any more". He, Schraders and Springer left. Burgess called Schraders back, gave him some money, told Robinson to take them to the Ambassadors and said that he would meet them there later. At that stage, the evidence suggested that Jahmal was already fatally injured. Jahmil was lying semi-conscious; he had both been punched and had his legs fractured by blows with the bat. Much later, the post-mortem established that he had received at some stage serious injuries to the face and neck/spine, and to the liver, which strongly suggested beating to those areas also. Neither Cann nor Whitter spoke of seeing such blows and so it was not proved that those were inflicted before they, and thus Robinson, had left. It was, on the pathological evidence, these later blows which were the fatal ones in the case of Jahmil.

4. At the Ambassadors Club, according to Whitter, Robinson dropped off his three passengers but did not get out himself and said that he was going back to Burgess. Sightings by Cann of his van, travelling in both directions, supported this evidence. The Crown adduced evidence of CCTV footage from a camera in Flatts Village some way east of the scene of the crime heading in the direction of the cliff where the bodies were dumped; it showed a white van passing east at about 0540 and a white van passing back westwards about 50 minutes later. The van (or possibly vans) caught by the camera appeared to be the same model as Robinson's and to have a logo on the doors as his had, but the detail of the logo could not be made out. In the van there was later found a smear of blood with DNA matching Jahmal; it was on the inside of the sliding side door in a position in which anyone cleaning the van could easily miss it.

5. Robinson did not give evidence, although Burgess did, advancing an alibi for himself which the jury clearly rejected. Robinson's case, as advanced by counsel through cross-examination and argument, was that although he was

shown to be present, he was not shown to have done anything to aid Burgess. He was, it was said, in no different a position from Cann, Whitter or the other two present. The initial driving to the house, rather than to the club, was explained by his simply following Burgess and realising where he was going, and he had said something consistent with that to Cann at the time. Burgess' attack on the twins, and especially the use of the baseball bat, had taken Cann and Whitter by surprise, so it followed that the same could be said of Robinson. The putting out of Cann, being told to look for him, and the deliberate positioning at the door were challenged in cross-examination, and inconsistencies in the evidence were said to demonstrate the unreliability of the witnesses. The CCTV footage was inconclusive; the van(s) could not reliably be identified as Robinson's, and even if that is what the camera showed, there were many other places that might have been visited in the easterly direction apart from the cliff. The blood in the van could easily have got there by secondary transfer from the clothes of one of the three people taken back to the Ambassadors, any one of whom might have got in the way of spraying blood during the attack.

The law

6. The principles of liability in crime are governed in Bermuda by the Criminal Code, under the Criminal Code Act 1907. By section 287 murder is committed (inter alia) when a defendant kills with the intent either to kill or to do grievous bodily harm. Thus the rule mirrors the common law.

7. Section 27(1), although headed 'Principal Offenders', deals also with what are generally referred to as secondary offenders. It provides:

> "(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-
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> (a) every person who actually does the act or makes the omission which constitutes the offence;
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> (b) every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the offence;
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> (c) every person who aids another person in committing the offence; and
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> (d) any person who counsels or procures any other person to commit the offence."

The rule that secondary parties may be charged as principals mirrors that contained in section 8 of the Accessories and Abettors Act 1861 in relation to England, Wales and Northern Ireland.

8. Section 28 of the Code provides for the particular form of secondary liability which arises when D1 and D2 embark together on crime A, and in the course of it crime B is committed by D1. In the common law this kind of secondary liability is that described in the line of cases whose familiar landmarks include *Chan Wing-Siu v The Queen* [1985] AC 168, *Hui Chi-Ming v The Queen* [1992] 1 AC 34, *R v Powell and English* [1999] 1 AC 1 and *R v Rahman* [2008] UKHL 45; [2009] AC 129. It differs from other forms of secondary liability in that it may exist even where D2 does not wish D1 to commit crime B. It arises because by lending himself to crime A he may have sufficiently involved himself also in crime B. Section 28 provides as follows:

> "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, then each of such persons is deemed to have committed the offence."

