WIJESINGHE AND THREE OTHERS

v.

THE STATE

COURT OF APPEAL.
SENEVIRATNE, J., MOONEMALLE, J. AND T. D. G. DE ALWIS, J.
C.A. No. 123 – 126/82– H.C. GAMPAHA 34/80.
DECEMBER 12, 13 AND 14, 1983.

Directions to Jury – Burden of proof – Common intention formed in the course of a sudden fight.

The accused were indicted for being members of an unlawful assembly, the common object of which was to cause hurt to one Gunawardene, and in the course of the same transaction committing the murder of Gunawardene and causing hurt

to one Karunaratne. At the conclusion of the trial, the accused were convicted of culpable homicide not amounting to murder on the ground of sudden fight and causing simple hurt. The accused appealed against these convictions to the Court of Appeal on the grounds that (*a*) neither the prosecution nor the defence led any evidence of a sudden fight ; (*b*) the trial judge in summing up, wrongly directed the Jury on the burden of proof which the law places on the defence when an exception to murder is pleaded, by stating that the defence story should be more probable than improbable when compared with the prosecution story ; and (*c*) the trial judge had failed to give adequate directions to the Jury on the law relating to common intention and how common intention is formed in the course of a sudden fight.

Held–

(1) A Jury should never be directed in a way which opens for them the door to conjecture. In this case the trial judge in his summing up had invited the Jury to speculate on the question of a sudden fight, although there was no evidence of a sudden fight in the evidence led either for the prosecution or the defence.

(2) An accused person does not have to prove that his story is more probably true than the prosecution story. A direction to this effect by the judge places a heavier burden on the accused than what the law places on the accused. The accused need only prove that his version is more probably true than not.

(3) A common intention to kill can be formed in the course of a sudden fight only in exceptional circumstances. In this case the directions given by the judge are inadequate since no directions have been given on the following :

(i) that some act must be proved or some circumstances established from which a common intention could reasonably be inferred ;

(ii) that the inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case and an inference from which there is no escape ; and

(iii) how to consider a common intention to kill in the background of a sudden fight and how in the circumstance of a sudden fight such a common intention could be formed.

Case referred to

Fernando v. The Queen; (1953) 54 N.L.R. 255.

APPEAL from the High Court, Gampaha.

Dr. Colvin R. de Silva with *Mr. N. V. de Silva* and *Miss Saumya de Silva* for the accused-appellants.

A. S. M. Perera, Senior State Counsel, for the Attorney-General.

Cur. adv. vult.

January 23, 1984.

MOONEMALLE, J.

The five accused, (1) Kuruppu Aratchige Wijesinghe (1st accused-appellant), (2) Kuruppu Aratchige Samarasinghe (2nd accused-appellant), (3) Kuruppu Aratchige Chandratilleke (3rd accused-appellant), (4) Kuruppu Aratchige Ariyaratne (4th accused-appellant), (5) Kuruppu Aratchige Milton Abeysinghe (5th accused) were indicted on the following five counts :–

(1) That they were on or about 29th day of December, 1977, at Kossatadeniya in Mirigama members of an unlawful assembly the common object of which was to cause hurt to Kuruppu Aratchige Gunawardene an offence punishable under section 140 of the Penal Code.

(2) That they did on or about the 29th day of December, 1977, at the same time and place aforesaid commit the murder of Kuruppu Aratchige Gunawardena an offence punishable under section 296 of the Penal Code.

(3) That at the same time and place and in the course of the same transaction as aforesaid they did cause hurt to Jayakodi Aratchige Karunaratne with clubs and thereby commit an offence punishable under section 314 of the Penal Code.

(4) That at the same time and place and in the course of the same transaction as aforesaid, they being members of the said unlawful assembly mentioned in Count (1) did cause the death of the said Kuruppu Aratchige Gunawardene and have thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.

(5) That at the same time and place and in the course of the transaction as aforesaid they being members of the said unlawful assembly did cause hurt to Jayakodi Aratchige Karunaratne with clubs and have thereby committed an offence punishable under section 314 read with section 146 of the Penal Code.

