IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

REGULAR JURISDICTION

PROCEEDING FOR RELIEF UNDER THE CONSTITUTION

2020-HC-BER-CIV-FDA-143

In the matter of an application under the Judicial Review Act, Chapter 3:06 and Part 56 of the Civil Procedure Rules 2016 for Order/ Writ of Certiorari and Prohibition

BETWEEN:

MARK DHOMAN

Applicant

-and-

1. THE DIRECTOR OF PUBLIC PROSECUTIONS
2. OFFICER IN CHARGE NEW AMSTERDAM PRISON
3. COMMISSIONER OF POLICE

Respondents

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Murseline Bacchus for the Applicant

Ms. Deborah Kumar, Deputy Solicitor General and Ms. Raeanna Clarke for the Respondents

Delivered October 12th 2020 [via electronic mail]

DECISION

The Applicant applied for an Order quashing the decision of Magistrate Artiga of December 3rd 2018 committing him to stand trial for the offence of Murder in the course or furtherance of Robbery contrary to section 100(1)(c)(i) of the Criminal Law (Offences) Act; CAP 8:01 on the ground that a sufficient case was not made

out in the Paper Committal as required by section 71 of the Criminal Law (Procedure) Act; CAP 10:01.

The Applicant was charged and has been committed to stand trial with four co-accused for the said offence.

The Applicant posits that the only evidence against the Applicant is a statement that the DPP says the Applicant gave to the police while under caution.

The Applicant contends that even if it is accepted that he gave a statement to the police while under caution and the contents of that statement are accepted, the offence for which he is charged cannot be proven since, firstly, the felony-murder rule cannot be applied and secondly, the principle of joint criminal enterprise is not applicable.

The DPP contends that when all of the evidence is considered, including the statements to the police while under caution given by the four co-accused, a circumstantial case can be established against the Accused.

This position by the DPP must be rejected for the simple reason and basic principle of law that the statements of the co-accused cannot be evidence against the Applicant [a co-accused].

The Applicant's contention that the felony-murder rule cannot apply is based on his submission that the State is alleging that he conspired with others to steal from the deceased victim and such an offence is not a felony, however, the State has clearly alleged that the murder was in the course of or furtherance of a robbery.

Further, according to the Applicant's own words in his statement given to the police while under caution he initiated the plans for a robbery and there is sufficient evidence contained in the depositions from which a jury can find that indeed a robbery was carried out.

In any event, whether there was a robbery, is an issue that ought to be determined by the trial Court as an element of the offence for which he has been committed to stand trial.

In this regard the Applicant's contention that the felony-murder rule cannot be applied in this case must be rejected.

The Applicant's contention that the principle of joint criminal enterprise is not applicable since he was not present at the time that the robbery took place is also rejected.

Section 25 of the Criminal Law (Offences) Act; CAP 8:01 provides;

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 written law 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.

Section 24 of the Criminal Law (Offences) Act; CAP 8:01 provides;

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

It is clear that the law is that anyone who is an accessory to a felony before the fact is liable to be punished as the principal felon.

It is also clear that an accessory before the fact is one who, though absent at the time the felony is committed, yet aid and abet another or others to commit the felony and the Applicant did this by providing the information necessary to stage the robbery according to his own words in his statement given to the police while under caution, that he initiated the plans for a robbery.

It is for a trial Court to determine whether the Applicant is an accessory before the fact by providing such information to plan the robbery and if they so find then he would have been part of the joint criminal enterprise to commit the robbery.

The statute is very clear on the liability of an accessory and therefore the submission by Counsel for the Applicant that if the Applicant was not present and participating in the actual infliction of the injuries he cannot be liable for murder is not a correct statement of the law.

Counsel for the Applicant has asked the Court to note that the principle enunciated in **R V Chan Wing-Siu** [1985] AC 168 is not applicable to this case.

The principle in **R V Chan Wing-Siu** has been further developed and in fact in **R V Powell** [1997] 3 WLR 959 the House of Lords established that the accessory need only realise that the principal might kill with intent to do so and the accessory did not himself need to have the intention to kill.

R V Jogee [2016] U.K.S.C. 8 has not been accepted as legal precedence in Guyana.

In any event, the Court does not find that any of these principles are applicable to this case based on the wording of section 25 of the Criminal Law (Offences) Act, but, assuming that they are, it will still be for the trial Court to determine if based on the evidence the offence is proven against the Applicant.

Based on the foregoing, even if it is accepted that the only evidence against the Applicant is the statement that the State says he gave to the police while under caution, the Court finds that statement provides sufficient evidence upon which Magistrate Artiga could have committed the Applicant to stand trail in the Assizes for the offence of Murder in the course or furtherance of Robbery contrary to section 100(1)(c)(i) of the Criminal Law (Offences) Act.

In the circumstances this FDA is dismissed in its entirety.

The Court awards costs to the Respondents against the Claimant the sum of $100,000.00.

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Justice N. A. Singh