[COURT OF CRIMINAL APPEAL]

1965 Present: T. S. Fernando, J. (President), Sri Skanda Rajah, J. and Sirimane, J.

G. K. ARIYADASA, Appellant, and **THE QUEEN,** Respondent

C.C.A. 124 OF 1964, WITH APPLICATION 138

S. C. 28-M.C. Galle, 29805

Trial before Supreme Court-Burden of proof where the accused gives evidence--Misdirection-Charge of murder-Vicarious liability of accused on basis of common intention-Form of indictment-Criminal Procedure Code, ss, 167, 168 (7), 769 -Penal Code, ss.'32, 294, 296.

(i) Where, in a prosecution for murder, the accused gives evidence without seeking to bring himself within the benefit of a general or special exception in the Penal Code, the burden of proof does not shift on to him at any stage. In such a case, if the Judge, in his summing-up, puts the issue in the case as one of belief between the evidence of a prosecution witness on the one hand and that of the accused on the other, he would be placing on the accused a burden which the latter is not obliged in law to carry. The accused is entitled to be acquitted even if his evidence, though not believed, is such that it causes the jury to entertain a reasonable doubt in regard to his guilt.

(ii) The accused-appellant was charged with murder. The trial Judge left it open to the jury to return a verdict against the appellant on the basis that the fatal injury to the deceased was caused by a person other than the appellant but in furtherance of an intention shared in common between the appellant and that other person in a joint attack by them on the deceased. The charge as framed in the indictment contained no reference at all to section 32 of the Penal Code.

Held (by the majority of the Court), that there was no misdirection. Section 169 of the Criminal Procedure Code sets out the circumstances in which the manner of committing an offence has to be particularised in the charge. But illustrations (6) and (e) of that section show that, in a prosecution for murder, it is not necessary that the accused, in a case like the present one, should be made aware in the indictment, by specific reference to section 32 of the Penal Code, that he is vicariously liable for the criminal act of another person who is not before the Court. Moreover, section 32 of the Penal Code merely lays down a principle of liability, and not a manner of committing an offence.

The Queen v. Mulalihamy (59 N.L.R. 299) not followed.

APPEAL against a conviction in a trial before the Supreme Court.

K. Jeganathan, with J. V. C. Nathaniel, for the accused-appellant.

V. S. A. Puttenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

February 1,1965. **T. S. FERNANDO, J.-**

Two grounds of appeal were raised on behalf of the appellant who had been convicted upon the unanimous verdict of the jury that he was guilty of the murder of a man named David. The first of these grounds was that the jury had been misdirected in respect of the burden of proof arising in a criminal case where the defence does not seek to prove the existence of circumstances bringing its case within a general or special exception of the Penal Code. The second ground alleged that there was a misdirection of the jury inasmuch as the trial judge left it open to them to

---

67

return a verdict against the appellant on the basis that the fatal injury to the deceased was caused by a person other than the appellant but in furtherance of an intention shared in common between the appellant and that other person, although the charge as framed in the indictment contained no reference at all to section 32 of the Penal Code.

The prosecution relied solely on circumstantial evidence to establish the charge of murder. That evidence was furnished mainly by the deceased's mother, the witness Sopihamy. In regard to the first of the two grounds of appeal, it may be stated that the appellant did not seek to bring himself within the benefit of a general or special exception in the Penal Code. Instead, by his evidence he sought to establish that the deceased met with his death at the hands of a man called Jamis. It is correct to say that he sought also to establish that this man Jamis and the deceased broke into his house on the night in question in an attempt either to abduct his daughter or to commit an assault on her and that, on his intervening to save his daughter and inflicting a knife injury on the deceased in the course of that intervention, Jamis and the deceased ran out. It was thereafter, he stated, that Jamis and the deceased quarrelled between themselves and that Jamis struck the deceased on his head with a crow-bar. According to medical testimony, the necessarily fatal injury was one which the deceased had sustained as a result of a blow on his head with a blunt weapon. While the appellant may therefore be said to have claimed he was exercising the right he had at law to defend his daughter, he nevertheless did not plead that any injury other than the knife injury and another slight injury to the forehead of the deceased was caused by him in the course of the exercise by him of that right.

The learned trial judge, at a fairly early stage of his charge, having explained to the jury that the Crown had to prove its case beyond reasonable doubt, stated as follows :-

" Now, gentlemen, the degree of proof that is required from the defence is not so high as the degree of proof that is required from the Crown. Whereas the Crown has to prove its case beyond reasonable doubt, it is sufficient if the defence proves its case on a balance of probability. If you think that the version of the accused is more probable than the version related by the prosecution witnesses, the defence has discharged its burden. That is the burden that lies upon the defence to prove its case."

