

WIJITHASIRI AND ANOTHER
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
RAMANATHAN, J., W.N.D. PERERA, J. AND A. DE Z. GUNAWARDENA, J.
C.A. 2-3/87, - M.C. GAMPAHA 13/83.
NOVEMBER 2, 1988.

Criminal Law - Murder and arson - Common intention.

The prosecution case was that the two appellants had been actuated by common murderous intention.

Held :

- (1) Where the question of common intention arises the jury must be directed that-
- (a) the case of each accused must be considered separately;
 - (b) the accused must have been actuated by a common intention with the doer of the act at the time the act was committed;
 - (c) common intention must not be confused with similar intention entertained independently of each other;
 - (d) there must be evidence of either direct or circumstantial evidence of a pre-arranged plan or some other evidence of common intention;
 - (e) the mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence which justifies them in so holding.

(2) As there was evidence upon which the accused could have been convicted of murder and arson but for the non-directions, re-trial should be ordered.

Case referred to :

King v. Assanna and others 50 NLR 524

APPEAL from a judgment of the High Court of Gampaha.

Ranjith Abeyasuriya, P.C., for Accused - Appellants.

A.R.N. Fernando, Senior State Counsel, for the Attorney-General.

Cur.adv.vult.

January 17, 1989.

RAMANATHAN, J.

The two appellants were indicted jointly on the following counts:

- (a) That on or about the 22nd day of October 1982 at Dambuwatta that they did commit the murder of one Godagandeni Dewage Simion, an offence punishable under section 296 of the Penal Code.
- (b) That at the time and place aforesaid and in the course of the same transaction they did commit mischief by setting fire to the dwelling house of G. D. Pablis, an offence punishable under section 419 of the Penal Code.

After trial the jury brought in an unanimous verdict of guilt against the 1st accused on both counts and found the 2nd accused guilty of count one. The learned High Court Judge sentenced both appellants to death on count one and in addition sentenced the 1st accused to 7 years rigorous imprisonment on count two. This is an appeal against their convictions and sentences.

The case for the prosecution was testified to by Ananda Pushpa Kumar who was the sole eye witness. He was 8 years old at the time of the incident and was accompanying his father at about 10 p.m. that night. The witness stated, he had gone to watch a television programme at one Pablis's house and at about 10 p.m. his father had come on his bicycle to take him back home. When they came to a hill they had dismounted

from the bicycle and his father wheeled the bicycle while the witness followed the deceased. The first accused had come and hit his father on the head with a club and the second accused had said 'oka marendama gahapan' (hit him till he dies). The witness stated he had identified the accused by the aid of his father's torch light. The witness Ananda Pushpa Kumar had run to a relative's house named Yakkala uncle and shouted stating that his father had been killed by Vijitha uncle the first accused.

The other witness Sellawathie states that Pushpa Kumar came running and informed her of the assault on his father. She had gone to the scene and sent the deceased to hospital. This witness also speaks to the fact that the first accused had set fire to the house of Pabilis.

The medical evidence was that the deceased had five external injuries consisting of-

- (1) lacerated wound 2" long in the mid forehead commencing at the root of the nose extending upwards and terminating on the left frontal scalp.
- (2) contusion at the root of the nose.
- (3) linear surgical wound 2" long and horizontally placed in the left frontal scalp.
- (4) laceration 1 3/4" long in the right mid parietal area extending horizontally with a surrounding contusion.
- (5) contusion 3 1/2x2 on the back of the head.

The internal injuries were fracture of the left frontal bone commencing at the root of the nose and extending into the frontal bone up to the parietal suture. There were fractures extended outwards into the base of the skull. There was also a contused laceration of the frontal bone of the brain, forming a cavity 3" by 1" which was filled with blood. This injury corresponds to external injury No. 3. The injuries were consistent with having been assaulted on the head with a club.

The cause of death was cardio respiratory failure from the fracture of the skull and laceration of the brain.

It was submitted by counsel for the appellants that the indictment had been forwarded on the basis of liability arising from a common murderous intention shared by the appellants. Therefore it was essential for the trial Judge to have given adequate directions as to the legal principles involved in regard to common intention in order to assist the jury to apply the law to the facts of the case before them. It was submitted that the trial Judge has also failed to direct the jury on the factual situation relating to the case but had merely made a perfunctory statement relating to the law of common intention and had not directed the jury to consider whether there was evidence to prove that there was a common murderous intention shared between the first and second appellants.

Secondly, the counsel for the appellants submitted that there was no useful purpose served in ordering a retrial due to non-directions of law, because the evidence of Ananda Pushpa Kumar the principal eye witness, was unsatisfactory. The said witness has made a belated statement to the police, and had not mentioned the second accused's name to his Yakkala uncle at the first opportunity the witness had. It was contended that it was unsafe to convict the second accused due to this omission and as the evidence against the first accused also came from the same source it was unsafe to convict the first accused also.

Thirdly, it was submitted that the trial Judge had failed to refer in the summing-up to the omission of Pushpa Kumar, to mention the second accused's name to his Yakkala uncle and in his statement to the police.

Learned Senior State Counsel conceded that the directions on common intention were inadequate and that the trial Judge should have directed the jury that they must be satisfied beyond a reasonable doubt that the appellants shared a common murderous intention to kill the deceased Simion and that an inference of a common intention can be only drawn if it was an irresistible inference. Senior State Counsel invited the court to send the case back for a fresh trial as the evidence of Pushpa Kumar was cogent and adequate to support the charge.

We are of the opinion, that the verdict of the jury is vitiated due to this serious non-direction on the law relating to common intention. The case for the prosecution rested on the basis that both appellants were actuated by a common murderous intention to cause the death of the deceased G.D. Simion. The case of *King v. Assanna and others* reported in 50 NLR

at 324 has held that where the question of common intention arises the jury must be directed that-

- (1) the case of each accused must be considered separately.
- (2) that the accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.
- (3) common intention must not be confused with similar intention entertained independently of each other.
- (4) there must be evidence of either or circumstantial evidence of a pre-arranged plan or some other evidence of common intention.
- (5) the mere fact of the presence of the co-accused at the time of the offence is not necessarily evidence of common intention unless there is other evidence which justifies them in so holding.

The trial Judge has failed to direct the jury to consider whether the appellants shared a common murderous intention nor has he related the law to the facts of the case.

We, accordingly set aside the convictions and sentences of both appellants. We have considered the case presented at the trial and on a consideration of the evidence of Pushpa Kumar who has identified both the appellants and his not mentioning the name of the second accused does not affect the quality of his evidence. Nor can we say it is unreliable, due to the delay of four days to make a statement, in the circumstances of this case. The delay can be explained, as, what was uppermost in his mind was the attack on his father by the first accused and the taking of the injured for treatment to the hospital. Furthermore, Sellawathie's evidence substantially corroborates Pushpa Kumar's evidence, as she not only speaks to arson committed by the first accused but also speaks to the fact that when she went to the scene to dispatch the injured to hospital both accused were present at the vicinity of the scene.

We are of the opinion, that there was evidence before the jury upon which the appellants might reasonably have been convicted but for the non-directions. We accordingly quash the convictions and sentences

against both appellants and acting under the terms of the proviso to section 334(2) of the Code of Criminal Procedure Act, No. 15 of 1979 we order that a fresh trial be held.

W.N.D. PERERA, J.- I agree.

A. DE Z. GUNAWARDANA, J.- I agree.

Convictions quashed.

Case sent back for retrial.
