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COMMON INTENTION IN SEYCHELLES LAW – A BRIEF COMMENT ON R V KILINDO

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I Introduction

Section 23 of the Seychelles Penal Code defines common intention 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 nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed an offence.”

This means that if D1 and D2 agree to commit crime X and D1, going beyond what was agreed to, commits crime Y, then D2 will also be guilty of crime Y if and only if crime Y was a probable consequence of crime X.

Before analysing what “probably consequence” means it is useful to set out English law on that point.

If D1 and D2 agree to commit crime X and D1, going beyond what was agreed to, commits crime Y, then D2 will also be guilty of crime Y if and only if he foresaw that D2 might do crime Y. (see *R v A* [2011] Q.B. 841)

The only difference is that in our law probable consequence is required whereas in English law it is foresight.

II Objective element

The first difference is that under Seychelles law whether something is a probable consequence is an objective test (whereas in England the secondary crime must be foreseen, this is subjective). This was confirmed by the Privy Council in *Furbert v The Queen* [2000] 1 W.L.R. 1716^[1].

However the determination of whether Y was a probable consequence is determined by taking into account of what D2 knew or did not know: *Furbert v The Queen*.

Consider the following example:

D1 and D2 agree to break into a house and steal. There is no agreement to kill anyone. In the course of the theft D1 takes a gun out and kills V.

Consider two alternative scenarios: (i) D2 knew that D1 had a gun, (ii) D2 did not know that D1 had a gun.

In (i) the killing can indeed be said to be a probable consequence. However that

is not the case in (ii). In (i) D2 would be guilty of murder on the basis of common intention but in (ii) he would only be guilty of breaking and entering.

English law would lead to the same result in (ii) since D2 did not know of the gun he could not have foreseen that D1 would kill V. In (i) it is theoretically possible that D2 did not foresee the killing however in practice he is likely to be convicted of murder on the basis of joint enterprise.

III What must be a probable consequence/foreseen?

According to English law what must be foreseen by A is *crime Y*. This means both the *actus reus* and the *mens rea* (if any) of Y: *R v A*

In *Kilindo v Republic* [2011] SCCA 20 the Seychelles Court of Appeal (at [22]) stated the position in English law following *R v A* as:

"It appears that in England, in cases involving joint enterprise it is not sufficient to show that a secondary act took place as a result of the agreed first act. It must also be shown that the co-accused who committed the secondary act had *intended the secondary act*."

It is respectfully submitted that this is not quite accurate. What must be shown is that D2 (the party who did not commit the secondary act) foresaw that D1 might do the secondary act with the required *mens rea*. In the case of murder (which was the charge in *R v A*) this is indeed intention (to kill or cause grievous bodily harm). But if the *mens rea* for the secondary crime was subjective recklessness then foresight by D2 that D1 would act with subjective recklessness is sufficient.

It is important to note that it need not be shown that D2 had *mens rea* of the secondary crime. All that needs to be shown is that D2 *foresaw* that D1 would have the *mens rea* of the secondary crime.

The Seychelles Court of Appeal then goes on to suggest that this principle (that A must foresee that B would act with the required *mens rea*) is not part of Seychelles law:

"[23] As I have pointed out this distinction does not arise in Seychelles because of the wording of section 23 of our Penal Code. If we are to use the same terminology as the English cases quoted above, then to put it simply the law in Seychelles is that it suffices to show that a secondary act *took place as a probable consequence of the agreed first act intended*. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first act to which they had agreed upon."

It is respectfully submitted that the Court of Appeal erred in saying that. Whilst it is true that the requirement that D2 must *foresee* crime Y is not part of Seychelles law, the requirement that D1's commission of the *actus reus* of crime Y together with the *mens rea* of crime Y was a probable consequence of the agreed first crime X is part of Seychelles law.

To hold otherwise would lead to absurd situations. Suppose D1 does the *actus reus* of Y without the *mens rea* of Y, then he is obviously not guilty of Y. But if his doing of the *actus reus* of Y was a probable consequence then D2 would be guilty

of Y (on the basis of s. 23)!

