[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present :* **Basnayake, C.J. (President), H. N. G. Fernando, J., and Sinnetamby, J.**

THE QUEEN *v.* MUDALIHAMY

APPEAL NO. 123 OF 1957 WITH APPLICATION NO. 146

S. C. 8—M. C. Matale, 10,100

Penal Code—Section 32—Common intention—Charge of vicarious liability—Right of accused to be given notice thereof—Form of indictment—Criminal Procedure Code, ss. 167, 168, 169, 171.

Where it is sought, on the ground of common intention, to make an accused person vicariously responsible for the criminal acts of persons who are not being charged at all as co-accused, section 169 of the Criminal Procedure Code requires that the accused should be made aware at the outset that it is a charge of vicarious liability under section 32 of the Penal Code that he has to repel.

APPEAL against a conviction in a trial before the Supreme Court.

Lucien Jayetileke (Assigned), for the Accused-Appellant.

J. R. M. Perera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 2, 1957. BASNAYAKE, C.J.—

The appellant Hulanbeddegedera Mudalihamy was indicted on a charge of the murder of Talawinnegedera Kiri Banda. The jury returned a verdict of causing grievous hurt under provocation and he was sentenced to 18 months' rigorous imprisonment.

The material facts are narrated by the two eye witnesses Ukku Banda and Punchi Banda. According to the former, on the day in question the deceased, who appeared to be drunk, was seen going along the foot-path which runs past the appellant's house hurling abuse and uttering threats. The witness is unable to say at whom the abuse and threats were directed. When the deceased was passing the appellant's house his wife Dingiriamma who was standing in her verandah threw a few stones at him. While doing so she said, "You are abusing every day, you are not allowing us to live here." Immediately after that the two daughters of the appellant, his wife and he ran towards the deceased. They seized the deceased and a struggle ensued on the devata road near the corner of the witness's cocoa plantation. The deceased extricated himself from the huddle and ran into Ukku Banda's garden pursued by his assailants who once more seized him and attacked him there. Here the appellant attacked the deceased on his head with a kitul club. It alighted above the right ear. The witness did not see any other blow as he was busy enlisting the support of others in order to stop the assault. For the second time the deceased freed himself from his assailants and ran hotly pursued by them into the witness's house where he obtained sanctuary. Ukku Banda and Punchi Banda both prevented his pursuers from entering the house and attacking the deceased. In doing so the witnesses themselves received blows aimed at the deceased. The blow which fell on Ukku Banda was dealt by the appellant and the blow on Punchi Banda by his youngest daughter with the round kitul club P1. There was no further attack on the deceased. The version of the witness Punchi Banda is slightly different. According to him the attack near the cocoa plantation was begun by the wife and daughters of the appellant, who joined them later and struck a blow on the deceased's head with a kitul club. The club was 4" broad and one fathom long. He did not see the second struggle in Ukku Banda's garden. Both speak of a blow dealt by the appellant with a club on the head of the deceased. One says it was struck in Ukku Banda's garden in the second round of the fight, the other says it was near his cocoa garden in the first round. The Crown also led the evidence of a witness called Ranhamy to prove that the appellant intended to kill the deceased that day. He said that before the arrival of the deceased on the scene the appellant was heard by him to utter these words: "Nisa will be murdered", "If the whore's son Nisa comes I will kill him today". The prosecution led evidence of motive and of bad character of the deceased. There is no doubt that in the course of the struggle one of the four assailants did inflict the injury which resulted in the death of the deceased. The other assailants were not indicted on any charge whatsoever, and the proceedings do not show whether they were ever charged before the Magistrate. The autopsy revealed a lacerated wound, four abrasions and four contusions. One of the contusions was 3" × 2" on the left side of the abdomen just below the costal margin. Internally there was a perforation about 1" just below the sigmoid flexure with the intestines matted together with flakes of lymph under the external injury. The medical evidence is that the perforation could have been caused by a kick or a blow with a smooth club on the stomach or even by a blow

with a closed fist. The doctor also expressed the opinion that a person who receives such an injury would collapse within a few seconds but that it is possible that after receiving the injury a person could survive a combined attack by four persons and then run a distance of anything from 20 feet to 25 yards before collapsing.

Of the grounds of appeal in the notice of appeal learned counsel for the appellant urged—

(*a*) that the verdict was unreasonable,

(*b*) that the direction of the learned trial Judge that the prisoner can be found guilty on the ground that he had a common intention with the others who were not charged and was liable for any offence committed by them, was wrong in law,

(*c*) that the appellant was prejudiced by the fact that he had no notice of the fact that the prosecution was relying on section 32 of the Penal Code to establish the charge against him.

There is no evidence that the appellant struck any blow other than that described by the two eye witnesses, nor is there evidence that the deceased was kicked or that any other person struck the deceased with a club or the fist.

The learned trial Judge charged the jury thus :—

"Now if you accept the evidence for the prosecution that the deceased was attacked at one stage of this episode by four persons, what was the intention common to all ? I have already told you that it is the easiest thing in this world, if you accept the prosecution evidence, to find as proved that there was a common intention to cause ordinary hurt. Can you on the evidence before you find that there was a common intention to cause more than ordinary hurt, namely grievous hurt ? ".

After having explained the meaning of grievous hurt the learned Judge, said :

"Can you say with reasonable certainty that the four who attacked did not want to let off the deceased without inflicting on him hurt of a grievous character ? If you can confidently say " Yes ", then each one of the attacking persons must be held responsible for all the injuries that were inflicted. If you cannot say " Yes ", then, you can hold each of the attackers responsible for only what he did or what she did.

