

## [COURT OF CRIMINAL APPEAL.]

1948 *Present* : Dias J. (President), Nagalingam and Gratiaen JJ.THE KING *v.* ASSAPPU *et al.*

APPLICATIONS 184-186

*S. C. 11—M. C. Galle, 6,233**Court of Criminal Appeal—Common intention—Direction to Jury—Duty of Judge—Penal Code, Section 32.*

In a case where the question of common intention arises the Jury must be directed that—

- (i) the case of each accused must be considered separately.
- (ii) the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
- (iii) common intention must not be confused with same or similar intention entertained independently of each other.
- (iv) there must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention.
- (v) the mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

**A**PPPLICATIONS for leave to appeal from three convictions in a trial before a Judge and Jury.

*Colvin R. de Silva*, with *H. A. Chandrasena* and *K. C. de Silva*, for all applicants.

*H. A. Wijemanne*, *Crown Counsel*, for the Crown.

*Cur. adv. vult.*

August 8, 1948. DIAS J.—

The first, second and third accused apply for leave to appeal against their convictions for the murder of one Kottage Sedris Perera on June 3, 1947, at Mawadawila in the Galle District. The three accused along with two others, the fourth and fifth accused, were jointly charged under section 296 of the Penal Code read with section 32 of the Penal Code. Therefore, the case for the prosecution was presented on the footing that all the five accused persons were actuated by a common murderous intention at the time the deceased Sedris Perera was killed.

After the summing-up of the learned Judge the Jury deliberated for fifteen minutes. They announced that they were unanimous. They were asked whether they found the prisoners guilty or not guilty of murder as charged in the indictment. The record then reads as follows :—

Foreman : We find the first, second and third prisoners guilty of murder ; and the fourth and fifth prisoners guilty of voluntarily causing simple hurt.

Court : What view do you take of the facts ?

Foreman : We accept the prosecution witnesses' evidence. Fourth accused of simple hurt due to the Judicial Medical Officer's evidence that the blow was one given without much force with a sword—a light blow. Fifth accused we take the view lightest of the contusions given by him.

No further attempt was made to elucidate what the Jury meant. The applicants were sentenced to death. The fourth and fifth accused were discharged on their entering into recognizances, to be of good behaviour and to come up for sentence at any time within a period of six months.

The case for the prosecution consists of four separate incidents. At about 5 p.m. on the day in question the first and second accused accompanied by the fourth accused and a man called Rotin came to the house of the deceased man who at that time was in his back compound tethering a goat. The first accused was armed with a gun, the second applicant had " something like a knife ", the fourth accused had a sword and Rotin was armed with a club. These men enquired from the wife of the deceased where " the chandiya " was—meaning the deceased. The woman replied that he was not at home, whereupon the first accused opened the gun, loaded it and pulled the trigger. This shot took effect on the wall of the deceased's house, and the marks of that shot were subsequently seen by the police. As the shot was fired the woman closed the door. She then heard the sound of a second shot. This is the first incident.

The deceased man then entered his house by the back door. He armed himself with an iron rod and went out by the back door. What transpired then, nobody knows except the deceased and the four men who came there. The woman however says she heard the noise of an assault. She came out of the house and saw Rotin lying injured on the

doorstep and her husband standing by with the iron rod. The other three men had disappeared. A government clerk, Mr. Nansiridasa, happened to pass along the road on a cycle. The deceased man stopped him and told him to inform the village headman of what had happened. The deceased having waited for a while, but as the headman did not come, he left Rotin lying on his doorstep and went out saying he would borrow a cycle from Somadasa and go in search of the headman. He was unarmed and carried a cap in his hand. The woman did not see her husband alive again. This is the second incident.

A little later the woman heard cries and she went in that direction to investigate. She saw the fifth accused dragging the dead body of the deceased by his legs and the first, second, third and fourth accused following the fifth accused. The woman was frightened and she went home. She found Rotin still lying on her doorstep. She is unable to say how her husband met with his death. Something, therefore, had happened to cause the death of the deceased after he left his house.

The witness Somadasa Waidiyatilleke says that his house is by the roadside. At about 6 p.m. on the day in question he heard a commotion on the road, and came out to see what was the matter. He saw the first, second, third, and fourth accused. The first accused had a gun and the fourth accused had a sword. He saw others running behind them at some distance. As there had been previous ill-feeling between himself and first accused, Somadasa went inside his house and locked the front door. Seeing Somadasa enter his house, the first accused said "This is one of the fellows we want, break open the door". Thereupon stones were pelted at his house. Somadasa also heard the report of a gun. This is the third incident.