It is to be observed in passing that that test for this form of secondary liability is somewhat wider than is the common law test of actual foresight by D2 of crime B. No more, however, needs to be said about this form of secondary liability. Whether or not this case might have been presented as falling within it, the Crown understandably limited its case to aiding within section 27(1) of the Code.

9. The Board agrees that in a jurisdiction governed by a code the starting point is the language of the code, rather than the common law. So far, however, as aiding within section 27(1) is concerned, there is no difference of any significance between its provisions and the common law. The omission of the word 'abet' is of no significance, for its meaning is encompassed in any event within 'counsel' or 'procure' and it may be also within 'aid'. The Chief Justice's simple direction that 'aid' means 'assist' was a helpful and accurate rendering of the essence of this form of secondary liability, whether under the code or at common law.

<u>The Crown's case</u>

10. The indictment was in common form and simply alleged that each defendant murdered the two deceased. In answer to a request for particulars made on behalf of Robinson, the Crown responded, so far as material, as follows in respect of each of the victims:

> "Denis Alma Robinson….did aid Kenneth Jermaine Burgess in committing the offence of murder … in that he:
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> (i) intentionally encouraged … Burgess by his presence or behaviour to commit the offence; or
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> (ii) intentionally conveyed to … Burgess by his presence and behaviour that he was assenting to and concurring in the commission of the offence; or
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> (iii) intentionally helped … Burgess to commit the offence pursuant to the provisions of section 27 ... of the Criminal Code."

11. As the evidence at trial unfolded, the Crown's case became clearer, as may generally happen at trial. By the end of the evidence, the principal planks of the Crown case were succinctly and helpfully summarised for the jury by the Chief Justice as follows:

> "…it's the Crown's case against Robinson that he knowingly assisted Burgess by helping set up what happened, by bringing one of the twins, and by preparing the scene, and that he was present during part at least of the beatings and assisted by standing guard at the door and by shoving Cann out of that door, and then later by removing the others and taking them to Ambassadors."

As the Chief Justice went on immediately to explain to the jury, the Crown also relied on its evidence that Robinson went straight back after taking the others to the Ambassadors, and helped to dispose of the bodies. He rightly told the jury that if Robinson's assistance was confined to help after the event, that would not make him guilty of the murders. But he also told the jury, as was also plainly correct, that if they found that Robinson had indeed helped Burgess after the event in this way, that could be evidence which pointed towards his having been actively assisting also at the time of the killings.

The Appeal

12. For the appellant, the principal submission of Mr Perry QC is that by referring to, and adopting, the threefold formulation of aiding which appeared in the particulars to the indictment (see para 10 above), the Chief Justice inadvertently misdirected the jury. Says Mr Perry, the second particular adds nothing to the third but carries the risk that the jury may deduce from it that mere presence and agreement can constitute aiding so as to make a secondary party guilty. This was not a case in which verbal encouragement was really suggested. Nothing less than some positive act of assistance would do to make Robinson guilty.

13. It would appear that the second particular has its origin in the direction given to the jury in the Australian (Victoria) case of *R v Lowery and King*, a case which subsequently reached the Board on a quite different point of admissibility of evidence: [1974] AC 85. The direction was not under consideration in either the Court of Appeal or before the Board. It was referred to in passing in the Queensland case of *R v Sherrington and Kuchler* [2001] QCA 105, at para 12, where the criminal code is in the same terms as the Bermuda code. But that was in the context of a case where each defendant was shown himself to have used violence upon the deceased and the issue was whether each was aiding, ie assisting, the other; the direction was not itself under question.

