SHIU PRASAD AND ANOR. *v.* THE QUEEN

[FIJI COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and C. C. Marsack, JJ/A), November 11, 1959]

Criminal Appeal No. 12 of 1959

(Appeal from H.M. Supreme Court of Fiji—Knox-Mawer, ag. J.)

Parties to offences—principal offenders—joint offenders—ss. 21 and 22 of the Penal Code—deceased fatally wounded by first appellant—wounded again by second appellant—whether second appellant had intention to do grievous harm in common with first appellant—whether it is now a matter of law that a person intends the natural consequences of his acts.

Held.—(1) If two persons share a common hostility towards another when meeting with him and they come armed to that meeting, there is a sufficient basis for concluding, in the absence of evidence to the contrary, that a common intention is maintained up to the point of time when one of them strikes a blow following the striking of a blow by the other, which former blow was the cause of death ;

(2) In such circumstances the second appellant was aiding his co-appellant in the commission of the offence by the co-appellant ;

(3) It was the law, at one time, that a person intends the natural consequences of his acts but later authority has introduced a different view.

Appeal dismissed.

Cases referred to:

R. v. Spriggs, 1958, 1 A.E.R., 300 ; *R. v. Loughlin,* 1959 C.L.R., p. 518 ; *R. v. Steane,* (1947) K.B., 997 ; *Hosegood v. Hosegood* (1950) 66 T.L.R., 735.

Cases distinguished:

R. v. Achila, 8 E.A.C.A., 63 ; *R. v. Mohammed,* Vols. 9 to 11 W.A.C.A., 249 ; *R. v. Tindara and Anor.,* 1951, E.A.C.A., 180 ; *Murtagh and Kennedy,* 39 C.A.R. 72.

F. M. K. Sherani for the appellants.

J. F. W. Judge, ag. Solicitor-General, for the respondent.

On the 13th December, 1958, one Ram Sewak was murdered at Lagalaga, Labasa. So much has never been questioned.

The deceased suffered two fatal wounds. (*The wounds were described in detail.*) The first wound would cause more or less immediate death. The second wound in point of time of infliction would, itself, have caused death had death not been more immediately caused by the first wound. In other words, although the second wound was dangerous to life and would have caused death, death, in fact, was caused by the first wound.

The case for the Crown was that the deceased and others had been attending a meeting and went from there pursuant to some loose arrangement to meet on the roadside a party consisting of the two appellants and a number of their friends. There was at that time some hostility between the parties concerning land. The Crown alleged that there was first some form of struggle between the appellant Dhanessar (referred to hereafter as the second appellant) and the deceased and that during this struggle Shiu Prasad (hereafter referred to as the first appellant) stepped up to the deceased and struck the blow firstly described. It was further alleged that, as the deceased staggered from that first fatal blow, he was struck the second blow by the second appellant. Faced with the difficulty, if not the impossibility of establishing that the death of the accused was caused by the second blow—the medical evidence was against such a possibility—the prosecution sought to associate the second appellant with the alleged criminous act of the first appellant. It relied first upon the provisions of section 22 of the Penal code which, the Crown contended, applied in the circumstances. Secondly, it relied upon the contention that the second appellant aided or abetted the first appellant within the meaning of section 21 of the Penal Code.

The case for the first appellant was a bare denial that he struck any blow ; he gave evidence to that effect. The second appellant did not give evidence but his defence too was in substance a denial that he struck any blow. There was an abundance of evidence against both appellants in respect of the blows that they struck. Ten witnesses testified to the striking of the first blow by the first appellant, seven testified to the striking of the second blow by the second appellant. There was, therefore, an abundance of evidence on which the assessors and the Judge could base a finding that the appellants had struck the respective blows alleged and, in the light of the verdicts, this Court can only deal with the appeals upon the footing that the appellants were guilty of the physical acts charged against them. Indeed, there was little said or which could have been said on the hearing of the appeal in favour of the first appellant, the effort of Counsel being concentrated almost exclusively on an effort to extricate the second appellant from the verdict.

The applicability of sections 22 and 21 of the Penal Code were alike challenged. It was said there was no evidence of any common intention such as is referred to in section 22 and no proper direction as to—we quote literally—" what considerations would have been taken into account in determining the intention of each appellant in the event of their negativing the existence of a common intention ". Counsel had some difficulty in interpreting precisely what he meant by this latter ground but eventually interpreted it by saying that what he meant was that if no common intention were found, then there was no direction given as to the consequences.

Section 22 of the Penal Code indicates a definitive sequence of events, all factual in character. There must first be the formation of a common intention to prosecute, in conjunction, an unlawful purpose. Next there must be the sustained prosecution of that purpose ; then finally, an offence must be committed which was a probable consequence of the prosecution of the purpose. The formation of a common intention to prosecute in conjunction an unlawful purpose and the prosecution in fact of that purpose can, like all facts, be proved by inference, provided always that the inference is sufficiently strong to satisfy the high degree of certainty which the criminal law requires. The question which in consequence presents itself in this case is whether the facts proved provided a sufficient basis from which the assessors

and the Judge could infer a common intention on the part of the appellants to inflict grievous physical injuries on the deceased, and a continued prosecution of that intention up to the time the first blow was struck. Then, of course, arises the further question whether the inference of guilt was a proper inference and whether it had a character of certainty to the degree the criminal law requires.