Then Somadasa heard the first accused say "There comes the man we want", and he heard the sound of people running towards Ratgama. Being curious, Somadasa stood on his bed and looked through the fan-light. He saw the deceased man coming along the road carrying a cap in his hand. The first four accused ran towards him. Deceased seeing them halted. *Somadasa saw the fourth accused cut the deceased with a sword.* The first accused fired a shot in the direction of the deceased and then hit him with the gun butt holding the weapon by its barrel. The deceased fell and the gun stock broke. The third accused struck the deceased with a manna knife. The fifth accused came running *with a club* and struck the deceased with it as he lay fallen. Amaradasa, the brother of Somadasa, came along the road. Some of the accused are alleged to have rushed at him and assaulted him. The first accused seeing Somadasa watching came running up and pelted a stone which fell into the house. After that the fifth accused dragged the deceased along the road followed by the others. It was at this point of time the widow says she saw her husband. At the time the deceased was assaulted the second accused had a knife, the third accused a "manna" knife and the fourth accused a sword. The Jury have stated that they accepted the evidence of the prosecution witnesses.

The medical evidence shows that the deceased sustained 16 external injuries which can be classified as (a) Contusions, (b) Contusions with

abrasions, and (c) Incised wounds. This indicates that at least two separate agencies were used by his assailants to produce those injuries. The *post-mortem* disclosed that there were two fissured fractures of the left temporal bone extending to the base of the skull. It was these injuries which by injuring the brain caused death. These injuries correspond to the external injuries 11, 12, 14 and 16, namely, a contusion on the left side of the head 4 in. long and scalp deep, a contused wound on the left cheek and temple 7 in. long and  $\frac{1}{2}$  in. deep, a contused wound behind the ear 2 in. long, and a contused wound below the last injury  $1\frac{1}{2}$  in. long and scalp deep. The doctor was of opinion that the fatal injuries would be caused by a hard blow from a broad object like a club of broad dimensions. The stock of a gun would we think be capable of producing those injuries. There is no evidence that any of the other injuries contributed to the death of the deceased man.

We are of opinion that the fatal injuries were inflicted by the first applicant with the butt-end of the gun he carried. Having regard to the force with which those blows were inflicted, the manner in which they were caused, and the result which they produced there is no room for doubt that the first accused inflicted those injuries with a murderous intention. We are, therefore, of opinion that the conviction of the first accused is right. At the close of the argument we indicated that the application for leave to appeal by the first accused should be refused.

The evidence proves that the first, second, and fourth accused went together to the house of the deceased man. They were all armed with deadly weapons. That they had animosity against the deceased is proved by the facts that they asked the widow where "the chandiya" was, and the firing of the shots at the house of the deceased. That a fight then took place between the first, second, fourth accused and Rotin on the one side and the deceased man on the other appears to be clear. In the course of that fight Rotin was seriously injured by the deceased man. The first, second, and fourth accused went away, leaving Rotin lying on the doorstep. They came together armed and left the place together. They were then joined by the third accused who was armed with a manna knife. Seeing the deceased man coming along the road the first accused said "There comes the man we want". Thereupon, the fourth accused began the attack by cutting the deceased man with his sword. The first accused fired a shot as he ran and clubbed the deceased with the butt of his gun. This felled the deceased, whereupon he was further assaulted and cut by the four accused. The second, third and fourth accused did nothing to dissuade the first accused. The fifth accused came running armed with a club and hit the fallen man.

Therefore, while it is possible to take the view that the fifth accused may not have been actuated by a common intention with the first accused who dealt the fatal blows, it is difficult to see how such a distinction can be drawn between the case of the fourth accused on the one hand and that of the second and third accused on the other. Nevertheless, the Jury, while attributing a common murderous intention to the second and third accused who inflicted no fatal injuries, absolved the fourth accused, who not only was armed with a deadlier weapon, but who

actually began the murderous attack on the deceased at the behest of the first accused. This verdict can only mean that they took the view that while the second and third accused were actuated by a common murderous intention with the first accused, the fourth accused had no such common intention.

Mr. de Silva submits that the Jury having discriminated between the cases of the fourth accused and the second and third accused when no grounds exist for such a discrimination, this Court should give to the second and third accused the benefit of the doubt and absolve them also of a common murderous intention.

