SIRISENA RANAWAKA AND OTHERS

v.

THE ATTORNEY-GENERAL

COURT OF APPEAL.
G. P. S. DE SILVA, J., T. D. G. DE ALWIS, J. AND DHEERARATNE, J.
C. A. 154 - 172/84.
H. C. ANURADHAPURA 35/82.
JULY 10 AND 11, 1985.

Unlawful assembly – Housebreaking – Robbery – Mischief by fire – Sections 140, 443, 380, 418 of the Penal Code.

Nineteen persons were indicted on seven counts of being members of an unlawful assembly the common object of which was to cause hurt to one Heen Banda, (s. 140 of the Penal Code, (Count 1) ; and in prosecution of the said common object : (Count 2) of committing housebreaking by night by entering the house of one Wimalawathie (section 443 read with section 146 of the Penal Code), (Count 3), of committing robbery of articles valued at Rs. 10,000 in the possession of Wimalawathie (section 380 read with section 146 of the Penal Code) and (Count 4) of committing mischief by fire by setting fire to car No. 1 Sri 2081 (section 418 read with section 146 of the Penal Code). On the other three counts the accused were charged with committing housebreaking by night, robbery and mischief by fire in respect of the same acts but on the basis of their having acted with a common intention.

The 4th accused was dead by the time of the trial. All the accused were acquitted on Counts 3 and 6 as there was no evidence regarding the actual robbery. All the accused were convicted on Counts 1, 2 and 4 and no order was made on Counts 5 and 7 as they were considered to be framed in the alternative to Counts 2 and 4.

The evidence showed that the appellants were looking for Heen Banda but not all of them had entered the house of Wimalawathie where Heen Banda was hiding at the time. The car referred to in the Count 4 had been set on fire (and was still burning when the Police came) but the evidence did not show by whom or when.

Held –

1. The appellants were clearly members of the unlawful assembly the common object of which was to cause hurt to Heen Banda. The fact that all of them did not enter the house made no difference to their liability. Once they are found to be members of an unlawful assembly the extent of their participation is immaterial. They also serve who only stand and wait so far as liability goes.

2. The only common object of the unlawful assembly alleged in Count 1 was to cause hurt to Heen Banda. The act of setting fire to the car was in no way connected to the common object of the unlawful assembly as specified in Count No. 1. The offence must be committed *in* prosecution of the common object. It is not enough that it was committed *during* the prosecution of the common object. Hence Count 4 fails.

3. The offence of housebreaking was immediately connected with the prosecution of the common object to cause hurt to Heen Banda who had taken refuge in Wimalawathie's house. Hence even those who did not enter the house of Wimalawathie are constructively or vicariously liable inasmuch as one or more members of the unlawful assembly committed the offence of housebreaking in the search for Heen Banda. Criminal liability will arise merely from membership of the unlawful assembly at the time of the commission of an offence if known or known to be likely to be committed in prosecution of the common object.

4. The 6th and 7th accused were first offenders of the ages of 14 and 15 years respectively at the time of the commission of the offence. Hence their age and antecedents should have been taken into account in the matter of sentence.

Cases referred to :

(1) *The King v. Abeywickrema et al (1943) 44 NLR 254, 256.*

(2) *The King v. Sellathurai (1947) 48 NLR 570.*

(3) *Khan v. Ariyadasa (1965) 67 NLR 145 (P.C.).*

APPEAL from the judgment of the High Court of Anuradhapura.

Dr. Colvin R. de Silva with *Mrs. Manouri Muttetuwegama* and *Miss Saumya de Silva* for 1st to 12th and 14th to 16th appellants.

Cecil Goonewardena for 13th and 17th appellants.

Moses Fernando, Senior State Counsel, for the State.

Cur. adv. vult.

August 9, 1985.

G. P. S. DE SILVA, J.

Nineteen persons were indicted on seven counts :–

(1) That they, with others unknown to the prosecution, were members of an unlawful assembly the common object of which was to cause hurt to Heen Banda, an offence punishable under section 140 of the Penal Code.

(2) That one or more members of the said unlawful assembly committed housebreaking by night by entering into the house of one Wimalawathie Sahabandu in prosecution of the said common object or was such as the members of that assembly knew to be likely to be committed in prosecution of the said object, an offence punishable under section 443 read with section 146 of the Penal Code.

