ABEYSEKERA

v.

ATTORNEY-GENERAL

SUPREME COURT
WEERARATNE, J.,
WIMALARATNE, J., &
RATWATTE, J.
S. C. NO. 25/81
C. A. NOS. 47 TO 52/79
H. C. KURUNEGALA NO. 26/27
SEPTEMBER 28, 1981.

Criminal Law – Indictment for unlawful assembly, robbery and murder – s. 296 read with s. 32 of the Penal Code Circumstantial evidence – Identification – Identification parade – Presumption from possession of stolen articles.

Six persons were indicted on six counts of unlawful assembly, robbery and murder of a Buddhist priest and found guilty on all six counts by the unanimous verdict of the jury. The Case rested on circumstantial evidence. In appeal the Court of Appeal acquitted the 3rd, 4th, 5th and 6th accused on all six charges on the ground of unsatisfactory identification. The 1st and 2nd accused were also acquitted on counts 1, 2 and 3 based on liability as members of an unlawful assembly but their appeals on count 4 (murder on the basis of common intention) and counts 5 and 6 (robbery and causing hurt whilst committing robbery on the basis of common intention) were dismissed. The 1st accused did not appeal from the judgment of the Court of Appeal. The 2nd accused appealed only against the judgment and sentence on count 4 (murder on the basis of common intention – s. 296 read with s. 32 of the Penal Code).

Held

(1) Identification parades are held to enable persons to identify suspects who had not been known to them earlier. It is therefore of the utmost importance that the identifying witnesses should be called as witnesses at the trial and asked the specific question as to whom they identified at the earlier parade. The best evidence is not obtained by simply asking the officer who held the identification parade to testify as to who identified whom.

(2) There was so sharp a conflict in the evidence relating to the possession by the 2nd accused of certain stolen articles (razor and pocket watch) and the evidence relating to the discovery of a trunk box on a statement alleged to have been made by him that if the attention of the jury had been drawn to it the verdict may well have been different.

(3) Although the presumption arising from recent possession of stolen property is that the person in possession is either the thief or has received them knowing them to be stolen, there is no similar presumption that a murder committed in the same transaction was committed by the person who had such possession. The onus still remains on the prosecution to prove that the person who committed the robbery did also commit the murder or participated in the criminal act of killing sharing a common intention to kill.

(1) Sunderalal v. State of Madhya Pradesh (1954) 55 Cr. L.J. (S.C.) 257.
(2) Fakirchand v. The State (1950) 51 Cr. L.J. 1265.
(3) Chiraveddi Munayya v. Emperor 21 MLJ 1071.
(4) Don Somapala v. Republic of Sri Lanka (1975) 78 NLR 183.

APPEAL from judgment of the Court of Appeal.

Dr. Colvin R. de Silva with N. V. de Silva for the appellant.
P. R. P. Perera Deputy Solicitor-General with W. N. D. Perera Senior State Counsel for the respondent.

Cur. adv. vult.

October 14, 1981
WIMALARATNE, J.

On 28.9.81 we allowed the Appeal of the 2nd accused from his conviction and sentence for the offence of murder; we now state our reasons.

Six accused were indicted in the High Court of Kurunegala with having committed the offences of unlawful assembly, robbery of cash and articles to the value of Rs. 3390/- from the Minhettiya temple, and of the murder of Rev. Sarananda Thero, the Chief incumbent of that temple. The 1st, 2nd & 3rd counts were charges on the basis that the six accused were members of an unlawful assembly. The 4th count charged them with having committed the offence of murder, an offence punishable under section 296 read with section 32 of the Penal Code (Cap. 19), whilst the 5th and 6th counts charged them with having committed the offences of robbery, and causing hurt whilst committing robbery, offences punishable under sections 380 and 382 respectively read with section 32.