It does not follow that because the Jury has absolved one of several persons who are alleged to be acting with a common intention with the doer of the criminal act, that the others participating must necessarily be absolved also. This is a question of fact which is essentially one for the Jury to decide, provided they have been adequately assisted and directed by the learned trial Judge.

We have, therefore, carefully considered the summing-up in order to ascertain whether the Jury had been assisted, guided and directed on this question of common murderous intention.

After dealing with the murderous intention necessary to establish a charge of murder, the learned Judge proceeded to consider the question of common intention. The learned Judge by means of illustrations indicated to the Jury the cases where a common murderous intention can be said to be present or absent. The learned Judge pointed out that when considering whether a particular accused had or had not a common murderous intention "the facts must be incapable of explanation on any other reasonable hypothesis than the guilt of the accused person". At the end of his charge the learned Judge said "But the question again is whether there was a common intention between the first, second, third and fourth accused or between some of them. The first, second, third and fourth accused . . . were together and were armed, going from this place, one using those words. Was there not a common intention on the part of the first, second and fourth accused, if you believe the evidence? Then it is a question of coming to a conclusion adverse to those whom you find had common intention". In an earlier part of the summing-up the learned Judge in dealing with the case of the fifth accused differentiated his case on the facts and added "If the fifth accused had no common intention, it is safer to find him guilty of causing simple hurt, if you believe he caused one of the lightest (injuries) and if you accept the evidence of Somadasa and the others". Dealing with the case against the fourth accused, the learned Judge told the Jury "The real question is—Was the fourth accused among the persons who attacked the deceased on the road? Was he armed? If you accept the evidence that he was there and was armed, and was attacking the deceased, whether any of the injuries were caused by him or not is not very material on the question of his guilt. In testing the evidence of Somadasa and Amaradasa you may consider whether any of the injuries were due to a sword or not".

Mr. de Silva submits that while the learned Judge told the Jury what they were to do if they found that the first four accused were actuated by a common intention, he has not specifically dealt with the cases of the second and third accused, or told them what they should do in the event of their finding that the second, third and fourth accused or any of them did not share a common intention with the first accused.

We are of opinion that in all cases where the question of common intention arises the Judge should tell the Jury that, in order to bring the rule in section 32 into operation, it is the duty of the prosecution to satisfy them beyond all reasonable doubt that a criminal act has been done or committed; that such act was done or committed by several persons; that such persons at the time the criminal act was done or committed were acting in the furtherance of the common intention of all; and that such intention is an ingredient of the offence charged, or of some minor offence. The Judge should also tell the Jury that in applying the rule of common intention there are certain vital and fundamental principles which they must keep prominently in mind—namely (a) the case of each prisoner must be considered separately; (b) that the Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed; (c) they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned—47 *N. L. R. at p 375*; (d) the Jury must be warned to be careful not to confuse “Same or similar intention entertained independently of each other” with “Common intention”; (e) that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case—*A. I. R. 1945 P. C. 118*; (f) the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other—47 *N. L. R. at p. 375*, 48 *N. L. R. 295*; (g) the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act—44 *N. L. R. 370*, 46 *N. L. R. 135*, 473, 475; (h) in such a case such co-accused would be liable only for such criminal acts which they themselves committed; (i) the Jury should also be directed that the mere fact that the co-accused were present when the doer did the criminal act does not *per se* constitute common intention, unless there is other evidence which justifies them in so holding—45 *N. L. R. 510*; and (j) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles.

In our opinion, the Jury were not directed in regard to (g), (h) and (i). The confused and illogical verdict they returned by absolving the fourth.

accused of common intention while attributing to the second and third accused a common intention with the first accused is, we think, due to this omission.

We think that the verdict of the Jury in regard to the second and third accused in the circumstances is unreasonable and is set aside. The evidence which the Jury accepted proves that the second and third accused participated in the assault on the deceased. The injuries they inflicted were non-fatal. The Jury having absolved the fourth accused of a common intention, we think the second and third accused in the circumstances are entitled to the benefit of the doubt which operated in the minds of the Jury in regard to the fourth accused. We, therefore, substitute a verdict of voluntarily causing simple hurt under section 315 of the Penal Code in regard to each of them. The second and third accused for this offence are severally sentenced to undergo eighteen months rigorous imprisonment.

The conviction of the first accused is affirmed.

*Conviction of first accused affirmed.*

*Convictions of second and third altered.*