14. The Board is disposed to agree that to frame an allegation of aiding in the form of the second particular does carry danger and is best avoided unless carefully qualified and explained. It courts the risk that insufficient attention is paid to the undoubted requirement that aiding imports a positive act of assistance. Of course that positive act of assistance may sometimes be constituted by D2 being present, and communicating to D1 not merely that he concurs in what D1 is doing, but that he is ready and willing to help in any way required. The commission of most criminal offences, and certainly most offences of violence, may be assisted by the forbidding presence of another as back-up and support. If D2's presence can properly be held to amount to communicating to D1 (whether expressly or by implication) that he is there to help in any way he can if the opportunity or need arises, that is perfectly capable of amounting to aiding within section 27(1)(b) and (c). It is, however, important to make clear to juries that mere approval of (ie "assent" to, or "concurrence" in) the offence by a bystander who gives no assistance, does not without more amount to aiding. It is potentially misleading to formulate aiding according to the second particular without that qualification and without explaining that the communication of willingness to give active assistance is a minimum requirement.

15. In the present case, however, the dangers associated with the second particular were effectively and succinctly removed by the clearest of directions given by the Chief Justice. Although he recited the terms of all three particulars, he explicitly told the jury:

i) that mere presence was not enough to constitute aiding;

ii) that presence plus secret approval or enjoyment or even secret intention to help if needed does not do so either; and

iii) that in order to make a bystander guilty "he must do something positive, intending to help or to encourage".

16. Mr Perry's second submission is that the judge erred in not telling the jury that nothing which had happened before the production of the baseball bat could be considered when asking whether or not Robinson was aiding or assisting Burgess. He contends that section 27 of the Code is clear in requiring that the aiding be in, or for the purpose of, committing "the offence". The offence in this case is murder. Even if there was evidence of assistance in a beating with fists it could only be after the production of the baseball bat that the offence of murder was committed. After that there was, he submits, no evidence that Robinson did anything at all beyond continue to be present, and, he argues, mere presence cannot suffice.

17. It is not safe to assume, as Mr Perry does, that the jury must have accepted, at least as a possibility, that the production of the bat was as much a surprise to Robinson as it was to the others present. There was a clear prima facie case for the consideration of the jury that the diversion to the house, out of the way of the apparent route to the Ambassadors, and the decanting of the twins there, was part of a plan by both men to allow Burgess to take his revenge on them, and was not accidental. Robinson had, on the evidence, been inside the room assisting Burgess in doing something to its contents, which must have included the bat, before the twins were taken into it and beaten. However, whether this was so or not, the argument is unsound. Robinson's actions before the bat was produced, for example by putting out Cann, were perfectly capable of amounting to evidence from which the jury could infer that his continued presence was not simply that of a bystander, but was to give assistance as required. Moreover, it was plainly open to the jury to conclude that he was standing guard over the door in order to permit Burgess to attack the twins uninterrupted, whether or not it was necessary to hold the door shut. That, if it was done, was a positive act of continuing assistance which was rendered both before and after the production of the bat. For both reasons, it would have been wrong for the judge to tell the jury that nothing which

happened before the production of the bat could be relevant to the question of whether Robinson was aiding Burgess or not.

18. It is of course clear law, whether under the Code or at common law, that an aider (D2) is guilty in respect of acts which he assists the principal offender (D1) to commit, knowing what D1 is about, so that if D1 steps right outside what was contemplated by D2, the latter will not be guilty. That, however, assumes that D2's assistance ceases upon the fundamental departure by D1. It is clearly otherwise if D2 continues to render assistance after a change of direction by D1. In this case, even if the production of the bat was entirely unexpected to Robinson, there was a clear case of continued assistance afterwards. The judge made the principle crystal clear to the members of the jury. He directed them that if Robinson did not know that the bat was to be used he would not be a party to anything done with it, even if he had been assisting up until that point, unless he continued to lend himself to the enterprise by continuing to aid Burgess in full knowledge of what was going on. That direction was impeccable.