(3) That one or more members of the said unlawful assembly committed robbery of articles valued at Rs. 10,000 in the possession of the said Wimalawathie Sahabandu, in prosecution of the said common object or was such as the members of that assembly knew to be likely to be committed in prosecution of the said common object, an offence punishable under section 380 read with section 146 of the Penal Code.

(4) That one or more members of the said unlawful assembly committed mischief by setting fire to car No. 1 Sri 2081, in prosecution of the said common object or was such as the members of that assembly knew to be likely to be committed in prosecution of that common object, an offence punishable under section 418 read with section 146 of the Penal Code.

(5) That they with persons unknown to the prosecution committed housebreaking by night by entering into the house of the said Wimalawathie Sahabandu, an offence punishable under section 443 read with section 32 of the Penal Code.

(6) That they with persons unknown to the prosecution committed robbery of articles valued at Rs. 10,000 in the possession of Wimalawathie Sahabandu, an offence punishable under section 380 read with section 32 of the Penal Code.

(7) That they with persons unknown to the prosecution committed mischief by setting fire to car No. 1 Sri 2081, an offence punishable under section 418 read with section 32 of the Penal Code.

The 4th accused was dead at the time of trial. The High Court Judge convicted all the other accused on counts 1, 2 and 4. All the accused were acquitted on counts 3 and 6 since there was no evidence in regard to the actual robbery of the articles. The High Court Judge made no order on counts 5 and 7 as he took the view that they were framed in the alternative to counts 2 and 4. All the accused who were convicted have appealed against their convictions and sentences.

This prosecution is the sequel to an incident which occurred on 27th November 1978 at the house of Wimalawathie. She was a widow who lived with her two daughters and her two sons in her house at Pansalgodella. On 27.11.78 at about 6 or 6.30 p.m. car No. 1 Sri 2081 driven by one Gamini came and stopped in the compound. Gamini inquired as to whether the doctor who was a boarder in the house was at home. Wimalawathie replied that he was away and while she was talking to Gamini, a lorry belonging to the Multipurpose Co-operative Society of the area came and stopped by the gate. Heen Banda, the President of the Co-operative Society got down from the lorry and came up to the house. Heen Banda was engaged to be married to one of the daughters of Wimalawathie. While Wimalawathie was talking to Gamini and Heen Banda, she observed that a crowd had collected near the M.P.C.S. lorry. The crowd was armed and were shouting. Thereupon Wimalawthie and the others came inside the house and closed the door. The crowd began to throw stones at the house. The tiles broke and fell inside the house. Stones struck the windows and the window panes were shattered. Wimalawathie and her children hid themselves in a room. Heen Banda too got on to some planks which were placed across the rafters and hid himself in a room. A short while later the door was forced open and several of the appellants entered the house. Some of them were armed. They began to smash the articles in the house. A little later Wimalawathie heard the words "Police, Police". The crowd thereupon disappeared. She identified the 7th, 8th, 10th and 14th appellants as having entered the house. She further identified the 11th, 15th, 16th, 18th and 19th appellants at the entrance to the house. She said they were armed. She observed that the kitchen and the car in the compound had been set on fire.

The next eye-witness was her son Sunimal. He identified the 8th, 10th, 11th, 12th, 14th, 15th, and 16th appellants as having entered the house. Some of them had shouted "kill, kill". He said they were armed.

The last eye-witness was Heen Banda. He identified the 2nd, 3rd, 11th, 12th, 13th, 14th, 16th and 17th appellants inside the house. He testified to the fact that these appellants shouted and inquired as to where he was. He said that they were in search of him. He was hiding in a room at that time and they failed to get at him. Once the police arrived, he came out of the room. He saw the 1st appellant at the entrance to the house armed with a gun. He further stated that around noon on this very day, there was an altercation between him and the deceased 4th accused and that in the course of that incident he had struck a blow on the latter. The deceased 4th accused was one of the sons of the 1st appellant. The 1st appellant was also present at that time.