Each accused pleaded not guilty to the charges. After trial, by the unanimous verdict of the Jury–

(*a*) All the accused were found not guilty on count (1) and they were acquitted.

(*b*) The 1st, 2nd, 3rd and 4th accused were found guilty of culpable homicide not amounting to murder on the ground of a sudden fight on count (2) and each was sentenced to two years rigorous imprisonment.

The 5th accused was found not guilty on count (2) and was acquitted

(*c*) The 1st, 2nd, 3rd and 4th accused were found guilty of causing simple hurt on count (3) and each was sentenced to six months rigorous imprisonment.

The 5th accused was found not guilty on count (3) and was acquitted.

(*d*) All the accused were found not guilty on counts 4 and 5 and were acquitted.

The sentences on counts 2 and 3 were to run consecutively.

The appeal by the 1st, 2nd, 3rd and 4th accused-appellants is from these convictions and sentences.

The 1st, 2nd and 3rd accused-appellants are the sons of Pabilis Appuhamy. The 4th accused-appellant and the 5th accused are the sons of John Ralahamy. Pabilis Appuhamy and John Ralahamy are two brothers. The prosecution relied on two alleged eye-witnesses namely, Karunaratne and Wimalasena. The prosecution case was that Karunaratne was the watcher of Halgahapitiyawatte. On 29.12.77 about 9 p.m. Karunaratne had gone to buy kerosene from the boutique of one Gunasekera Mudalali which was situated by the Mirigama-Negombo Road. From his house Karunaratne had

to proceed along the Kossatadeniya-Pallewela V.C. road and then get on to the Mirigama-Negombo Road. He had a bottle and a torch with him. On his way back home, Karunaratne met Gunawardene the deceased on the Mirigama-Negombo Road. Then the two of them had come along the V.C. road and got on the Pansala Road which branches off from the V.C. road. This road ends at a temple. One has to pass the 1st accused-appellant's house to reach the temple. The residing land of John Appuhamy adjoins the temple land and is about 150 fathoms away from the 1st accused-appellant's house. When Karunaratne and the deceased came up to the 1st accused-appellant's house the 1st accused-appellant who had been seated on a mound by the road had come forward and said, " I was waiting for you," and had dealt a blow on the deceased's head with a club. The deceased had fallen for that blow. Then the 4th accused-appellant who is also known as Kalumahattaya had dealt Karunaratne a blow with a club which alighted on his forehead. Thereafter the 2nd, 3rd and 4th accused-appellants had assaulted the deceased who was fallen on the ground. They had also assaulted Karunaratne. Then Karunaratne had run to the house of Weerasinghe, the brother-in-law of the deceased, and he had lost consciousness there. Karunaratne had seen the incident with the aid of his torch.

According to Wimalasena, about 10–10.30 p.m. when he was at home, he heard a commotion and cries of " Buddu Ammo, I am being murdered ", coming from the direction of the house of the 1st accused Wijesinghe. He then went in that direction. He approached a fire which was in front of the 1st accused-appellant's house. He then saw the 1st, 2nd and 4th accused-appellants assaulting the deceased with kitul clubs. The 3rd accused-appellant had a club in his hand. He had watched this for about 15 minutes and then had gone and informed Weerasinghe the brother-in-law of the deceased. He had not seen the 5th accused at the scene. He had not met Karunaratne at Weerasinghe's house that night.

Dr. W. R. de Alwis who had held the post mortem examination on the body of the deceased did not give evidence as he was abroad. Dr. Hoole gave evidence and produced the post mortem report (P3) of Dr. de Alwis. The body of the deceased had been identified by his father Liyanonis and brother-in-law Nandasoma.

According to P3 the external injuries on the deceased were–

(1) Contusion 1 inch long on front side of forehead.
(2) Contusion 3 inches long across top of head.
(3) Lacerated wound above the left ear.
(4) Lacerated wound just below shoulder blade on left side of chest.
(5) Lacerated wound near the shoulder blade on left side, back side of chest.
(6) Abrasions on lower part of left arm.

