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Judgment
54/1964

IN THE PRIVY COUNCIL No. 15 of 1964

ON APPEAL FROM THE SUPREME COURT OF CEYLON

1. ABDUL AZEEZ (AZIZ)
2. M.A. THANGAVELU
3. A.K. KANDASAMY
4. A. SINNA NADAR
5. P.S.V. NAIDU
6. K.R. SUPPIAH
7. V. RASALINGAM
8. K. PERIYASAMY — Appellants

- and -

THE QUEEN — Respondent

CASE FOR THE APPELLANTS

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

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ON APPEAL FROM THE SUPREME COURT OF [redacted] CEYLON

B E T W E E N :-

1. ABDUL AZEEZ (AZIZ)
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1. This is an appeal by special leave of the Judicial Committee granted upon the 2nd day of March 1964 from a Judgment of the Supreme Court of Ceylon (Basnayake C.J. and Abeyesundere and G.P.A. Silva JJ.) dated the 31st day of January, 1963 which dismissed the appeals from the decision of the Magistrate sitting at Balangoda dated the 24th day of July 1959 whereby the Appellants were convicted and sentenced to imprisonment as hereinafter appears.

2. The questions raised on this Appeal are:-

(a) Whether the evidence in the Court of first instance was such as to enable the learned Magistrate to draw the inferences

of fact that he did, in particular as to the intention of each of the accused and further, whether upon the evidence that was given, the prosecution could in law be held to have proved each of the charges against each of the accused.

(b) Whether the joinder of the second and third charges accords with the provisions of the Criminal Procedure Code and if not, whether such defect renders the indictment and trial void.

(c) Whether the conviction of each Appellant on the third charge as well as the second charge was contrary to law.

3. The Appellants and the Respondent are hereinafter referred to respectively as "the Accused" and "the Prosecution".

4. On the 20th day of March 1959 the Accused where each charged in respect of the same transaction which was alleged to have taken place upon the 4th day of February 1959 in the following terms :-

1. Being members of an unlawful assembly the common object of which was to commit criminal trespass to the annoyance of A.S. Rasanayagam the Superintendent of Pettiagala Estate, Balangoda, by entering into the said estate in the occupation of the said A.S. Rasanayagam and that you have thereby committed an offence punishable under Section 140 of the Penal Code.

2. That at the same time and place aforesaid and in the court of the same transaction, you did, commit Criminal Trespass by entering into the said Pettiagala estate, in the occupation of the said A.S. Rasanayagam, which offence was committed in the prosecution of the common object of the unlawful assembly or was such as the members of the said assembly knew to be likely to be committed in prosecution of the said object and you being the members

of the said assembly at the time of the committing of the said offence, are thereby guilty of an offence punishable under Section 433 read with Section 146 of the Penal Code.

3. That at the same time and place aforesaid and in the course of the same transaction, you did, in furtherance of the common intention of you all commit criminal trespass by entering into the said Pettiagala Estate in the occupation of the said A.S. Rasanayagam, with intent to cause annoyance to the said A.S. Rasanayagam and thereby you have committed an offence punishable under Section 433 read with Section 32 of the Penal Code.

5. The trial took place upon the 15th day of May, the 12th, 24th and 26th days of June and the 10th day of July 1959 and the evidence called by the Prosecution included the following :-

(i) the labourers on the Pettiagala Estate had been on strike since the 24th day of December 1958;

(ii) negotiations had been entered into between the Employers Federation and the Democratic Workers Congress (D.W.C.) and the Superintendent of the Estate gave evidence that he had instructed the 6th Accused, who was the District Representative of the D.W.C. that no officials of the Union should enter the Estate until the negotiations were completed;

(iii) on the 1st day of February 1959 the 1st Accused, who was the President of the D.W.C. asked the Superintendent for permission to enter the Estate, which was not granted;

(iv) on the 4th day of February 1959 the Accused entered the Estate without permission and on being stopped and

questioned by the Police, they did not leave but remained upon the Estate and were arrested..

(v) on either the 20th or 21st day of February 1959 the 1st Accused accompanied by a Labour Officer and the Police, entered the Estate with permission, for the purpose of calling off the strike, which was done.

(vi) on the 20th day of February 1959 the Inspector of Police of Balangoda submitted a report concerning the alleged offence upon the 4th day of February 1959 as a result of which, process was issued against the Accused.

