[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Sansoni, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* J. MAHATUN and another

APPEALS 108 AND 109 WITH APPLICATIONS 138 AND 139 OF 1959

S. C. 28—M. C. Matugama, 30504

Common intention—Meaning thereof—Vicarious criminal liability—" Criminal act "—" Done by several persons "—Penal Code, ss. 31, 32, 33, 34, 35, 36, 113A, 113B.

Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such act as if it were done by him alone.

To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment.

APPEALS, with applications, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva* and *Anil Moonesinghe*, for Accused-Appellants.

V. S. A. Pullenayegum, Crown Counsel, for Attorney-General.

Cur. adv. vult.

December 21, 1959. BASNAYAKE, C.J.—

The only ground of appeal which learned counsel has argued is that the learned Judge's directions as to the liability of the second accused for the acts committed by the first accused are wrong in law.

The first accused Jayaweerage Mahatun is the younger brother of the second accused Jayaweerage Dharmadasa. They were indicted on the following charges:—

"1. That on or about the 30th of September, 1958, at Agalawatte in the division of Matugama, in the division of Kalutara, within the jurisdiction of this Court, you did throw a hand bomb at Pitagoda Hewage Dharmadasa with such intention or knowledge and under such circumstances that had you by such act caused the death of the said Pitagoda Hewage Dharmadasa you would have been guilty of murder, and by such act you did cause hurt to the said Pitagoda Hewage Dharmadasa, and you have thereby committed an offence punishable under Section 300 of the Penal Code.

"2. That at the time and place aforesaid and in the course of the same transaction you did throw a hand bomb at Hewage Romanis with such intention or knowledge and under such circumstances that had you by such act caused the death of the said Hewage Romanis you would have been guilty of murder and by such act you did cause hurt to the said Hewage Romanis, and you have thereby committed an offence punishable under Section 300 of the Penal Code."

In respect of the attempted murder of Pitagoda Hewage Dharmadasa the jury returned a verdict of guilty against both of them and in respect of the attempted murder of Hewage Romanis a verdict of not guilty. The first accused was sentenced to 12 years' rigorous imprisonment and the second to 8 years' rigorous imprisonment.

Shortly the facts are as follows: Pitagoda Hewage Dharmadasa one of the injured men was the lessee of the field known as Medagonaduwa belonging to the Pathiraja Pirivena of Agalawatte. It was leased to him by one K. D. Dharmasena on deed No. 4901 of 13th September 1958 (P2). On 30th September the date on which he was injured Dharmadasa went along with William his elder brother, Romanis *alias* Ithapanhadaya, and about six others at 9 a.m. to plough and prepare the field for sowing. About noon when they were engaged in their work the two accused came from the direction of the adjoining temple, the Pathiraja Pirivena, with a crowd of followers carrying swords, katties, and other weapons and shouting: "Get out of the field you fellows. Wait there to eat you fellows. You fellows will be eaten up." The two accused were leading the crowd. The first accused had a red ball in one hand and a sword in the other. The red ball turned out to be a bomb which exploded and injured Dharmadasa when thrown at him. The second accused who was close behind him also had a red ball in his hand. According to Dharmadasa, as the first accused came he shouted: "Get out of the field", and according to Romanis both accused shouted: "Who asked you people to mud? Run away, run away", and they advanced to where Dharmadasa and his party were. The latter in fear took to flight. Dharmadasa ran in the direction of the ela across which was his village, pursued by the first and second accused and their followers. When they were about three fathoms from the ela the first accused flung the red ball he had in his hand towards Dharmadasa. It struck his body and exploded injuring him. He jumped into the ela almost simultaneously and got across under cover of the thickets that grew on its banks. Romanis was also injured. He says two bombs were thrown but is unable to say who threw the second one.

Learned counsel did not complain against the directions to the jury in respect of the first accused, but he submitted that the following directions in so far as they affect the second are wrong in law:

> "Whether two bombs were thrown in this case or only one may have to be considered when you have to arrive at a finding on those questions of fact, but I want you to remember at the outset that, in order to establish these charges that the Crown has brought in this indictment, it is not in law necessary to prove that more than one bomb was thrown. If only one bomb was thrown and the person who threw it is satisfactorily identified, then there is proof that that person threw that bomb; but any other person who can be shown to have acted together with the man who actually threw the bomb, who can be shown to have acted with him in such a way that you can say that it was in furtherance of a common intention entertained by both of them, that one of them threw the bomb, the law says the other man must be held to be equally liable as though he had done the act with his own hand. You may think that is not a technicality; it is just and it is common sense that if several persons act together with a common intention in indulging in any kind of criminal behaviour, then it does not matter which particular act was done by anyone of the persons concerned. You may think that morally all of them are equally liable and in law too the view is the same. . . .

