

1957

Present : T. S. Fernando, J.

D. D. WEERASINGHE, Appellant, and KATHIRGAMATHAMBY and another, Respondents

S. C. 451—M. C. Trincomalee, 17,443

Fisheries Ordinance, No. 24 of 1940—Sections 14 and 22 (3)—“Conspires”—Common intention—Penal Code, s. 32—Applicability to statutory offences.

By section 22 (3) of the Fisheries Ordinance :—

“Any person who attempts or conspires to commit any offence under this Ordinance shall be deemed to be guilty of that offence.”

Held, that the word “conspires” should be given its ordinary meaning, viz., plots or combines secretly for an unlawful purpose.

Quaere, whether section 32 of the Penal Code relating to “common intention” is applicable in a case where persons are charged with the commission of an offence other than an offence under the Penal Code.

APPPEAL from a judgment of the Magistrate’s Court, Trincomalee.

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

No appearance for the accused-respondents.

Cur. adv. vult.

¹ (1958) 59 N. L. R. 481.

October 30, 1957. T. S. FERNANDO, J.—

The two accused-respondents and another were charged in the Magistrate's Court with using explosives or a stupefying substance for the purpose of killing or stupefying fish in breach of section 14 of the Fisheries Ordinance, No. 24 of 1940, an offence punishable under section 22A (1) of the same Ordinance, as amended by the Fisheries (Amendment) Act, No. 25 of 1952. At the end of the trial, the accused-respondents were acquitted, but the other man charged along with them was convicted and sentenced to pay a fine of Rs. 500, in default 3 months' rigorous imprisonment. The complainant has appealed against the acquittal of the two respondents.

The evidence accepted by the learned Magistrate shows that the respondents and the convicted man were in a boat at sea about 40 yards from the shore, and the convicted man was seen to stand up in the boat, raise both his hands together and throw something into the water whereupon there was an explosion in the water near the boat. One of the respondents was thereafter seen jumping from the boat into the sea and collecting fish with the aid of a ring net, while the other respondent kept the boat in position on the water. After some time the respondent who jumped into the water and collected fish got back into the boat and all three rowed off towards the beach. When the boat was about to beach, preventive officers of the Fisheries Department rushed up, but the three men rowed off without beaching, paying no heed to the calls of the officers to come back. An officer of the Fisheries Department collected some fish from the water close to the place where the explosive was thrown into the sea, and these fishes when examined showed signs of death from rupture of the gut due to under water explosives.

In acquitting the respondents the learned Magistrate stated that he was unable to infer from their respective acts of collecting the fish and keeping the boat in position while the collecting was being done an intention in common with the convicted man of using explosives for the purpose of killing fish.

Crown Counsel has argued that the proved facts, viz. (i) that the respondents and the convicted man had come together on a fishing expedition, (ii) that one of them had brought an explosive and used it without protest from the other two, (iii) that after the explosive was used by one the other two took action in furtherance of their joint purpose, and (iv) that they all made away on the approach of officers of the Fisheries Department, show without possibility of doubt that all three men were acting in furtherance of an intention shared by them in common and, invoking the aid of section 32 of the Penal Code, he contended that the acquittal was wrong. If the general explanation embodied in section 32 of the Penal Code was available to be applied in a case where persons are charged with the commission of an offence other than an offence under the Penal Code, I have no doubt that on the facts accepted by the learned Magistrate as proved in this case all three persons accused should have been found guilty. I am not aware of any previous decision in which it has been held specifically that section 32 of the Penal Code

can be applied in the way indicated above. For that reason I indicated to Crown Counsel that I wished to hear further argument in this case and, as the respondents were not represented at the appeal, I arranged for the assistance of counsel, *amicus curiae*, to argue that section 32 of the Penal Code can be applied only in the case of offences under the Penal Code. Before argument on this point could be resumed, I was referred, in the course of an appeal in another case where a person had been charged with the commission of an offence in breach of section 14 of the Fisheries Ordinance, to a provision of that Ordinance which in my opinion makes argument on the point referred to above unnecessary. I refer to section 22 (3) of the Fisheries Ordinance which enacts that “ *any person who attempts or conspires to commit any offence under this Ordinance shall be deemed to be guilty of that offence*”. Giving the word “ *conspires*” its ordinary meaning—plots or combines secretly for an unlawful purpose—it seems to me that the respondents have certainly conspired to commit the offence which they were charged with committing. The question of law I have referred to above could therefore be left for consideration in a case where persons are charged with the commission of a statutory offence other than one under the Fisheries Ordinance.

I would set aside the order of acquittal of the respondents and convict them of the offence specified in the charge read out to them. Each of them will pay a fine of Rs. 100 or undergo rigorous imprisonment for one month in default of payment.

[Postscript :—]

I delivered judgment in appeal in the above case on 30th October, 1957, setting aside the acquittal of two of the persons accused and holding that both these persons had acted in contravention of the provisions of section 14 of the Fisheries Ordinance and had thereby committed an offence punishable under section 22 A(1) of the Ordinance, as amended by the Fisheries (Amendment) Act, No. 25 of 1952. I also ordered each of the accused to pay a fine of Rs. 100 or undergo rigorous imprisonment for one month in default of payment.

Crown Counsel has now brought to my notice the question of the legality of the sentence ordered by me and has invited me to revise the sentence in the event of that sentence having been ordered *per incuriam*. I regret that in imposing a fine of Rs. 100 on each of the accused I had overlooked that part of section 22 A(1) of the Amending Act, No. 25 of 1952, which renders a person found guilty of contravening any of the provisions of section 14 of the Ordinance liable to a fine *not less than* five hundred rupees or to imprisonment of either description for a term not exceeding one year. As a result of the introduction of section 22 A(1) it is therefore clear that, if a Court decides to give a person convicted of an offence punishable under this section the opportunity of paying a fine, the fine has to be one of *not less than* five hundred rupees. I observe that there is no minimum term of imprisonment directed to be imposed in default of the payment of the fine.

While I agree that the sentence of fine indicated in my judgment of 30th October 1957 is not legal, I have to take note of the fact that both

accused persons have already paid the fines I have ordered. I have also to bear in mind that they were acquitted by the Magistrate at the trial and were convicted only on an appeal preferred by the complainant. While it is, no doubt, open to me to revise an order made by me *per incuriam*, I think that in the circumstances of this case the regularising of the sentence is not imperative. I have no doubt that the learned Magistrate will take note of the interpretation of section 22 A(1) indicated by me herein.

Acquittal set aside.