"It is absolutely clear that there is no evidence as to who caused the injury to the stomach which ultimately proved fatal. We know that that injury was a grievous injury. If you cannot say that there was a common intention to cause grievous hurt, then the accused in this case can only be found guilty of simple hurt, subject perhaps to other circumstances that I would mention later on, but if as I said

before you are positive in your minds that the four who attacked the deceased were actuated, were impelled, were guided by one idea in their minds, namely to cause grievous hurt, then it would be immaterial that we do not know who actually caused the injury to the stomach, because in that state of affairs the accused must be held responsible for all the injuries they inflicted, and if his wife and daughters were here, each of them also would be held liable for all the injuries. Now, that is the crucial point in the case."

The learned Judge next dealt with the question of causing hurt both grievous and simple under provocation. We are of opinion that the learned trial Judge has directed the jury correctly and that his charge does not contain a misdirection. In accordance with the direction of the learned Judge the jury were entitled on the evidence before them to return the verdict they did. This disposes of the first two grounds. The third remains for consideration.

There was no indication in the indictment that the appellant was being made vicariously liable for the death of the deceased. It contained a straightforward charge which alleged that the appellant committed murder by causing the death of the deacesed. Now it must have been clear to the learned Attorney-General, if the evidence given at the trial was the material on which the indictment was framed, that there was no evidence whatsoever that the appellant caused the death of the deceased. The appellant should therefore have been made aware that it was proposed to make use of section 32 of the Penal Code in order to bring home guilt to him. The simplest and the usual way of achieving this object is by referring to section 32 in the charge. The proceedings do not show that at any stage of the trial he was made aware even in some other way of the fact that he was being made liable, not for the act committed by him, but for an act presumed to have been committed by one of the other three. Although the indictment gives the offence with which the accused was charged, the time and place of the alleged offence, and the person against whom it was committed, those particulars were not in our opinion reasonably sufficient to indicate to the appellant the ground on which it was sought to bring home guilt to him. Section 169 of the Criminal Procedure Code requires that when the nature of the case is such that the particulars mentioned in sections 167 and 168 do not give the accused sufficient notice of the matter with which he is charged, the charge shall contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

It is true that section 32 lays down a principle of joint liability in the doing of a criminal act[1] and it does not create a new offence[2] and although the omission to mention section 32 in the charge in a case where more persons than one are being charged with an offence and it is sought to make them vicariously responsible for a criminal act committed by one of them in furtherance of their common intention, may not be fatal to a conviction, if it is clear to the accused that they are being made

[1] *1945 A. I. R., P. C. 118.* [2] *1924 A. I. R., Cal. 257.*

vicariously liable for the acts of one of them, we think that it is desirable even in such cases to refer to section 32 or other appropriate section of that group in the charge and certainly in this case, if it was sought to make the person charged vicariously responsible for the acts of those who are not being charged at all, it was necessary that the appellant should have been made aware at the outset that it was a charge of vicarious liability that he had to repel. We are of opinion that section 169 of the Criminal Procedure Code requires that it should be done. In the instant case there has been a failure to give the appellant such particulars relating to the charge against him as are reasonably sufficient to indicate the Crown's reliance on the principle of liability laid down in section 32 of the Penal Code. The evidence does not disclose why the others were not indicted. The question then is, was the appellant misled by the omission to refer to section 32 and has there been a miscarriage of justice in consequence ? Section 171 of the Criminal Procedure Code provides that no error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission. The trend of the cross-examination does not show that the counsel assigned to defend the appellant realised that he was being made to answer a case of vicarious liability. Nowhere except in the learned Judge's charge has the matter been mentioned. It is relevant to note that the appellant did not give evidence. It is difficult to say how far his decision was influenced by the fact that he was unaware of the real nature of the charge against him. It is just possible that appellant's counsel may have adopted a different line of cross-examination if the charge contained an indication that section 32 was being invoked by the prosecution. We are unable therefore to escape the feeling that the appellant was misled by the omission in the charge and that there has been in consequence a miscarriage of justice.

Learned Crown Counsel cited the case of *Ramlochan v. The Queen* [1] in support of his contention that the course adopted by the prosecution was unobjectionable. We are unable to agree that that case has any application to the one before us. The report does not refer to the relevant provisions of the Penal and Criminal Procedure Codes of Trinidad and Tobago. Apart from that the Trinidad case is one dependent entirely on circumstantial evidence and is not one in which it was sought to make the accused vicariously liable for the criminal act of another not before the Court. The following extract from the judgment of the Board indicates the real issue in that case (127) :

" It is true that no other person was indicted along with the accused for the murder. But that may have been because, whatever suspicions there were, there were no incriminating circumstances attaching to any other person sufficient in the opinion of the Crown to justify it in bringing against any other person an accusation of murder. There were many incriminating circumstances attaching to the appellant which were all before the jury, including some to which their Lordships have not found it necessary to refer. The evidence was very fully

[1] *(1956) 3 W. L. R. 117 (P. C.)*

placed before the jury by the judge in his summing-up. On the evidence it was open to the jury, in their Lordships' opinion, to take the view that the accused committed this deed alone or that he committed it with the assistance of some other person. "

As the verdict of the jury shows that they were satisfied that the appellant struck the deceased with a club on his head they would in any event have convicted him of voluntarily causing simple hurt with an instrument which when used as a weapon of offence is likely to cause death. As the verdict also shows that in the view of the jury the appellant acted under grave and sudden provocation we propose to substitute for the verdict of the jury a verdict of voluntarily causing simple hurt on grave and sudden provocation punishable under section 325 of the Penal Code. The appellant has been on remand for over a year and we think that the ends of justice would be satisfied if we sentence him to one month's rigorous imprisonment and direct that a month of the period he has been on remand be treated as the period of imprisonment. In the result he will be entitled to be discharged from jail immediately upon the communication of this order to the Prison authorities.

Verdict altered.