The internal injuries were as follows :

The bone above the left ear had been fractured and broken into pieces. The fracture had extended to the left side and lower part of skull. There were marks of blood in the membranes of the brain.

The cause of death was given as due to heavy inflow of blood into the brain.

Dr. Hoole stated that injury No. 3 and the connected internal injuries could be capable of causing the inflow of blood into the brain. He said that injury 3 could be due to a heavy blow with a club and the injuries 1, 4 and 5 could be due to a fall. He said that injury 3 with the internal injuries was capable of causing death in the ordinary course of nature.

According to the medical report (P4), Karunaratne had a contusion just below the left eye and a contusion on the right thigh and an abrasion on the right side on neck. Dr. Hoole stated that they were non-grievous injuries caused with a blunt instrument like the club (P1).

The 1st accused-appellant gave sworn evidence and stated that he had never been convicted or punished for any offence. He stated that the deceased could not go to his house along the cart road which led to the temple. He said that the deceased lived with his mistress Chandra, a sister of Rupasinghe, at Siyambalagoda. To get to Siyambalagoda, one had to go along the Mirigama Road. He said that the deceased and Rupasinghe were well known criminals

and were boisterous people. He said that Rupasinghe was not on good terms with his family and that was because the police had taken charge of an unlicensed gun from Rupasinghe on an information given by Dhanapala, a brother of the 4th accused appellant. Then on 6.4.1974 Rupasinghe and the deceased had come to John Ralahamy's house and had started a quarrel and were assaulted. The police had filed action against John Ralahamy, Dhanapala, the 1st, 4th and 5th accused-appellants, on a complaint by Wimalasena that he was assaulted. They had been discharged. Then he said that his boutique was broken into and damaged by Wickramasinghe, Premalal, Wimal Jayatisa and Bramby and his leg had been cut with a sword and his father assaulted. He said that the chief person involved in that incident was the deceased. He said that on 29.12.77 the inmates of his house had chicken pox. About 9.30 p.m. he heard shouts from the direction of John Ralahamy's house. The shouts were, "Maranawo, Gahanawo, your houses should be burnt." He recognised the voices of Gunawardena and Karunaratne. Then he said that they had come in front of his compound and had shouted, "We have come to destroy you, we will kill you". Then the 2nd accused-appellant had come out of the rear of the house with a door bar and then had come to the compound. They had appealed to Karunaratne to go away as they were having chicken pox and that they had nothing against them. Then the deceased had tried to stab with the kris knife (P5) and the 2nd accused-appellant had dealt him a blow on his hand with the club. The deceased had fallen and then had got up from the road and had come up to stab the 2nd accused-appellant. Then the 1st accused-appellant thinking that the deceased would stab and kill his brother, had struck the deceased with the club (P1). The deceased had fallen on the road in front of the house. Then Wimalasena had struggled with the deceased in order to remove him, but the deceased had brushed him aside and had come to the compound and had fallen down there. The 1st accused-appellant said that he had to assault Karunaratne and the deceased through fear that they would stab and kill his younger brother. He said that he assaulted the deceased while the 2nd accused-appellant assaulted Karunaratne. He said that the 3rd accused-appellant was in the compound when the deceased fell there for the club blow. He said that the 4th and 5th accused-appellants were not present.

Learned Counsel for the accused-appellants submitted that as it was neither the case for the prosecution nor for the defence that there had been a sudden fight, the conclusion to be drawn from the verdict of the Jury was that the prosecution had not in its evidence placed before Court the correct version of events and that the verdict was a substantial acceptance of the 1st accused-appellant's version. Therefore, he submitted that the prosecution case was open to a reasonable doubt which entitled the accused-appellants to an acquittal. He cited the case reported in *Fernando v. the Queen* (1) and submitted that that case covered the case before us substantially.

