TILLAKARATNE AND OTHERS
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
RAMANATHAN, J., W. N. D. PERERA, J. AND WIJAYARATNE, J.
C.A. NO. 149 – 152/84 – H.C. COLOMBO 503/77
MARCH, 28, 29, 30 AND 31, 1989

Criminal Law – Robbery – Can accused charged with robbery be found guilty of retention? – Ss. 380, 394 Penal Code – Conspiracy

Where a person is charged with robbery under s.380 of the Penal Code, he can be found guilty of retention of stolen property under s.394 (under Ss.176 and 177 of the Criminal Procedure Code). Robbery, theft and retention are cognate offences.

The mere fact that an accused pointed out stolen property thereby leading to the inference that he knew it was concealed in that place is insufficient to find him guilty under S.394. There must be evidence to suggest that the property was placed there by the accused himself or that it was in his conscious and exclusive possession.

Sumanasena vs. *The King* (52 N.L.R. 400) followed.

A conspiracy is generally hatched in secrecy and it is almost impossible to adduce direct evidence.

A conspiracy is a matter of inference deduced from certain acts of the accused done in pursuance of an apparent criminal purpose or design between time.

Each accused's case must be considered separately and the inference must be irresistible that he was a party to the conspiracy.

Cases referred to:

1. *The King* v. *Piyasena* 44 N.L.R. 58
2. *The Queen* v. *Vellaswamy* 63 N.L.R. 465
3. *The King* v. *Podisinno* 11 N.L.R. 235
4. *Sumanasena* v. *The King* 52 N.L.R. 480
5. *Billu v. Emperor* A.I.R. (1930) Sind 168 (4))

6. *The King* v. *Cooray* 51 N.L.R. 433

7. *The Queen* v. *Liyanage* 67 N.L.R. 193, 203

8. *Bishan Lal* v. *State of Maharashtra* A.I.R. 1965 SC 682

APPEAL from judgment of the High Court of Colombo

Batty Weerakoon with *Miss Chamantha Weerakoon* and *S. Subasinghe* for the 4th, 5th and 6th accused-appellants

Upawansa Yapa, D.S.G. for Attorney-General

Cur. adv. vult

June 30, 1989.

WIJEYARATNE, J.

The seven accused in this case were indicted in the High Court of Colombo on the following counts:-

(1) That they between 1.8.1976 and 6.9.1976 did agree to commit or abet the offence of robbery of money belonging to the Arrack Tavern at Kollupitiya, an offence, punishable under section 113A read with section 380 of the Penal Code.

(2) That on 6.9.1976 the 1st to 5th accused were members of an unlawful assembly the common object of which was to commit robbery, an offence punishable under section 140 of the Penal Code.

(3) That at the same time and place aforesaid and in the course of the same transaction set out in the 2nd count above, one or more members of the said unlawful assembly did commit robbery of cash Rs.213,325/- and cheques to the value of Rs.6,877/50, which offence was committed in prosecution of the said common object, or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object, and the 1st to 5th accused, being members of the said unlawful assembly, at that time did thereby commit an offence punishable under section 146 read with section 380 of the Penal Code.

(4) That the 1st to 5th accused did commit robbery of the said cash and cheques, property in the possession of Karthigesu

Kanapathipillai, an offence punishable under section 380 read with section 32 of the Penal Code.

(5) That the 6th and 7th accused did abet the commission of the offence set out in the above 4th count and thereby committed an offence punishable under section 380 read with section 102 of the Penal Code.

As the 1st accused was never present in court and was absconding, after evidence to this effect was led he was tried in *absentia* under the provisions of section 241(1)(a)of the Code of Criminal Procedure.

The 2nd accused Nihal Wickramasinghe and the 3rd accused Hettiarachchige Chandradasa, who were charged on counts 1 to 4, had pleaded guilty to the charges against them.

On 9.6.1978 the 2nd and 3rd accused were each sentenced to 6 years' rigorous imprisonment on the 1st count, 6 months' rigorous imprisonment on the 2nd count, 6 years' rigorous imprisonment on the 3rd count and 1 year's rigorous imprisonment on the 4th count, the sentences to run concurrently.

The trial commenced on 28.1.1980 against the other accused.

The 1st, 4th and 5th accused were charged on counts 1 to 4.

The 6th and 7th accused were charged on counts 1 and 5.

After a very lengthy trial, the 1st, 6th and 7th accused were found guilty and the 4th and 5th accused not guilty on count 1.

The 1st accused was found guilty on count 4.

The 4th and 5th accused were acquitted on the charge of robbery on the 4th count, but were found guilty of the lesser offence of dishonestly retaining stolen property, punishable under section 394 of the Penal Code.

The 6th and 7th accused were found not guilty on the 5th count.

The 1st accused was sentenced to 10 years' rigorous imprisonment each on the 1st and 4th counts, the sentences to run concurrently.

The 6th and 7th accused were each sentenced to 3 years' rigorous imprisonment on the 1st count.

