

## [IN THE COURT OF CRIMINAL APPEAL]

1960 *Present* : Sansoni, J. (President), H. N. G. Fernando, J., and Sinnetaṃby, J.

THE QUEEN *v.* N. K. A. APPUHAMY *et al.*

Appeals 170–172 and 175–177, with Applications 190–192 and 195–197

*S. C. 5—M. C. Polonnaruwa, 15428*

*Unlawful assembly—“Common object”—Distinction between common object and common intention—Presence of a person at scene of offence—Inference of guilt therefrom—Penal Code, s. 138.*

*Certificate for appeal given by trial Judge—Bearing on the appeal—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 4 (b).*

The accused-appellants were indicted, on the 1st count, for having been members of an unlawful assembly, the common objects of which were to commit mischief by fire, murder and rape and, on the 2nd, 3rd and 4th counts, for the commission of the offences of mischief by fire, murder and rape in prosecution of the respective common objects.

*Held*, (i) that a common object in an unlawful assembly is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, then their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves.

(ii) that a person can become a member of an unlawful assembly not only by the doing of a criminal act but also by lending the weight of his presence and associating with a group of persons who are acting in a criminal fashion.

(iii) that the common objects of an unlawful assembly may come in succession and need not necessarily exist together at the beginning.

*Held further*, that the grant of a certificate by a trial Judge under section 4 (b) of the Court of Criminal Appeal Ordinance is not a ground by itself for quashing the conviction even when the verdict of the jury is reasonable and there has been no misdirection.

**A**PPEALS, with applications, against six convictions in a trial before the Supreme Court.

*Colvin R. de Silva*, with *M. L. de Silva*, *A. A. de Silva* and *B. Bodinagoda* (Assigned), for the Accused-Appellants.

*V. S. A. Pullenayegum*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

December 5, 1960. SANSONI, J.—

Seven accused were indicted in this case on four counts which charged them (1) with having been members of an unlawful assembly, the common objects of which were to commit mischief by fire, murder and rape, (2) with having committed mischief by fire in respect of the house of D. B. Podiya in prosecution of the common object, (3) with having committed murder by causing the death of Thuraisamy Mani, daughter of the said D. B. Podiya, in prosecution of the common object and (4) with having committed rape on Thuraisamy Kiruvanesan, another daughter of D. B. Podiya, in prosecution of the common object.

These offences were alleged to have been committed on 26th May, 1958, at Ulpathwewa, a village about 1½ miles from Hingurakgoda. At the close of the prosecution case, the 7th accused was acquitted because there was no evidence against him, while all the other accused were ultimately convicted on all the counts by a majority verdict of 5 to 2. The present appeal has been brought after a certificate had been obtained from the trial Judge under section 4 (b) of the Court of Criminal Appeal Ordinance No. 23 of 1938.

The case for the prosecution rested mainly on the evidence of Podiya, his daughter Kiruvansesan, and James Singho who lived in a house very close to that of Podiya. Podiya himself is the child of a Tamil mother and a Sinhalese father, and he had married a Tamil woman who died shortly before the day in question. He had five children living with him—a daughter Kiruvanesan aged 12½ years, 3 sons who were younger than Kiruvanesan, and another daughter, Mani aged 1½ years. He was employed as a Kangany in the Railway Department and 1st, 4th and 5th accused were three of the labourers in his gang. All the accused were residents of that area.

According to Podiya, a state of tension arose in and near Hingurakgoda prior to 26th May, due to feelings of hostility entertained by Sinhalese against Tamils. Although he went to work that morning, he returned home at about 8.30 a.m. because he was anxious about the safety of his children. The 1st, 4th and 5th accused had turned up for work that morning, and he asked the 5th accused to inform his superiors why he had returned home. On returning home, he met James who advised him to hide himself and his children in the jungle. Accordingly, the two girls were hidden at one spot behind James' house and the 3 boys at another. Podiya said that after he had returned home, at about 11 a.m. or 12 noon he saw the 1st to 6th accused on the tank bund not far from his house. From their behaviour he thought they were drunk; they were shouting "Shall eat the Tamils. Where are the Tamils?" and similar expressions; and they all carried weapons. The 1st accused carried a gun, the 2nd accused an iron rod, the 3rd accused a pointed weapon, while the other 3 accused had clubs. While they approached his house, he heard shouts and cries uttered by another crowd which he did not see. When the 1st to 6th accused rushed towards his house, he ran into the jungle and hid himself.

