PIYATHILAKA AND 2 OTHERS
V.
REPUBLIC OF SRI LANKA

COURT OF APPEAL.
DR. A. DE Z. GUNAWARDENA J. (P/CA)
J. A. N. DE SILVA J.
C.A. 103 - 105/94
H. C. Ampara 517/91
April 04, 1996.

Criminal Law - Penal Code - S. 296 Common Intention - Mere presence - Overt act - Intoxication - Provocation.

Held:

(1) To Maintain a charge on the basis of Common Intention the mere presence is not sufficient.

"The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a Criminal Act which manifests the State of Mind".

(2) In this case there is evidence that the Accused were under the influence of liquor. They were therefore more susceptible to provocation.

Where there is evidence of provocation the drunkenness of the Accused can be taken into account in considering what effect the provocation had on his mind."

APPEALS from the High Court of Ampara.

Cases referred to:

1. *Q. v Vincent Fernando* 65 NLR 265.
2. *Ariyaratne v. Attorney General S.C.* 31/92 SCM 15.11.93
3. *King v. Marshal Appuhamy* 51 NLR 140 at 142.
4. *In re Alexei Letenock* 1917, 12 Criminal Appeal Reports 221 at 222.

Dr. Ranjith Fernando with *Miss. Yasanthi Kumari* for the Accused-Appellants
C.R. de Silva D.S.G. for Attorney General.

Cur. adv. vult.

April 04, 1996.
DR. GUNAWARDENA, J. (P/CA)

The three Accused-Appellants in this case were indicted in the High Court of Ampara on two charges of having committed the murder of one U.A. Upul Priyantha on 12.01.87, an offence punishable under Section 296 of the Penal Code and with having committed the murder of one T. Gayashantha in the same transaction, an offence punishable under Section 296 of the Penal Code. Both charges were based on common intention. After trial, before the High Court Judge, without a Jury, the Accused-Appellants were convicted and sentenced to death. This appeal is from the said convictions and the said sentence.

The prosecution called a witness by the name of Sunil, who stated that the Accused and the deceased were gambling from about 4.30 in the evening, till about 8.30 in the night, on the day in question. After the gambling was over they had started drinking. There was a group of people consisting of eight persons. The group consisted of the three Accused, the two deceased, one Hal Rajah, one Sumith and the witness. During the drinking session, they had consumed in all 2 1/2 bottles of liquor, brought by different people, at different times. Thereafter, the deceased Upul had set out to go home. He was staggering and could not walk alone, and was helped by the deceased Gayashantha alias Hichcha, the witness Sunil, the three Accused and the person called Hal Rajah. On the way, the deceased Upul had abused the 1st Accused and 1st Accused had got angry and had gone away, having called the other two Accused also. A little while later, the three Accused have returned to the place where the deceased was sitting on the road. At that stage, the 2nd Accused was armed with a weapon like a katty or a sword. The 2nd Accused had dealt several blows on the deceased Upul. When the 2nd Accused struck the deceased Upul, the deceased Hichcha had said "පව් ඔයි" meaning it is a sin. At that stage the 3rd Accused had said "හිටිවටත් ගහපන්" meaning, attack the deceased Hichcha also. Thereafter, the 2nd Accused has struck the deceased Hichcha also, with the weapon he had in his hand. At that stage the witness Sunil had run away from the scene. The prosecution has called another witness by the name of Jayaratne, who has stated that he had heard some noise and came out of his house. He saw two people fallen on the ground with injuries. The 1st, 2nd and 3rd Accused were

there shouting. He heard them shouting saying "තව වණ්ඩි ඉන්වානම් වෙරල්ලා". After some time the Accused have gone away from that place.

Dr. Ahamed has given evidence and stated that the deceased Upul had five injuries. He has described the injuries as follows:- Injury No. 1. A cut injury on the right side of the face 4 inches long and 3 inches deep. Injury No. 2. A cut injury on the right side of the neck 5 inches long. Injury No. 3. A cut injury on the right side of the neck 2 inches long. Injury No. 4. A cut injury 5 inches long on the left leg. Injury No. 5. A cut injury on the right hand at the wrist 2 inches long.

The doctor has described four injuries on the deceased Gayashantha alias Hichcha. Injury No. 1. A cut injury left side of the head 9 inches long 4 inches deep. Injury No. 2. A cut injury severing the left hand at the wrist. Injury No.3. Superficial cut injury on the left side of the nipple. Injury No. 4. A cut injury on the right hand cutting the index finger and the hand.

