NA'IM ABU AMIRAM v. ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal

Agranat J., Landau J. and Witkon J.

Criminal Law—Murder—Act of vengeance for the killing of another—Secs. 23 (1), 212, 214(b) *and* 216(b) *of the Criminal Code Ordinance.*

In broad daylight in the centre of Raanana, the appellant and his brother together stabbed one Abdush to death as an act of veneance for the slaying of their father by the son of Abdush. The appellant pleaded that the killing was an attempt and not murder since there was no evidence as to which knife wound had caused the death, nor was he an accomplice since he was of a psychopathic nature and unaware that his brother had done the killing. The onslaught on the deceased had not been premeditated but arose in the course of an accidental meeting. The appellant also pleaded that he had acted under provocation of an alleged insult to him by the victim and was therefore only guilty of manslaughter.

Held: The facts and the medical evidence showed that the appellant was aware of what was happening and even if the brother had struck the fatal blow, the appellant was an accomplice in aiding and promoting the combined effort and was equally responsible for the outcome. There had been no provocation.

Israel cases referred to:

(1) *Cr.A.* 97/57—*Zvi Kadouri and others v. Attorney-General, and cross appeal* (1958) 12 *P.D.* 1345.
(2) *Cr.A.* 46/54—*Attorney-General v. Baruch Segal* (1955) 9 *P.D.* 393.

English cases referred to:

(3) *Ackroyds Air Travel, Ltd. v. Director of Public Prosecutions* [1950] 1 *All E.R.* 933.
(4) *Thomas v. Lindop* [1950] 1 *All E.R.* 966.
(5) *R. v. Salmon* (1880) 6 *Q.B.D.* 79.
(6) *R v. Swindall and Osborne* (1846) 175 *E.R.* 95.
(7) *R. v. Downing* (1822) 1 *Cox, C.C.* 156, 160.

Tamir for the appellant.
Bach, Deputy State Attorney, for the respondent.

LANDAU J. giving the judgment of the court. The appellant, Na'im Abu Amiram, and his brother, Uri Abu Amiram, were convicted by the District Court, Tel Aviv-Jaffa, under sec. 214 (b) of the Criminal Code Ordinance, 1936, of the murder of Avraham Abdush. On appeal, appellant's counsel, Mr. Tamir, sought to

change the conviction to that of attempt to murder or, in the alternative, to manslaughter under sec. 212. We dismissed the appeal on the day it was heard, and these are our reasons.

The deceased, Abdush, was killed by the appellant and his brother Uri in broad daylight in the centre of Raanana as an act of vengeance for the killing of Michael Abu Amiram, the appellant's father, who had been stabbed to death by Abdush's son. The appellant's family had also charged Avraham Abdush personally with the killing of Michael Abu Amiram and although Avraham was acquitted of this charge the members of the family had not reconciled themselves to the acquittal. On the day of the occurrence the appellant and his brother came upon Abdush by chance when he was sitting in a jeep. They attacked him with knives and stabbed him many times until he died.

Mr. Tamir submitted two arguments. In the first, by which he sought to reduce the appellant's guilt to one of attempt to murder, he proceeds from the premise that there was no proof—and the prosecution concedes this to be true—as to which of the many stab-wounds inflicted by the two brothers had actually caused the death. That being so, the appellant is entitled to benefit from everything implied in the assumption that the death was caused by one of the stab-wounds which Uri inflicted. The doctors who gave evidence at the trial found that the appellant possessed a psychopathic personality and committed the act while his consciousness was impaired. Mr. Tamir would infer from this that the appellant was not aware at all of the fact that his brother was standing at his side and also stabbing the deceased. Without such knowledge, the appellant is not even to be regarded upon the above assumption as an accomplice to the homicidal act which was carried out by Uri.

