[2020] JMSC CRIM 06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CASE NO. 2017HCC00754

BETWEEN **REGINA**

AND **UCHENCE WILSON AND OTHERS**

OPEN COURT

Jeremy Taylor QC, Claudette Thompson, Orrette Brown and Ruth-Anne Robinson for the Crown

Lloyd McFarlane, Michael Howell, Jason Mitchell and Nicholas Kellyman for Uchence Wilson

CJ Mitchell and Paul Gentles for Fitzroy Scott, Cornel White, and Tashina Baker

Vanessa Taylor for Stephenson Bennett

Denise Hinson and Kerry-Ann Wilson for Machel Goulbourne

Richard Lynch for Michael Lamonth

Tamika Harris for Derron Taylor

Cecile Griffiths Ashton and Roxaine Smith for Kerron Walters

Christopher Townsend and Aneika Townsend for Lanworth Geohagen and Judith Johnson

Xavier Leveridge and Kamisha Mittoo for Tevin Khani, Donovan Cole, Sheldon Cripps and Sheldon Christian

Jacqueline Cummings for Junior Rose

Donna McIntosh Brice Gayle and Tameka Menzie for Kenith Wynter

Donald Bryan and Alexander Shaw for Dane Edwards

Sean Osbourne for Shantol Gordon

Sasha-Kay Shaw for Odeen Smith

Latoya Lattibeaudiere for Shadday Beckford

Peter Champagnie QC for Lloyd Knight

Pamella Shoucair Gayle for Jermaine Stewart

Jacqueline Cummings and Giovanni Gardner for Ricardo Serju

March 5, 7-8, 11-15, 18-22 and 25-28; April 1-5, 8-11, 25-26 and 29-30; May 1-3, 6-9, 13-17, 21-24 and 27-30; July 1-5, 8, 15-16, 18-19, 22-24 and 29-31; September 18-20 and 23 of 2019; and September 21, 2020

CRIMINAL LAW – CRIMINAL JUSTICE (SUPPRESSION OF CRIMINAL ORGANIZATIONS) ACT - SECTIONS 10 (1), (2) – AIDING AND ABETTING – ACCESSORY BEFORE THE FACT – ACCESSORY AFTER THE FACT – CONCEALING AND HABOURING PERSON WHO IS PART OF OR PART OF CRIMINAL ORGANIZATION

SYKES CJ

[1] These written reasons are to be read along with **R v Carlington Godfrey and others** (CACT201800451) [2020] JMSC Crim 04. The understanding of the law outlined there applies to this case. The court will now address the specific offences that arise in this case that did not arise in **Godfrey's** case.

Section 10 of The Criminal Justice (Suppression of Criminal Organizations) Act (hereinafter referred to as **CJSOCOA)**

[2] Section 10 (1) seeks to criminalize the different modes of participation in the commission of serious crime by a criminal organization. It does so by making it a criminal offence to knowingly aid or abet a criminal organization, or become an accessory before, or after the fact, in the carrying out of a serious offence by a criminal organization.

[3] To understand these offences, it is necessary to refer to the common law and then show how the common law relates to these statutory offences. The three common law concepts utilized in section 10 (1) are aiding and abetting, accessory before the fact, and accessory after the fact.

[4] The common law concepts used in section 10 (1) are drawn from the vocabulary used in relation to misdemeanours and felonies. Jamaica retains the distinction between these two classes of offences. At common law there were two classes of offences. The more serious offences were known as felonies and the less serious were known as misdemeanours. Both categories were created either by the common law or by statute. Initially the classification was by judicial decision but as time went any statute creating a new offence would state explicitly whether the offence was felony or misdemeanour. If the statute did not state explicitly that the offence was a felony, then by default it was a misdemeanour. The classification had consequence for procedure and practice in relation to the offence created. For example, if was classified as misdemeanour, the concept of accessory after the fact did not apply for at common law no such concept existed in relation to a misdemeanour. Also if the offence was created but was not a summary offence and the mode of trial was not specified then by default the mode of trial would be on indictment before a jury (unless jury trials were abolished) and the venue would be before a superior criminal court of record with unlimited criminal jurisdiction. The reason is that there is no such thing as an offence without a mode and venue of trial.

