[COURT OF CRIMINAL APPEAL]

1969 *Present:* Sirimane, J. (President), Samerawickrame, J., and Weeramantry, J.

A. PUNCHIBANDA, Appellant, and THE QUEEN, Respondent

C. C. A. 4–6 OF 1969, WITH APPLICATIONS 5–7

S. C. 74/67—M. C. Anuradhapura, 15209

Charge of murder—Plea of grave and sudden provocation—Abuse unaccompanied by any physical act—Whether it can be sufficient provocation—Relevancy of social class of accused person—Liability on basis of common intention—Burden of proof—Penal Code, s. 32.

Mere abuse unaccompanied by any physical act may be sufficient provocation to reduce what would otherwise be an offence of murder to the offence of culpable homicide not amounting to murder.

It is the duty of the Judge to direct the jury that in considering the question of provocation they should consider whether the provocation was grave to an average person from the same social class and background as the accused person.

Before a person can be held vicariously responsible for the criminal act of another under section 32 of the Penal Code, the prosecution must prove that he shared a common intention to commit that particular act.

APPEAL against three convictions at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *T. Parathalingam* and *G. E. Chitty* (Jnr.), for the 1st accused-appellant.

Colvin R. de Silva, with *T. Parathalingam, M. L. A. Refai, W. Justin Perera* and (assigned) *W. G. Perera*, for the 2nd and 3rd accused-appellants.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Crown.

Cur. adv. vult.

March 19, 1969. SIRIMANE, J.—

The three appellants were convicted of the murder of one Pinhamy and sentenced to death. The only eye witness to the incident was one Ratnayake, who was married to the deceased's daughter. According to his evidence, he and his father-in-law, who was armed with a gun, were going in search of a head of cattle which they had lost when they met the

three appellants. The 2nd and the 3rd appellants are brothers, and the 1st is married to their sister. Ratnayake goes on to say that an "altercation" ensued between the deceased and the 1st accused-appellant, which lasted about 10 minutes. In the course of this altercation, the 3rd accused-appellant is said to have snatched the gun which the deceased was carrying. The 1st accused-appellant then stabbed the deceased several times, and after he had fallen, the 2nd accused-appellant is said to have struck him with a club which he (the 2nd accused-appellant) picked up at the scene. The medical evidence proved that there were nine stab wounds on the deceased, but there were no injuries consistent with blows inflicted with a blunt weapon. The cross-examination of Ratnayake showed that the deceased's cattle had been stolen almost daily and at that time he had lost nearly 30 animals. He had armed himself with a loaded gun, and proceeded nearly one and half miles and reached the appellants' village where this incident took place. In the course of the altercation, the deceased had taunted the appellants by saying that though they wore expensive shirts and bought cars—they were nothing more than cattle thieves. On the evidence of Ratnayake, the question whether the appellants acted under grave and sudden provocation arose for consideration by the jury. Words alone can often offer grave provocation to a villager, depending on the circumstances of each case. The learned Commissioner did not direct the jury that in considering this question they should consider whether the provocation was grave to an average person from the same social class and background as the appellants. He dealt with this question very shortly when he said,

> "If you think that there was grave and sudden provocation and it was a result of that grave and sudden provocation that the 1st accused stabbed, then gentlemen, the offence should be reduced from murder to culpable homicide not amounting to murder, *i.e.* if these people lost their self-control as a result of grave and sudden provocation. It seems to me that there is not sufficient evidence to support a defence of grave and sudden provocation. That is an opinion that I am expressing and you are not bound by that opinion."

Learned Crown Counsel, relying on the decision in *Lee Chun-Chuen v. The Queen* [1], argued that there was no case of provocation to go before the jury as provocation in law means something more than a provocative incident. In that case the provocative incident deducible from the evidence of the appellant was that the deceased had thrown a stone which had struck the appellant on his leg and caused a slight injury. The deceased had been battered to death with a hammer. The facts here, in our view, are entirely different. The deceased was obviously angry over the loss of his cattle, and in that mood was engaged in an altercation with the 1st appellant for about ten minutes. Anyone with the slightest acquaintance with this type of altercation which takes place in our villages must know that the language used can be highly provocative to a

[1] *(1963) A. C. 220.*

villager. Our Courts have repeatedly held that mere abuse unaccompanied by any physical act may be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder (see *e.g. King v. Coomaraswamy* [1] and *Regina v. Piyasena* [2]).

In the circumstances of this case, we consider the direction on provocation, in the passage of the summing-up referred to above, inadequate, and the non-direction may well have deprived the 1st accused-appellant of being found guilty of the lesser offence of culpable homicide not amounting to murder.