Had the factual basis of this argument been proved, i.e. that the appellant did not know that his brother was standing beside him and stabbing the deceased, there would have been some merit in Mr. Tamir's argument, because ordinarily a person can only be considered an accomplice to another's criminal act when he knows the facts necessary to prove the offence: *Ackroyds Air Travel Ltd. v. D.P.P.* (3); *Thomas v. Lindop* (4). But just as every person is presumed to be of sound mind until the contrary is proved, so he is presumed to know what is happening around him to the extent that a person of ordinary physical and mental attributes would in similar circumstances. In the case before us the appellant could rebut that presumption only by discharging a heavy burden of proof. In the first place, both brothers had a strong common motive for carring out the act, namely, a desire to avenge

their father's death. What they said immediately after the act testifies to this (the Appellant: "This was revenge"; Uri: "He killed my father"). Secondly, both brothers acted together during the crucial stage of the attack upon the deceased as they stood next to each other stabbing him in the back. The victim sat in front of them and the wounds inflicted were concentrated on his left side. Thirdly, after they had finished, both of them fled from the place with the appellant shouting "Come, come" to his brother. It was after this that the appellant made the above remarks about vengeance, which indicates that he was aware of what he had done and why he did it. It would be very difficult to conceive that, despite all this, the appellant did not know when the act was being committed that Uri was standing next to him stabbing away, even if evidence of such lack of knowledge were given. But, in fact, there was no such evidence before the court. The appellant himself who could have given direct evidence on this point chose not to testify under oath and even then said nothing to suggest that he did not know about Uri's presence and action. Although he says in keeping with his defence plea that he acted automatically in a state of *fugue*: "I did not know what I was doing; I lunged at him, and only became conscious when my hands and clothes were spattered with blood", yet he adds: "And Uri, my brother next to me, ran off fleeing", i.e. that even according to his own statement he knew of his brother's presence at a moment close to the main occurrence.

Against all this, Mr. Tamir finds support for his submission in the evidence of the doctor alone, that the appellant acted with impaired consciousness. But this also is far from being well founded. The substance of the plea relating to the appellant's mental state, the *fugue,* was rejected by the court because the doctors who gave evidence for the defence in support thereof expressed their opinion in reliance upon factual data for which there was no basis in the evidence. As to this there is no appeal. It is true that even Dr. Rabinowitz, the principal witness for the prosecution on the medical aspect of the matter, spoke in evidence of the appellant's impaired consciousness, but one must examine his evidence more closely in order to understand the meaning of what he said (pp. 353-4):

> "I do not think that the accused was in a special mental state very different from his usual state of mind. I said 'not very' because I think that he was in a rage which in some sense reduced his consciousness somewhat, but by no means clouded it.
>
> A clouding of consciousness is always connected with a

lack of orientation. A very clear indication of clouding of consciousness occurs in an epileptic state. In this instance, when I hear that he turned to his brother and said to him 'Come, come' and invited him to join in the act, I cannot think that the accused acted without consciousness or in a state of clouded consciousness.

Impaired consciousness means in the case of a person acting in anger that all his emotions and activity are directed to the object of his anger; this is not to say that he is not in a state of disorientation or unconsciousness." [From the context it is clear that the last "not" in this quotation is superfluous and was added through a clerical error.]

To the same effect is the evidence of the second doctor for the prosecution, Dr. Meir, (at p. 347):

"I was strongly impressed by the fact that there was here a condition of impaired consciousness....In such an impaired state, consciousness exists in a qualitative sense, but it is concentrated upon one thing and neglects the rest."

In contrast, Dr. Raphaeli and Dr. Streifeld who testified on behalf of the defence speak of an absence of perceptivity, adhering to the theory of *fugue* which was rejected by the court, and in this connection Dr. Streifeld says (at p. 337) that at the moment of *"fugue"* the appellant would have had no impression of anyone's presence, be it a police officer or anyone else.

But the following words of Dr. Raphaeli, also called by the defence to support the extreme *fugue*, are interesting (at p. 307):

"The fact that the accused was in a state of consciousness at a given moment does not prove that before that he was not in a state of consciousness. *I do not contend that the accused was not in a state of consciousness; this is the accused's contention."*

Neither of these doctors was asked directly whether in his opinion the appellant knew of Uri's presence and actions at the time. From the medical evidence as a whole no such inference can be drawn at all. Although the appellant's consciousness was restricted in the sense of being completely concentrated on his objective—to strike his enemy upon whom he had rushed in violent rage—there was nevertheless no evidence before the court to enable it to find that during the onslaught

he was oblivious to the presence of Uri who stood by his side striving towards the same goal to which all of the appellant's attention was directed.

