

91441

1967/11

IN THE PRIVY COUNCIL

No. 23 of 1965.

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N :

PANDITHA APPUJAMILAGE DHARMASENA
(3rd Accused)

and

MALLAWANTHANTHRIGE SIRIPALA PERERA
(4th Accused) Appellants

- and -

INSPECTOR OF POLICE, KEGALLA Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
18 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

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C A S E FOR THE RESPONDENT

1. This is an Appeal by Special Leave from a Judgment of the Supreme Court of the Island of Ceylon (Sri Skanda Rajah J and Alles J), dated the 25th day of January 1965, whereby the said Court allowed in part an appeal by the Appellants against their conviction by the District Court of Kegalla (T.J. Rajaratnam A.D.J.), on the 5th day of January 1963 upon an indictment which contained in all 4 Counts against the Appellants and 5 other accused. The said Supreme Court of the Island of Ceylon varied the Judgment of the said District Court by setting aside the Appellants' conviction and sentence on one Count but ordering that sentences passed by the said District Court on other Counts be increased.

Record
pp.118-120
pp.116-7

pp.99-105

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2. The Appellants were charged upon the following indictment:-

pp. 1-3

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INDICTMENT (DISTRICT COURT)
IN THE DISTRICT COURT OF KEGALLA.

The Queen

Versus

1. Heerala Pathirennhelage Hendrick Appuhamy

Record

2. Jayasinghe Pathirenehalage Sarpin Singho
3. Panditha Appuhamilage Dharmasena
4. Mallawa Tantirige Siripala Perera
5. Bulathsinghalago Dharmasena alias Lany
6. Arachchige Henry Fernando
7. Damunupola Appuhamilage Jayawardene Hemendranath.

You are indicted at the instance of the Hon. Douglas St. Clive Budd Jansze, Q.C., Her Majesty's Attorney General, and the charges against you are:

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1. That on or about the 6th day of February 1961 at Andiramada in the division of Kegalla within the jurisdiction of this Court, you with others unknown, were members of an unlawful assembly, the common object of which was to commit robbery of Motor Car bearing registered number EL. 5241 from the possession of Kuruppu Mudiyanalage Punchi Banda and that you have thereby committed an offence punishable under Section 140 of the Penal Code.

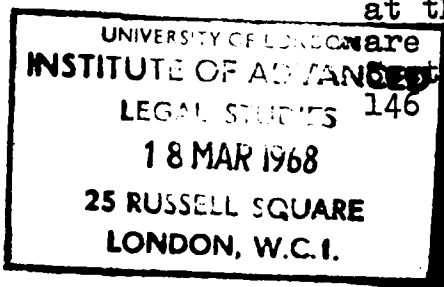
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2. At the same time and place aforesaid and in the course of the same transaction you H.P. Hendrick Appuhamy the 1st accused being a member of the unlawful assembly aforesaid were armed with a deadly weapon, to wit: a revolver and that you have thereby committed an offence punishable under Section 141 of the Penal Code.

3. That at the time and place aforesaid and in the course of the same transaction one or more members of the unlawful assembly aforesaid did commit robbery of the said Motor Car valued at Rs. 4000/- property in the possession of K.M. Punchi Banda of Eriyauilla which said offence was committed in prosecution of the common object of the said unlawful assembly aforesaid and you being members of the unlawful assembly aforesaid at the time of the committing of the said offence are thereby guilty of an offence punishable under Section 380 of the Penal Code read with Section 146 of the Penal Code.

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4. That at the time and place aforesaid: in the course of the same transaction you the above named accused did commit robbery of the said Motor car valued at Rs. 4000/- property in the possession of the said K.M. Punchi Banda of Eriyaula and that you have thereby committed an offence punishable under Section 380 read with Section 32 of the Penal Code.

Record

This 25th day of January 1962.

10 3. The District Court convicted the Appellants (and all the other accused) on Counts 1, 3 and 4 and the 1st accused on Count 2 also. Each of the Appellants was sentenced to 3 months' rigorous imprisonment on each of the 3 Counts upon which he was convicted, the sentences on Counts 3 and 4 to run concurrently, making 6 months in all. The 1st accused received the same sentences on these Counts, but on Count 2 received a sentence of 1 month's rigorous imprisonment to run consecutively, 20 making 7 months in all.

pp. 105-8

4. The 1st accused appealed to the Supreme Court but died prior to the hearing of the Appeal. Upon the hearing of the Appeal of the Appellants, the Supreme Court set aside the conviction and sentence in respect of Count 4, increased the sentence on Count 3 to 2 years' rigorous imprisonment and purported to increase the sentence on Count 2 to 6 months' rigorous imprisonment.

p.116 l.29

30 5. The principal matters that fall to be considered in this Appeal are as follows:-

p. 117

(a) The purported increase of sentence by the Supreme Court on Count 2. It is conceded that the Appellants (and all their co-accused except the 1st accused, whose Appeal had abated upon his death) were not convicted or charged upon this Count, and it is not contended by the Respondent that the part of the Supreme Court Judgment which relates to Count 2 can be supported.

40 (b) Whether there was any misdirection by the Courts below as to the state of mind required to constitute the offence of robbery.

