[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Swan J. (President), H. A. de Silva J. and L. M. D. de Silva J.**

M. J. FERNANDO *et al.*, Appellants, *and* THE QUEEN, Respondent

APPEALS 67–70 WITH APPLICATIONS 99–102

S. C. 17—M. C. Colombo, 11,415

Charge of murder—Several accused—Common intention—Sudden fight—Summing-up —" Unreasonable verdict ".

A jury should never be directed in a way which opens for them the door to conjecture. A trial Judge, by suggesting an unsustainable element of evidence in favour of an accused may, by rendering a verdict founded on that element unreasonable, make the verdict itself unsustainable.

Where, therefore, in a prosecution of several persons jointly for murder, no evidence has been given which could raise the issue of a sudden fight, it is not the duty of the Judge to invite the jury to speculate as to sudden fight.

It is very rarely, if at all, that a common intention to kill in the circumstances of a sudden fight can be established.

No direction as to common intention can be adequate where the law is stated in general terms and not applied closely to the particular facts of each case. The inference of common intention must be not merely a possible inference but a *necessary* inference, i.e., an inference from which there is no escape.

Obiter : In a summing-up, a general statement of the law followed by a statement of the facts is undesirable. The trial Judge should apply the relevant law to the relevant facts in the course of the analysis of those facts.

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

Colvin R. de Silva, with *L. G. Weeramantry* and *J. R. M. Perera*, for the accused appellants.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 15, 1952. L. M. D. DE SILVA J.—

In this case the 1st to the 5th accused have been convicted on the 3rd count of an indictment presented against them which was to the following effect :—

> " That at the time and place aforesaid (17th December, 1950) . . . . you did commit murder by causing the death of the said Gorakanage Nicholas Peiris Gunawardene ; and that you have thereby committed an offence punishable under section 296 of the Penal Code. "

The verdict brought in by the jury on this count was one of culpable homicide not amounting to murder " on the ground that there was a sudden fight ". They have been acquitted on count 1 in which they were charged with being members of an unlawful assembly the common object of which was to commit murder and on count 2 in which they were charged with murder committed by one or more of the members of the unlawful assembly. There were no other counts.

There are several disturbing features in this case. There was for instance blood found on the shirt of the deceased which according to expert medical evidence could not have been the blood of the deceased or any of the assailants. It was, if the expert evidence was accepted, completely unaccounted for by the prosecution evidence. It was also difficult to reconcile the prosecution evidence with several wounds found on the first accused. There were further difficulties.

All these features were very fairly and completely put by the trial Judge to the Jury but there is one portion of the summing-up, on which

with all respect to him we feel ourselves reluctantly compelled to acquit the accused—all the more so because it is the portion most material to the verdict which has been brought in.

The evidence of several witnesses was subject to various infirmities all carefully mentioned by the learned trial Judge in the course of his summing-up. These difficulties and infirmities must have been responsible for his having said to the jury " I do not think you can convict any of the accused unless you can say that the evidence of Narayan and the evidence of Sirina Pieris is true " and he went on to warn them that it was not sufficient that " they may be speaking the truth " but the jury had to be satisfied that they were speaking the truth. This was an admirable direction which we think was necessary. The evidence of these two witnesses was free from any obvious infirmity and a verdict of murder could have been returned on their evidence. In fact no verdict other than that of deliberate and premeditated murder was possible if their evidence had been accepted.

Narayan's evidence very shortly was that he saw the five accused accompanied by others armed with cutting instruments, sticks and clubs pass along the road. He says he followed them and saw them standing in front of the deceased headman's house and abusing him in filthy language. That he then saw the headman come out of the house whereupon the " first five accused jumped into his land, caught him and assaulted him " striking him with clubs and cutting him with knives. He says he saw the third accused " holding the headman's (deceased) neck and stabbing him with a kris knife ".

Sirina Pieris says that she saw ten or twelve persons gathered in front of her house which is in the immediate vicinity of the deceased's house, that she heard a challenge to the deceased to open his doors, that the deceased came out whereupon the five accused rushed up to him and assaulted him. As far as one can gather the deceased was unarmed. She says she saw one of the accused inflict an injury.

In the evidence of the two witnesses just mentioned and in the rest of the evidence led for the prosecution there was no suggestion of a sudden fight. The evidence led for the defence gave an entirely different version of the events denying that the accused came together to the spot and suggesting that the deceased and one Peter Pieris (his brother) were the aggressors. The possibility of a sudden fight was not raised by the defence in evidence or otherwise.

