1974 *Present* : **Walgampaya, J. and Vythialingam, J.**

S. PARANDAMAN and 4 others, Appellants

*and*

T. M. D. WIJESINGHE (S. I. Police), Respondent

*S. C. 33-37/70—M. C. Hambantota, 60102*

*Penal Code, sections 32, 35, 38—Joint criminal liability—Common intention—Applicability of s. 32 to offences other than those under the Penal Code—Effect of the expression "criminal act"—Fauna and Flora Protection Ordinance (Cap. 469), as amended by Acts Nos. 44 of 1964 and 1 of 1970, section 59.*

Section 32 of the Penal Code reads as follows :—

" When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The five accused-appellants were charged with killing deer in a game sanctuary in breach of the relevant provisions of the Fauna and Flora Protection Ordinance. The evidence proved (1) that the appellants with others had gone out on a shooting expedition, (2) that one or more of them had fired shots and (3) that they were apprehended shortly after the shots were heard while bringing out from the jungle two freshly killed deer.

*Held :* (1) That the principle of joint criminal liability set out in the section is applicable even in a case where persons are charged with the commission of an offence other than an offence under the Penal Code. The expression "criminal act" in section 32 applies to all criminal acts whether made punishable by the Penal Code or any other law.

(2) That in view of section 32 of the Penal Code, the appellants were all guilty of killing deer irrespective of whether it was any one or more of them who fired the shots which killed the deer.

Cases referred to :

*Attorney-General vs. Munasinghe, 70 N.L.R. 24*

*Weerasinghe vs. Kathirgamathamby, 60 N.L.R. 87*

*Mahabood et al vs. Food and Price Control Inspector, 72 N.L.R. 116*

*Francis vs. Joseph, 73 N.L.R. 270*

*Perera vs. Munaweera, 56 N.L.R. 433*

*Wecrakoon vs. Ranhamy, 23 N.L.R. 542*

*Munasinghe vs. Perera, 74 N.L.R. 542*

*Barendra Kumar Gosh vs. Emperor, 1925 A.I.R. (P.C.) 1*

*Queen vs. Mahatun, 61 N.L.R. 540*

APPEAL from a judgment of the Magistrate's Court, Hambantota.

*N. Satyendra*, with *P. Suntheralingam*, for the accused-appellants.

*Tissa Bandaranayake*, Senior State Counsel, for the complainant-respondent.

*Cur. adv. vult.*

June 6, 1974. VYTHIALINGAM, J.—

The first and second accused who at the times material to this action were police constables attached to the Kataragama police station and the other three accused all of Kataragama were charged with killing deer in the Kataragama Game Sanctuary (count 1) and with assaulting two game wardens with clubs (counts 4 and 5). The first and second accused were in addition, charged with falsely charging two game wardens with unlawful possession of flesh of deer (counts 6 and 7). There were two other charges (counts 2 and 3) which were withdrawn at the commencement of the trial as the sanction of the Attorney-General had not been obtained.

After trial the learned Magistrate found all the accused guilty of the respective charges against them and sentenced the first and second accused to various terms of imprisonment which were to run consecutively and the third to the fifth accused to a fine of Rs. 100 each on each of the counts 1, 4 and 5. All the accused have appealed against their convictions and sentences.

The case for the prosecution which the learned Magistrate has accepted is that all these five accused along with two others went to the watch hut of the game wardens at Kataragama in a van. This place is about nine miles away from Kataragama and there is a road leading up to it from Kataragama. On either side there is a thick elephant-infested jungle and it is unusual for people or vehicles to go along this road at night. About 200 yards away from Kataragama on this road there is the quarters of the game warden M. K. P. Karunaratne, and a hut for the game guard and two watchers at Kataragama. At the other end at Katagamuwa also there is a hut with one game guard Kirineris and two game watchers Jinadasa and D. B. Gunatilake.

At this hut Kirineris is the only person provided with an official gun. On the morning of 13.9.1968 Kirineris informed Karunaratne that he wanted to take treatment in the hospital for some throat trouble and left at about 9 a.m. He returned at about 2 p.m. and stayed with Karunaratne at Kataragama. That night at about 10.30 p.m. Karunaratne observed a vehicle moving towards Katagamuwa with dim lights, and he immediately suspected that people were going out shooting and he along with Kirineris and two others waited in ambush about 2½ miles away from his quarters.

At about 11.40 p.m. these five accused and two others had gone in a van to the hut at Katagamuwa. The first accused was in uniform while the 2nd accused was not. They said that they had

come on duty and the first accused signed the patrol book which was in the hut and they had tea and left. There can be little doubt that this was the vechicle which was seen by Karunaratne as it is a lonely stretch of jungle road and vehicles seldom if not never used it.