Then, again, in the middle of his charge, he reverted to the question of ' the burden of proof lying on the defence in the following words :-

" I have addressed you on the burden of proof - (obviously a reference to the passage reproduced above)-that lies upon the defence and I said that it is not necessary that the accused should prove his case with that same high degree of proof that is required of the Crown ; but still he has to prove it. You must be satisfied on his evidence that what he is saying is true."

68

Finally, towards the close 61 his charge, fie directed, the jury thus :-

" The case for the defence is that it was Jamis who struck the fatal blow on the deceased. Then, gentlemen, you have to consider whether the accused's story on that point is true. If you are satisfied, on a balance of probability, that it was Jamis who struck the deceased, then the accused is entitled to be acquitted, because it was not he who caused the fatal injury on the deceased.....So, gentlemen, you will see that the entire case boils down to a very small issue; do we believe Sopihamy or do we believe the accused ? "

It appeared to us that when the learned judge put the issue in the case as one of belief between the evidence of Sopihamy on the one hand and that of the appellant on the other, he was placing on the appellant a burden which the latter was not obliged in law to carry. If the jury believed the appellant, he was, of course, entitled to be acquitted. He was, in our opinion, also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt. The evidence he gave at the trial did not affect the cardinal principle of the criminal law that the accused person is presumed to be innocent and the corollary of that principle that the burden of establishing his guilt lay on the prosecution. In the state of the evidence the burden of proof did not shift on to the appellant at any stage of this case. Moreover, as is evident from the passages in the learned judge's charge which we have thought necessary to quote above, the jury might well have approached their deliberations in respect of the guilt or innocence of the accused on the assumption that an accused person who has denied his guilt and thereby thrown the burden of establishing it on the prosecution yet himself had attached to him at law a burden of proving his innocence on a balance of evidence. The directions complained of were, in our opinion, clearly erroneous and the first ground of appeal had to be upheld.

In view of the conclusion we reached on the first ground on which misdirection was alleged, we allowed the appeal at the conclusion of the argument and we quashed the conviction. Acting, however, in terms of the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance we ordered a new trial of the appellant as we were of opinion that there was evidence before the jury upon which the appellant might reasonably have been convicted but for the misdirection established. Although the upholding of the first ground raised disposed of the appeal, as we have ordsred a new trial, we think it is necessary to deal also with the second ground of appeal.

For the consideration of this second ground of appeal, one or two relevant facts have to be recounted. The case for the prosecution was that the appellant inveigled the deceased out of his home on the night in question on a pretext of giving him liquor to drink, that the appellant and Jamis both came together to the deceased's home to take him away and that when he had been taken into the compound of the appellant he was subjected to a severe assault from which he died in that compound

---

itself. The medical evidence was to the effect that the deceased had sustained a number of injuries which could not all have been caused with one weapon but must have been caused with at least two weapons, one blunt and the other sharp cutting. The fatal injury was due to a blow with a blunt weapon and, if more than one person had taken part in the assault upon the deceased, the prosecution was not able to establish that it was the appellant and not some other person who had caused that injury. Being a case of circumstantial evidence, the prosecution appears to have put forward alternate theories as to how the deceased might have come by his injuries, namely, either that the appellant himself caused the fatal injury or that Jamis or some other person caused that injury but the appellant participated in the attack sharing an intention in common with Jamis or that other person to kill the deceased.

The defence apparently contended at the trial that, if two persons attacked the deceased, and if the prosecution failed to establish the identity of the person who actually delivered the fatal blow,

the appellant was entitled to be acquitted. In regard to this contention, the trial judge directed the jury that if they were satisfied beyond a reasonable doubt that the deceased was lured or inveigled on to the compound of the appellant by the latter and Jamis on a false pretext and was there fatally assaulted soon afterwards "it matters not who it was who inflicted the fatal injury ". He further directed them that " it is equally possible for you to bring in a verdict of murder if you are convinced-quite convinced-by the evidence that the accused was a party to a carefully prepared plot, in accordance with a common plan, that the deceased should be brought to his compound some way or other and assaulted fatally by the conspirator in pursuance of that common plan to kill. It matters not if there was another person who participated in the assault on the deceased. It matters not even if the fatal blow was not delivered by the accused. If you are satisfied beyond reasonable doubt that Jamis and the accused took part in the assault in furtherance of a common criminal purpose of causing the death of the deceased and that one of them struck the fatal blow, even if it was not the accused, then the accused will be guilty of the offence of murder". The learned judge reverted to this same matter towards the end of his charge when he stated " I told you that if you are satisfied that the deceased had been inveigled into the compound by the accused and Jamis, it matters not who struck the fatal blow provided there was a common plan between the accused and Jamis to attack the deceased fatally ".

The charge contained in the indictment was in the terms reproduced below:-

" That on or about the 1st day of October 1963 at Kirindallahena, Lewala Pahala,in the division of Galle, within the jurisdiction of this court, you did commit murder by causing the death of Elpitiya Vithanage David, and that you have thereby committed an offence punishable under section 296 of the Penal Code."