The learned trial Judge charged the jury thus in one portion of his summing-up :—

> " Could it be that the 1st and 3rd accused went along the road and that they met Peter Pieris and that there was an altercation resulting in a fight, and that the other accused also came along and engaged themselves in a fight in which the headman also became involved ?
>
> Now gentlemen that is not the case for the prosecution, nor is it the case for the defence. There was a fight, but there are items of evidence in this case which if you accept may justify your returning a verdict on the footing, I mean the 1st to the 5th accused got involved

along with the deceased and Peter Pieris. Of course it means, gentlemen, rejecting large chunks of the evidence of the prosecution and also rejecting large chunks of the evidence of the witnesses for the defence . . . . ."

" Supposing the view that you take is that what happened was that there was a sudden fight between Peter Pieris and the 1st and 3rd accused in the first instance into which the other accused became drawn and to which the deceased headman also got involved, then, even if you are satisfied beyond reasonable doubt that in that fight these accused had a common intention of causing the death of the deceased with the intention of killing him, or with the intention of causing an injury sufficient in the ordinary course of nature to result in death and therefore *prima facie* the offence of murder, if you are satisfied notwithstanding the offence was committed with that intention, still if you think that it is more likely than not that that killing was caused in the course of a sudden fight between the accused and the headman and Peter Pieris, which arose on a sudden quarrel, without premeditation and without the accused having taken an undue or cruel advantage, then gentlemen the offence of the accused is one of culpable homicide not amounting to murder if all the five accused were animated by a common intention that such an injury should be caused to the headman and that the infliction of that injury was accompanied by a murderous intention as explained by me ".

It appears to us that it was extremely difficult on the evidence to come to the conclusion that there was a sudden fight merely by rejecting " large chunks of the evidence " of the witnesses for the prosecution and the defence. It would have been necessary in addition to supplement what evidence was left after the rejection mentioned by facts derived from conjecture. If there was reason to think that there was a sudden fight which the prosecution witnesses had suppressed, then, fairly considered, the prosecution case would have been open to reasonable doubt and the accused would have been entitled to an acquittal. But a verdict can never be based upon facts suspected but not proved.

A jury should be told to accept or reject evidence that they are entitled to and should draw reasonable inferences from the evidence which they accept, but they should never be directed in a way which opens for them the door to conjecture. This is necessary not only in order that the case for the defence may not be prejudiced but also in the interests of the prosecution. It has to be remembered that a trial judge by suggesting an unsustainable element of evidence in favour of an accused may by rendering a verdict founded on that element unreasonable make the verdict itself unsustainable. The prosecution case can be prejudiced in other ways also. The following passages from decisions in English cases have a bearing on what we have just said. Dealing with an appeal on a conviction for murder the Lord Chief Justice said in the case of *The King v. Catherine Thorpe* [1], " If there is no evidence on which a verdict of manslaughter can properly be found, it is the duty of the judge not to leave the question of manslaughter to the jury, but if there

[1] *(1925) 18 Cr. A. R. 189.*

is evidence, then it is the duty of the judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised ". In the case of *Mancini v. Director of Public Prosecutions* [1], Viscount Simon said, " Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence ".

It is clear that we are not in a position to ascertain the reconstructed facts in the minds of the jury which led to the verdict of a sudden fight and this is an important factor which gives emphasis to what follows.

It is admitted by Crown Counsel that there was only one fatal injury and that upon the evidence and verdict we must proceed upon the basis that it is not ascertained which accused inflicted it. In fact Crown Counsel quite properly conceded that unless the element of common intention to kill the deceased can be sustained the conviction cannot stand.

We are of the opinion that the directions given on the question of common intention is inadequate particularly when, as in this case, the common intention to kill, which must be established, was formed if formed at all, in the course of a sudden fight. It is very rarely if at all that a common intention to kill in the course of a sudden fight (which must be assumed to be a " sudden fight " on a " sudden quarrel " and without " premeditation ") can be established. It must in this case have been formed, if it was formed at all, "in the twinkling of an eye ", to borrow the words used very appropriately by Crown Counsel. Some act must be proved or some circumstance established from which common intention could be reasonably inferred. No direction on this point was given to the jury. In this case there is no such circumstance or act established or even spoken to by the witnesses. As we do not know what facts the jury reconstructed we cannot review them to ascertain whether an inference of common intention was possible on these facts. It is however reasonably clear that without premises derived from conjecture they could not have found that such an act had been done or such circumstance had occurred.

