[COURT OF CRIMINAL APPEAL]

1950 *Present :* **Jayetileke, S.P.J. (President), Gunasekara J. and Pulle J.**

THE KING *v.* HEEN BABA

Appeal 68 and Applications 174–175

S. C. 2—M. C. Badulla, 7,804

Court of Criminal Appeal—Unlawful assembly—"Common object" and "common intention"—Distinction between—Indictment under Penal Code, section 146—"Common intention" of accused not implicit in such indictment—Scope of sections 32 and 146 of Penal Code.

The accused were charged under section 146 of the Penal Code with having committed, as members of an unlawful assembly, the offences of house-breaking, robbery, grievous hurt and hurt (sections 443, 380, 383 and 382 of the Penal Code). The jury, acting on a direction given to them by the presiding Judge, found that there was no unlawful assembly, but that the offences of house-breaking, robbery, grievous hurt and hurt were committed by the accused acting in furtherance of a common intention within the meaning of section 32 of the Penal Code.

Held, that it was not competent to the jury to return a verdict of guilty under sections 443, 380, 383 and 382 read with section 32 when those offences did not form the subject of separate charges but were referred to in charges coupled with section 146. The charges under the former sections were not implicit in the charges under the latter sections.

APPEAL, with applications for leave to appeal, against two convictions in a trial before a Judge and Jury.

M. M. Kumarakulasingham, with *V. S. A. Pullenayagam* and *R. S. Wanasundera*, for accused appellants.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult

February 27, 1950. JAYETILEKE S.P.J.—

The appellants were charged with the following offences :—

1. That they with others unknown to the prosecution were members of an unlawful assembly the common object of which was to commit house-breaking and robbery and thereby committed an offence punishable under s. 140 of the Penal Code.
2. That they, being members of the said unlawful assembly, in prosecution of the said common object, committed house-breaking by night by entering the house of one Thevani Amma in order to the committing of robbery and thereby committed an offence punishable under s. 443 read with s. 146 of the Penal Code.
3. That they being members of the said unlawful assembly, in prosecution of the said common object, committed robbery of cash and other articles of the value of Rs. 2,675 property in the possession of Thevani Amma and thereby committed an offence punishable under s. 380 read with s. 146 of the Penal Code.

1——J. N. A 95837 –1,042 (2/50)

4. That one or more members of the unlawful assembly, at the time of committing robbery, in prosecution of the said common object, caused grievous hurt to one Muthiah, which offence was committed in prosecution of the said common object or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object and they being members of the said unlawful assembly at the time of the commission of the said offence thereby committed an offence punishable under s. 386 read with s. 146 of the Penal Code.

5. That they, being members of the said unlawful assembly, in committing or in attempting to commit robbery in prosecution of the said common object caused hurt to Thevani Amma and thereby committed an offence punishable under s. 146 read with s. 382 of the Penal Code.

6. That they, being members of the said unlawful assembly, in committing or in attempting to commit robbery in prosecution of the said common object, caused hurt to one Poornam and thereby committed an offence punishable under s. 382 read with s. 146 of the Penal Code.

The jury acquitted them on all the charges but, acting on a direction given to them by the presiding Judge that it was competent to them to do so, they found them guilty under sections 443, 380, 383 and 382 read with section 32. The verdict of the jury was that there was no unlawful assembly, but that the offences of house-breaking, robbery, grievous hurt and hurt were committed by the appellants acting in furtherance of a common intention within the meaning of s. 32 of the Penal Code.

The main question that arises for our decision is whether it was competent to the jury to return a verdict of guilty under sections 443, 380, 383 and 382 read with section 32 when those offences did not form the subject of separate charges but were referred to in charges coupled with s. 146. The answer to this question would depend on whether charges under the former sections are implicit in charges under the latter sections.

It is well settled law that s. 146 creates a specific offence and deals with the punishment of that offence and that s. 32 merely declares a principle of law and does not create a substantive offence. *Barendra Kumar Ghose v. Emperor* [1].