Learned Counsel for the appellants also submitted that the learned trial Judge in his summing up wrongly directed the Jury on the burden of proof that the law places on the defence, when an exception to murder is pleaded which would be fundamentally fatal to the conviction. He further submitted that the learned trial Judge failed to give adequate directions to the Jury on the law relating to common intention. He also submitted that the learned trial Judge failed to direct the Jury that it is very rarely that a common intention to kill is formed in the course of a sudden fight and as to how in the circumstances of a sudden fight such a common intention was formed. He submitted that in any approach to this case the appellants are entitled to an acquittal.

Learned Senior State Counsel at one stage of his submissions tried to justify the verdict of the Jury by stating that the Jury would have rejected the evidence of the prosecution witness Karunaratne and the evidence of the 1st accused-appellant, but would have acted on the evidence of Wimalasena supported by the police evidence of the presence of a patch of blood near the mound when one enters the compound of the 1st accused-appellant's house, the drops of blood from that place up to the spot where the body of the deceased lay in the compound, and the signs of a struggle where the earth had been disturbed on the mound, and on the evidence of previous enmity between the parties. Later, however, he abandoned that line of argument and restricted the argument to the contention that even if the verdict was unreasonable and there was no common intention, still, on the basis of Wimalasena's evidence that the 1st to the 4th accused-appellants had assaulted

the deceased with clubs, each of them would be liable for their own separate acts, and each would therefore be guilty of causing simple hurt under section 314 of the Penal Code.

It is clear that there is no evidence of a sudden fight to be found in the evidence led for the prosecution or the defence. The prosecution case pointed to a straight case of murder, while the defence was one of private defence.

The source of the Jury's verdict evidently flows from the following passage in the learned trial Judge's summing up :–

" The deceased person and Karunaratne started this sudden fight having come to the compound of the 1st accused or in front of his house on the road, then it is possible that a sudden incident of this nature, where clubs or knives had been used, could arise. Accordingly you could hold that even without provocation there had been a sudden fight and bring in a verdict of guilty of culpable homicide based on that situation. "

Though this direction referred to the possibility of knives being used, the prosecution witnesses did not speak to any one using knives at that incident. It was the 1st accused-appellant who in his evidence referred to the deceased having a knife in his hand which he identified as (P5) which was found by the side of the deceased.

It appears that the trial Judge has invited the Jury to speculate on the question of sudden fight. A Jury should never be directed in a way which opens for them the door to conjecture. In the case of *Fernando v. The Queen (supra)* five accused were charged with murder. The Jury brought in a verdict of culpable homicide not amounting to murder on the ground that there was a sudden fight. In that case too there was no evidence of a sudden fight led by either the prosecution or the defence. In that case too the trial Judge directed the Jury on the possibility that the killing of the deceased took place in the course of a sudden fight. It would be relevant for me to quote two passages from the judgment in that case delivered by L. M. D. de Silva, J. at page 258 :

" It appears to us that it was extremely difficult on the evidence to come to the conclusion that there was a sudden fight merely by rejecting 'large chunks of the evidence' of the witnesses for

the prosecution and the defence. It would have been necessary in addition to supplement what evidence was left after the rejection mentioned by facts derived from conjecture. If there was reason to think that there was a sudden fight, which the prosecution witnesses had suppressed, then, fairly considered, the prosecution case would have been open to reasonable doubt and the accused would have been entitled to an acquittal. But a verdict can never be based upon facts suspected but not proved. "

" A Jury should be told to accept or reject evidence that they are entitled to and should draw reasonable inferences from the evidence which they accept, but they should never be directed in a way which opens for them the door to conjecture. This is necessary not only in order that the case for the defence may not be prejudiced but also in the interests of the prosecution. It has to be remembered that a trial Judge by suggesting an unsustainable element of evidence in favour of an accused may by rendering a verdict founded on that element unreasonable make the verdict itself unsustainable. "

In the present case, the verdict of the Jury which is totally incompatible with the case presented by the prosecution and the case presented by the defence, is founded purely on conjecture due to the direction of the learned trial Judge relating to a sudden fight ; it makes the verdict unreasonable and unsustainable. Further, the fact that the verdict based on sudden fight is inconsistent with the evidence of the prosecution and that of the defence leads to the inference that the Jury have found that the prosecution has suppressed material facts of the events of the night of the incident which induces a reasonable doubt in the prosecution case and entitles the appellants to an acquittal.