6. The first Accused elected to give evidence upon oath and stated that the strike was a peaceful one without incidents or clashes, but that on the 20th day of January 1959 certain of the strikers without the approval of the Union started to perform Sathyagraha (squatting and fasting). This was admitted by the prosecution. The Union thought that this practice might lead to tension and violence. After a meeting on the 1st day of February 1959 of the Action Committee of the Union at Balangoda which was dealing with the strike, the 1st Accused being the President of the Union, telephoned the Superintendent of the Estate the same day asking permission to enter the Estate to try and persuade the strikers to leave the factory premises and go to their lines. The Superintendent wished to contact the District Convenor, but was unable to do so. The strikers despite word being sent from the Union, did not give up Sathyagraha and on the 4th day of February 1959 the Accused went to the Estate in order to persuade the strikers to give up this practice. At the conclusion of his evidence the 1st Accused stated as follows :-

> "I did not for a moment imagine that such action on my part would cause embarrassment to the Estate management, but on the contrary I believed that the management would be relieved. My intention

in entering the estate was to persuade these persons to call off the hunger strike."

The 1st Accused also stated in evidence that all the Accused held office in the D.W.C. with the exception of the 8th Accused, who it was stated did not enter the Estate with the remainder, but joined them on the Estate.

7. The cross-examination of the 1st Accused appears from the Record of Proceedings to have been limited to the following two matters :-

"Prior to 4.2.59. I did not ask the Employers Federation permission to enter Estate. I did not have the express permission of the Superintendent to enter the Estate."

No further questions appear to have been put to the 1st Accused in particular none appear to have been asked concerning his intention in entering the Estate. None of the other of the Accused gave evidence.

8. Judgment was given by the learned Magistrate upon the 24th day of July 1959 which included the following passages to which the accused would particularly draw attention :-

(i) "After careful examination of the evidence given by the 1st Accused and the circumstances of this case, I am of the view that the claim put forward by the 1st Accused was merely a pretext for the 1st accused and the 2nd to 8th accused, who are all office bearers of this labour organisation, to enter the estate against the wishes of the Superintendent of the estate who was in occupation."

On behalf of the Accused it is respectfully submitted that this finding is not warranted by the evidence, in particular because the Superintendent knew on the 1st day of February 1959 of the desire of the 1st Accused to enter

the Estate which he did not specifically refuse and also because of the unchallenged intention concerning the visit to the Estate which was given in evidence by the 1st Accused. Further, the learned Magistrate failed to have regard to the admitted visit of the 1st Accused to the Estate upon either the 20th or 21st day of February 1959 when as a result of his efforts, the strike was discontinued.

(ii) "In any event there is no reason why the 1st Accused should have taken with him on this trip a band of Union officials who had been expressly asked by the estate Superintendent not to enter the estate during the pendency of the negotiations, unless it be to cause embarrassment to the person in occupation of the estate."

The Accused further respectfully submit that this finding is also not warranted by the evidence in particular the evidence of the 1st Accused.

(iii) "Quite apart from the fact that there is direct evidence that the entry of these accused into the estate on the day in question did cause annoyance to Rasanayagam; it is also quite clear that the natural consequences of the accuseds' act would be to cause annoyance to Rasanayagam. I am therefore satisfied that the real intention of the 1st to the 8th accused at the time they entered this estate was to cause annoyance to Rasanayagam, the person in occupation, and that they thereby committed the offence of criminal trespass."

The Accused respectfully submit that whether their entry upon the Estate did cause annoyance or whether any annoyance was a natural consequence of their acts are only relevant to the offence of criminal trespass in so far as they may assist the Court to ascertain the dominant intention of the Accused in accordance with the requirements of section 427 of the Penal Code. Further that the Magistrates finding regarding intention is

not justified by the evidence.

(iv) "In any event there is not the slightest doubt that, when all these nine accused, after consultation among themselves, deliberately defied Inspector Munasingha and the Police party and persisted in going into the estate, they not only contributed themselves into an unlawful assembly, the common object of which was to commit criminal trespass, but also did, in pursuance of the common object of the said unlawful assembly, commit criminal trespass again."

The Accused also respectfully submit that even if they deliberately defied the Police party which they do not admit, that they did not thereby become an unlawful assembly neither did they commit or commit again any act of criminal trespass in accordance with section 427 of the Penal Code.

9. Upon the 24th day of July 1959 the Accused filed Petitions of Appeal in the Supreme Court of Ceylon which were all in the same terms and stated (inter alia) that the Judgment of the learned Magistrate was contrary to law and against the weight of the evidence; further, that the sentences imposed were excessive.