[5] Misdemeanours include summary offences created by statute (**Du Cross v Lambourne** [1907] 1 KB 40, 44; **Gould and Company v Houghton** [1921]1 KB 509, 513 – 514). [1]

[6] Historically, the criminal law, for the purpose of punishment and other matters, developed vocabulary to distinguish between the different ways in which a person could participate in a crime. The law sought to distinguish between pre-commission of crime activity, the commission of the actual crime itself, and post-commission of crime activity. The law went further to develop a vocabulary to distinguish between those present at the scene of the commission of the crime but did not do the actual act which amounted to the

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[1] ***Du Cross by Lord Alverstone****: In Burn's Justice, 30th ed. vol. 3, at p. 1008, under the title "Misdemeanour," it is stated that: "This word, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name.* ***....*** *A misdemeanour is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; and misdemeanours comprehend all indictable offences which do not amount to felony.* ***....*** *In crimes below the degree of felony there can be no accessories; but all persons guilty therein, if concerned at all, are principals." … Keeping in view the fundamental distinction between felonies and misdemeanours and the impossibility of there being in the case of misdemeanours accessories or aiders and abettors as distinct from principals, one finds that s. 5 of the Act of 1848 provides that a person aiding and abetting may be charged with the principal offender and is liable to the same punishment. Prima facie I should have thought that that meant charged with the same offence as the principal offender. It is true, as the case of Stacey v. Whitehurst shews, that aiders and abettors may be charged separately, but it was pointed out in that case that they could also be charged as principals. It is contended that that is true only of misdemeanours in the limited sense of indictable misdemeanours, and Mr. Avory relies on the difference between the language of s. 5 of the Act of 1848 and s. 8 of the Act of 1861. I am not prepared to say that s. 8 does not apply to summary convictions.*

In ***Gould*** *Lord Reading stated: …, and it cannot be disputed that in misdemeanours (and treason) all who take part in the offence may be proceeded against as principals.* ***Misdemeanour in this connection is not limited to indictable misdemeanours, for guilty participation in any offence punishable by summary conviction is a misdemeanour within this principle of law: Du Cros v. Lambourne****. It is admitted at the bar that the appellants could have been lawfully prosecuted as principals either together with Gore or before or after Gore's conviction by virtue of the Summary Jurisdiction Act, 1848, s. 5, and the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 8, and I would add, under the common law, for the statutes are in this respect declaratory of the common law: Lord Alverstone C.J. in Du Cros v. Lambourne. If the appellants had been convicted with Gore or otherwise as principals they, equally with Gore, would have been entitled to the protection of the twenty-eight days' limitation of time under s. 19 of the Sale of Food and Drugs Act, 1899.* (my emphasis)

crime and those who were present at the scene of the crime and did the actus reus with the appropriate state of mind. For example, in felonies, the law, called those who provided counselling (as in advice), procuring (doing things to enable the commission the crime, and encouragement (motivating persons to commit the crime) accessories before the fact. Fact here means the act of committing the crime. These persons were not present at the crime scene but played their part before. Then were there those who went to the scene of the crime with the intention of assisting the commission of the crime but did not do the act which amounted the crime. In felony language these were called principals in the second degree. They have also been termed accessories at the fact. Finally, there were those who were present at the scene, had the intention to commit the crime and did the act amounting to the crime. These were called principals in the first degree. [2]

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[2] ***Russell on Crimes*** *(8th) Vol 1 page 109: All persons who take part in the commission of a felony are in construction of law felons: but at common law a distinction was drawn in the case of felony between – (i) Principals in the first degree; (ii) principals in the second degree, or accessories at the fact; (iii) accessories before the fact; (iv) accessories after the fact. This distinction was of importance with reference both to procedure and punishment: but much of the earlier case law on the subject has been rendered obsolete by legislation.*

At page 110: Principals in the first degree are those who have committed the fact with their own hands or through an innocent agent whether the fact be a complete crime or an incitement to commit a crime.

In reason and in misdemeanour all persons participating are liable as principals.

At page 111: Principals in the second degree are those who were present, aiding and abetting at the commission of the felony. They are often termed aiders and abettors, and sometimes accomplices: but the latter appellation will not serve as a term of definition, as in includes all the participes criminis, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.

As Sir William Blackstone stated is his monumental work, ***Commentaries on the Laws of England: Book IV: On Public Wrongs, Chapter 3****: Of principals and accessories page 15:*

A man may be principal in an offence in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present, aiding and abetting the fact to be done. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder and another keeps watch or guard at some convenient distance.