That B acting with the required *mens rea* must be a probable consequence is indeed clear from the wording of s. 23: "in the prosecution of such purpose an *offence* is committed of such nature that its commission was a probable consequence of the prosecution of such purpose". The word *offence* and not just *act* is used. *Offence* includes both the *actus reus* and the *mens rea*.

Granted, it will generally be the case if the *actus reus* was a probable consequence then so was the *mens rea*. However, this is not always the case. Consider the following example:

D1 and D2 agree to break into a house and steal. D2 knows that the person in the house is an old man (V) who may have a heart attack if a replica gun is pointed at him, he hopes that that V will remain asleep. D1 does not know that (and D2 knows that D1 does not know). D1 has a gun. D2 thinks it is a replica gun.

Let us pause to see (from D2's point of view) what the probable consequences are. It is a probable consequence that V will wake up, that D1 will point the replica gun at him and that V will die from a heart attack. This will amount to constructive manslaughter (*R v Watson* [1989] 1 W.L.R. 684). If this does indeed happen then D1 would be guilty of manslaughter as a principal and D2 would also be guilty of manslaughter on the basis of common intention.

Let us now continue with the story

V wakes up and sees them. D1 fires the gun at V. It was in fact not a replica but a real gun, D2 thought it was a replica.

D1 is clearly guilty of murder. Whilst D1 killing V was a probable consequence that he would do so with intent to kill was not. This is because it was a probable consequence (from D2's point of view) that D1 would take out a replica gun and V would die of fear (that would be manslaughter on D1's part as he does not have malice aforethought). But it was not a probable consequence (from D2's point of view) that D1 would shoot V with a real gun (as D2 thought D1 only had a replica gun). So D2 is not guilty of murder on the basis of common intention. He is nevertheless guilty of manslaughter, this is because every murder includes manslaughter and, that D1 would commit manslaughter was a probable consequence.

Here is a further example:

D1 and D2 agree to break into a house and steal. D1 is a very strong man. V is a frail old man. D1 is epileptic and can have at some occasions epileptic fits in which he does not know what he is doing. D2 knows that.

Let us consider what the probable consequence is. It is a probable consequence^[ii] that D1 would go into an epileptic fit and kill V in the process. This however would not amount to an offence because of the involuntary nature of D1's bodily movement. Also D1, not knowing what he is doing, is incapable of having *mens rea*. If that happens D1 would not be guilty of any further offence and neither would D2.

D1 pretends to go into an epileptic fit and kills V intentionally.

D1 is clearly guilty of murder. D1 killing V (in what looks like an epileptic fit) was a probable consequence but that he would do so intentionally (whilst only pretending to have an epileptic fit) was not. So D2 would not be guilty of murder on the basis of common intention.

IV Conclusion

The position in Seychelles law is for D2 to be guilty of the secondary crime Y (which was not agreed) it must have been a probable consequence that D1 would do the *actus reus* of Y with *mens rea* of Y.

Any suggestion to the contrary by the Seychelles Court of Appeal in *Kilindo* is, it is respectfully submitted, wrong. In fairness to the Court it might have been that the choice of the word "act" in "All that is necessary is that the secondary act took place as a probable consequence of the first act to which they had agreed upon" was an unfortunate choice of word. However, the rejection of *R v A* is then unclear.

It follows that when directing a jury it is insufficient to merely ask "Was V's death a probable consequence?" Rather the question should be "Was D1's killing of V with malice aforethought a probable consequence?"

In *Kilindo* it is, given the wide definition of malice aforethought, unlikely that the correct direction would have made any difference to the conviction for murder.

V Post Script

After having written this note (but before publishing it) the Court of Appeal gave its judgement in the case of *Sopha v Republic* SCA 11/2010.