The scope of sections 146 and 32 was defined by the Privy Council in the case of *Barendra Kumar Ghose v. Emperor* (*supra*). Lord Sumner said :—

(1) " The other part of the appellant's argument rests on sections 114 and 149 (which correspond with sections 107 and 147 of our Penal Code) and it is said that if s. 34 (which corresponds with s. 32 of our Penal Code) bears the meaning adopted by the High Court—these sections are otiose. Section 149, however, is certainly not otiose for

[1] *A.I.R. (1925) P. C. 1; A.I.R. (1924) Cal. 257.*

in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, viz., one of those named in s. 141 (which corresponds with s. 138 of our Penal Code) and then the doing of acts by members of it in prosecution of that object. "

(2) " S. 34 deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for ' that act ' and ' the act ' in the latter part of the section must include the whole action covered by ' a criminal act ' in the first part, because they refer to it. "

When the charges are read in the light of the first dictum it is clear that the appellants were not charged on counts 2, 3, 4, 5, 6 with having committed the offences of house-breaking, robbery, grievous hurt and hurt themsleves but they were charged on the basis that they were constructively liable inasmuch as some person or persons committed the said offences in prosecution of the common object of the unlawful assembly in which they were engaged. In order to establish these charges the Crown had to prove—

(1) That the appellants were members of an unlawful assembly.
(2) That the offences were committed in prosecution of the common object or that the offences were such as the members knew to be likely to be committed in prosecution of the common object.
(3) That the appellants were members of the assembly at the time the offences were committed.

It must be noted that in count 4 there is an allegation that the offence was committed in prosecution of the common object or was such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The distinction between the scope of the two sections is brought out very clearly in the following passage in Dr. Gour's well-known commentary on the Penal Law of British India.[1]

" It should be observed that the words used here (s. 34) are ' in furtherance of the common intention of all ' whereas in s. 149, describing a similar community of intention and design of an unlawful assembly, the words used are ' in prosecution of the common object of that assembly ' which cannot mean the same thing as the words used here. What they do mean will, however, be clear by a comparison between the two sections : First, this section is wider as regards the complicity of criminals, since it affects them regardless of number, whereas s. 149 limits it to persons whose number is not less than five ; secondly, while the common object under this section is undefined that under s. 149 is limited by s. 141 ; thirdly, a conviction under this section involves a co-operative criminal act whereas under s. 149 all members of an unlawful assembly became constructively liable for an offence committed by one or more of them. In the one case there must be proof of the criminal *act*, while in the other liability would arise for a mere criminal intention or knowledge. "

[1] *Gour Vol. 1 page 186, 5th Edition.*

and in the following passage in the judgment of Lord Sumner in *Barendra Kumar Ghose v. Emperor* (*supra*) :—

> "There is a difference between object and intention for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful while the element of participation in action which is the leading feature of s. 34 is replaced in s. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who became punishable as sharers in the offence. Thus they have a certain resemblance and may to some extent overlap, but s. 149 cannot at any rate relegate s. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

According to Dr. Gour the main distinction between the two sections is that in s. 32 criminal liability ensues from the doing of a criminal act in furtherance of the common intention whilst in section 146 it ensues from mere membership of the assembly at the time of the committing of the offence in prosecution of the common object. There is an illustration in Dr. Gour's commentary at page 187 which shows that the evidence of criminality under the sections varies according to the degree of the criminal intent or criminal act, and that the *mens rea* of the two sections may at times overlap one another. It reads :—

> "A plans a dacoity and invites B, C and D to join him. They agree to commit dacoity at P's house. Here A has abetted dacoity by B, C and D and all the four became members of a criminal conspiracy and would be liable to punishment under s. 120B. They are of course not yet liable under ss. 34, 114 and 149. Now A says to B, C and D 'I am an old man and will only keep a watch outside P's house'—which he does : B, C and D enter P's house and rob P. Hence A became liable under s. 114 for the dacoity to the same extent as if he had actually joined in robbing P. Now if while proceeding to P's house A, B, C and D meet E and wish him to join them in the dacoity and he refuses, A, B, C and D all became liable as abettors under s. 115. Now suppose E agrees and joins the four, the five become an unlawful assembly under s. 141 ; and suppose E gets hurt while crossing a ditch and remains behind while the remaining four proceed to rob P, A is nevertheless liable with the four by reason of s. 149 but s. 34 has not yet come into play. But suppose when E joined he warned his companions that while he was for dacoity he was not for shedding blood. But A and B were enemies of P and had previously decided to kill him.
>
> Here the common intention of A and B was to kill P though the common object of all the five was to dacoit P. Section 34 begins to function. Now suppose after the dacoity is over B gives P a fatal stroke, B's stroke could be treated as A's stroke as well by reason of s. 34 though C, D, and E could not be liable for the murder of P. Now suppose in committing dacoity one of them C is seized by P to

rescue whom B, C and D strike P with lathis of which P dies, here B had intended to kill P in any case and he with A must share the consequences of B's act, while the common object of the assembly being to dacoit P in prosecution of which B, C and D kill P though by reason of s. 149 all five become *prima facie* liable for the murder of P."