The events of the day ended with the arrival on the scene of Police Inspector Maligaspe, accompanied by a sergeant and a constable. As soon as the Police got down from their vehicle, they arrested the 2nd, 3rd, 5th, 6th, 7th and 9th appellants while they were damaging the house from outside. The Police observed that the whole house was damaged, a car was burning in the front compound, and the kitchen was on fire.

On a consideration of the evidence outlined above, there is little doubt that the appellants were members of an unlawful assembly, the common object of which was to cause hurt to Heen Banda. Their conduct both inside and outside the house, their utterances which showed that they were in search of Heen Banda and the incident Heen Banda had with the son of the 1st appellant earlier in the day, clearly established that they were members of the unlawful assembly. The identification of the appellants was not seriously canvassed before us. The appellants were well known to the witnesses ; the burning car and the kitchen which was on fire shed sufficient light.

The fact that all the appellants did not enter the house makes no difference to their liability on count 1. In the oft-quoted words of Soertsz, S.P.J. in *The King v. Abeywickrema et al* (1) "once they were found to be members of an unlawful assembly, the extent of their

participation is immaterial when we are considering their liability in law. In regard to that liability they also serve who only stand and wait." Mr. Moses Fernando, Senior State Counsel, was right in his submission that there was ample evidence to establish count 1. I accordingly affirm the convictions of all the appellants on count 1.

The principal submission of Dr. de Silva, Counsel for the 1st to 12th and 14th to 16th appellants was that the convictions on count 4 cannot in law be maintained. Counsel emphasised that the only common object of the unlawful assembly alleged in count 1 was to cause hurt to Heen Banda. Dr. de Silva strenuously contended that it cannot be said that the act of setting fire to the car in the compound was committed in "prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object" – vide section 146 of the Penal Code. In other words, Dr. de Silva submitted that the mischief alleged in count 4 is in no way related to the common object of the unlawful assembly specified in count 1. This argument is supported by the decision of the Court of Criminal Appeal in *The King v. Sellathurai* (2) cited before us by Mr. Cecil Gunawardena, Counsel for the 13th and 17th appellants. Mr. Gunawardena relevantly referred us to the following passage in the judgment of Howard, C.J. :

> "Now the common object of this particular unlawful assembly was to cause hurt to Murugar Chelliah, Velan Sinnapodian and Murugan Nagan. Can it be said that, if attempted murder or attempted culpable homicide not amounting to murder was committed by one of the members of the unlawful assembly, such offence was committed "in prosecution of the common object of that assembly" within the meaning of these words in section 146 ? Mr. Perera contends that the phrase does not mean the same as the phrase "during the prosecution of the common object of the assembly". With this contention we agree. The offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members. In other words the act must be one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object".

The evidence does not disclose the person or persons who set fire to the car, the stage at which it was done, nor the circumstances in which the act was committed. In short, there is no evidence to show that the offence of mischief alleged in count 4 was committed with a view to accomplishing the common object of the unlawful assembly specified in count 1. The most that can be said is that the car was set on fire "during the prosecution of the common object" of the unlawful assembly. This would not suffice to bring home the charge on count 4. The submission of counsel for the appellants is therefore entitled to succeed. I accordingly quash the convictions and sentences imposed on all the appellants in respect of count 4 of the indictment.

Dr. de Silva next submitted that, on count 2, it is only the appellants who actually entered the house, after the door was forced open, who could be found guilty and not the appellants who remained outside the house. As stated earlier, there is clear evidence to show that the common object of the unlawful assembly was to cause hurt to Heen Banda. Once the attack on the house commenced, Heen Banda sought shelter in a room in the house. The door of the house was closed and whoever who came in search of Heen Banda had necessarily to force open the door and thereby commit "housebreaking" – vide the definition contained in section 431 of the Penal Code. Thus it is clear that the offence of "housebreaking" is immediately connected with the common object of the unlawful assembly of which the appellants were members. Now, the appellants were not charged on count 2 with having committed the offence of housebreaking *themselves* but the charge was specifically on the basis that they were *constructively* or *vicariously* liable inasmuch as one or more members of the unlawful assembly committed the offence of housebreaking "in prosecution of the common object of the assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object" – vide section 146 of the Penal Code. What the prosecution had to prove was –

(*a*) that the appellants were members of the unlawful assembly set out in count 1 ;

(*b*) that the offence of housebreaking (section 443 of the Penal Code) was committed in prosecution of the common object or that the offence was such as the members knew to be likely to be committed in prosecution of the common object ;

(c) that the appellants were members of the unlawful assembly at the time the offence of housebreaking was committed.

