

LURDU NELSON FERNANDO AND OTHERS
v.
THE ATTORNEY-GENERAL

SUPREME COURT
FERNANDO, J.,
AMERASINGHE, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 59/95
C.A. NOS. 90 – 93/92
H.C. COLOMBO NO. 3394/88
MARCH 14TH, 1996

Criminal Law – Verdict of murder – Common intention – Defects in the summing-up – Power of court to dismiss appeal notwithstanding defects – S. 334 (1) of the Code of Criminal Procedure Act.

The appellants were convicted of the offences of conspiracy and murder on the basis of common intention. It was urged on behalf of the appellants that the High Court Judge had failed to give adequate directions to the jury regarding common intention and conspiracy.

Held:

Even though the points raised on behalf of the appellants might be decided in their favour, yet no miscarriage of justice has actually occurred; hence the appeal should be dismissed.

APPEAL from the judgment of the Court of Appeal.

Ranjit Abey Suriya PC with Miss. Dilanthika Navaratne and Miss Priyadarshini Dias for appellants.

C. R. de Silva, DSG with Kapila Waidyaratne for Attorney-General.

Cur. adv. vult.

March 21, 1996

FERNANDO, J.

The three appellants, and two others, were charged on four counts in respect of the murder of A. S. M. Fernando: conspiracy, murder in furtherance of a common intention under section 32 of the Penal Code, membership of an unlawful assembly the common object of which was to cause hurt to A. S. M. Fernando, and murder in prosecution of the common object of that unlawful assembly. One accused died before the trial commenced, and the other four were tried and convicted on all four counts, and sentenced to death.

The Court of Appeal set aside the conviction of one accused on all four counts, and the convictions of the three appellants on the two counts involving unlawful assembly. Special leave to appeal was granted on the question of the adequacy of the directions given to the jury in regard to common intention and conspiracy.

Mr. Ranjit Abeysuriya, PC, pointed out certain deficiencies in the summing-up: the jury were not cautioned that they should not conclude that there was a common murderous intention unless that was a necessary inference, and not merely a possible inference, and that the case of each accused should be considered separately; and the jury were not given any guidance as to how the legal principles regarding common intention and conspiracy were applicable to the facts of the case. The Court of Appeal had not dealt with these matters. Mr. C. R. de Silva, DSG, contended that, whatever the deficiencies in the summing-up, the evidence was overwhelming, and the proviso to section 334 (1) of the Code of Criminal Procedure Act was applicable; the order of the Court of Appeal should therefore be allowed to stand.

The evidence is that all five accused stole a Hi-ace van at Kochchikade on the previous day. Thereafter, in broad daylight, on 27.11.85 while the deceased was travelling, with two others, in a car along Reclamation Road, Colombo, that van was driven into the car, bringing it to a stop. There were five persons in the van, but only

the 1st and 2nd appellants were identified. The 1st appellant got down with a pistol in his hand. The deceased was seated in the right rear seat, behind the driver; his son-in-law, the only eye-witness who gave evidence, was seated in the front seat beside the driver. The 1st appellant first tried the left rear door, and finding it locked, then tried the right rear door, with the same result. The 2nd appellant came up to the son-in-law, and saying "salli, salli", tried (unsuccessfully) to take the money which was in his shirt pocket. An unidentified third person also got down from the van, armed with a pistol. The other two remained in the van. The son-in-law heard a shot (which had been fired through the right rear window) and immediately afterwards saw the 1st appellant with his pistol aimed at the deceased; he also saw the third person behind the 1st appellant, with his gun pointing in the direction of the deceased. No attempt was made thereafter to steal money or anything else, and all five left in the van, which was abandoned some time later. The gun used for the killing was not found.

The 3rd appellant's fingerprints were found on the van, but that was only proof of his presence the previous day, and not at the time of the killing. However, there was evidence that later the 3rd appellant had asked another witness for a loan, saying that he was in financial difficulties because he had not received payment in respect of a "contract" for the killing of the deceased; he had stated that "we killed" the deceased.

The three appellants did not give evidence, but made dock statements denying any involvement in the incident in which the deceased was killed. Thus if any of them were found to have been actually present at the scene, there was no explanation for his presence or motive.

Whether it was the 1st appellant or the unidentified person who fired the fatal shot, the only inference from the facts was that they shared a murderous intention. Although the eye-witness did not identify the 3rd appellant as one of those present at the scene, his confession establishes his murderous intention, from the time the "contract" was given to him, and the statement "we killed" establishes his personal participation in the killing.

The evidence thus appears overwhelming, as against the 1st and 3rd appellants, that there was prearrangement and a common murderous intention. However, Mr. Abey Suriya submitted that a common intention to murder was not the "necessary" or inescapable inference from this evidence. While submitting that the defence was under no obligation even to suggest what other inference was possible, he relied heavily on the evidence that the 2nd appellant had demanded money from the deceased's son-in-law. This, he said, indicated that the 2nd appellant's intention was only to commit robbery, and also created a reasonable doubt even as to whether the other two appellants intended murder or only armed robbery. In the case of the 1st and 3rd appellants that is mere speculation, and nothing more. The former did nothing indicative of a theftuous intention, and the other had accepted a contract to kill. While the 2nd appellant's demand for money makes his case different, yet taken in the context of his continuing participation, commencing with the robbery of the van, the compelling inference is that he intended to rob as well as to kill, or intended to kill in order to rob. The fact that none of the persons involved made any attempt to steal after the murder, shows that robbery was, if at all, an incidental consideration.

Any reasonable jury, properly directed as to the law, would necessarily have found, on this evidence, that the three appellants shared a common intention to kill the deceased, and that that intention was the result of a conspiracy. I am therefore of the opinion that even though the points raised by Mr. Abey Suriya might be decided in favour of the appellants, yet no miscarriage of justice has actually occurred. I therefore dismiss the appeal.

AMERASINGHE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.