It is true that the learned trial Judge did say :—

" Of course, if there was a sudden fight between these accused and the headman and in the course of that one of the accused all of his own went up to the headman and stabbed him, then the other accused are clearly not guilty of that offence ", but we do not think this was a sufficient direction. It was an illustration of what was not common intention. There was no doubt further direction on the question of common intention but the positive elements, if there were any, from which common intention could have been inferred were not put to the jury. The jury were told that they must find that there had been a "common intention animating the minds" of all accused but they were not told how in the circumstances of a sudden fight such a common intention could be held to have arisen in this case. They were not told that mere presence of the accused was not sufficient and the difference

[1] *(1942) A. C. page 1 at page 12.*

between "similar intention" and "common intention" was not explained. The Privy Council in the case of *Mahbul Shah v. King Emperor* [1] said: "The inference of common intention within the meaning of the term in the section should never be reached unless it is a necessary inference deducible from the circumstances of the case". It is to be noted that it must be not merely a possible inference but a *necessary* inference, that is to say, an inference from which there is no escape. There was no direction to his effect.

Numerous decisions (most of them mentioned in *King v. Assappu* [2]) of this Court have stressed the importance of a sufficient direction on the question of common intention. These decisions point to the necessity of quashing a conviction based on common intention unless it appears from the summing-up that the possibility of an erroneous view on the part of the jury on this question has been excluded by adequate direction. It should be said that it also appears from them that no direction can be adequate where the law is stated in general terms and not applied closely to the particular facts of each case.

On this last point we may be permitted, going further than is necessary in this case, and taking an extreme case which is not this case, to say that in a summing-up a general statement of the law followed by a statement of the facts is undesirable. A summing-up should avoid not only the pattern just mentioned but any pattern which approximates to it. From a practical point of view it should be realised that a jury is not likely to absorb a long disquisition on the law and the significance to be attached to such a disquisition is problematical. What is of importance is that with or without a preliminary general disquisition the trial judge should apply the relevant law to the relevant facts in as simple a manner as possible and in the course of the analysis of those facts. The closer he keeps to this narrow path the more likely is it that the jury will arrive at a correct conclusion and more clearly will it appear to this Court that justice has been done.

We feel unable to accept the only theory which was put forward by the Crown in support of the conviction. In view presumably of the direction that the accused were entitled to an acquittal unless the evidence of Narayan and Sirina was accepted it was urged that a sudden fight was consistent with their evidence. The theory was that the headman had advanced thirty-five feet before he was struck down and that this showed that he had accepted the challenge of the accused and engaged in a fight. The fight had to be upon a "sudden quarrel" and "unpremeditated". It was difficult to see how these elements could have been established if Sirina and Narayan were speaking the truth when they said that the accused went armed to the spot and made a challenge. The Crown sought to get over this by suggesting that the jury might have found that it was Peter Pieris (living in the vicinity) that the accused had come to challenge and did in fact challenge and that the deceased on coming out of his house was drawn into a sudden unpremeditated fight. The evidence of the two witnesses indicates that it

[1] *(1945) A. I. R. 118.* [2] *(1948) 50 N. L. R. 324.*

was the deceased who was challenged. In any case we think the occurrence of a sudden fight is entirely inconsistent with their evidence and it has to be remembered that a point made by the learned trial Judge with which we have already agreed is that it would be unsafe to convict the accused if the evidence of these two witnesses was open to doubt.

The theory put forward by the Crown serves to illustrate the danger of holding that a common intention was established. On the facts suggested by the Crown the accused arrived at the spot armed to attack Peter Pieris. Their attention was diverted to the deceased against whom it appears the accused cherished no animosity of a degree comparable with that which they cherished against Peter Pieris. " In the twinkling of an eye " there was a fight between the accused and the deceased. Someone inflicted an injury which was fatal. In this state of facts the circumstance that the accused were armed establishes neither " common object " nor " common intention " in an offence against the deceased. What other facts establish common intention on the part of the accused to kill him ? There are none which we think can safely be relied on.

For these reasons we quash the convictions and acquit the accused.

Convictions quashed.