

**RAJADHEERA AND OTHERS**  
**v**  
**ATTORNEY-GENERAL**

COURT OF APPEAL  
RANJITH SILVA, J.  
SISIRA DE ABREW, J.  
CA 178/2003  
HC NEGOMBO 138/2001  
MARCH 26, 2007

*Common intention – Failure to consider the principles of law relating to the common intention – Fatal – Criminal Procedure Code – Section 334 – Constitution Article 138.*

The appellants were convicted of the offence of attempt to commit murder of one D. It was contended by the appellant that the learned trial Judge had failed to consider the principles of law relating to common intention and that he has not considered his evidence against each appellant separately.

**Held:**

- (1) When accused persons are charged on the basis of common intention trial Judge or Jury must be mindful of the principles of law relating to the common intention:-
  - (1) *Case of each prisoner must be considered separately.*
  - (2) *Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed.*
  - (3) *They must be told that the benefit of any reasonable doubt in this matter must be given to the prisoner concerned.*
  - (4) *Jury must be warned to be careful not to confuse 'same or similar intention entertained independently of each other' with 'common intention.'*
  - (5) *Inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case.*

- (6) *Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence direct or 'circumstantial either of pre-arrangement or a pre-arranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence to enable them to say that a co-accused had a common intention entertained independently of each other.*
- (7) *Jury should be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act.*
- (8) *In such a case such co-accused would be liable only for such criminal acts which they themselves committed.*
- (9) *Jury should be also directed that the mere fact that the co-accused were present when the doer did the criminal act does not per se constitute common intention, unless there is other evidence which justifies them in so holding.*
- (10) *Judge should endeavour to assist the jury by examining the case against each of the co-accused in the light of those principles.*

(2) The trial Judge totally failed to consider the concept of common intention but proceeded to convict all the accused on the basis of common intention – failure to give adequate reasons as to why he convicted all the accused on the basis of common intention and the failure to consider the concept of common intention – have resulted in a miscarriage of justice – Section 334 of the Code and proviso to Article 138 cannot be applied.

**APPEAL** from the judgment of the High Court of Negombo.

**Cases referred to:**

- (1) *King v Assappu* -50 NLR 324.
- (2) *King v Ranasinghe* - 47 NLR 375.
- (3) *Mah bub sha v Emperor* - 1945 PC 118.
- (4) *King v Piyadasa* - 48 NLR 295.
- (5) *King v M.H.Arnolis* - 44 NLR 370.
- (6) *King v Croos* - 46 NLR 135.
- (7) *King v Sathasivam* - 46 NLR 468, 476.
- (8) *King v K.W.Jayanhamy* - 45 NLR 510.

*Dr. Ranjit Fernando* for appellant.

*Mohan Seneviratne* SSC for the Attorney-General.

May 23, 2007

**SISIRA DE ABREW, J.**

The appellants were convicted of the offence of attempt to commit murder of a man named Dhanushka and each was sentenced to three years rigorous (RI) imprisonment. A fine of Rs. 1500/- carrying a default sentence of three months RI was also imposed on each appellant. This appeal is against the said convictions and the sentences.

The prosecution case can be quiet briefly summarized as follows:

On the day of the incident around 1.30 p.m. Dhanushka who was on his way home from a nearby boutique went to the front yard of the house of the 4th appellant as he motioned Dhanushka to come. When Dhanushka went to the door-step of the 4th appellant, he was attacked by a person named Ananda and the appellants. All of them were armed with clubs and swords. The 1st appellant attacked him with an iron club and the 2nd appellant with a sword. He did not describe the region of the body where the blows alighted. At one stage he said he lost his consciousness after the 1st blow. Again he said that the attack went on for about twenty minutes.

The complaint of the learned Counsel for the appellants was that the learned trial Judge failed to consider the principles of law relating to the common intention. I have gone through the judgment of the learned trial Judge and in my view, he has failed to consider the principles of law relating to the common intention. He has not considered the evidence against each appellant separately. The words 'common intention' were not even found in the judgment. Although it is not strictly necessary for the learned trial Judge who has a trained legal mind to state all the principles of law relating to common intention, it must be apparent from the judgment that he had directed his mind to the relevant principles of law because especially in a case of murder he should be mindful that he was dealing with liberty of a person. When accused persons are charged on the basis of common intention trial judge or the jury as the case may be must be mindful of the principles laid down in *King v Assappu*<sup>(1)</sup>. If the accused is tried by a judge he must bear in mind the following principles or if the accused is tried by a jury trial judge

must direct the jury on the following principles. I will reproduce below the principles laid down in *Assappu* case (*supra*) (a) the case of each prisoner must be considered separately; (b) that the Jury must be satisfied beyond reasonable doubt that he was actuated by a common intention with the doer of the criminal act at the time the alleged offence was committed; (c) they must be told that the benefit of any reasonable doubt on this matter must be given to the prisoner concerned, *King v. Ranasinghe*<sup>(2)</sup> at 375; (d) the Jury must be warned to be careful not to confuse "Same or similar intention entertained independently of each other" with "Common intention"; (e) that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case *Mah bub sha v. Emperor* <sup>(3)</sup>; (f) the Jury should be told that in order to justify the inference that a particular prisoner was actuated by a common intention with the doer of the act, there must be evidence, direct or circumstantial, either of pre-arrangement, or a pre-arranged plan, or a declaration showing common intention, or some other significant fact at the time of the commission of the offence, to enable them to say that a co-accused had a common intention with the doer of the act, and not merely a same or similar intention entertained independently of each other, *King v. Jayasinghe* (*supra*) <sup>(4)</sup>; (g) the Jury should also be directed that if there is no evidence of any common intention actuating the co-accused or any particular co-accused, or if there is any reasonable doubt on that point, then the charge cannot lie against any one other than the actual doer of the criminal act, *King vs Arnolis* *King v. Arnolis*<sup>(5)</sup>; *King v. Croos*<sup>(6)</sup>; *King v. Sathasivam*<sup>(7)</sup>; (h) in such a case such co-accused would be liable only for such criminal acts which they themselves committed; (i) the Jury should also be directed that the mere fact that the co-accused were present when the doer did the criminal act does not *per se* constitute common intention, unless there is other evidence which justifies them in so holding, *K vs Jayanhmy* *King v. K.W. Jayanhmy*<sup>(8)</sup>; and (j) the Judge should endeavour to assist the Jury by examining the case against each of the co-accused in the light of these principles."

Learned trial judge should have been careful in this case in analyzing and accepting the evidence against each appellant since Dhanushka had said that he lost consciousness after he received the first blow. In my view the learned trial Judge totally failed to

consider the concept of common intention but proceeded to convict all the accused on the basis of common intention. Failure to give adequate reasons as to why he convicted all the accused on the basis of common intention and the failure to consider the concept of common intention, in my view, have resulted in a miscarriage of justice. Therefore we are unable to apply the *proviso* to Section 334 of the Criminal Procedure Code and *proviso* to Article 138 of the Constitution. Further if we are going to apply the *proviso* to Section 334 of the Criminal Procedure Code we have to rewrite the judgment which is not the function of the Court of Appeal.

For the reasons set out in my judgment, I set aside the convictions and the sentences imposed on the appellants. I am unable to acquit the appellants as the prosecution has led evidence against the appellants which should be considered at a retrial. No appeal has been lodged against the acquittal on the 1st and 2nd counts I, therefore, do not make order setting aside the acquittal on the 1st and 2nd counts. Considering the evidence led at the trial, I order a retrial on count No. 3 of the indictment.

**RANJITH SILVA, J.** - I agree.

*Appeal allowed.*