Thus collapses the main pillar of the argument which seeks to base itself upon the premise that the fatal stab was made by Uri and not by the appellant. In Mr. Tamir's words, however, there could be heard something like a sequel to this argument: that even if the appellant knew of Uri's presence and his stabs, that does not make him an accomplice of Uri because the meeting with the deceased Abdush was accidental and it had not been proved that the two brothers had conspired beforehand to attack the deceased. In any event, the appellant did not intend to help Uri do the killing but his purpose was rather that he himself should attack the victim. For this reason, it is argued, the requirements of sec. 23 (1) (b) that a person is considered an accomplice only when he "does or omits to do any act *for the purpose of* enabling or aiding another person to commit the offence," have not been fulfilled.

The answer to this part of the argument has already been given in *Kadouri v. Attorney-General* (1), where it was said (at p. 1350):

> "When Reuven, Shimon and Levi attack the victim in concert and with one mind, each doing the wounding, and there is no way of knowing who actually caused the victim's death, all of them are to be convicted of having caused the death, for this must be so whichever way you look at it. If we assume that the death was caused by Reuven he is guilty as a principal and Shimon and Levi also are fully guilty as his accomplices, and if Shimon caused the death, Reuven and Levi are the accomplices. In these circumstances it makes no difference and there is therefore no need to prove who struck the fatal blow."

To support this statement, two English decisions were cited: *R. v. Salmon* (5) and *R. v. Swindall and Osborne* (6), both of which concerned the causing of death in consequence of criminal negligence, the latter involving the running over of a person by one of two carriages, the drivers of which were racing against each other, and the former killing a man by a stray bullet fired while three persons were engaged in target practice. In both cases there was no evidence who was the actual killer (the driver of the carriage which had run over the victim; the one who fired the fatal shot). The court nevertheless decided in both cases that the joint activity—the racing and the common participation in target practice without taking proper precautions—was sufficient

to convict all of them despite the doubt as to who actually caused the death. If this is true of criminal negligence, a fortiori where the act was intentional. This has always been the rule in English Law. See, 1 Hale, Pleas of the Crown, 463, cited in *R. v. Downing* (7):

> "That although the indictment was that B gave the stroke, and the rest were present aiding and assisting, though in truth C gave the stroke, *or that it did not appear, upon the evidence, which of them gave the stroke,* but only that it was given by one of the rioters, yet that evidence was sufficient to maintain the indictment."

Glanville Williams (in The Criminal Law at p. 222) sums up the law as follows:

> "Difficulties of evidence are of no legal importance. If D is indicted as principal in the first degree and E as principal in the second degree, and it is not certain from the evidence which is principal in the first degree and which principal in the second degree, both may be convicted by a general verdict of guilty".

The logical reason for this rule is that mere acting in concert and with one mind constitutes mutual aid and assistance and also mutual encouragement for commiting the offence and ensuring that it be carried out. In this way the English rule fits into the framework of subsecs. 23 (1) (b) and (c) of our Code, the contents of which the Mandatory legislator drew from the English original. The circumstances of the present case well illustrate this idea, for there is no doubt that the joint attack of the two brothers upon the deceased Abdush naturally made the attainment of their objective easier, since as the number of attackers increases, the victim's ability to defend himself decreases, and this encourages the assailants and each of them and renders their task easier. Therefore, assuming that Uri was the actual killer, the appellant should be regarded as his accomplice and as encouraging him by his own action directed to the same end.

It is indeed true that appellant's intention was to be the killer himself and not to assist Uri in killing the victim. There was something like a contest between the two, similar to the racing in the *Swindall* case (6), but this does not lessen the appellant's responsibility even if it should ultimately appear—on the assumption we have made—that his role was only that of an accomplice. Criminal intent is required in the case of an accomplice in the sense that he must intend the commission

of the offence, but there is no authority for the view that he must intend only an *auxiliary* act. His general intent to commit the offence itself supplies the element of criminal intent also as to the assistance which he renders to his co-actor, the principal offender. The language of sec. 23 (1) (c) is sufficiently broad to embrace also a situation such as this.