From his hiding place he saw the 2nd accused climbing on to the roof of his house, and later shouting "The big Tamil man's house is on fire, let us go to the house below to set fire to the small Tamil's house". His house was burnt to the ground. He heard the other accused shouting "Kill the Tamil fellow, search for him to eat him up", and the whole party then ran towards James' house. He then heard cries of "murder" uttered by James' wife. He heard Kiruvanesan also crying out, and James protesting against the children being harmed. He also heard the accused shouting, "The big Tamil fellow escaped; the sucklings got caught; you para demali come here, I will tear you into pieces", and cries of distress, though he could not understand what was said.

A short while afterwards he saw the 1st accused dragging Kiruvanesan away, threatening her, while she kept appealing to him. She was carrying Mani at the time. The 2nd to 6th accused followed them, and the party went towards the railway bridge which crosses a stream called the Minneriyodiela. That was the last time he saw his child Mani. He said he could not see what happened thereafter, because the bridge was hidden by a large tree.

James Singho, in his evidence, spoke to having helped Podiya to hide the children at about 10 a.m. that morning. He said that he later heard shouts in Sinhala which meant "Murder, eat, hack," and he saw a crowd going towards Podiya's house and the house on fire. He saw the 2nd accused on the roof of that house. He next saw the 2nd accused running to his compound with 6 or 7 others, shouting "Podiya's house was set on fire. Set fire to the small Tamil fellow's house also". He identified only the 2nd and the 6th accused who were running in front, but he said there were 7 or 8 others also, and they came carrying guns, swords, iron bars, axes and petrol tins, the 2nd accused himself carrying a gun.

When they reached his house, they assaulted him and his wife, and at that stage Kiruvanesan came up carrying Mani and shouting, "Do not assault uncle". Eventually the 2nd accused dragged Kiruvanesan, who was carrying Mani, towards the bridge, while she was shouting, "Don't kill me", and the other men followed her. At this point, James' evidence became a little confused. At one stage he said that the party went across the railway bridge, and he lost sight of them thereafter owing to a fence. Again, he said that he saw the crowd reaching the cemented bund of the channel near the bridge, but he could not see anything more. He admitted that he told the Magistrate that he saw the 2nd accused snatching the child, dashing it on the cemented bund, and throwing it into the stream, but his final version at the trial was that he only saw something like a parcel about 2 feet long and wrapped in cloth, being thrown into the stream. He also said that about 5 days after the day in question he saw the headless body of Mani lying abandoned about 2 miles away, dressed in a spotted frock which he identified because it was put on the child at his house, and it was being worn by her when he last saw her.

Kiruvanesan in her evidence said that when she was hiding behind James' house with Mani, the 1st to 6th accused came to her father's compound shouting "Kill the Tamils". She saw the house on fire and heard the 2nd accused shouting "The Tamil man's house is ablaze; we will go in search of the Tamil man." According to her, both the 1st and the 2nd accused carried guns. The party then went to James' house, and demanding that the Tamil man should be pointed out they assaulted James and his wife. At that stage, she ran up carrying Mani, fell at their feet, and begged of them not to assault her aunt and uncle. The 1st accused then said "The big Tamil fellow escaped; two young ones have got caught", and dragged her to the bridge abusing her in filthy language while she was still carrying Mani; and the 2nd to 6th accused followed them. She said that she appealed to the 1st accused to save her and not to kill her, but he dragged her saying, "Shall kill you". At the bridge the 1st accused snatched Mani from her, dashed the child twice on the cemented bund of the channel, and threw the body into the river. The others then said, "This Tamil woman also should be killed." From there the 1st and 6th accused took her across the bridge, while the others followed her. The 1st accused removed her clothes and raped

her, and then the 6th accused did the same, while the other accused were a little distance away. Thereafter the 2nd accused raised her up, and she was told that she would be taken to Hingurakgoda and the 'Sri' mark placed on her.