The 1st Accused has not given evidence nor called any evidence on his behalf. The 2nd and 3rd Accused have given evidence on oath and have denied the charges against them. They have stated that they were elsewhere. The 2nd and 3rd Accused have called evidence in support of their contention.

The learned Counsel for the Appellants submitted that the charges against the 1st Accused cannot be maintained as the evidence is insufficient. He pointed out that the only evidence is that of Sunil, who stated that, the 1st Accused was present at the scene when the attack took place. The evidence of the witness Sunil was that the 1st Accused had earlier taken away the 2nd and 3rd Accused after the deceased Upul abused him. Thereafter he has come back with the 2nd and 3rd Accused to the scene. The witness Sunil has not stated that the 1st Accused had uttered any word or did anything to instigate the other Accused. He had come back with the other two Accused and stayed there whilst the attack took place. Witness Jayaratne has stated that the Accused shouted, but he does not distinguish any utterance made by the 1st Accused. The 1st Accused was not armed. He had left the scene along with the other Accused. It is to be noted that the 1st Accused was in the company of the 2nd and 3rd Accused and the

deceased from about 2.30 p.m. that afternoon. While they were gambling and also when they were drinking. However he has not partaken liquor. The Counsel submitted that to maintain a charge on the basis of common intention the mere presence is not sufficient. The prosecution must prove an overt act manifesting his intention. He cited the case of *Queen v. Vincent Fernando*,[1] where Basnayake, J. has stated as follows:-

> "A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under Section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. In the Penal Code the words which refer to acts done extend also to illegal omissions."

He also cited the case of *Ariyaratne v. Attorney-General.*[2] In that case G.P.S.de Silva, C.J. has reiterated that the inference of common intention must be not merely a possible inference, but an inference from which there is no escape. The facts revealed that, the principal witness speaks only of the presence of the Appellant at the scene. The Appellant had thrown a stone at the deceased and uttered the words "This is what you deserved". This utterance was at a stage when two other Accused had attacked the deceased with a sword i.e. the evidence against the Appellant was the incriminating words uttered by him and throwing of a stone. Which in fact has not been mentioned to the Police or non-summary inquiry. The learned Chief Justice has held that the prosecution was left only with the presence of the Appellant at the scene, and therefore a conviction on the basis of a common intention by the jury, was clearly unreasonable, having regard to the evidence.

The Counsel for the Appellants submitted that the dicta in the above cases are applicable to this case, as the evidence in this case reveal that the 1st Accused had only been present at the scene, and therefore no inference of common intention can be drawn against the 1st Accused, on the facts of this case. He added that, therefore, the available evidence against the 1st Accused is insufficient to prove the charges against the 1st Accused, on the basis of common intention.

Having considered the evidence against the 1st Accused we are of the view that evidence is insufficient to sustain the conviction. Therefore we are of the view that the 1st Accused should be acquitted.

In regard to the 2nd Accused, it was submitted by the Counsel for the Appellants that there is clear evidence of the 2nd and 3rd Accused having partaken liquor. During a period of about 2 1/2 hours, i.e. from about 8.00 p.m. till about 10.30 p.m. six people have consumed two and a half bottles of liquor. He submitted that the level of intoxication could be judged by the fact that the evidence disclosed that the deceased Upul was staggering and had to be helped. He submitted that it is relevant to take into consideration the fact that the Accused were intoxicated, in considering the question of provocation. He drew our attention to the findings of the learned trial Judge at page 207, where he has specifically stated that, the Accused would have behaved in the way they did, by making a show at the scene, to enable them to be identified by others, because they were under the influence of liquor. The learned trial Judge had pointed out that the fact that they have consumed liquor has facilitated the commission of the offences.

The Counsel for the State however submitted that, although question of intoxication is relevant to the question of provocation, it is not relevant to the consideration of the question of gravity of the provocation.

The Counsel for the Appellants pointed out that in the case of *King v. Marshal Appuhamy*[3] Wijewardena, C.J. has stated that:-

> "In paragraph 2 the Judge appears to have expressed himself in such a way to give the impression to the Jury that any intoxication falling short of the degree of intoxication contemplated by Section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication. None of the above paragraphs 1 to 4 would have indicated to the Jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention need not necessarily be the degree of intoxication referred to in Section 78 of the Penal Code."

