PETRO AND ANOTHER v THE PEOPLE (1967) ZR 140 (CA)
COURT OF APPEAL
BLAGDEN CJ, DOYLE JA AND EVANS J
10th OCTOBER 1967

Flynote and Headnote

[1] Criminal law - Murder - Felony killing in course of - Accused lacking knowledge of use of arms in burglary - Sections 22 and 180 (C) of Penal Code construed.
If the common purpose for which the accused joined was limited to burglary without arms, the accused is not guilty of murder when a firearm is used and a death results.

[2] Criminal law - Murder - Felony, killing in course of - Accused possessing knowledge that burglary is armed - Sections 22 and 180 (c) of Penal Code construed.
If the accused enters into a burglary scheme knowing that loaded firearms are being carried on the expedition, even if the intention is only to frighten potential resistance, a death resulting from the use of firearms will result in a murder conviction against the accused.

Case cited:
(1) *R v Jarmain* [1945] 2 All ER 613; (1945) 31 Cr. App. R 39.

Statute construed:
Penal Code (1965, Cap. 6), ss. 22 and 180 (c).
Carruthers, for the first Appellant
Cave, for the second appellant
Reilly, Senior State Advocate, for the respondent

Judgment

Blagden CJ: The two appellants, Kalunga Petro and Oswald Mwewa, whom we shall continue to refer to in this judgment as the first appellant and the second appellant, respectively, appeal against their convictions by the High Court. Ndola, for the murder of one Henry Rhodes Dunckley at Cleveland Park Farm, Itawa, Ndola, on the night of the 18th/19th January, 1967.
The evidence led on behalf of the State disclosed that on that night a party of five men visited Cleveland Park Farm. The two appellants were members of that party. The other three men were of Congolese nationality and for convenience we shall continue to refer to them in this judgment as "the Congolese". One of the Congolese cut the telephone wires running to the farm, and all the Congolese then entered the premises whilst the two appellants remained outside. There was no direct evidence of what happened inside the house, but from statements made by the two appellants it would appear that Mr Dunckley was roused and that after a short altercation he was fatally shot in the chest with a 9 mm pistol. The intruders then stole a considerable amount of property from the premises of which each of the appellants received a share.
These facts are not in dispute. The main issue before the trial judge was to determine whether the degree of complicity of the two appellants in this raid on Cleveland Park Farm was sufficient to justify their being convicted of the murder of Mr Dunckley as charged.
By section 22 of the Penal Code it is provided that:

> "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 a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The State's case was that the two appellants, together with the Congolese, had formed the common intention to prosecute the unlawful purpose of armed burglary; that in

furtherance of that purpose Mr Dunckley was murdered; and that his murder was a probable consequence of the prosecution of the purpose of armed burglary.
[The learned Chief Justice than reviewed the evidence relating to the appellants' participation in and knowledge of the raid on Cleveland Park Farm.]
[1] Once it is accepted that the common purpose which the second appellant joined was limited to burglary without arms he cannot be saddled with any responsibility for what happened when a firearm was used; and it cannot be said that murder was a probable consequence of the limited common purpose which he had joined. His conviction for murder therefore cannot be sustained.
[2] The case of the first appellant, however, is different. He joined and pursued the common purpose in the full knowledge that this was armed burglary. Where loaded firearms are carried on a burglarious expedition, even if the intention be only to frighten off any opposition, it is in our view, an inescapably probable consequence that someone will be shot and killed in circumstances which, almost inevitably, must amount to murder (*see R v Jarmain* [1]).
That is what, in fact, happened here. Mr Dunckley was shot and killed; and even if his assailant did not intend that he should die or be grievously harmed, he did have the intent to commit the felony of burglary by force of arms. In accordance with the provisions of the Penal Code, section 180 (c), the incidence of such an intent is deemed to establish the element of malice aforethought. That, added to the unlawful act of fatally shooting Mr Dunckley, constitutes the crime of murder. In our view the first appellant was rightly convicted.
We accordingly dismiss the first appellant's appeal, but we allow the appeal of the second appellant and quash his conviction and sentence.

Appeal of first appellant dismissed.

Appeal of second appellant allowed.