"In the present case, if you are satisfied that it has been proved as against either of these accused that he intentionally threw a bomb, threw it either with his own hand or by the agency of another and did so aiming it at some human being, I do not think you will have any difficulty as to what inference you should draw as to the intention with which is was thrown. The Crown would rely, I should imagine, mainly on the nature of the injuries that were actually caused by the throwing of a bomb or by the throwing of bombs on this particular occasion. . . . .

"Even if you are in doubt whether the second accused threw anything at all, you will still have to ask yourselves whether upon the other evidence you are satisfied beyond reasonable doubt that it was in pursuance of a common intention shared by him with the first accused that the first accused threw the bomb.

"Even if you are in doubt as to whether the first accused threw a bomb, you may ask yourselves whether one of them threw a bomb and whether that was done in pursuance of an intention common to both of them. If you are satisfied, beyond reasonable doubt, that a bomb was thrown which exploded and caused injuries and that that bomb was thrown by one or other of these accused, but you cannot say which of them was responsible for the throwing of the bomb that exploded and if you are satisfied that although you cannot say which of them threw the bomb whichever one threw it, it was done in pursuance of a common intention that a bomb or bombs should be thrown, then the act of one is the act of both, and it is immaterial which of them threw the bomb but you must be satisfied that there was an intention common to both of them that a bomb should be thrown at Dharmadasa and Romanis."

The evidence shows that the first and second accused and their followers had the common intention of dispossessing Dharmadasa of the field by violence and that the first accused in furtherance of that common intention threw a bomb at him. It is not difficult to decide the first accused's liability because he is liable for the act committed by him by virtue of section 300 of the Penal Code which provides: "Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, ...". What is the liability of the second accused? The evidence establishes that he joined the first and shared his intention, that he himself shouted to Dharmadasa to clear out of the field, that he also had a red ball like his brother's in his hand, and that he joined in pursuit of Dharmadasa and his fellow cultivators. Section 300 does not help to determine his liability because the evidence does not establish that he threw his bomb at Dharmadasa or Romanis or did any act "with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder". There is no evidence that he aided or instigated his brother to throw the bomb, nor is there any evidence of a conspiracy to commit the offence with which

he stood indicted. Is he then liable for the act of his brother done in furtherance of their common intention ? If so what is the provision of law that makes him liable ? Among the general provisions of the Code in the Chapter bearing the heading General Explanation is a group of sections 32, 33, 34, 35 and 36 which prescribe criminal liability in the circumstances specified in those sections. They are as follows :—

" 32. When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

" 33. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

" 34. Whenever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

" 35. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

" 36. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act ."

Now these sections do not create any distinct offences, but they state how criminal liability is determined in the cases set out in them. Sections 32 and 33 state in what circumstances a person is liable for an act committed by the hand of another and not actually committed with his hand. It lays down a rule of vicarious criminal liability. These sections are not easy to construe and have been the subject of controversy and there has been a conflict of judicial opinion as to their true meaning. They should be construed with due regard to both the rules of interpretation prescribed in the Code and the Interpretation Ordinance as well as the general rules of interpretation of statutes. Now those sections do not purport to lay down a rule by which a person is liable for acts done by himself for such a rule is superfluous as each penal provision of the Code makes a person liable for his own act. The sections on abetment punish those who aid, instigate or conspire with others. Sections 113A and 113B catch up those who commit the offence of conspiracy for the commission or abetment of an offence. Although such cases are not excluded by these sections they are not designed for the purpose of prescribing criminal liability where the same or identical act is done jointly or in unison by several persons, if that were possible, for, in those cases too the actual doer would be responsible for his act and each of such persons would bring himself within the particular penal provision of the Code that determines his liability.

What then are the cases to which they are applicable ? Turning first to section 32, a literal reading of it leaves one with the impression that it applies to a case in which a criminal act is done by several persons acting together. Now cases in which several persons commit identical criminal acts are extremely rare. Even where several persons hold the same weapon and deal a blow at a person doubts might arise as to the exact liability of each of them under the penal provision or provisions of the Code under which the act falls. The section must therefore be construed not in its literal sense. In construing it we should seek to give it a meaning which does not render it useless or impair its value. Bearing in mind that it is a provision of a well-planned Code in construing it the scheme of the entire Code must be examined in order to gain its true meaning and give it not so much the meaning which it may individually bear as that which it ought to have from the context and the scheme of the instrument. More than any other legislative instrument a Code must be regarded as a statute which has been carefully planned and designed. Every provision must be taken to be a part of a comprehensive scheme and superfluity is the last thing that may be attributed to such a document. It must therefore not be construed in such a way as to render the provision superfluous or purposeless. It must be construed so as to give it its proper place in the scheme of a Code of penal law. The essence of a Code as observed by the Privy Council in *Gokul Mandar v. Pudmanund Singh* [1] " is to be exhaustive on the matters in respect of which it declares the law. "

