

RAJU AND OTHERS
v
ATTORNEY-GENERAL

COURT OF APPEAL
FERNANDO, J.
EDIRISURIYA, J.
CA 89-91/98
H.C. KANDY 1719/96
NOVEMBER 7, 25, 2002

Penal Code – S. 32 and 296 – Common Intention – Murder – Legal Principles – Common Intention to be shared – Directions to the Jury

Held :

- (i) Common murderous intention must be shared before a person can be convicted of murder on the application of section 32.
- (ii) The Trial Judge has failed to consider the case of each accused separately – failed to consider as to whether all the accused were actuated by common murderous intention – failed to refer to the required mental element re. the Murderous Intention to constitute the offence of Murder.

APPEAL from the High Court of Kandy.

Cases referred to:

1. *K v Assappu* – 50 NLR 324
2. *Punchi Banda v The Queen* – 74 NLR 494

M.K. Jayakumar for accused-appellant

P.P. Surasena, S.S.C., for Attorney-General.

Cur adv vult

December 11, 2002

EDIRISURIYA, J.

1st, 2nd, 3rd and 4th accused in this case were indicted for having committed the murder of one Sellamboram Sundararaja an offence punishable under section 296 of the Penal Code. 01

The accused having pleaded not guilty to the charge were tried by the High Court Judge of Kandy without a Jury. After trial the 1st accused was acquitted. The 2nd, 3rd, and the 4th accused were found guilty of murder and sentenced to death by the High Court Judge.

The prosecution witness Perumal Sundaralingam gave evidence to the following effect: On 18.07.1990 around 7.30 p.m. whilst he was going for work he heard the 2nd accused ordering the deceased to come out of the house. He said the 2nd accused thereafter broke open the door of the line room of the deceased and dragged him out. He had seen the incident with the help of the light burning on top of the Kovil. According to this witness he saw a big crowd of people assembled in front of the deceased's house. It appears that this witness has identified only the 2nd accused. He said when the deceased was being dragged out of the house he heard a sound of "දඩි දඩි." He also heard the deceased shouting "මාව බේර ගන්න මාව බේර ගන්න." He had seen something in the second accused's hands. He could not say whether it was a pipe or a club. 10 20

The second witness Gopalkrishnan giving evidence said that whilst he was going to work with the first witness he heard a loud noise. He ran towards the place where the incident took place. He heard Ramo the second accused telling Sundararaj that he wanted to kill him. The second accused dragged the deceased out of the line room and assaulted him. He said the accused had pipes and clubs in their hands. According to him four persons had attacked the deceased. He had seen this incident from a distance of about 15-30 feet. The light burning in the Kovil helped him to see the incident. He said he saw the fourth accused also at the scene of the incident. According to him the fourth accused had a knife in his hands. He said the first accused did not have anything in his hands but that he held the deceased when the 3rd accused attacked the deceased on the head with a pipe. 30

He sent the first witness Sundaralingam to inform the elder brother of the deceased.

The doctor who conducted the Post-mortem Examination on the deceased said he observed 10 external injuries on the body of the deceased. He said that there were 8 contusions. 40

It is his evidence that injury no. 3 had penetrated into the brain and caused a contusion in the brain. This could have been caused with a blunt weapon like a club. He said death was due to the injuries inflicted on the brain. Therefore it appears that injury No. 3 was necessarily fatal. The prosecution witness Subramaniam Tangavelu giving evidence said that on 18.07.1990 when he was at home one Sundaralingam informed him that his younger brother was attacked. He went to line No. 4 and found Sundaraja. lying in bed with injuries.

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He further said he became aware of the relationship between the deceased and him only after the death of Sundaraja. It is his evidence that when he inquired from the deceased he had told him that Raju, Ramu and Balakrishnan attacked him. He identified them as the first, second and the fourth accused respectively. There is no evidence to show that the 1st accused participated in the attack on the deceased other than the dying declaration of the deceased, which Tangavelu spoke to. The learned trial judge has having considered the fact that there was no corroboration of the 1st accused's participation acquitted him. The prosecution witness Perumal Sunderalingam has identified only the 2nd accused. It has been brought to the notice of this Court that the 2nd accused has expired since his conviction whilst in prison.

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According to the dying declaration of the deceased the fourth accused also had attacked him. The prosecution witness Gopalakrishnan has said that the 3rd accused attacked the deceased on the head with a pipe whilst the first accused held the deceased. The second accused had dragged the deceased out of his house. He said the fourth accused had a knife in his panels. The medical evidence does not disclose that the deceased had any cut injuries on his body. Therefore I am of the view that it is unsafe to find the 4th accused guilty of the charges framed against him. Accordingly I acquit the fourth accused.

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The learned counsel for the accused-appellant submitted that the learned trial judge has failed to discuss the legal concept of common intention even though the indictment has been preferred on the basis that all the accused were actuated by a common intention in committing the crime.

It seems to me that the learned trial judge has failed to refer to the required mental element i.e. the murderous intention to constitute the offence of murder. 90

In the case of *King v Assappu* (1) Dias, J. sitting with Nagalingam, J. and Gratiaen, J. held that 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. 90
- (v) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.

Justice Sirimanne in the case of *Punchi Banda v The Queen*(2) refers to the legal principle laid down in *King v Assappu* (*supra*) that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32 of the Penal Code.

The learned trial judge has failed to consider the case of each accused separately. He has failed to consider as to whether all the accused were actuated by common murderous intention. There is nothing in the judgement to suggest whether the learned trial Judge looked for evidence of pre arrangement or pre-plan from which the inferences of common intention could be inferred as a necessary and inescapable inference. 100

The accused in this case was tried as far back as 1996. In the circumstances I set aside the conviction against the 3rd accused and find him guilty of the lesser offence of culpable homicide not amounting to murder on the ground of knowledge and sentence him to ten years' rigorous imprisonment. 110

FERNANDO, J. - I agree.

Sentence varied.