

1967

Present : Samerawickrame, J.

S. M. S. HAMEED and 2 others, Appellants, and
INSPECTOR OF POLICE, CRIMES, Respondent

S. C. 778-780/67—M. C. Panadura, 245

Common intention—Applicability of rule in a prosecution of two or more persons for unlawful possession of house-breaking instruments—Penal Code, ss. 32, 449.

Where, in a prosecution of more than one person for unlawful possession of house-breaking instruments in contravention of section 449 of the Penal Code, the evidence shows that the instruments were found in the possession of only one of the accused persons, section 32 of the Penal Code relating to common intention cannot be applied to convict the other accused of the offence charged

APPEALS from a judgment of the Magistrate's Court, Panadura.

Accused-appellants absent and unrepresented.

Ranjit Gunatilleke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 2, 1967. SAMERAWICKRAME, J.—

The 2nd, 3rd and 4th accused-appellants and one Mohamed Mohideen, who was the 1st accused, were charged with having committed an offence punishable under Section 449 of the Penal Code read with Section 32 of the said Code, in that they were found having in their possession without lawful excuse, instruments for house-breaking. All four accused had been convicted and the 2nd, 3rd and 4th accused-appellants have filed petitions of appeal.

The instruments were found in the possession of the 2nd accused and they consisted of articles that are commonly used for lawful purposes, though they may be capable of being employed for the purpose of house-breaking. In such circumstances, it is incumbent on the prosecution to prove the intention of the accused to use the instruments for house-breaking.

There are circumstances upon which the learned Magistrate was entitled to hold that such intent had been proved and I do not think that, sitting in appeal, I can interfere with that finding. The articles were found in the possession of the 2nd accused-appellant. In fact he was holding them in his hand. The 2nd accused-appellant was, therefore, guilty of the offence charged and I affirm his conviction and dismiss the appeal.

The Magistrate has convicted the other accused in reliance on Section 32 of the Penal Code. That Section deals with the position where a criminal act is done by several persons in furtherance of the common intention of all. There can perhaps be no doubt that the other accused shared an intention to commit house-breaking, but it cannot be said that they did any criminal act. Section 32 is applicable where several accused have jointly done a criminal act. I am, therefore, of the view that Section 32 cannot be applied in this case to make the other accused guilty of the offence charged.

I allow the appeals of the 3rd and 4th accused-appellants and set aside their convictions and the sentences passed on them. Acting in revision, I also set aside the conviction and sentence passed on the 1st accused. The sum of Rs. 50/- or any part of it that has been paid by the 1st accused will be refunded.

Convictions of 1st, 3rd and 4th accused set aside.