While she was being taken away, a crowd of 25 or 30 persons met them and she was handed over to them with instructions that she was to have the 'Sri' mark placed on her body. Those persons were taking her towards Hingurakgoda when witness Pathirana met them and appealed to them to release her. Pathirana took her to the house of witness Gamage, and Gamage's wife gave her a cloth and jacket. She said she told Gamage's wife that she had been molested, but did not tell her that Mani had been killed. Gamage arrived in a car on being sent for by his wife, and took her to the Hingurakgoda Police Station where refugees had already gathered. From there she was sent to Valachenai refugee camp, Valachenai Hospital, and then to Thambiliwila. She was examined by Dr. Rajalingam on 29th May at Valachenai Hospital, but not as a victim of rape. The latter found abrasions 3 or 4 days old all over her body, but he admitted that he did not examine her carefully as he was exempted from doing judicial work: he said he could not get an intelligible answer from Kiruvanesan, apart from being informed by her that she had been assaulted at Hingurakgoda. Ultimately she came back to Hingurakgoda Police Station with her father on 19th October, and her statement was recorded there for the first time. She was then sent to Polonnaruwa Hospital where Dr. Weerasooriya examined her for the second time, and found an injury which was consistent with the witness having been raped some time earlier.

Pathirana said that when he was walking along the railway line towards Ulpathwewa on the morning in question, from the direction of Hingurakgoda, Kiruvanesan came running towards him in a state of fear and there was a crowd of persons behind her. It is of the utmost significance that the child Mani was not with her then. She complained to him that some people had attempted to assault her. He then took her to Gamage's house and later accompanied her and Gamage in a car to the Police Station. Gamage's wife said that Kiruvanesan came running to her house at 2 or 2.30 p.m. that afternoon, wearing a dirty torn skirt, with the upper part of her body bare. She was frightened, and they did not speak to each other. She did not notice any scratches on the girl, nor did she examine her for injuries. As she was afraid to keep the girl in the house, she sent for her husband, and when he arrived and questioned the girl, the girl told him that men had taken her and molested her. Gamage said that when he arrived at his house on being sent for, he found Kiruvanesan bare-bodied and wearing a dirty piece of cloth. He asked his wife to give her a jacket. The girl told him that she had been molested by 7 or 8 men. It was elicited from him that the Sinhala expression she used for "molested" could also mean "raped". Gamage's statement was recorded for the first time on 20th October.

It is quite clear from the evidence given by Police Sergeant Rahim, who was attached to the Hingurakgoda Police at this time, that although refugees had come to the Police Station it was not possible even to record any statements from them until 3rd June. He met Podiya at the house of the Village Headman of Ratmale on 29th May, but did not question him nor did Podiya make a statement at that time. Podiya had gone to that Headman's house on the evening of 27th May, having spent about 1½ days in the jungle. No point can be made, in view of the conditions prevailing during those days, of the failure to record statements, nor is it surprising that statements which in normal times would have been made to the Police were not made. Things had come to a pass where the procedure which was normally followed after a crime had been committed could not possibly be followed, and all the efforts of the police were concentrated on rescuing and giving refuge to thousands of men, women and children who found themselves in deep distress.

Podiya, in his first statement recorded on 3rd June, referred among other matters to the invasion of his compound by a crowd; he also spoke to the incidents that happened in James' house; and he referred to Kiruvanesan being dragged away towards the railway line. There are certain contradictions, omissions and exaggerations to be found when his evidence is compared with what he said in that statement. For instance his statement has no reference to the burning of his house, and it refers to about 100 persons invading his premises. Even with regard to the evidence given in the Magistrate's Court by Kiruvanesan and James, one finds several contradictions. Kiruvanesan told the Magistrate that 1st, 2nd and 7th accused raped her, but at the trial she said that the 1st and 6th accused raped her. There is also the material contradiction between her and James as to which accused actually dashed Mani on the cemented portion of the bund. It is also remarkable that though James claims to have known all the accused for some years he identified only the 2nd and the 6th in that crowd.

But all these matters were placed before the jury, in a summing-up which was quite unimpeachable, completely fair, and at certain points even unduly favourable to the accused. The learned Judge in explaining what was meant by the term "common object", said this: "Each one must know the object of each of the others and must also appreciate that object is the same and that they assembled there for that same purpose"; and in dealing in particular with the question whether rape was a common object of the unlawful assembly he said: "If you cannot say with complete confidence that one of the common objects of this unlawful assembly was the commission of the offence of rape, in other words, if you are unable to say that just before this offence of rape was committed, it was in the minds of everyone of those members that rape was part of the programme, that rape was going to be committed, and each one knew that the other knew that rape was going to be committed; unless you can say that, you cannot find that one of the common objects of this unlawful assembly was to commit the offence of rape." The

burden thus placed on the prosecution, though perhaps unnecessarily heavy, was nevertheless discharged. A common object is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, then their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves. If these elements are established, the prosecution has then proved the existence of an unlawful assembly with that particular common object : see *Sukha v. State of Rajasthan*<sup>1</sup>.