The learned trial Judge directed the Jury as follows, on the burden of proof that rests on the defence when an exception to murder is pleaded :

" The function is yours as to whether you accept this evidence or not. If the accused wanted to call further evidence or to give evidence it was not necessary to be proved beyond reasonable

doubt. It will be quite sufficient if you can determine his story is more probable than improbable. Having accepted that you will have to discharge the accused. "

This direction on the law is correct. But the learned trial Judge made a grave error when he continued his direction as follows– " When I say the defence story should be more probable than improbable what I meant was when compared with the prosecution story it should be more probable. That is the yardstick when considering the case of the defence. " An accused person does not have to prove that his story is of a greater probability of truth than that of the prosecution story. The direction of the learned trial Judge places a heavier burden on the accused-appellants to discharge than what the law places. The appellants need only prove that their version is more probably true than not. If the defence version creates a reasonable doubt in the case for the prosecution that would entitle the defence to a verdict in its favour. Had the Jury in this case followed this direction of the learned trial Judge and founded its verdict on it, it would be fundamentally fatal to the conviction.

In this case the deceased had only one fatal injury, and on the evidence it cannot be said as to which appellant inflicted it. Therefore it would be necessary that there should have been a common intention to kill the deceased.

L. M. D. de Silva, J. in *Fernando v. The Queen (supra)* stated " It is very rarely if at all that a common intention to kill in the course of a sudden fight can be established. "

Thus, as a common intention to kill can be formed in the course of a sudden fight only in exceptional circumstances, the learned trial Judge's summing up should have been subject to a most careful direction on common intention and of the impact of a sudden fight on the question of common intention. The directions given by the learned trial Judge on the question of common intention are inadequate. No direction has been given to the Jury that " some act must be proved or some circumstances established from which a common intenion could be reasonably inferred. " Then there is no direction that the inference of common intention should

not be reached unless it is a necessary inference deducible from the circumstances of the case ; an inference from which there is no escape. The trial Judge has also failed to direct the Jury to consider a common intention to kill in the background of a sudden fight. There is no direction as to how in the circumstances of a sudden fight such a common intention was formed. It is also necessary for the learned trial Judge to have applied closely the law relating to common intention to the particular facts of this case. In this case there is no common intention established in an offence against the deceased. There is no evidence of a sudden fight. The verdict of the Jury is reasonably clear is based on pure conjecture.

The final question is whether on Wimalasena's evidence the appellants could be convicted of the offence of causing simple hurt. Wimalasena is by no means an untainted witness. At one stage in his evidence, Wimalasena said that the 1st, 2nd, 3rd and 4th accused-appellants had clubs in their hands. He also said that he saw these four accused-appellants assaulting with clubs. But he had to admit that he had told the police that only the 1st accused-appellant had assaulted the deceased with a club and that the 4th accused-appellant had assaulted Karunaratne with a club ; while the 2nd and 3rd accused-appellants had clubs in their hands. Then soon after that he contradicted himself and said that he had told the police that the 2nd and 3rd accused-appellants had also assaulted the deceased with clubs. The evidence of Wimalasena is unreliable and I do not think that the Jury would have acted on the evidence of Wimalasena. I hold that all four accused-appellants cannot be found guilty of any offence in this case.

For these reasons, I have set out, I allow the appeal and I quash the convictions and sentences passed on the 1st, 2nd, 3rd and 4th accused-appellants on counts 2 and 3, and I acquit them.

SENEVIRATNE, J.–I agree.

T. D. G. DE ALWIS, J.–I agree.

Appeal allowed.
Accused-appellants acquitted.