The illustration shows the various stages at which ss. 32 and 146 came into play and the various offences committed by A, B, C, D and E according to their intentions and objects at various stages. Suppose P was killed by B after the dacoity was over in furtherance of the common intention formed by himself and A, and the prosecution, in ignorance of that fact, charged all five with murder under s. 146 read with s. 296, could it be said that a charge against A and B for murder under s. 296 read with s. 32 was necessarily implicit in the former charge? We think not, because they were charged on the basis that the murder was committed either in prosecution of the common object of committing house-breaking and robbery or that they knew that murder was likely to be committed in prosecution of the common object. In a charge under s. 296 read with s. 32 the prosecution would have to prove that A and/or B struck the blow which killed P and that the blow was struck in furtherance of the common intention of A and B to kill P. We are unable to say that there is necessarily implicit in the charge under s. 146 read with s. 296 an allegation that A, B, C, D and E committed the murder by their own acts. The joint judgment of Holmwood and Imam JJ., in *Reazaddi v. Emperor*[1] appears to us to be directly in point on this question, and we would follow it, as it is in accord with the general principles of law and justice. They said:

"When a Court draws up a charge under s. 325 read with s. 149 it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves but that they are guilty by implication of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Now when these persons are acquitted of rioting obviously all the offences which they are said to have committed by implication disappear and the defence cannot be called upon to answer to the specific act of causing grievous hurt merely because it may have appeared in the evidence; for the Court having already declared by its charge that they did not commit a specific act, or not having given effect to the evidence for the prosecution by framing a fresh charge, the defence would not be justified in wasting the time of the Court in defending themselves on a charge which had never been brought against them. This will be perfectly clear if the offence disclosed by the evidence was the heinous one of murder and the Court framed no charge of murder but went on with the charge of rioting. Obviously in that case the accused could not be called upon to defend themselves on the charge of murder for it is only in the Session Court that the said charge can be tried. The Magistrate appeals to the provisions of s. 34

[1] *(1912) 13 Cr. L. J. 502.*

but s. 34 can only come into operation when there is a substantive charge of grievous hurt. The considerations which govern s. 34 are entirely different and in many respects the opposite of those which govern s. 149 and it is now settled law that when a person is charged by implication under s. 149 he cannot be convicted of the substantive offence."

Our attention was drawn by learned Crown Counsel to the case of *Bhondu Das v. Emperor* [1] in which Courtney-Terrell C.J. and Adami J. declined to follow the judgment of Holmwood and Imam JJ. in *Reazaddi v. Emperor* (*supra*). The learned Chief Justice said :—

"Now follows an important passage in the judgment which shows why in my view the judgment must be considered to be overruled by the decision of the Privy Council.

'The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149, and it is now settled law that when a person is charged by implication under s. 149 he cannot be convicted of the substantive offence.'

The reasoning of the decision (entirely dispelled by Lord Sumner) was based on the view that s. 34 necessarily involved specific acts or a group of specific acts of a similar character which brought about the wounding or killing of the persons injured. At that time the Court did not understand the real meaning of s. 34 and the whole basis of the decision has been destroyed by the judgment of Lord Sumner. Before that judgment it was believed that s. 34 only covered a group of acts of a similar character which contributed to a common result but this view has now been dispelled and it follows that the same act on the part of Bhondu Das alleged in the charge and in the evidence in this case in support of s. 326 read with section 149 would also support a charge under s. 326 read with section 34."

The learned Chief Justice said further that the judgments in *The Government of Bengal v. Mahaddin*[2], *Abhiram Jha v. Emperor*[3], and *Queen v. Ramjirar Sirbojirar*[4], illustrate the real test of whether a conviction can be upheld upon a charge which was not expressly formulated, i.e., whether the facts which it was necessary to prove and on which evidence was given on the charge upon which the accused is actually tried are the same as the facts upon which he is to be convicted of the substantive offence. If they are and if the accused is put to no disadvantage and would have to adduce no further evidence, then he may be rightly convicted of the substantive offence notwithstanding that the charge was originally framed under ss. 147, 148 or 149.

We have examined the cases referred to by the learned Chief Justice and we find that they are by no means helpful on the question we have to decide. In *The Government of Bengal v. Mahaddin* (*supra*) the decision was based on s. 457 of the Indian Criminal Procedure Code which finds no place in our own Code. In *Abhiram Jha v. Emperor* (*supra*) the learned Judge who decided the case said that each case must be decided

[1] *A.I.R. (1929) Patna 11.*
[2] *I.L.R. 2 Cal. 871.*
[3] *15 C.W.N. 254.*
[4] *12 Bom. H. C. R. 1.*

on its own facts. He said further that though it was sought to implicate the appellant under s. 149 the finding was that he was the actual assailant, and, in that sense, the offence under s. 326 was included in the constructive offence under s. 326 read with s. 149. He gave no reasons for his decision. In *Queen v. Ramjirar Sirbojirar* (*supra*) a person was charged with—

