

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(CRIMINAL JURISDICTION)
CRIMINAL CASE NO. 18A of 2007

THE QUEEN
and
JAY ARCHIBALD

Appearances: Mrs. Grace McKenzie with Ms. Christilyn Benjamin for the Crown
Mrs. Margaret Price-Findlay of Price-Findlay & Co. for the Prisoner

2007: October 29th, November 1st and 6th

Judgment on Sentencing

(Criminal Law – Sentencing – Guilty Plea – Assisting Offenders – Criminal Code 1997 – s. 318 of the Criminal Code – Prisoner assisting the Crown in the prosecution of the said offenders – whether sentence should be discounted – principles to be considered)

- [1] **Joseph -Olivetti J:** - The Prisoner pleaded guilty on Monday 29th October 2007 to the offence of assisting offenders contrary to s. 318 of the Criminal Code 1997 as amended ("the Code"). A sentencing hearing was held and sentence was pronounced on 6th November. These are my full reasons.

THE FACTS

- [2] The gist of the facts as given by the Prosecution are as follows. Ms. Dorcas Rhule was murdered on 3rd October 2006 at her home in East End, Tortola. Andrew Milton, Dennis Campbell, Christopher Bailey (now deceased) and George O'Connor were named as suspects in the matter
- [3] In September 2006, the Prisoner was remanded in prison in relation to a domestic abuse charge. Desmond Alphonso aka DA, signed bail for him on or about the 4th or 5th October 2006 and on the same day he was released from prison and spent the day with Alphonso. He was with Alphonso in Alphonso's vehicle when Alphonso received a telephone call. As

- [4] Alphonso stopped at his house in Kingston where they met two men, one of whom the Prisoner knows as "Otis". Alphonso entered the house and the Prisoner remained outside. Alphonso returned and told the Prisoner that the men had some immigration problems and the Police were looking for them for working illegally. He asked the Prisoner if he could let the men stay at his house as they could no longer stay at the Prisoner's house. The men Alphonso was referring to were Andrew Milton, Dennis Campbell and Christopher Bailey.
- [5] The Prisoner agreed and Alphonso drove them to the Prisoner's house and the Prisoner allowed them entry. The following day the Prisoner told Alphonso that he had learnt that the men were wanted in connection with a murder and that he wanted them out of his house. He admitted to seeing wanted posters of them and that he had seen one of them with a firearm. As a result, Alphonso took the three men to an abandoned house at Fish Bay and later he and the Prisoner took their luggage to them. The Prisoner said he did not communicate with the men thereafter.
- [6] The Prisoner was taken into custody on 16th December in relation to this matter and gave a statement under caution in which he outlined the assistance he had given to the alleged offenders.

Mitigation

- [7] Learned counsel for the Prisoner, Mrs. Margaret Price-Findlay spoke on his behalf. Essentially, counsel submitted that the Prisoner is 37 years old, married, with 2 children. He had two serious prior convictions for which he received custodial sentences but since his release from prison he has endeavoured to turn his life around and was by all accounts a successful businessman.
- [8] Counsel submitted a character reference from Mr. Mark Vanterpool, a well-known businessman, which supported her submission on the entrepreneurial skills of the

- Prisoner. Counsel stressed that the Prisoner only agreed to assist the alleged offenders because he was told that they were involved in immigration offences and that as soon as he learnt of their alleged involvement in the murder he asked that they be removed from his house. He had not reported the matter to the Police because Alphonso had told him that the men could turn on them and that he had seen one of them with a firearm.
- [9] Counsel also indicated that the Prisoner was a witness for the Crown in the murder case and other related offences and that he still had reservations about his own safety.

Crown's Submissions

- [10] Mrs. McKenzie, Learned Senior Crown Counsel, provided very useful cases as guides to the court in relation to the offence of assisting offenders. In particular Counsel cited the English cases of **R. v. Donald and Donald**¹ and **R. v. Charles Francis Matthews**.²
- [11] It is noted that the penalty under our law is the same as in England (s. 4 of the Criminal Law Act 1967) and that in **Donald** sentences of 18 months imprisonment and two years probation were imposed on a couple who had assisted the wife's brother who was a principal offender in a robbery. In **Matthews**, a sentence of 12 months imprisonment was imposed after conviction. The prisoner had assisted an offender who was wanted by the police for a serious armed robbery by allowing him to stay at his flat for three to four weeks. No local cases were cited.
- [12] In addition, Counsel relied on two local cases regarding the sentencing of offenders who had assisted the Police/Prosecution and on three English cases. The local cases are: **The Queen v. Sanjay Briscoe**³ and **The Queen v. Tasha Huggins**⁴ and the English cases are **R. v. Michael Shaun King**⁵, **R. v. P.**, **R. v. Blackburn**⁶, and **R. v. Sivan et al**⁷.
- [13] In **Briscoe** a sentence of 18 months imprisonment suspended for 3 years was imposed and in **Huggins** a sentence of three years suspended for 2 years in addition to compensation of \$1,000.00 was pronounced.