[7] From what has just been said, there were two things that distinguished one mode of participation from the other. The first was the time at which the activity took place. Second, location of the defendant at the time the crime was committed. [3] In felonies, the law undertook to deal with more problem. What to do about persons who knew that a felony had been committed and they, with that knowledge, assisted (receives, relieves, comforts or assists) the felon (the person who committed the felony) with the intention to enable escape, detection, apprehension, trial or punishment? Felony law called those persons accessories after the fact. [4] Of course, crimes can be committed through innocent agents or remotely (detonating bomb by remote device or through poison). In these instances, the innocent agent would not be a felon for the plain reason that he/she did not do any act with the requisite state of mind (hence the expression innocent agent) but the person who acted through the innocent agent, though absent from the scene of the crime would be the principal in the first degree. Similar reasoning applies to the bomb detonator and the poisoner.

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[3] ***R v Beverly Champagnie*** *SCCA 22, 23, & 24/80 (unreported) (delivered September 30, 1983) (Court of Appeal of Jamaica) citing Archbold's (34th ed) paragraph 4141, stated at page 18: An accessory before the fact is one who though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.*

See too ***Russell on Crimes*** *(8th) Vol 1 page 120: An accessory before the fact is he who, being absent at the time of the offence committed, procures, counsels, commands, or abets another to commit a felony. The term accessory is in practice confined to cases of felony. It is not used with reference to high treason. In crimes under the degree of felony there are no accessories: but all persons concerned therein, if guilty, are principals. Those who by hire, command, counsel, or conspiracy, or by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact.*

[4] ***R v Nathan Foster*** *SCCA No 131/80 (unreported) (delivered November 5, 1981) (Court of Appeal of Jamaica), page 9 citing paragraph 4155 of Archbold's 36th: An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. To constitute this offence, it is necessary that the accessory at the time when he assists or comforts the felon, should have notice, direct or implied, that he had committed a felony. It is also necessary that the felony should be completed at the time the assistance is given.*

[8] Thus, broadly speaking, accessories, other than the accessory at the fact (principal in the second degree) are absent from the scene of the commission of the crime whereas principals in the first and second degree are present. It should be obvious that a person can be a principal in the second degree, and an accessory after the fact in relation to the crime. The person can be an accessory before the fact and an accessory after the fact in relation to the crime. However, the same person cannot be a principal in the first degree and also a principal in the second degree in relation to the same crime. The key to understanding all this is to have in mind that it is one crime committed and there are different modes of participation. This point was made by Lord Tucker. [5]

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[5] ***Surujpaul (called Dick) v R*** *[1958] 1 WLR 1050 It may be convenient at this stage to refer to a passage in Russell on Crime, 11th ed., at pp. 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, or 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."*

[9] One reason why it is necessary to keep in mind the different modes of participation is that by statute a principal in the second degree as well an accessory before the fact can be indicted – as in the actual wording of the indictment – in language that is framed as if the person was a principal in the first degree but in reality the person is either a principal in the second degree or an accessory before the fact. [6]The distinction is still important for sentencing purposes because it is wrong in principle to sentence someone as if he/she were a principal in the first degree when the case against them is really one of secondary liability. This is why it has been suggested that even with the ability to indict someone as if he/she were a principal, the better course of action is to make plain by the terms of the indictment that the person is a secondary party.[7]

[10] Felonies developed these refined concepts and distinctions because they were the more serious offence and in the early days felonies were punishable by death or transportation to penal colonies such as Australia. A felony conviction also meant forfeiture of estates in land, personal property, titles and even the ability to pass on property to subsequent generations was lost. That is to say, children could not inherit the property of a felon because the felon was not permitted to pass on property to his/her progeny. The property went to the state. Hence the sovereign's interest in having as many offences classified as felonies. The inability to inherit was called corruption of blood. The inability of the felon to pass on property was called attainder. So if a felon was attainted then his/her children suffered corruption of blood.

[11] Felonies and treason attracted attainder and corruption of blood. It is therefore not hard to see why a king or queen, in dealing with political enemies, real or imagined, would want to have a clean sweep ranging from accessory before the fact to accessory after the fact.