Shortly thereafter Gunatileke and Jinadasa heard the report of a gun, from the direction of Kataragama. He made a note in his note book marked X and proceeded along with Jinadasa in the direction from which the report had come. About a mile away they saw the van halted and heard the sound of three more shots as they approached the van. These shots came from inside the sanctuary and close to this spot there was a waterhole. There was no one near the van and they hid in the jungle and watched.

Then they saw the flash of a torch from the direction of the sanctuary and they saw four persons carrying two carcases of deer and putting them in the van. There were others also and the 1st accused and 5th accused had guns. They then went up and Gunatilake told the first accused that they had done an illegal thing and wanted them to make statements, but they refused to make statements and said that the game watchers were the people who killed the deer. Then the 4th accused struck Gunatilake with a club and thereafter both of them were assaulted and bundled into the van and taken towards Kataragama.

On the way Karunaratne tried to stop the van but the van did not stop and drove on. From inside the van Gunatilake shouted out "Sir, I am Katagamuwa Gunatilake, come quickly." The first and second accused shouted out that they were the police and proceeded. Gunatilake threw his note book out in the direction of Karunaratne. The two game watchers were taken to the police station, kept overnight, paraded in the streets of Kataragama on the following morning and eventually produced in Courts on the B report P7 in which they were accused of unlawful possession of deer. They were eventually bailed out.

In the meantime Karunaratne who followed the van to the police station and met Gunatilake and Jinadasa who told them what happened. Gunatilake also told him about the note book X. He recorded their statements and also made a statement to the police. Having appraised himself of the turn of events Karunaratne left immediately by the 4.15 a.m. bus for Colombo and informed the Head of Department. Thereafter the Inspector-General of Police was informed and fresh inquiries were instituted by the Superintendent of Police as a result of which these charges were preferred against the accused.

The only matter canvassed in appeal on the facts was that in view of the unsatisfactory nature of the evidence in regard to the making of the notes X I in the note book X by Gunatilake and more particularly in the manner and belatedness of its discovery, the learned Magistrate should not have accepted this note as strongly corroborating the version of the prosecution, particularly in view of the fact that the learned Magistrate found "that there were certain inconsistencies in the evidence of Gunatilake and Jinadasa about the incidents that took place near the van when they were set upon by the accused."

The note book was thrown out of the van at about 2 a.m. on the 14th and it was found only on the afternoon of the 17th. Karunaratne to whom Guatilake had said that he had thrown it out secretly as he did not want the police to know about it, spent about one hour at the police station and left for Colombo at 4.15 a.m. He returned only late in the evening of the 16th and attended an inquiry on the morning of the 17th. He could not, therefore, have gone in search of it prior to the afternoon of the 17th. Gunatilake was released on bail on the 15th but in his statement to the Superintendent of Police he had stated that the note book was with Karunaratne. Having told Karunaratne that he had thrown the book out it was natural for him to have assumed that Karunaratne would have recovered it, and therefore he would not have gone in search of it. The delay is therefore satisfactorily explained.

There were also some alterations in the notes in regard to the number of the van and Gunatilake said that he made these alterations as he made the notes. He wrote the notes after the van had left and after he had heard the report of the gun. It is not unlikely that he would have made a mistake in trying to remember the number and then corrected it. Premadasá a police constable said that Gunatilake was dressed in a T shirt when he was at the police station and it was suggested that Gunatilake could not have carried his note book at that time as he was not wearing his tunic. But Premadasa made no note of this and was speaking from memory and the learned Magistrate considered this evidence and chose not to act on it.

The learned Magistrate very carefully considered these and the other matters and accepted the evidence of the prosecution witnesses. He has had the great advantage of hearing and seeing the witnesses and there is nothing to show that he has misread or misapprehended the evidence or formed impressions of the demeanour of the witnesses which are unwarranted by the facts. Where the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and specially where

that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, an appellate tribunal which has not had that advantage, would be very slow indeed to interfere.

The learned Attorney who appeared for the accused-appellants submitted that the charge on count 1 was not made out since there was no evidence that those accused killed the deer in question. The only evidence against the accused in respect of this charge was that the game watchers heard shots being fired and some minutes later these five accused and two others emerged from the jungle carrying the two carcases of the deer. There was evidence that the deer had been recently killed because the game ranger Karunaratne found the carcases bleading and the blood had clotted, an hour and a half later.