¹ (1986) 83 Cr. App. R. 49

² (1982) 4 Cr. App. R. (S) 233

³ BVI Magistrate's Court Case No. M876/2006

⁴ BVI Magistrate's Court Case No. M523/2005

⁵ [1986] Cr. App. R. 120

⁶ [2007] EWCA Crim. (22nd October, 2007)

⁷ [1988] 87 Cr. App. R. 407

- [14] Mrs. McKenzie identified the mitigating factors as the guilty plea at the first available opportunity, the Prisoner's admission to the allegations from the first time he was questioned by the Police, his assistance to the Police in their investigations, the fact that he did not provide any further help to the alleged offenders after he moved them from his house and that the Prisoner deposed at the preliminary inquiry and is to be a witness for the Crown in the matter of the murder of Elizabeth Rhule for which Andrew Milton, Dennis Campbell and George O'Connor have been indicted, the murder of Christopher Bailey for which Desmond Alphonso has been charged and the case against Desmond Alphonso for assisting offenders.
- [15] Counsel emphasized that the information given by the Prisoner to the Police and his testimony will be crucial to the successful prosecution of the matters in which he will be called as a witness.
- [16] Counsel enumerated the aggravating factors as follows; the arrestable offence was a serious one: murder, the Prisoner failed to inform the Police of the whereabouts of the wanted men, the Prisoner knew that these men were armed and dangerous and the Prisoner has previous convictions.

Court's Consideration

- [17] The maximum sentence this Court can impose for Assisting Offenders is ten years imprisonment - section 318(5) of the Code (as amended). Punishment is always a matter for the court's discretion having regard to the particular circumstances of the case and the law gives the Court a wide range of punishment options.
- [18] The English Court of Appeal in **King** laid down general principles on sentencing offenders who have assisted the police. In that case the Lord Chief Justice said at page 120 that **"no hard and fast rule can be laid down as to the amount by which a sentence can be reduced on a large scale informer by reason of the assistance he gives to the police. The court should first of all turn to the offences which the informer has admitted to assess their gravity and their number, thus enabling a starting figure to be reached"**. The court enumerated the factors which would result in a reduction of the starting figure. They are:- (i) the quality and quantity of the material disclosed by the informer; (ii) its

accuracy; (iii) his willingness to confront other criminals or give evidence against them; and (iv) the degree to which he put himself and his family at risk of reprisal.

- [19] The Court of Appeal in **Sivan** also listed factors to be considered when discounting sentence passed on a prisoner pleading guilty to an offence and assisting the police and court in the prosecution of other offences. They are similar to those in **King** and are: - (i) The nature and effect of the information imparted; i.e. did it relate to trivial or serious offences? Was the information successful in bringing to justice persons who otherwise would not have been brought to justice? (ii) The degree of assistance provided, i.e. was the prisoner prepared to give evidence if necessary to bring home the information which he had provided and to assist in the conviction of other criminals? (iii) The degree of risk to which the prisoner by his actions exposed himself and his family.
- [20] The aggravating and mitigating factors have been properly identified by the Crown and in my view the mitigating factors outweigh the aggravating factors. I also take into account his counsel's submissions that he considered himself in some danger having seen the firearm and having been told by Mr Alphonso that the men could turn on them hence his failure to seek out the Police. I note his prior convictions two of which were for serious offences for which he was incarcerated but that since his release he has been thriving to improve himself. This is an indication that the prison term might have been beneficial. Ordinarily, an offence such as this would in my view merit a term of between 1 to 2 years imprisonment.
- [21] However, I consider that the Prisoner's significant assistance to the Crown in the prosecution of the matters already mentioned merit special consideration and that this invaluable assistance ought to be reflected in his punishment having regard to the principles enunciated in **King** and **Sivan**.
- [22] The observation of the English court of appeal in **Sivan** is apposite - **"the judge should tailor the sentence so as to punish the Prisoner but at the same time reward him so far as possible for the help he had given in order to demonstrate to other persons that it was worth while to disclose the criminal activity of others for the benefit of the law-abiding public in general."**

Conclusion

[23] In all the circumstances and for the foregoing reasons in my judgment a suspended sentence will be just. Accordingly, I hereby sentence you, Jay Archibald, to one year's imprisonment suspended for one year.

Rita Joseph- Olivetti
High Court Judge
British Virgin Islands