10. The said Appeals came before Tambiah J., upon the 20th day of June 1961 and on the 23rd day of June 1961 the said Judge invoked the powers set out in section 48 (a) of the Courts Ordinance and referred the matter to a Bench of three Judges. Upon the 31st day of January 1963 the Appeals were argued before Basnayake C.J., Abeyesundere J., and G.P.A. Silva J., and the Court gave its reasons for dismissing the Appeals upon the 28th day of October 1963.

11. The principal Judgment of the Supreme Court was delivered by Basnayake C.J., with whom the other two Judges formally agreed. After summarizing the facts and setting out section 427 of the Penal Code the learned Chief Justice stated as follows :-

"The intent of the accused is one that has to be inferred from the circumstances of the case. In the instant case the 1st accused asked for permission to enter the estate and was not granted permission. Despite that he and the others entered the estate clearly in defiance of the Superintendent whose permission they had sought."

The Accused respectfully submit that the evidence relating to the entry upon the Estate by the Accused does not warrant the finding that it was "clearly in defiance of the Superintendent" and even if it were, that of itself does not disclose the commission of the offences charged against the Accused.

The learned Chief Justice further stated :-

"Having entered without permission, they disobeyed the lawful directions of the Inspector not to proceed further. The question is whether the learned Magistrate was wrong in inferring from those circumstances an intent to annoy the person in occupation as alleged in the charges. In our opinion he committed no error in doing so."

The Accused further submit that if any lawful directions of the Inspector were disobeyed, which they do not admit, again that of itself does not disclose the commission of the offence charged against them and therefore, that the Supreme Court fell into error in upholding the inference drawn from those facts of the guilt of the Accused.

12. In addition it is submitted on behalf of the Accused that the indictment was void in the following respects :-

(i) That the first charge which alleged an offence against section 140 of the Penal Code which sets out the punishments for members of an unlawful assembly merely

recited a premise of unlawful assembly and gave particulars of a common object to commit criminal trespass

(ii) That the second charge also alleged with the same particulars, the commission of criminal trespass by an unlawful assembly with a common object, but referred to section 146 of the Penal Code which in any event, it is submitted, does not create a separate offence. This charge also referred to section 433 which sets out the punishment for criminal trespass.

(iii) That the third charge also alleged, with the same particulars, the commission of criminal trespass with a common intention, but referred to section 32 of the Penal Code which again, it is submitted, does not create a separate offence and there was a further reference to section 433 as in the second charge.

It is therefore submitted that the offence alleged in the second and third charges is the same and that while by the Criminal Procedure Code, there is power in certain circumstances to try together charges of different and distinct offences, there is no power to try at the same trial different charges of the same offence. The Accused crave leave to refer to the Appeal pending before the Judicial Committee of the Privy Council from the Supreme Court of Ceylon entitled M. B. Ibralebbe alias Rasa Wattan and I. L. Mohideen alias Mankutty v. The Queen in which Your Majesty in Council was graciously pleased to grant Special Leave to Appeal upon the 6th day of November 1963 and which said Appeal raises in substance the same contentions as are set out in this paragraph.

The accused also crave leave to refer to the decision of the Ceylon Court of Criminal Appeal in the case of De Silva v. The Queen and of the decision of the Supreme Court in the cases of The Queen v. Don Marthelis and Khan v. Ariyadasa which were given on the 19th day of

March 1963 and on the 6th day of May 1963 respectively in each of which similar contentions were raised and as a result of which a conflict of authority has arisen.

13. The Accused would make two further submissions :-

(a) that the misjoinder of the second and third charges renders the indictment and trial thereon as a whole null, void and invalid aud further leads to a grave miscarriage of justice in that (inter alia) an accused is put in peril of being convicted and sentenced three times as in fact happened to each of the Accused.

(b) that both the learned Magistrate and the Supreme Court failed to differentiate the cases against each of the Accused either upon the evidence or in consideration of sentence and in particular failed to consider the evidence that the 8th Accused did not enter upon the Estate with the remainder of the Accused and further was not an office holder in the D.W.C.

14. The accused respectfully submit that this Appeal should be allowed and that ~~they~~ their convictions should be quashed for the following (amongst other)

R E A S O N S

1. BECAUSE neither the Court of first instance nor the Supreme Court appears to have directed itself properly on the issue as to the dominant intention of each of the accused at the relevant time.

2. BECAUSE there was a misjoinder of charges which rendered the indictment and trial invalid.

3. BECAUSE the conviction of each accused on the third charge as well as the second

charge was contrary to law.

E.F.N. GRATIAEN

JOHN A. BAKER

M.I. HAMAVI HANIFFA

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