The probative value of the facts on the basis of which inferences are deduced must necessarily be judged, not only separately, but also cumulatively.

In brief summary, those facts are that the two appellants were in company for the purpose of meeting the deceased ; that there was some hostility between the appellants and the deceased concerning property ; that each of the appellants went to the rendezvous armed with a lethal weapon and that almost instantaneously after the striking of the first blow by the first appellant, the second appellant struck the second blow. To come to the meeting sharing a common hostility and thus armed, and the immediacy with which the blow struck by the second appellant followed the striking of the first blow by the first appellant, provided in our view a sufficient basis in the absence of any evidence to the contrary of a previous common intention to do grievous harm to the deceased and a sufficient basis for the inference that that common intention was maintained up to the point of time when the second appellant struck the second blow. We are also of the opinion that the inference was in the circumstances of a sufficient degree of certainty to satisfy the standard imposed by the criminal law.

A number of cases were quoted by Counsel for the appellants but all are readily distinguishable. In *R. v. Achila,* 8 E.A.C.A., 63, the Court found that it was not proved that the act of the appellant in holding the man killed had any common purpose with the act of the man who caused the death of the deceased. The evidence in fact established that the holding of the deceased by the appellant was to facilitate his being beaten with thin sticks. He was killed by another man dislocating his neck. Much the same explanation attaches to *R. v. Mohammed,* Vols. 9 to 11 W.A.C.A., 249. There, one appellant was merely driving a lorry, albeit in a somewhat reprehensible way, when a second appellant struck the deceased with a stick. The Court held that there was no evidence to prove any concerted action by the appellants and that therefore an inference that there was any common purpose could not be sustained. The Court, however, did say that if there were an inescapable inference from the facts that there must have been such concerted action, then the conviction of the driver of the lorry would be justified. That is precisely the position which seems to us to pertain here.

In *R. v. Tindara and Another,* 1951, E.A.C.A., 180, there was, again, no evidence of common intention and none of any pre-conceived plan. One man struck a light blow whilst another quite independently struck a fatal one. In the absence of any proof of common intention or pre-conception, the Court held that the blows were independent and so was the criminal responsibility of the strikers.

In the circumstances, there was evidence from which the assessors and the Judge could infer the existence of a common intention between the appellants to prosecute in conjunction an unlawful purpose. If that unlawful purpose was the infliction of a grievous injury to the deceased then the latter phrase of section 22 of the Penal Code has only a meagre application, for the infliction of grievous injury with malice aforethought is murder if

death ensues, as it did here. There is, however, a second and equally apposite view which would render the second appellant responsible in law as a principal party to the murder. He would be so responsible if, knowing the intention of the first appellant was to inflict grievous physical injury to the deceased, he endeavoured to further that illegal purpose by himself striking a blow. He would, in those circumstances, in terms of section 21 of the Penal Code be aiding the first appellant in the commission of the offence committed by the first appellant.

It is difficult to imagine that when the second appellant struck the blow which he did strike, he was not aiding the first appellant in the illegal purpose of inflicting grievous physical injury to the deceased. If the infliction of such grievous injury was the purpose, and no one could doubt that it was, of the first appellant, then the act of the second appellant can have had no other purpose than to aid the first appellant in his illegal purpose. That being so, we think that on this ground too the second appellant was properly convicted as a principal party to the murder. The appellants therefore fail on the main grounds upon which the appeal is based.

The second ground complained of some defect in the direction as to the burden of proof and *Murtagh and Kennedy,* 39 C.A.R. 72, was referred to. There was in this case no such narrow issue as would invite a special direction as there was in *Murtagh and Kennedy* and we think the Judge dealt adequately with the question of the burden of proof at the various points at which he referred to the topic. In particular, we think that he sufficiently dealt with malice aforethought when he read the definition from the Penal Code ; see *R. v. Spriggs,* 1958, 1 A.E.R., 300. The rest of the grounds of appeal all relate to factual details which are either immaterial or are not of sufficient importance to have had any influence upon the verdict. In the latter class is what was, perhaps, a misdirection in the statement by the Trial Judge that it is a matter of law that a man intends the natural consequences of his acts. That was at one time the law but later authority has introduced a different view ; see *R. v. Loughlin,* 1959 C.L.R. at p. 518 ; *R. v. Steane,* (1947) K.B., 997 and *Hosegood v. Hosegood* (1950) 66 T.L.R., 735.

However, it is so impossible to conceive that a man could wound another as this deceased was wounded by each appellant without each fully appreciating that grievous injury, if not death, was the inevitable consequence, that this misdirection can have had no possible bearing upon the verdict. In the circumstances the appeals of both appellants are dismissed.