19. Mr Perry's third submission is that the judge should have withdrawn from the jury count 1, relating to the murder of Jahmil, on the grounds that although he was beaten in the presence of Robinson, the preponderance of the evidence suggested that the fatal injuries were inflicted after Robinson had left to drive the others back into town to the Ambassadors. The Board is satisfied that the judge was right not to do so. There was on the evidence a very serious attack on Jahmil whilst Robinson was present and, if the jury so found, assisting. It led to his being rendered unconscious or semi-conscious and having his legs broken by blows with the baseball bat. Robinson then removed the other witnesses, at a time when at least one of them was showing signs of dissent from what was being done, and did so at the order of Burgess. That left Burgess alone to complete the killing. Precisely at what stage he did it (and whether when alone or on Robinson's return) could not be known. But the jury was plainly entitled to find that Robinson both removed the witnesses and also went back in order to continue his assistance in the enterprise as a whole, and then did so by helping to dispose of the bodies. With or without the return, it was open to the jury to find that Robinson was guilty of aiding in the murder of Jahmil.

20. It is not necessary to deal separately with the grounds under which Mr Perry submitted that the judge ought to have withdrawn the entire case against Robinson from the jury, and/or that the jury's verdicts were unreasonable. Enough has been said to demonstrate that this case raised what were pre-eminently jury questions, namely what was the proper conclusion to be drawn about what Robinson did and whether he did it in order to assist Burgess in his attack on the twins, knowing that it was perpetrated with intent either to kill or

to do grievous bodily harm. The conclusions reached by the jury were properly open to it on full and accurate directions given by the judge.

21. Mr Perry's remaining grounds relate to the admission in evidence of the CCTV footage and the judge's directions about it. The stills from the footage had been enhanced by a witness, Mr Livecchi, but were not sufficiently clear to be indisputably of Robinson's van. Mr Livecchi agreed that the driver could not be seen, nor the registration number or the logo read. He himself could not identify the make of van. Says Mr Perry, if the expert could not identify the van as Robinson's the jury could not either. The judge should either have excluded the evidence, as he refused to do, or should have prevented the jury from making their own comparison of the photograph of Robinson's van with the stills from the CCTV.

22. It may well be that Mr Livecchi could not identify the van, but, as he perfectly properly said, he was an expert in photograph enhancement, not in vehicle recognition. There was other evidence, from a police officer, that it appeared to be a Mitsubishi of the same make as Robinson's and there were ample similarities of appearance for the jury to consider. True it was that there were 165 such white Mitsubishi vans on the Island, but the fact remained that the evidence that one of them was to be seen heading in the direction of the place where the bodies were dumped, at 0540 in the morning quite shortly after the murders must have been committed, was not irrelevant or inadmissible evidence. The judge left it for the jury to assess the evidence, including by comparison of the photographs, which did show some kind of logo on the door of the questioned van(s). It does not appear that at the time when the judge was asked to exclude the CCTV stills it was known that there was a local regulation under which all commercial vans had to display the name of the enterprise somewhere on the sides, but even when this was known it did not follow that all would have it on the doors, or that the appearance of all would be consistent with Robinson's logo, as this one arguably was. In any event, the common features of the photographs and Robinson's van, and the limitations upon the comparison, had been fully debated. The jury was not being invited or permitted to conduct private research on a topic which had not fully been argued out. The judge was quite entitled, on seeing the photographs, to take the view that they were admissible for the jury to examine for themselves. He had applied the right test, namely whether the jury could properly make such a comparison given the quality of the photographs, and had excluded some other footage from a different CCTV camera on the grounds that there the quality was insufficient. When he summed the case up, he set out both the comparison features and the obvious limitations on what could be seen, in full. The Board agrees with the Court of Appeal that it would have been better if the judge had directed the jury that it was impossible to be sure from the photographs alone that this was Robinson's van, and that the significance of the photographs and their timing therefore went to support the evidence (provided by the return to

the scene and the blood smear) pointing towards Robinson's assistance. But the judge specifically directed the jury that unless it was sure that the van was Robinson's the evidence was to be ignored; it is plain that the jury cannot have identified the van solely from the photographs, so the effect of that direction was if anything favourable to the defendant.