The 2nd and the 3rd accused-appellants had been convicted on the basis that they shared a common intention with the 1st accused-appellant.

They were unarmed, and it was a sudden meeting. There was no evidence to indicate that they knew that the 1st accused-appellant carried a knife. Indeed, the large knife *P1* produced at the trial was not identified by Ratnayake as the weapon used, nor did the medical evidence support such a suggestion. The Government Analyst found no blood-stains on it. So that, the evidence did not establish any connection between the knife P1 and the offence. The evidence from the police that they had taken it from the house of the 3rd accused-appellant's father-in-law must have caused some prejudice against that appellant, in the absence of a direction from the Commissioner regarding the real nature of the evidence relating to *P1*.

In regard to the snatching of the gun, the case went to the jury on the footing that, that was the only act which the 3rd accused-appellant did. On this point, there was a serious discrepancy between the evidence of Ratnayake, who said that the first act in the altercation was the snatching of the gun by the 3rd accused-appellant, and the deposition of the deceased according to which the gun was taken from him only when he had fallen down after the stabbing. The learned Commissioner did not draw the attention of the jury to this matter until requested to do so by Counsel for the defence.

He then said:

> "When considering the evidence of any witness you should be very careful. In the evidence of Ratnayake he says, as you will remember, that the gun was in the hand of the 3rd accused when Pinhamy was stabbed, whereas Pinhamy, in his statement to the police says he was having the gun and he fell down with the gun after three stabs. *You will keep in mind the fact that these incidents have taken place very quickly.*"

These words may very well have been construed to mean that the discrepancy was one which could quite easily be explained and, therefore, not one worthy of consideration.

[1] *(1940) 41 N. L. R. 289.*

[2] *(1955) 57 N. L. R. 226.*

The prosecution then led evidence through the Doctor to show that one Mudiyanse, a brother-in-law of the 3rd accused had sustained some gunshot wounds. They did nothing more. There was no evidence as to how, when and where Mudiyanse came by his injuries. When the prosecution places such evidence before the jury, they must also show exactly how that evidence becomes relevant in considering the charge which is being tried. As it stood, the evidence would only have confused the jury, and as the deceased had said in his dying deposition that after the gun was taken the 3rd accused-appellant fired it, the jury may very well have used this evidence, to attribute a murderous intention to the 3rd accused-appellant. The learned Commissioner's charge on this point would have tended to encourage that inference. On being requested by Crown Counsel to refer to the injuries on Mudiyanse, he said,

> "Gentlemen, it is not necessary in this case for the Crown to do or even to show how Mudiyanse came by his injuries. This case is a trial of a charge of murder of Pinhamy and as such the injuries on Mudiyanse are not relevant *except for the fact that there was the question of the gun being snatched from Pinhamy's hand.*"

The 2nd accused-appellant, as stated earlier, is alleged to have struck the deceased at a later stage with a club, which he picked up, in such a way as to leave no injuries at all.

The evidence, in our view, falls short of establishing a common murderous intention shared by the appellants.

Learned Crown Counsel submitted that if the 2nd and the 3rd accused-appellants had formed a common intention with the 1st accused-appellant to merely assault the deceased, and if the 1st accused-appellant stabbed him to death, then, even if the 2nd and the 3rd accused-appellants had no knowledge that the 1st accused-appellant was armed, or that he would use the knife to kill the deceased, still, they (the 2nd and the 3rd accused-appellants) would be guilty of murder. In other words, that under section 32 of the Penal Code a person can be found guilty of murder on the basis of common intention, even if that person did not share a murderous intention with the person who actually committed the act, if the act was done in furtherance of a common intention to commit some other offence. No authority was cited to us for this proposition. On the contrary, our Courts have always held that a common murderous intention must be shared before a person can be convicted of murder on an application of section 32. (see e.g. *King v. Assappu* [1].)

In our view, before a person can be held vicariously responsible for the criminal act of another under section 32, the prosecution must prove that such a person shared a common intention to commit that particular act.

[1] *(1948) 50 N. L. R. 324.*

We are of the view that the conviction of the 2nd and the 3rd accused-appellants cannot be supported on the evidence.

Counsel for the 1st accused-appellant also submitted that the questions of "sudden fight" and "exceeding the right of private defence" also arose, and that the jury should have been directed on these points.

But as we are of the view that the offence of the 1st accused-appellant should be reduced on the ground of grave and sudden provocation, it is unnecessary to deal with these matters.

For these reasons, we set aside the conviction and sentence of the 1st accused-appellant and substituted a conviction for culpable homicide not amounting to murder, and quashed the conviction and sentence of the 2nd accused-appellant and the 3rd accused-appellant.

Conviction of 1st accused altered.

Convictions of 2nd and 3rd accused set aside.