The prosecution case briefly was that the six accused had entered the temple on the night of 10.3.75 removing an iron bar of the window in a room reserved for visiting priests, and had forced open various almirahs in the hall and in two of the rooms and removed articles of clothing etc. from them. One of the almirahs was in the room where the deceased priest slept, one was in the hall and another was in a room which was reserved for Rev. Sumana, the Chief pupil of the deceased priest, who had taken up residence in the Rekawa temple, two miles away, but who was in the habit of visiting his 95 year old tutor at least twice a day. From the room where the deceased slept had been removed a "Zenith" Radio P6, and from Rev. Sumana's room had been removed various articles including a trunk box P1, a razor P13 in a case P13(a), and a pocket watch P20 minus its winder. The Rev. Sarananda had been tied up and had been smothered and strangled. Death had resulted from asphyxia resulting from strangulation of the neck. The person or persons who caused the death of the priest had undoubtedly a murderous intention.

Although three other persons had been sleeping in the temple that night there was no direct evidence of the identity of the intruders. The case for the prosecution rested entirely on circumstantial evidence, the main items of evidence being these :—

(a) the presence of the left palm print of the 1st accused in one of the shutters of the almirah in the deceased's room, which had been ransacked;

(b) the sale by the 1st and 3rd accused on or about 16.3.75 at Maradankadawala of the radio P6 which had been stolen from the deceased's room;

(c) the recovery of certain articles of clothing from the possession of the 3rd, 4th, 5th and 6th accused soon after the incident;

(d) the recovery from the possession of the 2nd accused of a suitcase inside which were, *inter alia,* the articles P13, P13(a) and P20 at the time he was arrested by Police Constable Wilfred when he was running away from the house of one Nimal alias Abeyratne on the approach of the Police party at about 11.30 p.m. on 19.3.75;

(e) the recovery of the trunk box P1 by Police Sergeant Kularatne, from behind the house of Nimal, on being pointed out by the 2nd accused on 21.3.75; and

(f) the close association by the 2nd accused with the 1st accused just before and some time after the date of the incident.

The jury by their unanimous verdict found all six accused guilty on all six counts of the indictment. All six accused appealed to the Court of Appeal. That court acquitted the 3rd, 4th, 5th and 6th accused on all the charges, as the articles found in their possession had not been satisfactorily identified as being property belonging to the temple. Consequently the 1st & 2nd accused were also acquitted on the unlawful assembly counts 1, 2, & 3, but their appeals from their convictions on counts 4, 5 & 6 were dismissed.

The 1st accused has not appealed from the judgment of the Court of Appeal. The 2nd accused has appealed only against the judgment and sentence on count 4, that is the murder count. Our task has, accordingly, been to decide whether the 2nd accused has been rightly convicted of the murder of Rev. Sarananda. There being no direct evidence that he it was who strangulated the priest, the problem is reduced to a determination as to whether the cir-

cumstantial evidence points conclusively to his having shared a common murderous intention with the person or persons who caused the death of the priest by strangulation.

The Court of Appeal has given the following reasons for dismissing the appeal of the 2nd accused:—

"The main items of evidence against the 2nd accused-appellant were his close association with the 1st accused appellant from the 10th March for about 10 — 12 days. On 19.3.1975 he was caught by P.C. 4879 Don Wilfred running away from Abeyratne's house at 10.30 p.m. carrying a suitcase. In this suitcase was found a razor p.13a and a pocket watch p. 20 apart from other articles. Rev. Sumana had written his initials " " on the razor case and he had no difficulty in identifying it as his razor which was kept in his room in the Minhettiya temple. He also identified the pocket watch p.20 as his property. He had engraved the letter 'M' near the figure '4' on the face of the watch. The winding knob was missing from the watch. This was later traced in the drawer of the table in his room in the Minhettiya temple."

"According to Inspector Ratnayaka on 3.4.1975 on a statement made by the accused-appellant: "I can point out where there are sardine tins" a crudely opened sardine tin was found near some tree stumps on a gravel road leading to the Minhettiya temple. The 2nd accused-appellant had knowledge of the existence of a sardine tin close to the Minhettiya temple of the same brand as those stocked in the temple prior to the murder. The 2nd accused-appellant gave no evidence at the trial and offered no satisfactory account of the stolen articles found in his possession."

