[COURT OF CRIMINAL APPEAL]

1952 *Present:* **Gunasekara J. (President), Pulle J.** *and* **L. M. D. de Silva J.**

ANTHONY *et al.*, Appellants, *and* THE QUEEN, Respondent

APPEALS 56–58 WITH APPLICATIONS 84–86

S. C. 2—M. C. Badulla, 11,086

Common intention—Deprivation of self-control by grave and sudden provocation—Co-existence—Penal Code, ss. 32 ; 294, Exception 1.

A finding that several accused acted in furtherance of a common intention is not necessarily inconsistent with the finding that they were at the same time deprived of the power of self-control by grave and sudden provocation within the meaning of Exception 1 to Section 294 of the Penal Code.

"A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed."

APPEALS, with applications for leave to appeal, against three convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, for the accused appellants.

Boyd Jayasuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

October 31, 1952. GUNASEKARA J.—

These appeals arise out of a prosecution of the three appellants and another man, who was the fourth accused, in respect of an incident that occurred on the 10th June, 1950, on a tea plantation in Passara known as the Dynawatta Division of El Teb Estate. All the accused, except the third, were resident labourers on this division. The third too had been a resident labourer until about the end of May, when he was discharged,

and after that the first accused occasionally put him up in his room. The second accused is a son of the first, and the third and fourth are close relatives of theirs. The four accused were tried on an indictment containing three counts, of which the first charged all of them with the attempted murder of T. E. Mack, an assistant superintendent in charge of Dynawatta, and the other two charged the second accused alone with voluntarily causing hurt with a cutting instrument to a watcher named Sinniah and a tea-plucker named Maradamuttu, who too were employed on the same estate. On the first count the jury found the first, second and third accused guilty of attempted culpable homicide punishable under section 301 of the Penal Code and the fourth accused not guilty of any offence. On the second and third counts they found the second accused guilty as charged. It appears from an answer given by the foreman to a question from the presiding judge that the jury found on the first count that the appellants had acted with a common intention that would have rendered their offence one of attempted murder but that the offence was reduced by reason of their having received grave and sudden provocation from Mack.

One of the grounds set out in the notice of appeal, which the appellants have signed jointly, is that the presiding judge in his summing-up " did not put the petitioners' defence of private defence adequately, nor adequately explain the law relating to private defence, nor its application to the facts of this case." The appeals were pressed upon this ground and also upon one that was not taken in the notice, namely, that the finding that the appellants acted in furtherance of a common criminal intention was inconsistent with the finding that they were at the same time deprived of the power of self-control by grave and sudden provocation. The latter ground may conveniently be considered first.

According to the prosecution the three appellants jointly set upon Mack and wounded him with lethal weapons—a club, a pruning knife, and a long-handled hatchet or *keteriya*. The incident occurred at midday, and Mack was admitted to the Badulla hospital on the same afternoon. He was unconscious and bleeding at the time of admission and his life was in danger. The doctor who examined him observed the following injuries :—

(1) an incised wound 2″ long and scalp deep on the right eye-brow ;
(2) an incised wound ¾″ long and scalp deep over the right parietal region with a compound fracture of the skull ;
(3) an incised wound ¾″ long and scalp deep over the right occipital region with a compound fracture of the skull ;
(4) a contusion of the right eye with sub-conjunctival haemorrhage (which was a result of injuries (1) and (2)) ;
(5) an incised wound 3″ long and 1″ deep on the back of the chest ;
(6) a bite mark on the left upper arm ;
(7) abrasions over the left knee.

He was suffering from shock and there were signs of injury to the brain.

The effect of the evidence for the prosecution, so far as is material to the present question, was as follows. Mack was near the weighing-shed on Dynawatta at about noon, giving the kanakkapulle Ramiah some

instructions, when a watcher named Ambrose reported to him that the third accused had returned to the estate and was in the first accused's room. He sent the third accused a message by Ambrose asking him to leave the estate. The third accused declined to comply with this request, and Mack sent Ambrose to him again asking him to come and see Mack. He refused to comply with this request either, and Mack himself went up to the lines to speak to him. Mack was accompanied by Ramiah and Ambrose and three or four others, including Maradamuttu. As he approached, the third accused came from the first accused's room to the verandah outside. At that time the second accused too was on the verandah and the first was inside the room. Standing outside the verandah Mack asked the third accused why he remained on the estate. The third accused thereupon asked Mack if he thought it was his estate and began to abuse and threaten him, gesticulating and moving about the verandah. After some attempt at argument with him Mack pulled him by an arm, and he thereupon seized Mack by an arm and pulled him in the opposite direction. When they were pulling each other the second accused gave Mack a push from behind that propelled him on to the verandah. The first accused immediately struck him with a club on the nape of his neck. At this blow Mack fell on his knees, and the second accused then slashed his back with a pruning knife. All three accused next dragged him on his knees into the first accused's room, where they assaulted him further. Mack's impression was that the weapons used by the first and third accused were clubs ; but the police found in the room, soon afterwards, a long-handled hatchet stained with human blood on both sides of the blade, which could have been used to cause the two incised wounds on the head and compound fractures of the skull, and Mack may well have mistaken this weapon for a club. According to Mack it was the fourth accused who bit him, and he had also joined in dragging him into the room. But, unlike in the case of the appellants, there was no other evidence implicating this accused ; and Ambrose, who too gave evidence about the dragging and said that at that stage he himself struck the first accused with his watcher's baton, stated that though the fourth accused was present he did not see him take part in the dragging. Ambrose fled immediately after he had struck the first accused in his vain attempt to rescue Mack, and Rasiah had run away as soon as Mack was cut by the second accused. After Mack had been dragged into the room, the second accused cut Maradamuttu who was outside, and later cut Sinniah who came to Mack's help after the assault.