The first and fifth accused had guns with them, but there was no evidence that the guns had been recently fired. Both guns were breached and examined and while the first accused's gun had a live cartridge in it there was no cartridge inside the gun which the fifth accused had. None of the witnesses spoke of any evidence of recent firing such as the barrel being hot or of smell cordite from either of the guns. The report of the Government Analyst P 10 shows that the deer had been shot by S.G. slugs from a factory-loaded cartridge. But there was no evidence that they could have been fired from these guns. Nor was there any evidence as to the identity of the other two persons.

In the circumstances unless the principle of joint liability set out in section 32 of the Penal Code is applicable to offences under the Fauna and Flora Protection Ordinance the accused cannot be said to be guilty on count 1 as there is no evidence that it was they who killed the deer. The charge itself does not mention section 32. But this is not necessary—*Attorney-General vs. Munasinghe,* 70 N.L.R. 24. The charge on count 1 however, is based on the principle of joint liability set out in section 32 because it sets out that the accused " with others " killed the wild animals.

Section 32 of the Penal Code is as follows :—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. "

The question is whether this general explanation is available to be applied in a case where persons are charged with the commission of an offence other than an offence under the Penal Code. The learned Magistrate did not answer this question because following the decision in *Weerasinghe vs. Kathirgamathamby,* 60 N.L.R. 87, he thought section 59 of the Fauna and Flora Protection Ordinance (Cap. 469) as amended by Acts Nos. 44 of 1964 and 1 of 1970 was a complete answer to this contention of the counsel for the accused.

The question of the applicability of section 32 of the Penal Code to offences under other statutes was adverted to in Kathirgamathamby's case but was left undecided. That was a case under the Fisheries Ordinance, which contained in section 22 (3) a somewhat similar provision to section 59 of the Fauna and Flora Protection Ordinance. T. S. Fernando, J. considered that the three accused could have been convicted of the offence of which they were charged under section 22 (3) of that Ordinance and the question of the applicability of section 32 to offences under statutes other than the Penal Code was " left for consideration in a case where persons were charged with the commission of a statutory offence other than one under the Fisheries Ordinance, " at page 89.

In the case of *K. S. P. Mahabood et al. vs. Food and Price Conrol Inspector,* 72 N.L.R. 116, a principle of criminal liability contained in another section, viz., section 35 of the Chapter on General Explanations in the Penal Code was applied to offences under the Control of Prices Act. In that case two accused were jointly charged with the offence of having sold two pounds of beef above the controlled price. Tennekoon, J. as he then was, said " There is in my mind no doubt arising on the evidence that the 1st and 2nd accused knowingly co-operated to effectuate a sale of two pounds of beef with bones at Rs. 2.50 each, one of them doing what he did at the different stages of the transaction in order to effect a sale of that quantity of beef at that price. Section 35 of the Penal Code provides that—

> " When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts either singly or jointly with any other person, commits that offence. "

I am of opinion that upon an application of the principle of liability contained in this provision of law the 1st and 2nd accused are each guilty of the offence charged," at page 118.

In another case under the same Act this case was referred to but distinguished on the facts. In *K. G. Francis vs. B. D. C. Joseph*, 73 N.L.R. 270, Siva Supramaniam, J. said at page 272 "The facts of the instant case, however, stated already are entirely different. On the evidence, the appellant was not aware that the parcel of gram handed to the buyer by the 1st accused was one ounce short and the principles of liability contained in section 35 of the Penal Code have no application." Apparently Siva Supramaniam, J. was also of the view that if the facts had been different the principle of liability contained in section 35 of the Penal Code would be applicable to offences under the Control of Prices Act as well.

If the principles of liability contained in section 35 have been correctly applied in these two cases to offences under the Control of Prices Act, then they afford clear examples of the application of the principles of criminal liability contained in the sections of the Penal Code in the Chapter on General Explanations to offences created by other statutes. However I am not satisfied, with great respect to the distinguished Judges, that the principle of liability contained in section 35 has been correctly extended to offences under the Control of Prices Act.

Section 35 refers to an "offence committed" and therefore applies only to "offences". Section 38 (1) of the Penal Code explains what the word "offence" is and is as follows:—

> "Except in the Chapter and sections mentioned in subsections (2) and (3) the word 'offence' denotes a thing made punishable by this Code."

Sub-section 2 sets out that in Chapter IV and in the sections enumerated in the subsections the word "offence" denotes a thing punishable in Ceylon under the Penal Code or under any law other than the Code. Sub-section (3) sets out that in the sections enumerated therein the word offence has the same meaning where certain punishment is indicated. These subsections are not relevant for our purpose. So that it is clear from section 38 (1) that the application of section 35 is

limited to offences under the Penal Code and cannot be extended in view of the use of the word " offence " in section 35 and the limitation contained in section 38 (1), to offences under other Ordinances except as provided in subsections (2) and (3) of Section 38.

