[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present :* **Basnayake, A.C.J. (President), Gratiaen, J., and Fernando, J.**

REGINA *v.* P. M. SOMAPALA *et al.*

APPEALS 66–68, WITH APPLICATIONS 106–108, OF 1955

S. C. 28—M. C. Walasmulla, 12,723

Mens rea—*Joint indictment—Several accused—Common intention—Guilty knowledge—Misdirection—Penal Code, ss. 32, 146, 291, 317.*

By Section 32 of the Penal Code—

" When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. "

Held (by the majority of the Court), that the Section has only a limited scope in relation to offences in which guilty knowledge is an element. It does not constructively impute to one *socius criminis* the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal acts, has committed an offence involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva, T. Velupillai* and *S. M. H. de Silva,* for the accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 13, 1956. GRATIAEN, J.—

There were three appellants in this case, the second and third being brothers-in-law of the first. They were jointly indicted for the murder of V. P. Sirisena who died at the Civil Hospital, Galle, on August 13th, 1954, in consequence of injuries inflicted on him two days previously in the 2nd appellant's house in Kirama. The appellants were acquitted of murder, but the jury unanimously found each of them guilty of culpable homicide not amounting to murder.

The appeal of the 1st appellant was not pressed before us and his conviction was accordingly affirmed. At the conclusion of the argument, however, the Court quashed the convictions of the other appellants for culpable homicide not amounting to murder and substituted in each case a conviction for grievous hurt punishable under S. 317 of the Penal Code.

The case for the Crown was largely based on certain statements (admissible under S. 32 of the Evidence Ordinance) which the deceased person had made to reliable witnesses as to the circumstances of the transaction which resulted in his death. His version was corroborated in part by the witness Charles who was present during the earlier stages of the incident. It is safe to assume that the jury was perfectly satisfied that, when the deceased and Charles were passing the 2nd appellant's house at about 8.30 p.m. on the night in question, all three appellants waylaid the deceased and dragged him forcibly into the house. Charles escaped, and was unable to say what took place thereafter behind the closed doors of the 2nd appellant's house, but, according to the dying declaration previously mentioned, all the appellants assaulted the deceased very severely with hands and with clubs.

The motive suggested for this high-handed conduct was that enmity had arisen between the parties owing to friction engendered during a recent election campaign ; there had also been bad feeling in connection with a trivial incident which took place three weeks previously in a neighbour's boutique.

After the assault, the appellants ran away, leaving their victim behind in the empty house. In the meantime Charles had spread the alarm in the locality and a crowd of neighbours collected outside the house, but none of them had the courage to enter it. At about 11.30 p.m. a Police Inspector who happened to be passing in a jeep arranged for the injured man to be conveyed to Walasmulla for medical attention. As surgical treatment was considered to be necessary, the man was taken to the Civil Hospital at Galle on August 12th, and a surgeon operated on him for compound fractures in both legs. On the following morning the patient died.

The nature of the injuries described by Dr. Udalagama who carried out the post-mortem examination made it clear that this unfortunate man had been severely " beaten up ". Several contusions had been caused by blows with fists ; he had also sustained, as a result of blows inflicted with one or more clubs, two simple fractures in his forearms and a comminuted compound fracture in the shin-bone of each leg. In addition, Dr. Udalagama found an " angular patch of abrasion " on the chest 4½ inches long

and 1½ inches broad which had not apparently been considered sufficiently serious to call for any special investigation at the Hospital with a view to the detection of possible complications. The autopsy revealed, however, that, in consequence of the blow which caused this particular injury, the 7th rib had been fractured in such a manner as to pierce the right lung. According to Dr. Udalagama, it was this undetected complication that proved fatal. He pronounced that shock and haemorrhage from the injury to the lung was "the primary cause of death" to which the other injuries were contributory factors.

The Crown offered no proof that any particular injury had been inflicted by any particular appellant, so that, at the time when the evidence for the prosecution was closed, the Crown had to rely on the principle of vicarious liability laid down in S. 32 of the Penal Code.

The 1st appellant alone gave evidence in support of his own defence and that of his co-accused. He accepted sole responsibility for all the injuries inflicted on the deceased, and stated that the other appellants were not present at all at the time of the assault. At the same time he gave a version which, if true, would have entitled him either to an acquittal on the ground that he had acted justifiably in self-defence or at least to a verdict of culpable homicide not amounting to murder on the ground that he had exceeded that right. It is safe to assume, however, that the jury rejected this version of the circumstances leading to the assault and also of the *alibi* relied on by the 2nd and 3rd appellants.

The learned Judge gave adequate directions to the jury as to how the provisions of S. 32 of the Penal Code ought to be applied in relation to the charge of murder. Our decision must therefore be based on the assumption that, in acquitting the appellants of murder, the jury were not satisfied that any appellant, by causing one or more injuries which in fact resulted in the man's death, had acted in furtherance of a "murderous intention" shared by all of them. It is in the light of these findings of fact that we must examine the verdicts convicting the 2nd and 3rd appellants of the lesser offence of culpable homicide not amounting to murder on the basis of guilty knowledge.

Having pointed out to the jury that there was no evidence to prove that either the 2nd or the 3rd appellant directly caused any injury which resulted in the victim's death, the learned Judge correctly explained that a conviction would only be justified by a proper application of the provisions of S. 32 to the facts as found by the jury. Up to this point the summing up was free from error. Unfortunately there followed, in the opinion of the majority of the Court, misdirections in law as to the proper limits within which S. 32 could be invoked as the foundation of a verdict based on guilty knowledge. The reasons for the decision of the majority of the Court must now be explained.