The presiding judge in his summing-up dealt with the exception of grave and sudden provocation in relation to the first count of the indictment and directed the jury to the effect that upon the evidence for the prosecution it was open to them to hold that Mack's conduct in pulling the third accused by his arm constituted such provocation. Considered in the light of the summing-up the verdict clearly means that by this conduct Mack gave the appellants provocation that was grave and sudden and they attacked him with lethal weapons while they were deprived of the power of self-control by that provocation. It is also clear that the jury held that this assault was committed by the appellants in furtherance of a common intention to commit such an assault and

therefore an intention to inflict on Mack such wounds as would be the natural and probable consequence of such an assault. The criticism that these are inconsistent findings is based on a view that it was not possible for the appellants to conceive a common intention before they had regained their power of self-control. We do not agree. The deprivation of the power of self-control that is referred to in the exception of grave and sudden provocation (Exception 1 to section 294 of the Penal Code) does not imply an incapacity to form an intention. On the contrary, the case contemplated by the exception is that of an offender who, while deprived of the power of self-control, conceives the specific intention of killing or wounding the person whose act so enraged him. Indeed, in a case falling within the exception frequently what leads to the formation of a murderous intention by the offender is the deprivation of the power of self-control, which results in a breaking down of the inhibitions that restrain him from personal violence. We can see nothing contrary to reason in a view that several persons affected in that way by rage may, while still deprived of the power of self-control, form a common intention to kill or to cause bodily injury to the person who gave them provocation. A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed. In the present case the jury may well have been satisfied that at the time of the provocation the appellants were already so united by a common bond of relationship to each other and hostility to Mack on the score of his attitude to the third accused, that as soon as he laid hands on the third accused they readily came to a tacit agreement to inflict grievous injuries on him. In our opinion there is no inconsistency in the verdict.

The evidence upon which the plea of private defence was based consisted of that of the first accused and the evidence of a doctor regarding injuries found on the appellants on the morning of the day after the incident.

The first accused gave evidence to the following effect. He and the third accused were reclining on two beds in his room when Mack came there accompanied by about 14 others. One of them, Ramiah, was armed with a knife, and the rest with clubs and sticks. The dimensions of the floor of the room were 9′ by 7′, but all of them came inside. As soon as Mack entered the room he assaulted the third accused with a stick, saying " You son of a whore, can't you come when I call you ? ". The first accused protested at this conduct and thereupon was himself struck on the head with a stick by Ambrose. He then picked up a stick and struck Ambrose a blow. There was a " big fight " inside the room and the first accused received 7 or 8 blows on his head and he fell down. After that he heard " the sounds of fighting " as he lay on the floor but he saw nothing of what went on. Presently he found Mack too lying fallen and he saw the third accused hiding behind a door and the others all running away. The second and fourth accused were not present at the time of the incident. There were only the third accused and himself to oppose Mack and those who came with him. He did not see the third accused strike a single blow. He himself struck only one blow, and that was a blow dealt at Ambrose.

According to the medical evidence the first accused had a lacerated wound 1″ long and scalp deep over the right frontal area of the scalp and another lacerated wound ¾″ long over the left parietal region. The second accused had two abrasions, ¼″ by ¼″ each, over the right parietal region of the scalp and the left side of the forehead respectively. (Though the defence elicited this evidence they adduced no evidence as to how these injuries were caused.) The third accused had a contusion 1″ by 1″ over the frontal area of the scalp.

The presiding judge directed the jury on the law relating to private defence of the body and drew their attention to the evidence that was relied on to establish the plea of private defence. It was contended that the learned judge misdirected the jury in that he failed to direct them to consider whether the appellants had also acted in the exercise of a right of private defence against house-trespass. We are quite satisfied that, having rejected the plea of private defence of the body, the jury would not have accepted that of private defence of property, which was based on the same evidence. It is clear that they disbelieved the evidence that Mack entered the room voluntarily and was not pushed and pulled into the verandah and the room by the appellants. Moreover, in view of the provisions of sections 96 and 97 of the Penal Code, in the exercise of a right of private defence against house-trespass the appellants were not entitled to take the risk of killing Mack unless the house-trespass was committed under such circumstances as reasonably caused apprehension that death or grievous hurt would be the consequence if such right was not exercised. If they had satisfied the jury that they reasonably entertained such an apprehension, then in view of the learned judge's directions regarding the right of private defence of the body the jury would have acquitted them.

The appeals are dismissed.

Appeals dismissed.