[COURT OF CRIMINAL APPEAL.]

1947 *Present :* **Howard C.J. (President), Jayetileke and Dias JJ.**

THE KING *v.* PIYADASA *et al.*

S. C. 70—M. C. Colombo, 20,265.

Joint charge of murder—No evidence of pre-arranged plan—Common intention—Conviction altered.

Four accused were charged with murder. The evidence was that after the deceased had been hit on the head with an iron rod by the first accused and had fallen down the other three accused came and hit him with iron clubs. There was no evidence as to where these blows alighted. The first accused also joined in the assault on the deceased when he lay fallen. The medical evidence revealed two fatal injuries on the head and other injuries which were not serious—

Held, that the evidence did not justify the inference that there had been a pre-arranged plan by all the accused to commit murder. In the circumstances, therefore, the second, third and fourth accused were convicted under section 317 of the Penal Code.

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

F. A. Hayley, K.C. (with him *M. M. Kumarakulasingham* and *Austin Jayasuriya*), for the accused, appellants.

T. S. Fernando, C.C. (with him E. L. W. *de Zoysa, C.C.*), for the Crown).

Cur. adv. vult.

[1] *(1936) 38 N. L. R. 295.*

June 18, 1947. HOWARD C.J.—

This appeal by the four accused from their convictions on a charge of murder was argued on the 9th June. After argument we affirmed the conviction of the first accused, but set aside the convictions of the other three accused for the offence of murder and substituted therefor convictions for the offence of intentionally causing grievous hurt under section 317 of the Penal Code for which offence we imposed sentences of 4 years rigorous imprisonment. Mr. Hayley who appeared on behalf of all the accused based his argument on behalf of the first accused on a question of fact. The only evidence for the Crown was that of the small boy Piyadasa and the dying declaration of the deceased. There was a discrepancy between the dying declaration and the testimony of Piyadasa arising from the fact that the deceased in his declaration implicated only the first accused, whereas the small boy implicated all four accused. Piyadasa also failed to mention the names of the assailants to the witness Martelis Appu, the driver of a car, who picked up the deceased and Piyadasa soon after the assault on the deceased had taken place. There was also delay on the part of Piyadasa in making a statement to the Police. In spite of these shortcomings in the evidence tendered by the Crown we think that there was ample material on which the Jury could find the first accused guilty. It is impossible to say that the verdict so far as the first accused was concerned was unreasonable. The conviction of the first accused was in these circumstances affirmed.

Different considerations apply in regard to the other three accused. The only evidence implicating them was that of Piyadasa, the small boy who stated that after the deceased had been hit on the head by the first accused with an iron rod and fallen down the other three accused came and struck him with iron clubs. He cannot say where the blows alighted. The first accused also joined in the assault on the deceased whilst he lay fallen. The medical evidence revealed two fatal injuries on the head. There was also another injury on the head which was not serious and three injuries on the legs. It was contended by Mr. Hayley that, in these circumstances, the Crown had not proved there was a common intention to commit the offence of murder. We think that there is considerable force in this contention. In *Mahbub Shah v. Emperor*[1] it was held that "common intention within the meaning of section 34 of the Indian Penal Code implies a pre-arranged plan. To convict the accused of an offence applying section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual; it has to be inferred from his act or conduct or other relevant circumstances of the case. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case"

[1] *A. I. R. (1945) Privy Council 118.*

Mahbub Shah v. Emperor was cited in the case of the *King v. Ranasinghe*[1]. At p. 375 Soertsz Acting C. J. stated as follows :—

"In the circumstances of the case before their Lordships, they refused to draw that inference and it appears to us that, in the circumstances of the case before us too, it would be safer not to draw the inference of a common intention. There is no evidence at all of any pre-arrangement or even of any declaration or of any other significant fact at the time of the assault to enable one to say more than that the assailants had the same or similar intentions entertained independently by each of them. The first appellant said that he ran up from the Co-operative Stores on hearing the women's cries. There is nothing to contradict this statement. Indeed, that is very probable. The second appellant, therefore, must have come up from elsewhere and independently. It may, therefore, well be that if the Jury had their attention called to this distinction, they might have differentiated between the offences of the two appellants."

Again in *The King v. Herashamy*[2] it was held by this Court that to convict all of the accused of the offence of attempted murder each one of them at the time of the assault must be actuated by a common intention not merely to beat the deceased, but to cause his death or such bodily injuries as were likely to cause his death. The same principle was formulated in *Gouridas Namasudra v. Emperor*[3], as follows :—

"Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that in the circumstances it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code."

The case of *Reg. v. Price and Others*[4] is also in point. The headnote of this case is as follows :—

"Six men assaulted another man. In the course of the assault one of them inflicted a stab and killed the person assaulted. They were jointly indicted for murder.

The Judge instructed the Jury :—

1st. That the man who stabbed was guilty of murder, whether he intended to kill or not.

2nd. That the other five would be guilty of murder if they participated in a common design to kill.

3rd. If there was no common design to kill, if the knife was used in pursuance of a common design to use it, they would all be guilty of murder.

4th. If there was no common design to use the knife, if being present at the moment of stabbing, they assented, and manifested their assent by assisting in the offence, they were guilty of murder.

[1] *(1946) 47 N. L. R. 373.*
[2] *(1946) 47 N. L. R. 83.*
[3] *I. L. R. (1908) 36 Calcutta 659.*
[4] *(1858) 8 Cox 96.*

5th. If neither of the last three modes of putting the case be proved against the five, they must find the stabber guilty, and acquit the rest.

6th. If they cannot ascertain which of them stabbed, they must acquit all".

In the present case there is really no evidence of a pre-arranged plan. There is no evidence of any connection between the first accused and the three others prior to the assault. It is not clear what the second, third and fourth accused were doing and where they had been prior to their arrival on the scene. Nor during the assault did the four accused say anything to indicate that they were acting in furtherance of a pre-arranged plan. It is true that they all seem to have been armed with the same type of weapon. Moreover the second, third and fourth accused joined in the attack on the deceased very soon after he had been hit on the head by the first accused. This circumstantial evidence does not in our opinion place beyond all reasonable doubt the question as to whether they all shared a common intention to commit the offence of murder. In these circumstances we have substituted for the conviction of the offence of murder a conviction under section 317 for which we have imposed on the second, third and fourth accused a sentence of 4 years' rigorous imprisonment.

Sentence varied.