On a perusal of the evidence, I am satisfied that all the above elements postulated in section 146 of the Penal Code have been clearly established. The Privy Council in *Khan v. Ariyadasa* (3) while dealing with the question of the joinder of charges under section 32 and 146 of the Penal Code observed :

> "Under section 32 criminal liability results from the doing of a criminal act in furtherance of the common intention : under section 146 criminal liability may result merely from the membership of the unlawful assembly at the time of the commission of an offence known to be likely to be committed in prosecution of its object".

Therefore, in so far as their liability under section 146 of the Penal Code is concerned, it matters not whether some of the appellants did not actually enter the house. In the words of Milton "they also serve who only stand and wait". It is to be noted that the 1st appellant was just outside the entrance to the house *armed with a gun*. The appellants who were arrested by the Police were at that time engaged in damaging the house. Thus they did more than "only stand and wait". I therefore find myself unable to accept Dr. de Silva's submission in regard to count 2. The convictions of all the appellants on count 2 are affirmed.

Mr. Cecil Gunewardena submitted that the 1st, 13th and 17th appellants were identified only by Heen Banda but that the High Court Judge has acted on the basis that Heen Banda's evidence in regard to identification was corroborated. With this submission I do not agree. On a scrutiny of the judgment it would not be fair to say that the trial Judge has taken the view that the evidence of Heen Banda on the question of the identification of the 1st, 13th and 17th appellants was corroborated by the testimony of any other witness. In any event, he has unreservedly accepted the evidence of Heen Banda.

Mr. Gunewardena also urged that the trial Judge has failed to comply with section 283 (1) of the Code of Criminal Procedure Act No. 15 of 1979 inasmuch as the judgment does not contain "the point or points for determination, the decision thereon and the reasons for the decision". The facts of the case fell within a narrow compass. In my view, there is a sufficient examination of the facts and there is a strong finding that the witnesses for the prosecution are

witnesses of truth. It is true that the questions of law raised on this appeal were not specifically considered by the Judge, but the failure to consider a pure question of law which does not appear to have been raised before him cannot, in the circumstances of this case, vitiate the judgment.

In the result, the convictions of all the appellants on counts 1 and 2 are affirmed ; the convictions and sentences imposed on all the appellants on count 4 are set aside and they are acquitted on count 4. In regard to the sentences imposed on the appellants on counts 1 and 2, Dr. de Silva stated that the 6th and 7th appellants were only 14 and 15 years respectively at the time the offences were committed and also that they were first offenders. Having regard to their age and antecedents, the terms of imprisonment imposed on the 6th and 7th appellants (Kolongahapitiya Herath Mudiyanselage Nimal and Ranawaka Arachchilage Ube Jayawickrema, respectively) on counts 1 and 2 are suspended for a period of 10 years from today. The fines of Rs. 500 imposed on the 6th and 7th appellants are also set aside. However, as regards all the other appellants, the sentences of imprisonment, the fines and the default terms of imprisonment imposed on counts 1 and 2 are affirmed. In the event of the fines being paid, the entirety of it should be given to Wimalawathie Sahabandu as compensation for the damages she has suffered.

The Registrar is directed to return the record to the High Court for compliance with the provisions of section 303 (4) of the Code of Criminal Procedure Act No. 15 of 1979 in respect of the 6th and 7th appellants whose terms of imprisonment have been suspended.

T. D. G. DE ALWIS, J. – I agree.

DHEERARATNE, J. – I agree.

Conviction of all the appellants on Counts 1 and 2 affirmed.
Conviction on Count 4 set aside.
Sentences of fine on 6th and 7th accused set aside and imprisonment imposed on them suspended for ten years.
Sentences of fines and imprisonment and default terms imposed on Counts 1 and 2 imposed on the other appellants affirmed – fines, if paid, to be given to Wimalawathie.