

[COURT OF CRIMINAL APPEAL]

1969 *Present* : H. N. G. Fernando, C.J. (President), Sirimane, J.,
and Samerawickrame, J.

M. K. R. DHARMAPALA and another, Appellants, and THE QUEEN,
Respondent

C. C. A. APPLICATION Nos. 130-131 of 1968

S. C. 85/68—M. C. Teldeniya, 5477

Penal Code—Section 32—Common intention—Charge based thereon against two persons—Whether one of them can be found guilty of offence of abetment.

Where A and B are charged with an offence on the basis of common intention (section 32 of the Penal Code) and there is no charge of abetment, the verdict of the jury that B is guilty of the offence of abetment is not valid in the absence of any explanation, in the summing-up, of the meaning in law of abetment.

APPPEALS against two convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with Ananda Guneratne, C. Chakradaran, M. S. Asiz and S. C. B. Walgampaya, for the 2nd accused-appellant.

S. Sinnatamby (assigned), for the 1st and 2nd accused-appellants.

V. S. A. Pullenayegum, Senior Crown Counsel, with Priyantha Perera, Crown Counsel, for the Crown.

January 15, 1969. H. N. G. FERNANDO, C.J.—

The two accused in this case were charged with the murder of one Naide on the basis of section 32 of the Penal Code. The jury retired at 10.20 a.m. and returned at 10.35 a.m. Thereafter the following is the record of the proceedings:—

“ Clerk of Assize : By your divided verdict of 6 to 1, do you find this 1st accused Metiwala Kumbure Rajapaksegedera Dharmapala, guilty of the offence of murder ?

Foreman : Yes. In regard to the 2nd accused also we are divided 6 to 1, and we find him guilty of aiding and abetting.

Court to foreman of the jury : You don't find that there was a common intention with the 1st accused to commit murder ?

- Foreman : My Lord, he went to defend his brother ; he has been helping.
- Court : There is no charge of aiding and abetting. The charge is one of murder against both accused. Is it your position that the 2nd accused did not share a common intention with the 1st accused to commit murder.
- Foreman : Yes, My Lord. We find both accused guilty of murder. ”

There was no charge of abetment and, naturally, no explanation in the summing-up of the learned trial judge of the meaning in law of the offence of abetment. The above record shows that, firstly of his own accord, and, secondly even in answer to a different question, the foreman referred to what he at one stage called aiding and abetting, and at the second stage called defending or helping his brother. It is only after these two answers that, when the trial judge again referred to the question of common intention, the foreman said “ we find both accused guilty of murder ”.

It is apparent from this record that what the jury decided in the jury-room by a majority of 6 to 1 was to inform the court that they found the 2nd accused guilty of aiding and abetting, and, that their reason for this decision was that the 2nd accused went to defend and help his brother. In the absence of any explanation in the summing-up of the meaning in law of abetment, we think it only reasonable to assume that the jury thought that affording any kind of assistance to the 1st accused would constitute the criminal offence of abetment. Such a thought, of course, would be perfectly wrong.

Having regard to the assumption to which I have referred and to the fact that the jury had retired only for 15 minutes or less, it is impossible to say with any measure of certainty that the jury did in fact deliberate as they were bound by law to do on the question whether the 2nd accused was actuated by a common intention with his brother to cause the death of the deceased. At a jury trial it is a right of the accused that the jury must deliberate upon all the facts and decide whether on the facts as found the accused is guilty in law of any offence. In this case the obvious failure of the jury to deliberate upon the one question which could bring home guilt to the 2nd accused constitutes, in our opinion, a miscarriage of justice. On this ground, we set aside the verdict and sentence against the 2nd accused. We see no reason to interfere with the verdict and sentence against the 1st accused and they are affirmed.

Appeal of 2nd accused allowed.

Appeal of 1st accused dismissed.