

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No. 31

R

v.

JAHFARI CYRUS- RAYNOR

RULING (Ex Tempore)

Whether necessary to include in an indictment particulars of gang association per section 70 JA and B of the Criminal Code Act 1907

Date of hearing: 18th January 2019

Date of Ruling: 18th January 2019

Mr. Marc Daniels for the Defendant

Ms. Cindy Clark and Ms. Shaunte Simons for the Crown

1. The Defendant, Jahfari Raynor is charged per Indictment number 31 of 2018 with the offence of unlawfully wounding Michelle Richards-Butterfield on the 5th August 2018 in Islands of Bermuda.
2. This is an application by the Crown to ascertain by a ruling from this court, whether it is necessary to add as part of the charge particulars subject to section 70 J of the Criminal Code.
3. Section 70 J of the Criminal Code Act 1907 falls under the heading Imprisonment and is subtitled, Calculations For Terms Of Imprisonment.
4. The application is really made under section 70 JB which is entitled Unlawful Gang Activity Increased Penalty.

That section says –

(1) Where a person is being sentenced for an offence which (whether wholly or partly) falls within the definition of unlawful gang activity, the court shall -

a) first determine the sentence (“the basic sentence”) in accordance with established principles but without regard to this section; then

b) where the basic sentence includes a term of imprisonment or a fine, increase the sentence by adding an additional element determined in accordance with subsection (2).

(2) The additional element shall be –

a) a term of imprisonment of at least one year but not more than five years where the basic sentence includes the term of imprisonment of less than five years or more; or

b) a term of imprisonment of not more than one year, where the basic sentence includes a term of imprisonment for less than five years; or

c) a fine of at least \$1,000 but not more than \$10,000, where the basic sentence includes a fine.

Subsection 2A says –

“Notwithstanding any requirement under subsection (1) and (2) the court may impose an additional penalty of a fine of at least \$1,000, but not more than \$10,000 to any basic sentence”.

Subsection 3 –

The Court shall not add an additional element under the section where the basic sentence is one of life imprisonment.

5. The Prosecution relies upon the case of *Roger Minors and The Queen* number 12 of 2003, a Court of Appeal decision in this jurisdiction delivered in November 2003. In that case, a drug case, the court was dealing with the issue relevant to the provisions of the Misuse of Drugs Act 1972, section 27 A, which provided for increased penalties when the possession occurred in an increased penalty zone.
6. The question was whether those provisions necessarily were to be pleaded in the indictment. The Court found in those circumstances, for the reasons given, that such was unnecessary. In fact those provisions went to the issue of sentencing rather than to an element of the offence.
7. The Prosecutions submits that that authority is relevant to the relevant provisions in the instant case.
8. The Defence has responded and there seems to be no disparity in the submissions nor disagreement between the two. In fact both the Prosecution and the Defence have relied upon the same authority for the same reason.
9. Section 70 JA of the Criminal Code under the heading, Unlawful gang and unlawful gang activity – interpretation, defines a gang as:-

a) is composed of 3 or more persons; and

b) has as one its purposes or activities the facilitation or commission of one or more offences, that, if committed, would likely result in the direct or indirect receipt of a material benefit (including a financial benefit) by the group by one of the persons who constitutes the group.

“Unlawful gang activity” means unlawful criminal acts committed by –

a) an unlawful gang; or

b) a person participating in or actively contributing to the activity of an unlawful gang.

10. Subsection 2 states – in determining whether a person participates in or actively contributes to unlawful gang activity, the court may consider if the person –

a) uses a name, words, symbol or other representation that identifies, or is associated with, an unlawful gang;

b) frequently associates with any other persons who constitute an unlawful gang;

c) receives any benefit from an unlawful gang; or

d) frequently engages in activities at the instruction of any of the persons who constitute an unlawful gang.

11. It is evident that unlike some other jurisdictions, Jamaica for example, the statutory provisions in Bermuda do not provide for a charge of the defendant for, “being as a member or associate of an unlawful gang commits an offence”. The provisions in Bermuda merely, in my view, go to the issue of sentencing. So it is not possible in Bermuda for example for the Prosecution to indict a defendant for, for example, being a member of an unlawful gang unlawfully wounded somebody as, it is possible to do in some other jurisdictions. It is not possible for example for the prosecution to indict a defendant for being a member of a gang unlawfully murdered somebody.

12. Therefore in this jurisdiction, the relevance of section 70 JA pertains only to the issue of sentencing. Obviously during the trial the Defence would be brought to notice of the possibility of an increased penalty because of the manner in which the evidence is going to be presented. Thus he could not claim to be surprised because there are disclosures that would be made to him prior to the trial. It is anticipated that in a case such as this the Crown would lead evidence tending to show that the defendant was a member of a particular gang and that the dispute in the circumstances was motivated as a result thereof; perhaps even against opposing persons who were associated with an opposing gang. For example see *Brangman, Cox and Myers v. the Queen* [2015] UKPC 40; [2015] 3 WLR 1145

13. In the circumstances I would hold that it is not necessary, in a charge such as now charged before this court, for the Crown to include in the indictment any provisions akin to section 70 JA and JB of the Criminal Code.

Dated this 18th day of January 2019

Carlisle Greaves, J
Puisne Judge