23. For these several reasons, the Board will humbly advise Her Majesty that the appeal against conviction should be dismissed.

Sentence

24. Section 288 of the Criminal Code provides as follows:

> "(1) Any person who commits the offence of murder shall be sentenced to imprisonment for life:
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> Provided that where any person is sentenced under this section, such person shall, before any application for his release on licence may be entertained or granted by the Parole Board…serve at least fifteen years of the term of his imprisonment."

Separate provision is made by section 286A for the separate offence, not in question here, of 'premeditated murder'; in that case the prescribed minimum term is 25 years. Section 286A(2) is in these terms:

> "Any person who is convicted of premeditated murder shall be sentenced to imprisonment for life without eligibility for release on licence until the person has served twenty-five years of the sentence."

25. The Chief Justice regarded himself as bound by section 288 to pass sentence of life imprisonment and disabled by it from directing any different minimum term from 15 years to be served before parole could be considered.

26. The Court of Appeal allowed Robinson's appeal against sentence, holding, for the reasons which it fully explained, that the proviso to section 288 was unconstitutional in that it removed from the judiciary the power to make an order for a minimum term proportionate to the facts of the offence. It

substituted a sentence of life imprisonment, which it accepted was mandatory, but with a minimum term of 12 years before consideration of parole.

27. However, because the Court of Appeal reserved its judgment on the constitutional question, it had not heard submissions on behalf of Robinson as to the appropriate length of the minimum term, if, as turned out to be its decision, the judge had power to diverge from 15 years.

28. The appellant challenges the order of the Court of Appeal only to the extent of inviting the Board to remit the question of minimum term, with a direction to the Court of Appeal that it be considered by the trial judge upon hearing submissions on either side. The Crown joins in asking the Board to make such an order. It has not, however, lodged any cross-appeal against the decision of the Court of Appeal on the constitutional point.

29. Just before the hearing before the Board, it became known that in a different trial the judge had, in reliance on the decision of the Court of Appeal in this case, passed a sentence of life imprisonment in a case of premeditated murder, with which he coupled a direction for the serving of a minimum term greater than the 25 years provided for by section 286A. Observing that this was likely to be challenged, the Court of Appeal asked the Crown to pass on to the Board its invitation to consider whether in the present case it might be possible to express an opinion on the constitutionality of both sections 288 and 286A. It is understood that another case is also likely to raise the lawfulness of a minimum term longer than 15 years which has been directed in a case of 'simple' (ie not premeditated) murder.

30. It may well be that the Court of Appeal was under the impression that the Board was to be entertaining a cross-appeal by the Crown against its conclusion upon the constitutional point in the present case. In fact, however, it is not.

31. However that may be, whilst the Board entirely understands the practicality of that invitation, it is one which it is not possible to accept. It came so shortly before the hearing that there was no opportunity for there to be any proper written submissions on the point on either side. The point is clearly one of some constitutional importance. It would be quite inappropriate – and equally unsatisfactory - for the Board to express a view about it without any appeal before it which raises the question, without detailed argument and a full set of relevant materials, and in a manner which would affect other cases not before it. Accordingly, resolution of any dispute as to the lawfulness of

sections 288 and 286A will have to await a reasoned decision of the Court of Appeal and a properly constituted appeal therefrom on the issue.

32. For the reasons explained, the Board will humbly advise Her Majesty that Robinson's appeal against sentence should be allowed to the extent of remitting the matter to the Bermuda Court of Appeal with a direction that the question of sentence be further remitted to the trial judge for consideration, upon submissions on each side, what direction ought to be made as to minimum term.