

FC  
6/4/65

Judgment  
16/19/65

IN THE PRIVY COUNCIL

No. 46 of 1963

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

ABDUL KHALID ABDUL MOOMIN KHAN Appellant

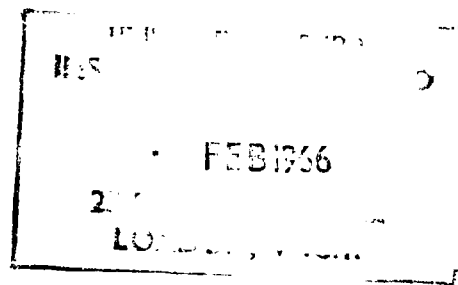
- and -

MAHANTI MULLA GAMAGE ARIYADASA Respondent

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CASE FOR THE APPELLANT

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

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

ABDUL KHALID ABDUL MOOMIN KHAN      Appellant

- and -

MAHANTI MULLA GAMAGE ARIYADASA      Respondent

C A S E   F O R   T H E   A P P E L L A N T

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1. This is an appeal by Special Leave from the Judgment of the Supreme Court of Ceylon dated the 6th day of May 1963 dismissing the appeal of the Appellant from his conviction and sentence by the Magistrates' Court at Matara on the 12th day of July 1962.

Record  
pp 85-86  
pp 74-84  
pp 57-66

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2. The principal question for determination is whether Section 146 of the Penal Code of Ceylon which reads as follows :

"146. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."

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creates a distinct and separate offence and if not whether a charge based on liability under this section can be joined in an information with a charge based on liability under Section 32 of the Penal Code which reads as follows :

"32. When a criminal act is done by several persons in furtherance of the common intention of all, each of such

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persons is liable for that act in the same manner as if it were done by him alone."

pp 57-58 3. The Appellant (hereinafter called Accused No. 2) was tried jointly with six others on the following charges.

"1. That they were the members of an unlawful assembly the common object of which was to commit house trespass by entering the house of the complainant with intent to cause hurt to him and to voluntarily cause hurt to the complainant an offence punishable under Section 140 of the Penal Code. 10

2. That they committed house trespass in furtherance of the common object of the unlawful assembly and thereby committed an offence punishable under Section 434 read with Section 146 of the Penal Code.

3. That in the course of the same transaction they committed rioting by using force and violence on M. Ariyadasa, M. Gomis and Daisy Wickramasinghe an offence punishable under Section 144 of the Penal Code. 20

4. That one or more members of the unlawful assembly in furtherance of their common object caused hurt to M. Ariyadasa, M. Gomis and Daisy Wickramasinghe an offence punishable under Section 314 read with Section 146 of the Penal Code.

5. That they committed house trespass by entering the house of M. Ariyadasa with intent to cause hurt to him an offence punishable under Section 434 of the Penal Code. 30

6. That they wrongfully confined M. Ariyadasa at Wewahamanduwa and other places an offence punishable under Section 333 of the Penal Code.

7. That they wrongfully confined M. Gomis at Wewahamanduwa and other places an offence under Section 333 of the Penal Code. 40

8. That they voluntarily caused hurt to

Ariyadasa an offence under Section 314 of the Penal Code.

9. That the 2nd 3rd and 4th accused voluntarily caused hurt to M. Gomis an offence under Section 314 of the Penal Code.

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10. That the 2nd accused caused hurt to Daisy Wickramasinghe with a baton, an instrument which when used as a weapon of offence is likely to cause death an offence punishable under Section 315 of the Penal Code."

4. On the 12th day of July 1962 the first accused was acquitted on all counts but all the other accused were found guilty on one or more counts; the appellant being found guilty on the counts 1-9 and sentenced to three months rigorous imprisonment on each count, the sentences to run concurrently.

p 66  
ll 42-44  
p 67  
ll 8-30

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5. The case for the prosecution was that some two days before the Commission of the crimes alleged the 6th accused, who was a member of the Excise Branch had been assaulted by Ariyadasa, the complainant, for unseemly behaviour and the making of indecent gestures at his (Ariyadasa's) wife and that this assault was the motive for a concerted attack on Ariyadasa by the accused who were all members of the Excise Branch; the Appellant was an Inspector of Excise; that the accused entered Ariyadasa's compound, assaulted him, forced him into a car along with his brother and took them both first to a house and secondly to Matara hospital where an allegation was made by the Appellant that Ariyadasa had ganga (an illegal drug) on him at the time he was seized; that the two men were released on bail and at a subsequent prosecution were acquitted, the appellant a material witness, being absent on the date of the trial the Magistrate refusing an application for a

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6. The first accused relied on an alibi but the other accused put forward a case that they had participated in a legitimate raid and had

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seen Ariyadasa's brother pass a parcel to Ariyadasa and that after a chase and arrest, in which force had been necessary, they had discovered that the parcel contained ganga.

pp 68-74

7. All the convicted accused appealed against their convictions and sentences to the Supreme Court of Ceylon on various grounds but the major issue argued before the said Court was that there had been a misjoinder of charges in that charges based on liability owing to participation in an unlawful assembly (s.146) had been joined with charges based on liability owing to participation in a common intention (s.32), both charges being based on the same facts.

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pp 75-84

8. The Supreme Court (T.S. Fernando, J.) on the 6th day of May, 1963 dismissed the appeal holding that Section 146 created a distinct offence and that Section 180 of the Criminal Procedure Code (annexed hereto) enabled this offence to be joined with charges based on liability under Section 32.

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9. There are conflicting decisions of the Supreme Court and the Court of Criminal Appeal as to the validity of counts so joined. In De Silva v. The Queen the Court of Criminal Appeal (Basnayake, C.J., Abeysundera, Herat, JJ.) allowed an appeal and acquitted the accused on similar grounds to this appeal but reserved their reasons for the decision; in The Queen v. Don Marthelis and Others the Supreme Court (Abeysundera and Herat JJ.) on the 19th day of March 1963, allowed an appeal from a District Court on similar grounds; in the case of Ibralebbe v. Molideen on the 7th day of June 1963 the Supreme Court (T.S. Fernando and H.N.G. Fernando) dismissed an appeal from a District Court where the same grounds were relied upon.

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pp 85-86

10. Special Leave to appeal to Her Majesty in Council was granted by Order in Council dated the 21st day of November, 1963.

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11. The Appellant humbly submits that this appeal should be allowed, the Judgment of the Supreme Court be set aside and his conviction and sentence quashed and the Respondent be ordered to pay the costs in

the Supreme Court and of this appeal for  
the following among other

R E A S O N S

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1. BECAUSE Section 146 creates liability on a member of an unlawful assembly for an offence committed by another member of that unlawful assembly in prosecution of the common object, but does not create an offence distinct from the offence committed by the other member.
  2. BECAUSE the Criminal Procedure Code permits the joinder at one trial of charges for distinct and separate offences but does not permit the joinder of two charges alleging the same offence.
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  3. BECAUSE counts 1, 2, 3 and 4 should not be joined with counts 7, 8, 9 and 10 which amount to the said offences under different names.
  4. BECAUSE the misjoinder of charges in this case renders the charge sheet and trial void and invalid.

DINGLE FOOT

THOMAS O. KELLOCK

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