1975 *Present :* **Thamotheram, J., Deheragoda, J., and Wimalaratne, J.**

H. MUDIYANSELAGE DON SOMAPALA Appellant and

REPUBLIC OF SRI LANKA Respondent

S. C. 111/74—H. C. Gampaha—17/74

Penal Code—Murder and Robbery—Possession of stolen property—Misdirection by trial judge.

Evidence Ordinance—Confession—Inference that the accused committed the offence—Prejudice to the accused.

(i) The accused-appellant was charged with the murder of three persons and in the course of the same transaction with having committed robbery. The trial judge directed the jury that where murder and robbery have been shown, as in this case, to form part of the same transaction, a recent and an unexplained possession of the stolen property will be presumptive evidence against a person on a charge of robbery and would similarly be evidence against him on a charge of murder.

Held, That while the Court may presume that a man who is in possession of stolen goods, soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession, there is no similar presumption that a murder committed in the same transaction was committed by the person who had such possession.

(ii) A sword was recovered from the house of the accused, from the accused's mother, on a statement made by the accused to the Police to the effect. "I went home and gave the sword to my mother". There was no evidence that the sword so recovered was the weapon used to commit the murders.

Held : that the evidence of the accused's statement to the Police was wrongly admitted as the possession of a sword cannot establish that the accused did participate in the criminal act of killing or that he had a common intention to kill, but the possession of the weapon which was used for the killing can.

Appeal against conviction.

P. B. J. B. Bulumulla (assigned) for the accused-appellant.
Sarath Silva, Senior State Counsel, for the State.

Cur. adv. vult.

September 23, 1975, THAMOTHERAM, J.,

The accused-appellant was charged before the High Court of Gampaha with having committed the murder of three persons, Somadasa, his wife Somi Nona and their 13 year old son Pathmatilleke. At the trial, the State Counsel moved to amend the indictment by adding as the 4th count a robbery charge which read :

> "That in the course of the same transaction (he) did commit robbery of cash, of a gold chain, and a wrist watch valued at Rs. 500 from the possession of Wanaguruge Somadasa."

The date of the offence was 28th April, 1971, at a time when insurgent activities were rampant in the country and had not yet been brought under control. There was no evidence that insurgents were active in this area.

On the 30th of April, 1971, in the evening Charles Senanayake, the Gramasevaka of the area, having received a complaint, went towards the house of the deceased. He got a foul smell from some distance away. When he went up to the house he noticed that all the doors and windows of the house were closed. Looking through a tat with the aid of a torch, he saw the dead bodies of the three deceased in the hall. He informed the Dompe Police, who arrived the next morning.

The three deceased had been brutally murdered ; each had deep cuts on the neck and all would have died instantaneously. After they had been killed, an attempt had been made to set fire to the bodies, for they had burn marks which were post-mortem. The deceased persons were the only inmates of the house. They had been killed about the 28th of April, 1971 ; two days before their bodies were discovered. Looking at the circumstances of the killing and the nature of the injuries, one would infer that the assailants had entered the house that night with murder in their heart rather than robbery. Either the murder was pre-planned or something had transpired after the entry of the assailants into the house to make such brutal killing necessary.

Inspector Abeyratne, who went in on the morning of 1st May, 1971, noticed that the almirah had been opened and articles removed. There was no evidence that the deceased had large sums of money or valuable jewellery. It was suggested that there was a rumour in the village that the deceased Somadasa had sold a land and the suggestion for the prosecution was that the assailants had broken into the house, hoping to find the proceeds of the sale. This is a motive which could have been common to many in the neighbourhood.

Although the charge refers to robbery of cash, there was no evidence led in support. The only articles belonging to the deceased which were recovered were a gold chain and a wrist watch. A question which strikes one at the outset is, was such brutal killing necessary for the robbery that was actually committed ?

The prosecution proceeded against four persons in the Magistrate's Court which included one Douglas and J. P. Martin. Douglas was a thug in the village. The police used to often go in search of him. He stayed less than 100 yards from the accused's house. He was involved with 8 others in a robbery case. He was remanded for sometime and had only recently returned from prison. There was also the evidence that the selfsame Douglas was taken by the police, together with the accused, to the jewellery shop also as a suspect in the case. The statement of the

jeweller was that he had identified both the accused and Douglas The latter had brought a gold bangle for sale which the jeweller claimed he refused to buy as he suspected them to be stolen.

The prosecution case at the non-summary inquiry was that more than one person had participated in the robbery and the murders. The accused alone was committed to stand his trial. The indictment was presented on the basis that the accused alone was responsible. As the case proceeded, the defence brought out material on which it was probable that more than one person had participated in the killing that night. The Doctor thought it more probable that at least two persons had attacked the deceased. The Registar of Finger Prints had found many finger and palm impressions which he was not able to identify. In view of all these, the learned Judge had rightly left both issues to the Jury.