In this case also there is evidence that the Accused were under the influence of liquor. They were therefore more susceptible to provocation.The learned Counsel for the appellants also cited the case of *Alexei Letenock*[4] which states as follows:-

> "Rowlatt, J. said that unless the applicant was so drunken at the time of the commission of the offence as to be absolutely incapable of knowing anything of what he was doing, his drunkenness could afford no answer to the prosecution. That direction might be right in a case where there was no provocation, and the sole matter before the jury was the drunkenness of the Accused, but here, according to the applicant's story, there was provocation. Where there is evidence of provocation, the drunkenness of the Accused can be taken into account in considering what effect the provocation had on his mind".

The Counsel for the Appellants pointed that, it is clear from the evidence that the 2nd Accused had been under the influence of liquor. He stated that it could be assumed from the facts proved in the case that the Accused and the deceased were friends, just prior to the attack. They had gambled, from about 2.30 p.m. that afternoon. Thereafter, they had enjoyed liquor together till about 10.30 p.m. Then only the displeasure had arisen, which is about 15 or 30 minutes prior to the attack. The Counsel for the Appellants pointed out that witness Sunil has stated that the Accused and the deceased have started quarrelling after they consumed liquor. He also drew attention to the evidence of witness Sunil that the deceased Upul was being helped by the three Accused, when the deceased Upul was staggering. At that stage the deceased Upul had abused the 1st Accused. Then the 1st Accused had got angry and called the other two Accused also and gone away. This conduct, the learned Counsel submitted, was clear evidence of provocation. There was no motive or other reason for the Accused to have attacked the deceased.

In view of the above evidence we are of the view that it is reasonable to infer that the 2nd Accused has acted under grave and sudden provocation,whilst being under the influence of liquor, when he attacked the deceased. The learned trial Judge has failed to consider this position. Therefore it is unreasonable to allow the verdict of murder to stand

against the 2nd Accused in respect of causing the death of the deceased Upul.

In regard to causing the death of Gayashantha alias Hichcha the Counsel for the State submitted the plea of grave and sudden provocation would not apply, because the deceased Gayashantha had only uttered the words, "එවි මියි" and sat near the deceased Upul. The uttering of these words the Counsel submitted would not be sufficient provocation to cause his death.

It is to be noted that implicit in those words was the objection raised by Accused Gayashantha to attack on the deceased Upul. Further those words express sympathy towards the deceased Upul. The utterance of these words have to be viewed in the back ground of the state of mind of the Accused at that stage, being already provoked and under the influence of liquor. The Counsel for the Appellants submitted that in such a situation there was sufficient reason, for the 2nd Accused to have been provoked by the utterance of those words.

In the circumstances, we are of the view that the 2nd Accused had attacked the deceased Gayashantha alias Hichcha under grave and sudden provocation, whilst being under the influence of liquor. The learned trial Judge has failed to consider this aspect of the case. Hence it is unreasonable to allow the verdict of murder to stand against the 2nd Accused in respect of causing the death of the deceased Gayashantha.

In regard to the 3rd Accused the Counsel for the Appellants submitted that the only evidence against the 3rd Accused is that he had told the 2nd Accused "හිටිවටත් ගහපන්" meaning assault Hichcha also. The Counsel for the Appellants also pointed out that the 3rd Accused was unarmed. Therefore he submitted that evidence was insufficient to prove common intention.

The Counsel for the State submitted that when the 3rd Accused stated "හිටිවටත් ගහපන්" it amounts approving the attack on deceased Upul and also the deceased Gayashantha alias Hichcha. The Counsel for the State added that this fact is sufficient to bring home the guilt to the 3rd Accused on the basis of common intention.

We are of the view that the evidence in this case is sufficient to prove that the 3rd Accused shared a common intention with the 2nd Accused. However, as we have already held that the conviction of the 2nd Accused on both the said murder charges is unreasonable, we hold that the conviction of the 3rd Accused on both the said murder charges is also unreasonable.

For the reasons stated above we hereby acquit the 1st Accused-Appellant, of both the charges.

In view of the reasons stated above the convictions of the 2nd and 3rd Accused-Appellants on both the said charges of murder are hereby reduced to culpable homicide not amounting to murder on the basis of provocation. Accordingly the sentences of death imposed on 2nd and 3rd Accused-Appellants are hereby set aside. The 2nd and 3rd Accused-Appellants are each, sentenced to 12 years rigorous imprisonment, on each of the said two charges. The sentence of 12 years rigorous imprisonment imposed on 2nd and 3rd Accused-Appellants on each of the said two charges, will run concurrently.

DE SILVA, J. - I agree.

Appeal of 1st Accused allowed.

Charges of 2nd and 3rd Accused reduced.