[COURT OF CRIMINAL APPEAL.]

1943 *Present :* **Howard C.J., Keuneman and Wijeyewardene JJ.**

THE KING *v.* M. H. ARNOLIS *et al.*

44—M. C. Gampola, 5,058.

Murder—Committed by two persons in furtherance of common intention—No evidence of person who inflicted the injury.

Where, in a charge of murder the case was presented to the Jury by the Crown on the basis that two persons committed the offence in furtherance of a common intention and there was no evidence upon which the Jury could say there was a common intention or that the one or the other inflicted the injury, which resulted in the death of the deceased,—

Held, that a conviction for murder could not be sustained.

APPEAL from a conviction by a Judge and Jury before the 1st Midland Circuit.

M. M. Kumarakulasingham (with him *T. D. L. Aponso*) for first accused.

H. Wanigatunge, for second accused.

G. E. Chitty, C.C., for the Crown.

August 2, 1943. HOWARD C.J.—

The appellants appeal from their conviction on a charge of murder on the ground that the verdict is unreasonable and cannot be supported having regard to the evidence. The case was presented to the Jury by the Crown on the basis that the two appellants committed this offence in furtherance of a common intention. Moreover, in his charge the

[1] *7 N. L. R. 182.* [2] *1 C. W. Rep. 16.*

learned Judge told the Jury that, if they were in reasonable doubt as to whether the two prisoners were acting in furtherance of a common intention, then, in view of the fact that there was no evidence upon which they could say that one or the other of the two appellants inflicted the injury which resulted in the death of the deceased man, they would not be able to convict either the first or the second appellant. We are in agreement with the view taken by the Crown and the learned Judge with regard to that aspect of the case against the two appellants. The question we have to determine is whether the verdict arrived at by the Jury was reasonably capable of being arrived at upon the evidence, taking into consideration that the Jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them. In this connection we have to consider whether there was any evidence on which the Jury could reasonably come to the conclusion that the two appellants were acting in furtherance of a common intention. This fact required strict proof and cannot be established by a case that amounted to mere suspicion.

The salient facts established by the evidence were as follows. The deceased was a well-to-do man, being a vel Vidane living in the Galatha road which is a turning off the Gampola-Pussellawa road. The two appellants lived in the next village. The first witness called by the Crown—Liyan Fernando—stated that he used to see the two appellants together once in a while. The wife of the deceased stated that she knew the two appellants. A boutique-keeper named H. Thepanis from Moragolla testified to an incident that took place at his boutique on October 2 where the first appellant came whilst the deceased was there. The first appellant asked for Rs. 5 which he said the deceased had promised him. The deceased gave him Rs. 3, but refused in spite of protests by the first appellant to give him more. This witness also stated that the deceased and first appellant used to talk to each other and appeared to know each other well. This is all the evidence connecting the two appellants with each other and with the deceased prior to the night of October 5 when this offence was committed. With regard to the movements of the deceased and the two appellants on October 5, it was established—

(*a*) That the deceased left his house about 3 or 3.30 P.M. carrying in his waist his purse in which his wife said there was Rs. 70 ;

(*b*) That about 4 P.M. the deceased visited the boutique of Thepanis at Moragolla, bought a measure of rice and paid for it with money taken from his purse in which notes were also seen.

(*c*) That about 8 or 8.30 P.M. the deceased, accompanied by the first appellant came to the boutique of Abdul Caffoor on the Gampola-Pussellawa road, followed a short time later by the second appellant. The three men are said to have left at 8.45 or 9 P.M. saying they were going to the house of Edwin which was in the direction of the house of the second appellant but in the opposite direction to that of the first appellant ;

(*d*) That the two appellants and the deceased were seen on the Gampola-Pussellawa road by Liyanage, a contractor who states that he

left the boutique before them and was proceeding in the direction of Pussellawa and when he reached the Village Committee road they were about 10 to 12 fathoms behind him ;

(*e*) That the two appellants and the deceased were met about 8.30 or 9 P.M. on the Village Committee road beyond the house of the second appellant and the culvert by the witness Juwanis, a breadman, who got on to the Gampola-Pussellawa road and took a lorry to go to the bakery one and a half miles beyond Gampola. This witness spoke to the deceased who was carrying a candle in a coconut shell. This witness heard no cries of "murder" ;

(*f*) That Nagamany, a Public Works Department Sub-Overseer, arrived at the house of the second appellant which was on a footpath off the Village Committee road and 263 feet from the culvert, about 8.30 P.M. He waited half-an-hour for the second appellant to come and whilst waiting heard a cry of "murder" twice from the direction of the culvert. The witness came out of the second appellant's house and went in the direction of the Village Committee road and caught sight of the latter running along the road. The witness asked him what the cries were and the second appellant said that some of the boys were shouting out in sport. This witness did not make a statement till October 15, although he heard on October 7 that the appellants had been taken into custody in connection with this offence ;

(*g*) That the first appellant was met by a man called Pedrick Appuhamy, a watcher on Storefield estate, sometime after 8.30 P.M. at the junction of the Village Committee road with the Pussellawa road. This witness states that the first appellant was coming towards him along the Village Committee road and, without being spoken to, said to the witness "I went here" ;

(*h*) That at 9 P.M. Sikurajapathi, a retired Apothecary living on the main road, heard shouts of "killing , killing" ;

(*i*) That on the morning of October 6, the witness Liyan Fernando on his way to the house of the second appellant to get his tools found the dead body of the deceased at the end of the culvert on the Village Committee road about 6.30 A.M. or 7 A.M. He went and informed the second appellant of his discovery and they both went and reported the matter to the Apothecary. The police were informed and on arrival on the scene found a broken coconut shell with a candle by the dead body of the deceased. The cloth purse was not found and the only money found on the deceased was a 2 cents note ;

(*j*) That the *post mortem* examination held on the deceased showed only one wound, a stab wound on the neck.

Can it be said that there exists on this evidence anything more than a case of mere suspicion ? Is it established that the two appellants were acting in pursance of a common intention ? We do not think it is. Different considerations would no doubt apply if the deceased had been last seen in the company of only one of the two appellants. No doubt it has been proved beyond all reasonable doubt that one or other of the

appellants committed this crime. But it has not been established which of them committed it nor, bearing in mind the fact that there was only one wound, that both participated. It is true that the behaviour of the second appellant in certain respects seems to require an explanation. In this connection I refer to his action in running along the Village Committee road, his explanation of the cries of "murder" and his failure when the body of the deceased was found to inform anyone that he had been in the latter's company on the previous night. On the other hand it cannot be said that such behaviour is only consistent with his guilty participation in this crime with the first appellant. These acts may be explained by his non-participation with the first appellant in committing this crime. With regard to the first appellant, there are even less circumstances calling for explanation. Bearing in mind that only one wound was found on the deceased, we feel that the verdict, resting, as it must, on an evidence of a common intention between the two appellants, is unreasonable and cannot be supported.

The appeals are therefore allowed and the convictions quashed.

Appeals allowed.