TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A No. Cr. 169 of 1998

THE STATE

VS

SHAKILLA SINANAN otherwise called Molin
KENNETH JONATHAN
And another person

Appearances:
Mr. R. Boodoosingh and
Ms. J. Paul for the State

Mr. P. Ramadhar,
Mr. R. Rajcoomar and
Mr. B. Debideen for Accused No. 1

Mr. I. Khan S.C. and
Ms. D. Mohan for Accused No. 2

Before the Honourable Mr. Justice P. Moosai

RULING

By Notice of Motion dated 9th November, 2000, Shakilla Sinanan ("the Applicant") sought an order for the proceedings to be stayed as an abuse of process.

The Applicant contended that at the conclusion of the preliminary enquiry Ms. Narinesingh, Attorney-at-Law appearing on behalf of the Director of Public Prosecutions (DPP), stated before the Magistrate, "the best we can go for is manslaughter she knew about it, but did nothing" and that such a statement: (1) Amounted to an implied undertaking in law; (2) Amounted to a concession that the further prosecution of this matter would be for manslaughter and not murder. Further it was submitted that

the conduct of the prosecution in obtaining and preferring an indictment for murder in these circumstances amounted to an unfair manipulation of the process of the Court to the detriment of the Applicant calculated to bring the administration of justice into disrepute. It was also submitted that the statement, coupled with the consent of the officer from the DPP to the grant of bail, and the Applicant being bailed for almost one year, gave rise to a legitimate expectation that the Applicant would not be prosecuted for murder.

Thirdly the Applicant contended that the continued prosecution of the Applicant is oppressive in that the depositions do not disclose evidence of murder by the Applicant.

Mr. Boodoosingh rightly submitted that the onus of proof is on the Applicant to establish on a balance of probabilities: **Archbold** 2000 para. 4-51. Mr. Boodoosingh submitted that Ms. Narinesingh's statement was a submission to the Court. That a submission is of a fundamentally different character from a promise, undertaking or representation. That the latter go much further in effect and purport than a submission.

An abuse of process was defined as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding": **Hui Chi-Ming V. R.** [1992] 1 A.C. 34, P.C.

R v. Schlesinger (1995) Crim L.R. 137, at 138 makes the point that there are two categories of abuse:

> "The first was where there had been prejudice to a defendant or a fair trial could not be had (see Ex p Brookes (1984) 80 Cr. App. R. 164). The second was where the conduct of the prosecution had been such as to justify a stay regardless of whether a fair trial might still be possible."

Mr. Rajcoomar is relying on the latter category. In **R. v Latif and Shahzad** [1996] 2 Cr. App. R 92, 100, [1996] 1 All E.R. 353 at 360H Lord Steyn referred to one of the leading cases on abuse of process, the House of Lords decision of **Bennett v Horseferry Road Magistrates' Court** [1993] 3 All ER 138, and stated at 101C and 361C:

"The speeches in **<u>Bennett</u>** conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. **<u>An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful</u>.** But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means." **[Emphasis Added].**

[**Black's** Law Dictionary] 5th Edn. defines the verb "submit" as:

"To commit to the discretion of another. To yield to the will of another. To propound; to present for determination; as an advocate SUBMITS a proposition for the approval of the court."

I am of the view that Ms. Narinesingh's statement was a legal submission made to the Magistrate. As I shall subsequently show, it was also an erroneous legal submission. It was presented for determination by the Court. The Magistrate in the exercise of his judicial discretion, committed the Applicant for manslaughter. It was perfectly possible for the Magistrate to reject Ms. Narinesingh's submissions and commit for murder or indeed, to discharge the Applicant.

The DPP, by virtue of the provisions of section 25 (3) of the Indictable Offences (Preliminary Enquiry) Act, Chap: 12.01, had the power to indict the Applicant for any offence which, in the opinion of the DPP, is disclosed by the depositions. That would include indicting the Applicant for murder: see **<u>Marlon Matthews v. The State</u>** Cr. App. No. 67 of 1998.

Mr. Rajcoomar made the further submission that the depositions did not disclose evidence of murder by the Applicant.

Mr. Boodoosingh submitted that the oral and written statements of the Applicant of 7th February, 1995 disclose evidence of murder by the Applicant.

The Plaintiff's case against the Applicant is that she was part and parcel of a joint enterprise to kill the Deceased. **Archbold** 200 para 18-14 sets out the principle of joint enterprise:

> "Where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise."