The dominant concept in the section appears to be the doing of a criminal act in furtherance of the common intention of a number of persons. Now what is common intention ? " Common " when used as an attributive means " belonging or pertaining equally to more than one, belonging to all, shared equally by two or more individuals ". Common intention of several persons is an intention shared equally by all of them. In regard to the expression " criminal act " it would be unwise to fetter its scope by any rigid definition. In this connection it is well to bear in mind that the word " act " is defined in the Penal Code (s. 31) and denotes a single act as well as a series of acts and that in the Code words which refer to acts done extend also to illegal omissions, (s. 30), a single omission or a series of omissions (s. 31 (2)). In the first place the expression means what it says, an act which is punishable by law—a crime in the generic sense. But its meaning is not confined to a single act. It includes an act or acts or a series of acts or an omission or a series of omissions. Lord Sumner in *Barendra Kumar's* case [2] described a criminal act as " that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence ". Next it is necessary to examine the meaning of the words " done by several persons ". Does the section contemplate a criminal act done by one of several persons or all of several persons ? If the latter meaning is given the section would be rendered useless. When would the same criminal act be committed by all of several persons ? Was it necessary to enact a special

[1] *29 Calcutta 707.* [2] *(1925) A. I. R., P. C. 1 at p. 9.*

provision for such a situation ? As stated above where a number of persons unite to commit the identical criminal act, if such a thing were possible, they would each be guilty of the offence committed by them under the penal provision which makes the criminal act punishable. In order to give the section a place in the scheme of the Code and to render it effective as a provision providing for a special aspect of criminal liability which the criminal law of any country should provide it must be construed as applying to a case in which a criminal act is committed by one of several persons in furtherance of the common intention of all. The word " done " must be understood in the sense of " brought about ", " carried out ", " executed ", " performed ", " carried into effect ", " produce ", according to the circumstances of each case. The following statement at p. 351 of Foster's Crown Law (1792) 3rd Ed. will be of assistance in understanding the place of section 32 in a planned Code such as ours :

> " For in combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument, by which the others strike ".

So will the statement of the Privy Council in *Gunesh Sing v. Ram Rajah*[1] :

> " Where parties go with a common purpose to execute a common object, each and everyone becomes responsible for the acts of each and every other in execution and furtherance of their common purpose : as the purpose is common so must be the responsibility ".

Having regard to the considerations stated above the section should be construed as follows :—When a criminal act is committed by one of several persons in furtherance of the common intention of all each of them is liable for that act in the asme manner as if it were done by him alone. If each of several persons commits a different criminal act each act being in furtherance of the common intention of all, each of them is liable for each such act as if it were done by him alone.

To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment. To hold that " common intention " within the meaning of the section necessarily implies a pre-arranged plan would unduly restrict the scope of the section and introduce an element which it has not. The following view expressed by the Privy Council in *Mahbub Shah's* case[2] seems to import into the section a consideration that is not an essential element of " common intention ":—

> " Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To

[1] *(1869) 12 W. R. 38—3 B. L. R. 44 (P. C.).*
[2] *(1945) A. I. R. (P. C.) 118 at 120.*

invoke the aid of s. 34 successfully it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, the liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."

Now applying the section as understood in the light of what has been said above to the facts of the instant case, for the criminal act of the first accused which was done by him, being one of several persons, in furtherance of the common intention of all, each of those who shared his intention is liable in the same manner as if he had done it himself. The evidence discloses that the second accused is one of those who shared the intention in furtherance of which the first accused threw the bomb which injured Dharmadasa and Romanis. He is therefore liable for it as if it were done by him alone. The learned Judge's directions are therefore right and the conviction of the second accused must be upheld.

The provisions of the Indian Penal Code (sections 34 and 35) which correspond to sections 32 and 33 have been the subject of considerable controversy in India and the decision in *Barendra Kumar's* case (*supra*) which was approved by the Privy Council can be taken as settling the conflict between what is known as the narrow view represented by *Nirmal Kanta Roy's* case[1] and the wider view upheld by that decision. The evil flowing from a construction of section 32 as narrowly as Stephen J. construed it in *Nirmal Kanta Roy's* case (*supra*) is stated thus by Lord Sumner in *Barendra Kumar's* case (*supra*) :

"If section 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether."

The following direction to the jury by the trial Judge in *Barendra Kumar's* case (*supra*), which is in essence what the Judge in the instant case told the jury, was approved as correct by the Privy Council :—

"Therefore in this case if these three persons went to that place with a common intention to rob the Postmaster and if necessary to kill him and if death resulted, each of them is liable whichever of the three fired the fatal shot.

[1] *(1914) 41 Calcutta 1072.*

"If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and if necessary to kill and death resulted from their act, if that be so, you are bound to find a verdict of guilty.

"I say, if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty."

The following comment of Lord Sumner on the defence of the accused that he did not enter the Post Office, but remained outside while his companions went in, shows how far the vicarious liability created by the section goes :—

"Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait."

The appeals are dismissed, and the applications are refused.

Appeals dismissed.
Applications refused.