[COURT OF CRIMINAL APPEAL.]

1946 *Present:* **Soertsz A.C.J. (President), Wijeyewardene S.P.J. and Canekeratne J.**

THE KING *v.* RANASINGHE *et al.*

APPEALS 28–29—APPLICATIONS 100–101.

16—M. C. Gampaha, 26,855.

Common intention—Same or similar intention is not common intention—Penal Code, s. 32.

Common intention within the meaning of section 32 of the Penal Code is different from same or similar intention. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case.

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

H. V. Perera, K.C. (with him *H. W. Jayewardene, V. Tillenathan* and *Mahesa Ratnam*), for the appellants.

T. S. Fernando, C.C., for the Crown.

Cur. adv. vult.

August 2, 1946. SOERTSZ A.C.J.—

The facts material for a consideration of the submissions made to us on behalf of the appellants in this case may be briefly stated thus: The deceased man owned a one-fifth share of certain fields. In the year 1938, by an informal writing, he agreed to give that share to his grand-aunt Ran Menika and her children in exchange for a high land belonging to them. After that agreement had been given effect to for a number of years, the deceased appears to have repented of the arrangement. On March 3, 1945, accompanied by four or five other men he came by car to the house of Ran Menika to ask for his share of the paddy of the fields he had given her on the informal agreement. It is said that this was a peaceful mission but it is important to bear in mind that the deceased man had been to jail for robbery and that, admittedly, he was a man of a

violent temper especially when he was under the influence of liquor, as he appears to have been on this day. His companions, on this occasion, were also men who bore the reputation of rowdies. When this party reached Ran Menika's house the only inmates of it were Ran Menika and another woman, the wife of the first appellant. The men of the household were out, attending to their usual work. The deceased asked for his share of the paddy and an altercation ensued. The women set up cries and in answer to those cries, the first appellant who is a son of Ran Menika and the husband of the other woman in the house, the second appellant a nephew of Ran Menika, and a third man named Raja Thomas ran up. The first appellant carried a sword, the second a club or iron rod, the third a gun. According to the version most favourable to the prosecution, it would appear that, at this stage, the "visitors" were about to drive off in their car, but that on seeing these three men, the deceased got out of the car and went up to them saying that he had not come to create a disturbance but only to get his share of the paddy. He was then attacked by the first appellant with the sword and the second appellant struck him with the club or rod that he carried. The third man fired his gun but caused no injuries. The witness Peiappu said he saw the second appellant deal only one blow, the other eye-witness for the Crown, Dareeju, said he saw the second appellant deal several blows. There was a suggestion that some of the neighbours who came up also joined in the attack and some broken rafters were produced to bear out that suggestion. Sub-Inspector Badurdeen found these pieces of rafters about twenty-five yards from the scene. But, there is no direct evidence to show that any of the neighbours joined in the attack upon the deceased. The medical evidence established that the blow with the sword caused a necessarily fatal injury. The other injuries, seven in number, were injuries caused with a club or iron rod or with several clubs or rods and these injuries too in the opinion of the doctor taken cumulatively would have resulted in death.

On these facts, the first submission made to us was that, there being only the evidence of one witness of doubtful character to support the case that the second appellant dealt several blows and as against that, the circumstantial evidence afforded by the broken rafters to suggest an attack with clubs by persons other than the second appellant, the Jury if properly directed, might reasonably have taken the view that it would be safer for them to go upon the assumption that the crucial injury was the fatal injury dealt by the first appellant with his sword. If they had taken that view, the complicity of the second appellant in the charge of murder would depend on whether they were satisfied that the second appellant was acting with the first appellant in furtherance of a common intention to cause death. In regard to this question, Counsel submitted that although the directions given by the learned trial Judge to the Jury on the point of common intention were unexceptionable as far as they went, they were inadequate in that they did not instruct the Jury sufficiently to enable them to discriminate between "common intention" and the "same or similar" intentions. As pointed out by their Lordships of the Privy Council in the recent case of *Marbub Shah v. Emperor*[1] "Care

[1] *A.I.R. (1945) P.C. 118.*

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. In their Lordships' opinion, the inference of common intention within the meaning of the term in section 34 (*i.e.*, sect on 32 Ceylon) should never be reached unless it is a necessary inference deducible from the circumstances of the case". 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 prearrangement 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.

The other submission made to us was that the learned Judge had not sufficiently drawn the attention of the Jury to the material facts that the deceased and his party were men of bad reputations, that they or some of them had been drinking, that they came in numbers, and had not directed them to consider whether in view of those facts the case for the prosecution that this was a peaceful expedition undertaken to make a request for a share of the paddy, or the case for the defence that this was an invasion by the deceased and his companions of Ran Menika's home in order to intimidate her into giving a share of the paddy was the more probable case. The manner in which the learned Judge dealt with this part of the case was calculated to create an impression in the minds of the Jury that this question hardly arose, for he said:

> "There is nothing to indicate that his mission (*i.e.*, the deceased's mission) on that day was anything but a peaceful one."

As already observed, there were many significant facts which pointed in the opposite direction and it is a reasonable view to take that if the Jury had been properly charged on this point, they would probably have found that the appellants were acting on grave and sudden provocation calculated to deprive them of their self-control, and that they were within the first exception in virtue of which their offence would be reduced to one of culpable homicide not amounting to murder.

For these reasons, we would set aside the conviction for murder, and substitute for it a conviction for culpable homicide not amounting to murder in the case of both the appellants and sentence each of them to a term of ten years' rigorous imprisonment.

Convictions altered.