Smith and Hogan Criminal Law 9th Edn. At pp. 141 and 142 sets out the principle thus:

> "Cases where two or more parties have embarked on the commission of a criminal offence - a joint criminal enterprise - have concerned the courts greatly in recent years. **It is submitted that these cases are governed by the ordinary principles of secondary participation**. It is important to notice at the outset that in **Rook** it was held that the same principles apply to a party who is absent as to one who is present – and rightly so, because the absent party may well be the "mastermind" and the most culpable party. However, a new and potentially dangerous theory appeared in the Law Commission's Consultation Paper No. 131, "Assisting and Encouraging Crime", and in **Stewart and Schofield** – that a party to a joint enterprise is different from a "mere aider or abettor, etc." or secondary party. Distinguishing secondary participation, Hobhouse L J said:
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>> 'In contrast, where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another.'

But if A and B set out together to rape (or to murder), how does B "participate" in A's act of sexual intercourse with P (or A's shooting P) except by assisting him or encouraging him – i.e., aiding, abetting, counselling or procuring him – to do the act? It is submitted there is no other way. The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look further for evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements. Frequently it will be acts of encouragement which provide the evidence of the common purpose." **[Emphasis Added].**

In dealing specifically with the case where the principal and the accessory share a common purpose **Smith and Hogan** ibid at p. 143 states:

"© Principal and *accessory* with a common purpose. (2) Where the parties have a common purpose to commit an offence but the act of A alone is the immediate cause of its commission, then –

(i) B is liable for the commission by A of that crime (X) which B intended and assisted or encouraged him to commit."

Against that background it is now possible to look at the statements.
In the written statement of the Applicant, of 7th February, 1995, the Applicant told Inspector Maharaj that before 22nd November, 1994 (the date of the death of the Deceased), Accused No. 2, Kenneth Jonathan, had asked her about the time she got up.

"Question: Did Kenneth Jonathan ask you the time you woke up anytime before 22.11.94. Answer: Yes. Sometime after May 1994. I cannot remember the date and he told me to leave the front door open when I got

up and I told him that I was afraid. Question. Why were you afraid. Answer: Because if Khem get up and see he see the door open he will say I going to meet a man. Question: Did Kenneth tell you why he wanted you to leave the door open. Answer No."

Further p. 1 of that written statement contains the following:

"Sometime after nine o'clock in the morning on Tuesday 22nd November, 1994, Kenneth Jonathan called me by telephone at my home. He said that he heard some men were coming to kill Khem and I up and tell him when they do they thing don't set up me and he say that he not in that because he was clear. Kenneth asked me the time I does get up and I tell him eleven sometimes half eleven to go to the toilet. Kenneth say that some people will come **in the night by my house and be careful and that I should open the back door**. We talk on the telephone for about forty-five minutes and I hang up the phone." **[Emphasis Added].**

This is the context in which the oral statement was made to Insp. Maharaj. Inspector Maharaj in his deposition stated:

"In the presence and hearing of Police Constable Winchester I told the Accused #1 that I had information that she had planned with one Kenneth Jonathan to kill her husband Kimkaran Sinanan. I also told her that I had information that she had paid someone else to kill her husband. I cautioned her and I told her of her rights and she replied "I did not plan to kill Kim but is Kenneth who called me the morning before Kim got killed and told me that some people will come by me in the night and that I should open the back door."

Finally the written statement states:

> "I sleepaway and wake up about five past twelve the night and I tell Khem I going to the toilet. He ask me what was the time and I tell him five past twelve. With that I gone in the toilet. As soon as I open the back door, the three men ran up the back step."

It would be open to a jury to find that as way back as May 1994, the Applicant was asked by #2 to leave the front door open when she got up.

It would also be open to a jury to find from the contents of the oral and written statements that the Applicant was aware that there was a plan to kill her husband that night, that she was aware that some men were coming to kill her husband that night, and that she participated in that plan by opening the back door.

I am therefore of the view that a reasonable jury properly directed could find that the Applicant was liable as a secondary party for the offence of murder in that she shared the common intention to kill and that she aided and abetted in the commission of the offence.

For the foregoing reasons the submissions of Counsel for the Applicant fail.

Dated this 12th day of April, 2001.

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PRAKASH MOOSAI

JUDGE