Thus in the case of *Perera vs. Munaweera,* 56 N.L.R. 433, a Bench of five Judges following the case of *Weerakoon vs. Ranhamy*, 23 N.L.R. 33 (four Judges) held that section 72 of Chapter IV of the Penal Code applies not only to offences under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon, because " Section 38 (2) of the Code unambiguously declares that the word ' offence ' in Chapter 4 of the Code (dealing with ' General Exceptions ') includes a thing punishable in Ceylon under any law other than this Code " even though in such a law the definition of the offence contains words of absolute and unqualified prohibition.

That was a case under the Control of Prices Act and after the decision in that case the Act was amended by Act No. 44 of 1957 which made section 72 of the Penal Code inapplicable to offences under that Act. In *Munasinghe vs. M. J. Perera,* 74 N.L.R. 542, Kretser, J. held that the exception contained in Section 73 of the Penal Code was still available to a person charged under that Act.

Section 32 of the Penal Code, however, is on a different footing. It does not use the word " offence ". The word used in the section is " a criminal act " and there are no words limiting it to criminal acts made punishable under the Penal Code. The section is as follows : " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if it were done by him alone. " The word " criminal act " is not defined in the Code. In the case of *Barendra Kumar Gosh v. Emperor,* 1925 A.I.R. P. C. 1, Lord Sumner defined the word " criminal act " in Section 34 of the Indian Penal Code which is identical with our section 32 as follows : " In other words a ' criminal act ' means that unity of criminal behaviour which

results in something for which an individual would be punishable, if it were all done by himself alone, that is in a criminal offence" at page 9. That is punishable as a criminal offence not necessarily under the Penal Code but also under any statute.

This definition has been accepted and followed by Courts in Munasinghe's case (*supra*) at page 245 and in *Queen vs. Mahatun*, 61 N.L.R. 540 at 545. In the latter case Basnayake, C. J. said at page 545, "In regard to the expression 'criminal act' it would be unwise to fetter its scope by any rigid definition. . . . In the first place the expression means what it says, an act which is punishable by law—a crime in the generic sense." In that sense, therefore there being no words of limitation, it applies to all criminal acts whether made punishable by the Penal Code or any other law.

The only reason, if it is a reason at all, why the principle of criminal liability embedded in section 32 should not be extended to offences under other Statutes is that it appears in the chapter entitled "General Explanations" in the Penal Code and it is possible to argue that it is an explanation to the provisions of the Code only. But there are other sections which are made expressly applicable to other laws. Subsections (2) and (3) of section 38 are an example. Here they are expressly made applicable. In the case of section 32 it is by necessary implication from the wider connotation of the words themselves of the section.

I hold therefore that the principle of joint criminal liability set out in section 32 of the Penal Code applies to acts made punishable by other laws as well. The proved facts in this case clearly show (1) that the accused-appellants with others had gone out on a shooting expedition, (2) that one or more of them had fired shots and (3) that they were apprehended shortly after the shots were heard while bringing out from the jungle two freshly killed deer. These facts clearly establish without doubt that all the accused appellants were acting in furtherance of an intention shared by them in common to kill deer. Invoking the aid of section 32 they are all guilty of killing deer irrespective of whether it was anyone or more of these five accused who fired the shots which killed the deer.

It is unnecessary therefore to invoke the aid of section 59 of the Fauna and Flora Protection Ordinance or to consider whether the accused who are charged as principal offenders can properly

be found guilty of attempting to commit or abetting the commission of the offence under this section 59 without a specific charge in that respect as was done in Kathirgamathamby's case (*supra*). I hold therefore that the accused were properly convicted on count 1.

The charge on counts 4 and 5 is that the injuries were caused "by means of instrument which when used as a weapon of offence is likely to cause death to wit a club." The club was not a production in this case. Nor was there any evidence as to the size and weight of this club. Gunatilake said that the fourth accused picked up the club from the spot. There is therefore no evidence that the weapon used was such as was likely to cause death. I accordingly alter the conviction on counts 4 and 5 to one under section 314 of the Code. Having regard to the gravity of the offence, which is an assault on public servants in the discharge of their official duties I see no reason to alter the sentence on these counts.

I accordingly dismiss the appeal of all the accused-appellants and affirm the convictions and sentences.

WALGAMPAYA, J.—I agree.

*Appeals dismissed.*