(1) attempting to commit criminal breach of trust as a public servant,

(2) framing as a public servant an incorrect document to cause an injury, and

(3) framing as such public servant an incorrect document to save a person from punishment,

and was acquitted on the ground that he was not a public servant. The High Court held that the Judge ought to have convicted him of attempting to cheat as the facts which he would have had to meet on that charge were the same as he would have had to meet on the charge of criminal breach of trust. With respect, we would say that that case was correctly decided but it has no application to the present case. It seems to us that the *ratio decidendi* in *Reazaddi v. Emperor* (*supra*) is that when a person is charged with having committed an offence under s. 149 he is told that he committed an offence constructively, and, when he is acquitted of that offence, he cannot be convicted of having committed the offence by his own acts in the absence of a charge that he did so. It is correct to say that the learned Judge said in the course of his judgment that the considerations which govern s. 149 are entirely different and in many respects the opposite of those which govern s. 34, but we do not agree that the reasoning of that decision is contained in those words. We are of opinion that the safer and the more proper view is that taken in *Reazaddi v. Emperor* (*supra*.)

Learned Crown Counsel also invited our attention to the judgment of Hearne J. in *The King v. Sayaneris*[1], and to the judgment of this Court in *The King v. De Silva*[2]. In *The King v. Sayaneris* (*supra*) Hearne J., followed two Indian cases which were cited to him and held that where an accused person is convicted of rioting and causing hurt and grievous hurt under ss. 315 and 317 read with s. 146 the conviction may be altered by the Supreme Court in appeal to a conviction of causing hurt and grievous hurt under ss. 315 and 317 read with s. 32 of the Penal Code. Though Hearne J. referred to the opinion of the Privy Council in *Barendra Kumar Ghose* (*supra*) in his judgment he overlooked the fact that it was decided in that case that s. 146 created a specific offence and dealt with the punishment of that offence alone. In *The King v. De Silva* (*supra*) there were three charges—

(1) a charge under s. 140
(2) a charge under s. 146 read with s. 296 and
(3) a charge under s. 296 read with s. 32.

The accused was convicted on the first two charges whereupon the Crown withdrew the third charge. On appeal it was found that the

[1] (*1937*) *39 N. L. R. 148.* [2] (*1940*) *41 N. L. R. 483.*

conviction on the first two charges could not be sustained on the question of an unlawful assembly. Learned Crown Counsel contended that the withdrawal of the third charge did not preclude the Court from convicting the accused on that charge. He relied on the provisions of s. 185 of the Criminal Procedure Code read with s. 6 (2) of the Court of Criminal Appeal Ordinance, No. 23 of 1938. He further contended relying on *The King v. Sayaneris* (*supra*) that apart from the third charge the jury could have convicted the accused on count 2 without " unlawful assembly ". Howard C.J., who delivered the judgment of the Court said " We are in agreement with these contentions. " Here again we would repeat what we said before that the learned Chief Justice overlooked the decision of the Privy Council in regard to the scope of s. 146.

Learned Crown Counsel addressed another argument to us that the offences of which the appellants were convicted are minor offences within the meaning of s. 183 of the Criminal Procedure Code. The two illustrations given in the section indicate that there is no substance in that argument.

For the reasons given above we are of opinion that in the absence of a charge the appellants could not have been convicted under ss. 433, 380, 383 and 382 read with s. 32.

On the facts the evidence against both appellants is that of Thevani Amma. She said that she identified both appellants when they came into the house but when she was taken to the identification parade she found it difficult to identify the 1st accused appellant by looking at his face. She examined his arms and identified him by the tattoo marks on the arms. That fact leaves room for the suggestion that she had been told by someone that the first accused appellant had tattoo marks on his arms. The evidence against the 1st accused appellant appears to be very weak.

We are of opinion that the convictions of both appellants must be quashed, and we would order accordingly.

Convictions quashed.

[COURT OF CRIMINAL APPEAL]

1950 *Present :* **Jayetileke, S.P.J. (President), Gunasekara J. and Pulle J.**

THE KING *v.* MARSHALL APPUHAMY

Appeal 4 and Application 6

S. C. 4—M. C. Negombo, 58,963

Court of Criminal Appeal—Evidence Ordinance, section 32 (1)—Statement of deceased prior to death—Admissibility—Meaning of " circumstances of the transaction."

The statement of a deceased person which is admissible under section 32 (1) of the Evidence Ordinance may be one which was made before the cause of death arose, or before the deceased had any reason to expect to be killed. The transaction contemplated by the section cannot be restricted to the physical cause of death and would include the connected events which culminated in death.