There were several disconnected passages in which the learned Judge purported to explain the scope of S. 32 in relation to the lesser offence of culpable homicide not amounting to murder—that is to say, if the jury were unable to conclude that the victim's death had been caused by acts committed in furtherance of a common intention to produce that result.

Each direction was substantially to the same effect. Having correctly explained the elements of this lesser offence as distinct from the offence of murder, the learned Judge said:

> "If you find *that the offence actually committed by the assailant is culpable homicide not amounting to murder,* and if you find *that these three accused were actuated by a common intention to commit that offence,* then you cannot find them guilty of murder but you can find them guilty of culpable homicide not amounting to murder."

These directions involve two distinct assumptions. The first was calculated to mislead the jury into thinking that in certain situations S. 32 imputes vicarious responsibility to a *socius criminis* not only for the "acts" but also for the "guilty knowledge" of his confederates. The second proposition was also incorrect. Where the death of a victim results from an act or series of acts committed by one or more confederates in pursuance of a common intention to do a criminal act of a kind which is known by them *collectively* to be likely to cause death, the proper conclusion is that all are guilty of murder as defined in the second part of S. 294 of the Penal Code.

S. 32 of the Penal Code has only a limited scope in relation to offences in which guilty knowledge is an element. The section which is the same as S. 34 of the Indian Code reads:

> "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

These words have been authoritatively explained by Lord Sumner in *Barendra Kumar Ghosh's* case [1]. The "act" includes "the whole action covered by the unity of criminal behaviour which results in something for which an individual would be punished if it were all done by him alone", and liability is imputed to each individual *socius criminis* not merely for his own acts but for the totality of the acts committed by his confederates in furtherance of their common intention. Vicarious or collective responsibility attaches in such a situation for the result (e.g., death) of their united action. But S. 32 certainly does not, in addition, constructively impute to one *socius criminis* the guilty knowledge of another. In order to decide whether an accused person, to whom liability is imputed for another person's criminal *acts* has committed an *offence* involving guilty knowledge, the test is whether such guilty knowledge has been established against him individually by the evidence. See also *State v. Saidu Khan* [2].

The application of S. 32 to the facts of a given case does not necessarily lead to the conclusion that each confederate is guilty of the same offence. Let it be supposed that A and B agree to assault C with hands. A strikes the first blow in furtherance of their common intention, and causes C an injury which under normal circumstances would constitute simple hurt (being clearly insufficient in the ordinary course of nature to cause the

[1] *(1925) A. I. R. (P. C.) 1.*

[2] *(1951) A. I. R. All. 21*

death of a person in a sound state of health). But, unknown to A, C was labouring under such a disease that even a mild blow was sufficient to cause the death of C who dies in consequence of the blow. B, on the other hand, was perfectly aware of C's disease and fully realised that even a mild blow of the kind inflicted by A in furtherance of their common intention would have been sufficient to cause C's death. In such a situation, A who administered the blow is guilty only of simple hurt, but B, who is vicariously liable for A's act, is guilty of murder. If, alternatively, B knew that there was only a bare possibility of death resulting from the blow inflicted by A, he has committed the offence of culpable homicide not amounting to murder based on his guilty knowledge. But neither B's murderous intention in the first illustration nor his guilty knowledge in the second could be imputed constructively to A.

S. 32 does not go counter to the principle of the criminal law of this country that as a general rule the basis of a man's guilt is his own *mens rea*. One (and perhaps the only) exception to this rule is found in S. 146 whereby a member of an unlawful assembly is declared to be vicariously liable for an offence (committed by another) which he knew was " likely to be committed " in the prosecution of their common object. But S. 146 does not touch the present case.

The Penal Code has not adopted the English common-law doctrine of " constructive malice ", as explained in *R. v. Beard* [1] and *R. v. Jarmain* [2], whereby a man who inadvertently kills another in the commission of a felony by violent means is guilty of murder. Nor does it recognise the rule of vicarious responsibility for actual or " constructive " malice. See *R. v. Ridley* [3]. In that case, a principal of the second degree to an offence of burglary was held to be guilty of murder because his confederate, by killing someone in furtherance of their common design to commit the burglary by violent means, had produced a result which neither of them intended.

Under our law, the only acceptable basis for a verdict convicting any particular appellant of culpable homicide not amounting to murder in the facts of the present case would have been a finding that he personally knew that death, though not intended, was likely to result from the combined assault. In the absence of a proper direction on this crucial issue, the majority of us were quite unable to conclude that the jury had addressed their minds to the question whether the requisite guilty knowledge (actual and not constructive) was brought home to either the 2nd or the 3rd appellant individually. Accordingly the verdicts against the 2nd and 3rd appellants of culpable homicide not amounting to murder could not be supported.

On the other hand, it was implicit in the verdicts recorded against the 2nd and 3rd appellants that, in the opinion of the jury, both of them did at least share with the 1st appellant an intention to assault the deceased severely without legal justification. S. 32 of the Penal Code therefore imputes vicarious responsibility to each of them for the entire series of criminal *acts* involved in the combined assault. The cumulative injuries

[1] *(1920) A. C. 479.* [2] *(1946) K. B. 74.* [3] *(1930) 22 C. A. R. 148.*

described by Dr. Udalagama were clearly of such a character as to disclose the offence of grievous hurt (of which guilty knowledge is not an element). As some of these injuries had been inflicted with dangerous weapons, the aggravated offence of grievous hurt punishable under S. 317 was established. The Court accordingly substituted convictions for this offence against the 2nd and 3rd appellants, and passed sentence on them accordingly.

Conviction of 1st appellant affirmed.

Convictions of 2nd and 3rd appellants altered.