The learned Judge said this at one stage in his charge :

> " What you have to decide in this case and what you have to find out is not who killed or could have killed Somadasa, Sominona and Pathmatilleke, but whether it was this accused who killed them ? I will, at a later stage, tell you that you will have to decide whether this accused did it alone or whether the accused did it along with others. "

He said elsewhere :

> " To prove the charges of murder, the prosecution must prove that it was the acts of the accused and of this accused alone that caused the injuries of Somadasa, Sominona and Pathmatilleke. "

He summed up the prosecution case as resting on five ' pillars. ' He said :

> " Now gentlemen, the most important ingredient in this case is the identity of the assailants. As you will notice, the prosecution has built its whole case, if I may say so, on five pillars. The first pillar is the possession of the gold chain by the accused which the prosecution says belonged to Somi Nona, shortly after her death. The 2nd pillar is the possession by the accused of the wrist watch shortly after this incident. In fact the possession of both these articles were on the same day, i.e. the 1st of May, 1971, which belonged to Somi Nona

and also five ten rupee notes. The 3rd pillar is the sword, which according to Sergeant Rahim, was recovered from the house of the accused from the accused's mother on a statement made by the accused to the effect: " I went home and gave the sword to my mother. " The 4th pillar is the finger and palm prints of the accused found at the scene by S. I. Sirisena and V. Liyanarachi the Registrar of Finger Prints. The 5th pillar according to the prosecution is the conduct of the accused. First of all, what the prosecution says is the strange conduct of the accused on the day of the burial of Somi Nona, Somadasa and Pathmatilleke and secondly, the conduct of the accused on the day when he was arrested by Sergeant Rahim, where Sergeant Rahim says that he was excited and his emotions upset and that he ran and he was chased and arrested. "

The learned Judge referred to the possession of a sword about 18 days after the murder as a ' pillar ' of the prosecution. This is the only item of evidence which suggests violence. The other ' pillars ' really amounted to (*a*) the possession of stolen articles; (*b*) the accused's conduct, and (*c*) the finding of the palm and finger impression on the almirah and wash basin respectively. The prosecution can only rest a case of robbery on these ' pillars ' and thereafter. try to suggest that since the accused was present at the time of the robbery, he must have participated in the murders as well.

It is not possible to take the view that the accused committed this offence alone in view of the medical evidence that probably at least two persons participated in the killing. Further, not only were the finger impressions of the accused found at the scene, but there were many others which were not decipherable and which could well have come from other persons who participated in the attack.

We have, therefore, to consider the other alternative; that this accused committed the offence of murder together with others.

Is there evidence that the accused, with the others, caused the injuries on the deceased ? Did he share a common murderous intention with others ? This implies that the accused went with

others to commit murder or at the spur of the moment joined the other to commit murder. Can we say that these further elements have been established by merely proving the accused's presence at the scene ? It is here that we think that the learned Judge seriously misdirected the Jury when he said :—

> " Gentlemen in a case where murder and robbery has been shown, as in this case, to form part of the same transaction a recent and an unexplained possession of the stolen property will be presumptive evidence against a person on a charge of robbery and would similarly be evidence against him on a charge of murder. "

The Court may presume that a man who is in possession of stolen goods, soon after the theft, is either a thief, or has received goods knowing them to be stolen, unless he can account for its possession. This is a presumption which a Court may or may not draw depending on the circumstances of the case. There is no " similar " presumption that a murder committed in the same transaction was committed by the person who had such possession. There is no presumptive proof of this. The burden still remains to prove beyond reasonable doubt that the person who committed the robbery did also commit the murder. All that the prosecution has established is that the accused was present at the time of robbery.

If it was, as rightly conceded by the State Attorney at the hearing, that more than one person was present, then there must be some more evidence to show that the accused was not only a thief but that he participated in the criminal act of killing, sharing a common intention to kill. This cannot come from recent possession of stolen articles, nor does it come from the conduct of the accused which can be explained by the fact that he was the person who committed the robbery. It is in these circumstances, that we must examine the item of evidence relating to the sword. The possession of a sword cannot establish that the accused did participate in the criminal act of killing or that he had a common intention to kill, but the possession of the weapon which was used for the killing can.

Sub-Inspector Abdul Rahim gave the following evidence :—

"On the 6th of May, 1971, I visited the house of the accused ..... He was not at home. ..... The next time was on the 15th of May ..... It was at about 1.20 p.m. I arrested the accused. When I first saw him his emotions were upset and he appeared to be excited. Thereafter he started running. I gave chase and arrested him. In arresting him I had to use minimum force to bring him under control. His arrest was made in the compound of his house. I recorded the statement in the verandah of his house"

"306. Q : In the course of his statement did he say this to you : "I went home and gave the sword to my mother

A : Yes."

In our opinion, this could well have led the Jury to take the view that in the statement the accused made to the S. I., he had admitted that he used the sword and that this sword he handed over to his mother. Although the learned Judge had given correct directions on this point, the Jury could still have made the inference that the accused had confessed to the killing.

In this connection, it is interesting to note what transpired at the trial in the absence of the Jury, before the State Counsel opened his case. The learned Judge told the defence counsel. "It will not be possible for the prosecution to prove that it was this identical weapon that was used and what the prosecution can prove is that the injuries were caused with a weapon similar to the weapon used in this case and it will be a matter for the Jury to decide whether this was the identical weapon or not that was used." He said this when the State Counsel informed him that he would be leading in evidence a part of the accused's statement to the police where he has said as follows :—"I went home and gave the sword to my mother."

In our opinion, this evidence should not have been admitted as it would have caused great prejudice to the accused as the case against him depended on circumstantial evidence alone. The Judge, having remarked that it was not possible for the prosecucution to prove that it was the identical weapon that was used,

proceeded to say that it will be a matter for the Jury to decide whether it was this identical weapon or not that was used. How can the Jury decide something which was not capable of proof ? To our mind not all the warnings given by the learned Judge could have prevented the Jury from falling into the same error as the Judge and infer that the sword produced was in fact the identical sword that was used although this was incapable of proof.

In all the circumstances of this case, we do not think it is safe to allow the convictions and sentences on the murder to stand. We, therefore, quash them and acquit the accused on these charges.

The conviction and sentence on the charge of robbery are affirmed.

DEHERAGODA. J.,

I agree.

WIMALARATNE, J.,

I agree.

Appeal allowed.