The appellant was, accordingly, properly convicted not only of an attempt to murder but of actual murder, whether he killed with his own hands or whether the victim's death was directly caused by Uri.

Mr. Tamir's second submission was that the prosecution had not proved the absence of provocation against the appellant and therefore his act is reduced to manslaughter under sec. 212. On the contrary, says Mr. Tamir, it was proved that the appellant had been provoked just before the act, as his brother Uri testified. According to the latter's evidence (at pp. 235-6) the appellant turned to Abdush saying in Arabic "Abdush, are you satisfied?," whereupon Abdush turned his head and said: "You skunk, your father got what was coming to him". It is contended that these words about the father of whose murder the appellant's family accused Abdush personally caused the appellant to lose control of himself, and that they were of the kind which were likely to influence in this manner any reasonable person because such defiance, of which there is no greater, is an illustration of those rare cases where words alone may constitute provocation for the purposes of sec. 216 (b). In the alternative, Mr. Tamir sought to re-examine the rule in the *Segal* Case (2), that the test of provocation is an objective one, and that for this purpose account must be taken of the appellant's personality.

This contention runs counter to the facts as established by the District Court. In paragraph 18, at p. 12 of their judgment, the learned judges say: "We do not believe that the deceased Abdush swore at Na'im before the stabbing," and this finding is repeated in paragraph 20, at p. 17. They do not state their reason for disbelieving Uri, but they were under no duty to do so. Be that as it may, this finding is definitely reasonable in view of these considerations. In this respect also we are left without the appellant's personal evidence under oath as primary evidence corroborating Uri's version. The witness Guakil, the driver of the jeep in which Abdush was sitting, does not understand Arabic. According to his evidence he heard something being said, not in a loud voice but indistinctly, not in Hebrew, by the deceased, followed by a rustling sound. He turned his head backwards and saw the appellant and Uri lower their knives on to the body of the deceased. He could

count from one to six in the interval between the time that the words were uttered by the deceased until he heard the rustling sound (possibly caused by the drawing of the knives or one of them). This evidence is not sufficiently clear, but the detail that the deceased did not speak in a loud voice does not particularly suggest swearing which is generally uttered aloud. Moreover, the appellant himself said in evidence given not under oath in court (at p. 232):

> "I said to him: 'Abdush, you're satisfied'. He turned his head and cursed. When he cursed, I recalled the picture when my father was killed and everything was full of blood, and how he came and let him have it with the pliers on the head. I remembered how I was also stabbed at the same time. I did not know what I was doing. I fell on him."

Here he speaks of cursing in a general way, without specifying the words. There is no hint of the stinging insult "Your father got what was coming to him", according to Uri's version. Speaking to Sergeant Ashkenazi immediately after the act, the appellant said: "I could not do otherwise. He cursed me and I gave him what was coming to a murderer who killed our father" (Ashkenazi's evidence at p. 34). Here also, there is no suggestion of the words about the father getting what was his due, the appellant merely saying that the deceased cursed him personally. If by this he meant the word "skunk", of which Uri gave evidence, that certainly cannot constitute sufficient provocation. In all the sequence of events it is also to be remembered that the deceased was sitting in the jeep unarmed while the two brothers stood behind. This position made it difficult for him to defend himself and it is hard to believe that in such a position the deceased would provoke the brothers by hurling at them serious curses and insults. In the face of all these considerations we see no grounds for interfering with the finding of the District Court that the brothers' attack upon the deceased was not preceded by any cursing. At any rate, it was not preceded by cursing so serious that it might be regarded as provocation. That being so, the circumstances of the case show sufficiently that the appellant did not act under provocation within the meaning of sec. 216 (b). We see no need to examine further the remaining arguments advanced by counsel upon the supposition of facts which have not been proved.

Appeal dismissed.
Judgment given on November 1, 1959.