The main item of the close association of the 2nd accused with the 1st is said to be the sale by the two of them on 16.3.75 of the radio P6 to one Ariyasena in the boutique of one Sugathadasa at Maradankadawela. The Court of Appeal has mistakenly gone on the footing that the 2nd accused it was who was associated with the 1st accused in that transaction. No, it was not the 2nd accused but the 3rd accused. The evidence was that the two persons who sold the radio set were unknown to Ariyasena and Sugathadasa. An identification parade was therefore held seven months later, on 20.10.75, in the Magistrate's Court by Mr. Ivor Perera, a J. P. U. M. Ariyasena was not called to identify anyone at that Parade, whilst Sugathadasa's evidence at the trial was that he "identified two persons in the parade as those two who came to sell the radio." He was not asked as to who those two persons were. Mr. Ivor Perera testified to the fact that Sugathadasa, when

asked to identify the persons who came to his shop and sold the radio to Ariyasena, pointed out B. M. Premaratne (the 1st accused) and B. H. Lionel (the 3rd accused). The *2nd accused Abeysekera was not identified at that parade;* the Court of Appeal has thus erred in stating that he participated along with the 1st accused in the sale of the radio and in treating that fact as an item of circumstantial evidence against him.

It is necessary at this stage to comment on the evidence led at the trial relating to the identification parade. Identification parades are held to enable persons to identify suspects who had not been known to them earlier. It is therefore of the utmost importance that the identifying witnesses should be called as witnesses at the trial and asked the specific question as to whom they identified at the earlier parade. The best evidence is not obtained by simply asking the officer who held the identification parade to testify as to who identified whom.

Let me now analyse the evidence relating to the possession by the 2nd accused of the stolen articles P13, P13(a) & P20, and the evidence relating to the discovery of the trunk box P1 on a statement alleged to have been made by him. There is so sharp a conflict of evidence on this aspect of the case that had the attention of the jury been drawn to it, the verdict may well have been different. Constable 4879 Wilfred of the Galewela Police claimed to have arrested the 2nd accused on the night of 19.3.75 when he was on patrol duty with another constable. On receipt of certain information they approached the house of one Nimal. The dogs began to bark, and when they flashed their torches two persons came out of the house of Nimal and started running. They arrested one person who was the 2nd accused, and he had in his hand a suitcase, which when examined later at the police station contained amongst some articles the razor P13, P13(a) & the pocket watch P20. They were identified subsequently by Rev. Sumana as the articles lost from his room. Some weeks later he handed over to the Police the missing winder of the pocket watch.

Sergeant 6066 Kularatne also of the Galewela police went for investigations on the evening of 21.3.75 along with the 2nd accused, to the house of Nimal, also known as Abeyratne. In a shrub jungle 50 yards behind that house he recovered the trunk box P1 and also a suitcase and a travelling bag, all on being pointed out by the 2nd accused.

The evidence of Inspector Ratnayake who was attached to the Kurunegala Police Station is that when he went to the Galewela

Police Station on 27.3.75 he learned that the productions had been removed to the Dambulla police station. Rev. Sumana identified his articles at that station. In the course of his investigations Ratnayake traced Nimal alias Abeyratne at Lellopitiya, in Ratnapura, and recorded his statement on 29.3.75. As a result of that statement he says he decided to arrest 1st, 2nd, 3rd & 4th accused. A search for them at their places of residence proved futile, but on 2.4.75, on information received he went to the Dambulla bus stand and took the 2nd accused into custody and recorded his statement on 3.4.75. He went to the temple along with the 2nd accused; by the gravel road that leads to the temple there were some stumps of trees and on examination he found an open "Morjan" sardine tin P19 which had not been opened with a tin cutter, but had been unevenly cut. There was evidence that similar tins of sardine which had been stocked in the temple had been lost.