At [22] Fernando JA approved of statement of law in *Kilindo* (which I criticise in this note). However at [24] he states that for one "to be convicted of having committed murder, while prosecuting the offence of robbery; the words 'of such a nature' necessarily requires proof from an objective standpoint, of knowledge of the three elements required to constitute the offence of murder, namely, the causing of death, by an unlawful act or omission, with malice aforethought; and the probability of death ensuing in such circumstances."

Merely, showing that death was a probable consequence is then (as I argued) not enough. What is most interesting is the reference to knowledge.

At [21] Fernando JA states "This brings in the element of knowledge i.e. knowledge on the part of the perpetrators as to the probable consequence of the prosecution of the offence they set out to commit. In such circumstances proof of the requisite intention on the part of the perpetrators, which may be an element of the other or second offence, need not be proved and proof of knowledge would suffice".

It is unclear what this means in terms of the direction for the jury. It could mean:

1. Did D2 know that D1 would kill V with malice aforethought?
2. Did D2 know that D1 killing V with malice aforethought was a probable consequence of the robbery?
3. Did D2 ought to have known that D1 would kill V with malice

aforethought?

4. Did D2 ought to have known that D1 killing V with malice aforethought was a probable consequence of the robbery? (this seems to be the same as "Was D1's killing of V with malice aforethought a probable consequence?")

1 seems excluded by the reference to an objective test at [23] and [24]. 3 and 4 actually seem equivalent (since whether there are a probable consequence is determined by what a reasonable person in D2's shoes would know).

Clarification by the Court of Appeal on this point would be most welcome.

At [23] Fernando JA states that the deeming provision of section 23 ("each of them is deemed to have committed the offence") is in line with the derogation to the presumption of innocence provided for in Article 19(10)(b) of the Constitution. A detailed examination of that claim is beyond the scope of this note so I shall only make a few short observations.

It is respectfully submitted that either section 23 is unconstitutional or it is not actually a limitation of the presumption of innocence and so does not need to be justified as being "necessary in a democratic society" (this requires a detailed proportionality analysis which the Court of Appeal did not undertake – see Tadros and Tierney (2004) and Dennis (2005)).

Article 19(10)(b) applies to laws that "[declare] that the proof of certain facts shall be prima facie proof of the offence or of any element thereof". By contrast the provision in section 23 is conclusive and not prima facie. No evidence can be adduced to rebut it. Nor is it concerned with only certain elements of the offence of (say) murder. Once all the requirements of section 23 are met there is nothing more to prove for D2 to be guilty of murder. As such section 23 is not a permitted derogation to the presumption of innocence and it is therefore unconstitutional: Art 47(b).

An alternative view is that Article 19(2)(a) (presumption of innocence) is not even engaged. This is because section 23 is actually not about evidence but about law. According to that view, as a matter of law, if D1 commits murder and the requirements of section 23 are met then D2 is guilty of an offence which the law terms murder. In other words, rather than "deeming" D2 to have committed murder the conventional way (i.e. actually killing someone himself with the required *mens rea* or aiding, abetting, counselling or procuring someone to do it), section 23 creates a new way of committing the offence of murder. On the debate about whether joint enterprise is a subset of accessorial liability see Virgo (2006) and Simester (2006).

For that interpretation of section 23 not to engage Article 19(2)(a) (the presumption of innocence) it would have to be argued that the presumption of innocence under our Constitution is merely procedural and not substantive. For an argument that it is substantive see Tadros (2007).

References

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*I am grateful to Professor Graham Virgo for having taught me criminal law and for his comments on this paper. All errors are, of course, my own.

[\[i\]](#) This was an appeal from Bermuda. Section 28 of the Penal Code of Bermuda is identical to Seychelles's.

[\[ii\]](#) We are assuming that the likelihood of a fit would be high enough to amount to a probable consequence. It is arguable in those circumstances that him going in the house of an old man would then be grossly negligent and so he would be guilty of gross negligence manslaughter. Even if that is so this does not detract from my point that D2 would not be guilty of murder.