Mr. de Silva, for the appellants, at one stage argued that the 3rd, 4th and 5th accused had not been proved to have done any acts indicative of their membership of an unlawful assembly, and that at most only their presence at the scene had been proved. Such presence, he said, was easily explained by the fact of their living in that neighbourhood. But it is not only by the doing of a criminal act, like the use of force, that a person becomes a member of an unlawful assembly. The jury must have been satisfied that the 3rd, 4th and 5th accused came, together with the other accused who were convicted, possibly carrying weapons and lending the weight of their presence by being in attendance throughout, until Kiruvanesan was finally handed over to another crowd on the railway line. The 3rd, 4th and 5th accused must surely have realised that, if they themselves did not shout, threaten or use language which the other members of the assembly are said to have used, they were associating with a group of persons who were acting in a lawless manner. The language used, the weapons carried (and the 3rd, 4th and 5th accused, according to Podiya and Kiruvanesan, did carry weapons), the state of tension prevailing at the time, must all have impressed themselves on the 3rd, 4th and 5th accused. Once they were apprised of the illegal objects of the others, it was their duty to withdraw ; when they failed to do so, their continued presence could reasonably have been construed as that of persons who intentionally remained in order to further the common objects of the assembly. It would be unreasonable to hold, in these circumstances, that they were not at least lending their aid to their associates who were acting in a criminal fashion.

The next stage of Mr. de Silva's argument was that if there was an unlawful assembly, the common object was only to commit arson. Certainly the manner in which Podiya's house was burnt demonstrated all too clearly that arson was a common object of the assembly, but this mob did not disperse after the house was burnt. They were obviously bent on more mischief, and another common object which they showed themselves to have was to kill the Tamils. This was surely established by their shouts and the manner in which they acted after Kiruvanesan came up to James' house carrying her little sister. If there was no common object to kill either Kiruvanesan or Mani, why did these men take them away

<sup>1</sup> *A. I. R. (1956) S. C. 513.*

from James' house in spite of all the appeals that they should not do so ? It is no answer to say that since murder was not committed then and there before these two girls were forcibly removed, there was no common object to kill either of them. They did not go far before the murder of Mani took place. When the evidence of James and Kiruvanesan is examined, it is not difficult to see why the majority of the jury thought that the common object of murder and rape had also been proved. The criminal behaviour of the members of the assembly showed that they were prepared to go to any length, pursuing and achieving one object after another, perhaps acquiring courage from the fact that they had triumphed over victims who were unable to offer any resistance. We are unable to say that the majority of the jury were wrong in accepting the evidence of Kiruvanesan, which they must undoubtedly have done on the charges of murder and rape, and we are all satisfied that from that evidence it was a reasonable inference that this unlawful assembly had the common object of murder ; and the majority of the Court are satisfied that rape was also a common object.

Finally, Mr. de Silva submitted that this may be a case where the assembly had one common object, probably arson, at an early stage, and later had other common objects. He urged that if murder and rape were common objects at any time, they became so at later stages of the incident, and the jury had not been properly directed on this matter. But the learned Judge, on a suggestion by Crown Counsel, directed the jury that common objects may come in succession and need not necessarily exist together at the beginning. It is more likely, however, that the jury felt that this assembly showed by its behaviour that all the common objects specified in the indictment existed from the time it approached Podiya's compound.

There is one more matter which we should deal with, and that is the bearing which the certificate given by the learned trial Judge has on these appeals. Mr. Pullenayagam referred us to *R. v. Hopkins-Husson*<sup>1</sup> which was decided by five judges of the Court of Criminal Appeal in England. That was a case in which the trial Judge had said in terms that he was surprised at the verdict of the jury, and would have preferred an acquittal. We need only quote the following passage from the judgment of Lord Goddard, L.C.J. :

“ . . . from a very early period in the history of this Court it has been laid down, and has been laid down frequently since, that the fact that the trial Judge was dissatisfied with the verdict, although it is a matter to be taken into account in this Court, must not be taken as a ground by itself for quashing the conviction. If it were, it would mean that we should be substituting the opinion of the Judge for the opinion of the jury, and that is one of the things which this Court will never do.

<sup>1</sup> (1949) 34 Cr. App. R. 47.



In just the same way it has been held from an equally early period in the history of this Court that the fact that some members or all the members of the Court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the jury."

For these reasons we are unable to interfere with the majority verdict of the jury. The appeals are dismissed.

*Appeals dismissed.*

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