The argument for the appellant in respect of the second ground of appeal was that he was called upon according to the terms in which the charge had been framed only to meet a case where the allegation was that the death of the deceased was caused by him, and that, in the absence to any reference to section 32 of the Penal Code in the charge itself, he was not required to defend himself on a charge which implied that he was vicariously responsible for the criminal act of another. Support for this argument was sought from the decision of this Court in The Queen v. Miidalihamy[1 (1957) 59 N. L. R. 299-] In that case Basnayake C.J. said in thecourse of the judgment of the Court - (see p. 302) -

" There was no indication in the indictment that the appellant was being made vicariously liable for the death of the deceased. It contained a straightforward charge which alleged that the appellant committed murder by causing the death of the deceased.....
Although the indictment gives the offence with which the accused was charged, the time and place of the alleged offence, and the person against whom it was committed, those particulars were not in our opinion reasonably sufficient to indicate to the appellant the ground on which it was sought to bring home guilt to him."

There followed a reference to the requirements of section 169 and to the provisions of sections 167 and 168 of the Criminal Procedure Code.

Section 167 (2) of the Criminal Procedure Code enacts that "if the law whichcreates the offence gives it any specific name, the offence may be described by that name only ". The Penal Code (section 294) gives the specific name of murder to the offence here in question. Section 168 (1) sets out what particulars shall be contained in the charge. Those particulars are required to be such as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 169 sets out the circumstances in which the manner of committing the offence has to be particularised in the charge. Mr. Pullenayegum has drawn our attention to illustrations (b) and (e) to that section. These two illustrations appear in the Code in the form reproduced

hereunder :-

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

Mr. Pullenayegum submitted that when the Court in Mudalihamy's case, (supra) - see p. 303- stated that, in a case where it is sought to make a person vicariously responsible for the acts of those who are not being charged at all, it was necessary that the accused should have been made aware at the outset that it was a charge of vicarious liability (with a specific reference in the charge to section 32 of the Penal Code), the law

---

has been laid down in a manner that is in conflict with the Criminal Procedure Code. In the opinion of the majority of us, the Court in Mudalihamy's case, with all respect to it, appears to have overlooked the significance of the illustrations (b) and (e) to section 169 which we have reproduced above. That section in combination with its illustrations serves to show that a charge such as that framed in the present case against the appellant was in conformity with the law. Moreover, section 32 of the Penal Code merely lays down a principle of liability, and not a manner of committing an offence. The majority of the Court were fortified in the view which commended itself to them when they examined the decision of the Privy Council in the West Indian case of Ramlochan v. The Queen[1 (1956) A. C.476.]which had indeed been brought to the attention also of the Court in Mudalihamy's case.

The Court of Criminal Appeal thought that this decision of the Privy Council hadno application to the facts in Mudalihamy's case for the reason, inter alia, that it was not one in which it was sought to make the accused vicariously liable for the criminal act of another not before the Court. With all respect to the Court and to the reasons set out in its judgment for distinguishing Eamlochan's case, the majority of us were unable to agree that the purported distinction is a valid one. Our reasons are apparent from a close examination of the judgment of Their Lordships of the Judicial Committee.

In that case the appellant Ramlochan had been charged with murder. The evidence was circumstantial, and right up to the stage when Ramlochan, who testified on his own behalf, came to be cross-examined, the case for the Crown had been that Ramlochan himself had killed the deceased. In the course of the cross-examination of Ramlochan by counsel for the Crown, the latter suggested to the witness that the fatal blow was struck not by him (Ramlochan), but by another man-who was not on trial-and that the appellant aided and abetted this other man. It was contended on behalf of Ramlochan that improper prejudice had been caused to his defence by this alleged change of front on the part of the Crown. As to this, the Court observed :-

" Their Lordships are unable to take the view that there was any illegitimate or improper exercise of counsel's right and duty to cross-examine the accused. The Crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or not the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck off the girl's head or was a party to someone else doing

---

so was immaterial. In either case he was guilty of murder..... Nor are Their Lordships able to

see that there was any change of front in the conduct of the case by the prosecution. The Crown was not bound to state its theories in advance. These theories were inferences from evidence which it may be assumed Crown Counsel explained to the jury in opening that he was about to lead. Their Lordships are unable to extract from the evidence led for the prosecution that the Crown had tied itself to any view of how the murder was committed."

For reasons which have been outlined above the majority of us were unable to agree with the observations of this Court in Mudalihamy's case and uphold the second ground of appeal. In the opinion of the majority of the Court (1) the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive and (2) there was neither prejudice to him nor misdirection by the trial judge,

---

Case sent back for a new trial.

- End -