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HIGH COURT OF AUSTRALIA

JOHNS (TS) v R

Barwick CJ, Stephen, Mason, Murphy and Wilson JJ

16 August 1979; 7 February 1980

[1980] HCA 3; (1980) 143 CLR 108; (1980) 54 ALJR 166; 25 ALR 573

CRIMINAL LAW (NSW) – ACCESSORY BEFORE THE FACT – LIABILITY – POSSIBLE CONSEQUENCES OF VENTURE PLANNED WITH PRINCIPAL IN FIRST DEGREE – SENTENCE OF ACCESSORY – WHETHER JUDGE MAY IMPOSE SENTENCE OF LESS DURATION THAN LIFE: *CRIMES ACT* 1900 (NSW), SS19, 346, 442(1).

The applicant for special leave to appeal was convicted in the Supreme Court of New South Wales on charges of murder, and of assault with intent to rob and wounding at the time of the assault. He was sentenced to life imprisonment in respect of the conviction for murder, and to fourteen years with no non-parole period in respect of the other conviction, the sentences to run concurrently. The charges and convictions were based on evidence indicating that the applicant had been an accessory before the fact by reason of his complicity in a common design to rob, and if need be, assault the deceased. The applicant's part in the affair had been to drive one W. to a rendezvous with the applicant's co-accused D., at some distance from the scene where the deceased was killed, and to wait there in his car while D. and W. drove off to waylay and rob the deceased. They were to return after the robbery and give to the applicant, for concealment by him, what they hoped would be the proceeds of the robbery. N., to the applicant's knowledge, always carried an automatic pistol, which the applicant, whilst not knowing if it was loaded on that occasion, expected it to be. On the way W. told the applicant who knew W. to be of quick temper and to be capable of becoming violent, that he, W., would not stand for any nonsense, and that the deceased was always armed and would not stand any ''mucking round'' if it came to a showdown.

In the course of a struggle, the deceased was shot dead by W., but the proposed robbery did not succeed. The trial judge in his charge to the jury directed that the applicant could be found guilty of the murder of the deceased as an accessory before the fact if the parties must have had in their mind, the contingency that for the purposes of carrying out their joint enterprise, or attempting to carry it out, W.'s firearm might be discharged and kill somebody, and that if a party to the enterprise must have been aware of such a possibility or contingency, then he was responsible for the death whether or not he was present at the time of the killing.

The applicant appealed to the Court of Criminal Appeal (NSW) against both convictions, and against the sentence. His appeal against the convictions was dismissed by a majority, and his appeal against the sentence was dismissed by a differently constituted Court consisting of five judges. The grounds of the applicant's application for special leave to appeal sufficiently appear from the conclusions of the Court set out below.

HELD: An accessory before the fact can be convicted by reason of his participation in a common design or joint enterprise on the basis of the same degree of responsibility as other participants, notwithstanding that he does not actively participate in the actual on-the-spot execution of the enterprise, to which he has agreed or encouraged. He is then liable for all that occurs in the course of such execution, if this be of a kind which fairly falls within the ambit or scope of such enterprise or design, while it is enough that the contingencies within the contemplation of the parties should be possible, as distinct from being probable consequences. The trial judge's charge to the jury was accordingly not open to objection.

***Brennan v R* [1936] HCA 24; (1936) 55 CLR 253; [1936] ALR 318, and**
***R v Eli Guay and Anor* (1957) OR 120 (Canada), distinguished.**