The 4th and 5th accused were each sentenced to 3 years' rigorous imprisonment on the 4th count (under section 394 of the Penal Code).

The 4th, 5th, 6th and 7th accused have filed petitions of appeal against these convictions and sentences, but the 7th accused subsequently withdrew his petition of appeal.

There remains for consideration the appeals of the 4th and 5th accused against their convictions (under section 394 of the Penal Code) on the 4th count and the appeal of the 6th accused against his conviction on the 1st count.

Learned counsel for the 4th, 5th and 6th accused-appellants submitted that the learned trial Judge could not find the 4th and 5th accused guilty of the lesser offence under section 394 of the Penal Code by acting under sections 177 and 178 of the Criminal Procedure Code (sections 181 and 182 of the old Code) and that he could do so only if a charge had been framed against the accused under section 394 of the Penal Code. He relied on the decisions in the cases of *The King vs. Piyasena* (1) and *The Queen vs. Vellaswamy* (2).

In these two cases it was held that the application of sections 177 and 178 of the Criminal Procedure Code (which correspond to sections 181 and 182 of the old Code) is limited to those cases where there is a doubt from the nature of the facts as to which of two or more offences the accused has committed. The different offences contemplated are cognate offences. The doubt must not be in regard to the facts but in regard to the offence disclosed by the undoubted facts. In *Vellaswamy's* case it was held that a person indicted on a murder charge cannot be acquitted of murder and at the same time, without an amendment of the indictment, he cannot be convicted under section 198 of the Penal Code of causing disappearance of evidence. In that case Basnayake, C.J., went on to say:

> "These two sections cannot properly be applied in a case in which one offence alone is indicated by the facts and in the course of the trial the offence falls short of that necessary to establish that offence but disclose another offence. Outside those offences given in the illustrations cases in which these sections may be applied seldom occur."

Therefore, learned counsel contended that it was not permissible in law to find the 4th and 5th accused guilty of the lesser offence without an amendment of the indictment.

In Sohoni's Commentary on the Indian Code of Criminal Procedure (18th Edition - 1985 - at page 2474) dealing with sections 221(1) and (2) which correspond substantially to sections 176 and 177 of our Criminal Procedure Code, it is stated:

> "The doubt contemplated by this section must arise at the time of the charge. The section contemplates cases where at the commencement of the trial there is uncertainty whether the facts which the prosecution expects or undertakes to prove, if proved, will constitute offence A or B or C and the uncertainty is resolved at the end of the trial, showing which particular offence out of these was actually committed. The uncertainty must necessarily be an uncertainty arising out of a postulated set of facts, not an uncertainty regarding the facts which the prosecution may be ultimately able to establish ..... At the time the charges are made it cannot be known what view the court will take of the evidence. In certain cases it may be doubtful as to what view will be taken by the court of the offence, although it may be considered that a view will be taken which will amount to a view that some offence has been proved."

Robbery under section 380 of the Penal Code is an aggravated form of theft as defined in section 366 of the Penal Code. The 4th and 5th accused being charged with robbery under section 380 could well have been found guilty of the lesser offence of theft. This could have been done under the provisions of either section 177 or 178 of the Criminal Procedure Code (see the decision of *The King vs. Podisinno* (3). Undoubtedly, theft and retaining stolen property are cognate offences.

In this case there were no eye-witnesses to prove that the 4th and 5th accused participated in the robbery, but they were found in possession of stolen property (consisting of some of the robbed currency notes) after the robbery. In addition there were certain other items of evidence connecting the 4th and 5th accused to this robbery. Therefore there was a doubt on the facts which could be proved, as to whether the 4th and 5th accused could be found guilty of robbery (under section 380) or of retaining stolen property (under section

394). Thereupon section 177 of the Criminal Procedure Code becomes applicable. Therefore it was permissible for the court to have found the 4th and 5th accused guilty of the lesser offence under section 394, on the 4th count.

Briefly the evidence against the 4th accused is that in consequence of information furnished by him to a Police officer (under section 27 of the Evidence Ordinance), on 18.9.76 a sum of Rs. 29,900/- in currency notes was recovered. Some of these currency notes bore the initials of witness Raman Nicholas (one of the contractors of the Kollupitiya Arrack Tavern), who identified them. These currency notes were found in a milk food (Lakspray) tin recovered from the house of his mother-in-law. The 4th accused's finger prints were found on this tin, for which no satisfactory explanation was offered.

A sum of Rs. 23,500/- was recovered by the Police in consequence of information provided by the 5th accused (under section 27 of the Evidence Ordinance), and this was recovered from the house of the 5th accused's father. Some of the notes carried the initials of the said Raman Nicholas, who identified them. In addition, there is evidence that the 5th accused had borrowed a black Peugot 403 car on 3.9.76 and returned the same on 6.9.76. It is in evidence that the persons responsible for the robbery that took place on 6.9.76 came in a black Peugot 403 car.