The officers therefore claimed to have arrested the 2nd accused – Constable Wilfred on 19th March and Inspector Ratnayake on 2nd April. There was no evidence led at the trial that the 2nd accused had been released from custody between the 21st March and the 2nd of April. The absence of such evidence ought to have created in the minds of the jury a doubt regarding the veracity of the evidence of either constable Wilfred or of Inspector Ratnayake or of both. It seems most extraordinary that when persons suspected of theft are detected running away to escape arrest by the police they are seen very often carrying with them incriminatory evidence such as the fruits of the very crimes they are suspected of having committed. In spite of these serious infirmities in the prosecution case against the 2nd accused the Court of Appeal has considered it safe to accept the verdict of the jury. We would, therefore, rather approach this problem on the footing that constable Wilfred is a truthful witness, and proceed to examine whether the conviction for murder could yet be sustained in law.

On the question whether recent possession of stolen property raises a presumption not merely of theft or dacoity but also of some graver offence committed in the same transaction, the decisions of the Indian Courts appear to be conflicting. In some cases – eg. *Sunderalal v. State of Madhya Pradesh* – (1954) 55 Cr. LJ (S.C.) 257[1] – it has been held that in cases in which murder and robbery are shown to form part of one transaction, recent and unexplained possession of stolen property, in the absence of circumstances tending to show that the accused was only the receiver of the property, would not only be presumptive evidence against the prisoner on the charge of robbery but also on the

charge of murder. There was evidence in that case that the stolen property sold by the accused was jewellery habitually worn by the deceased, and also evidence that the accused and the deceased were seen together immediately before the murder. In other cases eg. *Fakirchand v. The State* (1950) 51 Cr. L.J. 1265[2] a Full Bench of the Madhya Bharat High Court has expressed the view that mere possession of property stolen from the deceased is not enough for convicting the prisoner for murder. The possession by the accused of all the property which was the result of robbery justifies only an inference that they took part in the robbery.

On this question *Wills* in his work on *Circumstantial Evidence* (7th Ed.) page 104 says — "The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft." He then refers in footnote (2) to the case of *Chiraveddi Munayya v. Emperor* (21 MLJ) (1071)[3] "If it is proved that a person was found, soon after the murder of another person, in possession of property which was on the person of the latter when last seen alive, an inference might be drawn that he obtained possession of the property by the murder of the deceased; but to justify the inference, there must be satisfactory proof that the deceased had them on his person at the time of the murder and the accused cannot explain his possession." In India, therefore, no certain rule of universal application appears to have been laid down. The cumulative effect of all the circumstances, established by evidence and the nature of these circumstances have to be taken into consideration, and then it has to be judged whether, having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused.

In the case of *Don Somapala v. Republic of Sri Lanka* (1975) 78 NLR 183[4], our Supreme Court has taken a view more in consonance with the principles of English law; that is that although the presumption arising from recent possession of stolen property is that the person in possession is either the thief or has received them knowing them to be stolen, there is no "similar" presumption that a murder committed in the same transaction was committed by the person who had such possession. The burden still remains on the prosecution to prove that the person who committed the robbery did also either commit the murder or participated in the criminal act of killing sharing a common intention to kill. I would reaffirm the decision as stating the law relating to the presumption arising from recent possession of stolen property.

On an application of the principle laid down in *Somapala's case* (above) there was abosolutely no case for the accused to meet on count 4. Even on an application of the principle stated by *Wills* (above) the fact that the property found to have been in the 2nd accused's possession was not property proved to have been in the possession of the deceased but in the possession of Rev. Sumana, in a room not even adjacent to the room where the deceased was, should enure to the benefit of the accused.

For these reasons we allowed the appeal of the 2nd accused on count 4 of the indictment and acquitted him on the charge of murder.

WEERARATNE, J. – I agree.

RATWATTE, J. – I agree.

Appeal allowed.
Conviction and Sentence quashed and 2nd accused acquitted.