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[6] *Criminal Justice (Administration) Act sections 34 and 35.*

[7] ***DPP for Northern Ireland v Maxwell*** *[1978] 1 WLR 1350 where head note states: Per Viscount Dilhorne, Lord Hailsham of St. Marylebone, Lord Edmund-Davies and Lord Fraser of Tullybelton. Although by statute aiders and abettors can be charged as principals, it is desirable in cases of aiding and abetting counselling and procuring, that the particulars of offence in an indictment should make clear the nature of the case against the defendant (post, pp. 1352F, G, 1357C, D, 1359H–1360A, G, H).*

[12] Misdemeanours, on the other hand, were not seen as so serious and were punishable by fine and/or imprisonment. There was no need to have this broad range of modes of participation. However, misdemeanour had its own vocabulary for modes of participation other than being the person committing the crime. Secondary parties were called aiders and abettors, counsellors and procurers.[8] There was obviously the perpetrator of the crime. The perpetrator was the equivalent of felony's principal in the first degree. For secondary parties, aiders and abettors were those who were present at the scene of the commission of the crime assisting or ready to assist should it be necessary. These were the equivalent of felony's principal in the second degree.

[13] Counsellors and procurers were those who were absent from the scene of the crime (or the fact) but gave encouragement or assistance, before the commission of the crime, to enable its commission, were the equivalent of felony's accessory before the fact. Misdemeanour, conceptually, had no equivalent of felony's accessory after the fact. It appears that this 'gap' was filed by the offence of attempting to pervert the course of justice which covers a very wide range of conduct and so is not restricted to post-commission-of-crime conduct.

[14] In time, it became the practice in prosecuting misdemeanours to use the words aiding, abetting, counselling and procuring in the same charge without regard for the actual mode of participation of the defendant in the crime. This was so even if on the evidence the person was the actual perpetrator. This common law practice was eventually reflected in statute. With this in mind it we are now in a better position to understand section 10 (1).

[15] Other provisions in the statute dealt with perpetrators. Parliament wanted to put it beyond doubt that person assisted a criminal organization to commit a serious crime by either assisting: (1) before the time of commission of the serious offence; (b) at the time the serious offence was being committed; and (c) after the time the criminal offence was

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[8] ***Russell on Crimes*** *(8th) Vol 1 page 142: In the case of misdemeanour, no distinction in respect of procedure or punishment has ever been made between parties or privies to the offence who could, in the case of felony, be principals in the first, or second degree, or accessories before the fact. Indeed there is no such person as accessory in point of law to a misdemeanour.*

committed were caught by the criminal law. Since section 10 (1) is misdemeanour by virtue of the fact that it was not explicitly called a felony, it was necessary to legislate specifically for post-commission conduct. Parliament did this by using the common law expression accessory after the fact which means that this felony concept was now being deployed in support of a misdemeanour. The same can be said for accessory before the fact. In the case of accessory before the fact and accessory after the fact, these participants would be absent from the scene of the crime but would assist in the manner defined by the common law. Those who were present at the scene are called aiders and abettors.

[16] In summary Parliament used the concepts of:

a) aiding and abetting (misdemeanour language) to refer to those who are present at the scene of the crime ready and willing to assist the principal offender but who do not do the act of the serious offence spoken of by section 10 (1);

b) accessory before the fact (felony language) to refer to those who are absent from the scene of the crime but who, in the words of Russell on Crimes (8th), 'procures, counsels, command …';

c) accessory after the fact (felony language) to refer to those who knowing that a serious offence has been committed by a criminal organization provided assistance with the intention of enabling escape, detection, apprehension, trial or punishment.

[17] Section 10 (1) uses the language of secondary liability but does so in relation to a criminal organization carrying out a serious offence. This means that a serious offence must have been committed. Attention is now directed to section 10 (2).

[18] Section 10 (2) states that a person shall not harbour or conceal a person, knowing that the person is part of or a participant in a criminal organization. Harbouring means the act of affording, lodging, shelter, or refuge, to a person especially a criminal (**Black's Law Dictionary (8th)**. Another definition is shelter or hide (**Oxford Dictionary**). This means

that under section 10 (2) harbouring means the act of affording lodging, shelter, or refuge of a person and at the time of the harbouring the harbourer knew that the person harboured was part of or a participant in a criminal organization. Conceal means not allow to be seen; to hide; to prevent from being known (**Oxford Dictionary**). Concealment means the act of refraining from disclosure especially an act by which one prevents or hinders removing from sight or notice something (**Black's Law Dictionary (8th).** In the context of section 10 (2) conceal means refraining from disclosure by doing acts which prevent or hinder, remove from sight or notice someone known to the concealer to be part of or participant in a criminal organization at the time of the acts of concealment.

[19] This is the understanding of the law that will be applied to the facts as found by the court in this case.