There is the evidence of Yasawardene and Karunawathie (husband and wife) that the 5th accused came with some friends to their house on the evening of 6.9.76 and after they left they found an empty suitcase not belonging to their household. Yasawardene had later burnt this suitcase. They also testified that on this occasion a travel bag (a B.O.A.C. bag) which was in their house was missing. This travel bag was later recovered by the Police in the possession of the 1st accused.

It has been held in the case of *Sumanasena vs. The King* (4) and several other Indian cases that where the only evidence against the accused is that he had pointed out stolen property, the presumption of guilt in terms of section 114(a) of the Evidence Ordinance does not arise.

It has been held that there must be some additional evidence to suggest that the accused himself concealed the articles in the place where it was found and it was not sufficient for a conviction that the

accused pointed out the stolen articles if it was left doubtful whether the accused or some other person concealed the stolen articles or that the accused obtained in some way the information that the stolen property was in the place where it was found. Whether the fact of the accused pointing out stolen property is or is not evidence of possession is a question of fact.

The mere fact that the accused knew where the stolen property was concealed is not sufficient. There must be some evidence to *suggest* that the accused himself concealed the article in the place where it was found. See the Indian case of *Billu vs. Emperor,* (5) and the case of *Emperor vs. Photo* referred to therein.

The question is whether the inference in any particular case is that there was "innocent knowledge" or whether the inference is that the stolen property was placed there by the accused himself.

In short, to find an accused guilty under section 394, it must be proved that it was stolen property and that the accused knew or had reason to believe the same to be stolen property and that it was in his conscious and exclusive possession. The evidence clearly establishes that these two sums of money were stolen property to the knowledge of the 4th and 5th accused and that these amounts were in the conscious and exclusive possession of each of them.

Therefore the charges under section 394 have been proved beyond reasonable doubt against the 4th and 5th accused and their conviction is justified.

Learned counsel also submitted on behalf of the 6th accused-appellant that the learned trial Judge's findings against the 6th accused on the facts did not amount to conspiracy under section 113A of the Penal Code.

Our law relating to conspiracy has been dealt with in the case of *The King vs. Cooray* (6), and *The Queen vs. Liyanage* (7) which was a Trial-at-Bar.

Gour in his Penal Law of India (10th Edition-1982 - Vol.42, page 1065) states:

> "It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offence of conspiracy. There must be an agreement of some kind .... There

must be unity of design or purpose, a concert of will and endeavour comprising what has been agreed ..... It is sufficient to constitute the offence so far as the combination is concerned if there is a meeting of the minds, a mutual implied understanding or tacit agreement, with all the parties working together with a single design for the accomplishment of the common purpose."

Previous acquaintance between conspirators is unnecessary. It is not the law that every conspirator must be present at every stage of the conspiracy. Conspiracy involves concert of design and not participation in every detail. It is not essential that the conspiracy should have been accomplished. Agreement is the essence of the offence.

A conspiracy is hatched in secrecy and it is almost impossible to adduce direct evidence. Conspiracy is a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose between them. The offence can be proved largely from the inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of a common design.

Conspiracy can ordinarily be proved only by a mere inference from the subsequent conduct of the parties in committing some overt acts which tend so obviously towards the alleged unlawful acts as to suggest that they must have arisen from an agreement to bring it about.

In the Indian case of *Bishan Lal vs. State of Maharashtra* (8), it was held that section 10 of the Evidence Act (which is the same as section 10 of our Evidence Ordinance) introduces the principle of agency and if the conditions laid down therein are *prima facie* satisfied, the acts done by one are admissible against the other conspirators. However, the conspiracy must be on foot for section 10 to be applicable.

Each accused's case must be considered separately to decide if he is a conspirator. After the evidence affecting him is considered, each accused must be proved to have been a party to the conspiracy. The inference must be irresistible that each accused was such a party.

The learned trial Judge has carefully summarised the evidence

against the 6th accused on the conspiracy charge in the 1st count. They are as follows:-

(1) The 6th accused's association with the 1st accused on 5.9.1976, which is the day prior to the robbery.

(2) On 6.9.1976, soon after the robbery, being found in possession of Rs.13,000/- in currency notes, most of which was identified by Raman Nicholas by his initials as from the subject-matter of the robbery. His inability to account for the possession of this money.

(3) Being found in the company of the 1st accused (who was absconding) at the Gampaha Railway Station on 13.9.1976.

(4) Evidence of motive against the 6th accused, in that he had to return on this day a large sum of money which he had borrowed from his mother-in-law. She required it urgently for her son's wedding.

In my view this evidence along with other minor items of evidence is sufficient to find the 6th accused guilty on the 1st count.

Therefore, for the reasons given above, I would dismiss the appeals of the 4th, 5th and 6th accused and affirm the convictions and the sentences passed on them.

RAMANATHAN, J. – I agree.

W. N. D. PERERA, J. – I agree.

Sixth accused found guilty on count 1 only.
Appeals of 4th, 5th and 6th accused dismissed.