Record

6. The following provisions of the Penal Code are material

"22. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'."

"366. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit 'theft'."

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"379. In all robbery there is either theft or extortion. Theft is 'robbery', if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint.

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Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and by so putting in fear induces the person so put in fear then and there to deliver up the thing extorted."

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7. The complainant in the case was one Punchibanda, who testified that on the 6th February 1961 he was in possession of a Morris Minor car EL.5241. This car he had obtained through the 1st accused (who, it appears, was a car broker).

pp. 8-11

Previously Punchibanda had been in possession of a Ford car EN.3111. In 1960 however the 1st accused undertook to sell this car. Punchibanda delivered it to him for this purpose and was given by him an Austin A40 car to be used by Punchibanda until the 1st accused sold the Ford. Some time later the 1st accused told Punchibanda that there

p. 8, 1.21

p. 9, 1.2

p. 9, 1.17

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Record

- was a Morris Minor car available to exchange for his Ford car and that as part of the exchange he (Punchibanda) would be paid Rs. 500/-. This transaction was entered into on the 16th October 1960, upon which day Punchibanda was handed the certificate of registration for the Morris Minor, the number of which was EL.5241, and also a receipt and a transfer form, both signed by the seller, one H.D.W.Appuhamy. However Punchibanda did not take delivery of the Morris Minor on this day, as delivery had to await the return of the Austin A40 lent to him by the 1st accused. The return of this was delayed for a time because it had been involved in an accident and had to be repaired.
- 10
- Eventually, the repairs being completed, Punchibanda returned the Austin A40 to the 1st accused who then delivered the Morris Minor EL.5241 to him. This was on or about the 20th December 1960. Upon receiving the Morris Minor, Punchibanda filled in and signed the Transfer Form that he had been handed by the former owner and sent it to the Registrar of Motor Vehicles.
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- The witness, J. J. Wells, who was at the material time a clerk in the office of the Registrar of Motor Vehicles, Colombo, gave evidence confirming this. He said that Punchibanda was registered as the owner of the Morris Minor EL.5241 as from the 20th December 1960, his application for registration having been received on the 22nd December 1960. The previous owner was H. D. W. Appuhamy.
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8. Punchibanda's evidence was that about a week after delivery of the Morris Minor, he was approached by the 1st accused, the Appellants and another unknown person, when the 1st accused told him that the Morris Minor was worth more than the Ford and asked to be paid Rs.500/-. Punchibanda refused, whereupon the 1st accused told him that he would not allow him to use the car and left the place.
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9. Punchibanda in his evidence described how on the 6th February 1961 he was driving the Morris Minor EL.5241 on the Rambukkana Road when his passage was blocked by 2 vehicles, one a van and one a Ford car driven by the 2nd Appellant. A

p.10, 11.6-20
p.24, 11.6-25
p.27, 1.4

p.23, 11.8-9

p.31, 1.23

pp.32-5
p. 10, 1.30

p.10, 1.20

p.33, 1.29 -
p.34, 1.6

pp.69-72

p.11, 11.8-20

p.11, 1.29 -
p.13, 1.3

Record

number of persons, including the 1st accused and and both Appellants, then got out and all came up to Punchibanda's car. What followed was thus described by the witness.

p.13, 11.4-2

"Q. Then what happened?

A. The 3rd accused came and held me by my neck.

Q. Did anybody have anything in the hand?

A. They had clubs. The 1st accused had a pistol. The 3rd accused and some others pulled me out of the car. Then I fell into a drain. Some of them had iron rods also. Then the 3rd accused drove the car and went away.

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Q. Did you lose anything at that time?

A. I had about Rs.400/-. I did not know what happened to it.

Q. What happened to the other two cars?

A. Morris Minor went first and the other two cars followed it. I did not know where they went.

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Later I made a complaint to the Kegalla Police."

p.48
p.45

10. Punchibanda's account of what took place was corroborated by his passengers Wickramapala and Gunaratne. Gunaratne described how Punchibanda's car was obstructed and made to stop by a Ford car which overtook it and how at the same time a van drew up behind. The witness continued

p.45, 1.35 -
p.46, 1.6

"Then some persons got down from the van armed with some weapons. About 12 to 15 persons got down from the van. They were armed with iron rods. One person had a revolver. The door of the last witness's car was opened and the last witness was taken out. Last witness was held bodily and taken out. Wickremapala and I got down from the car. After last witness was dragged out, the

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person got into the last witness's car and drove the car away."

Record

Subsequently there was an identification parade, at which the witness picked out the Appellants as persons who had been travelling in the car.

p.46, l.17

The Appellants were arrested in the company of the 1st accused at Salgoda Bakery on the morning of the 17th February 1961.

p.63, ll.26-31

10 11. The 1st accused gave evidence on his own behalf. He denied that he had ever sold the Morris Minor EL.5241. to Punchibanda. It was his (the 1st accused's) car, and Punchibanda had removed it from the possession of one Silva of Negombo. He had asked Punchibanda to return the car but, as he did not do so, he went on this day to take peaceful possession of the car from Punchibanda.

pp.77-87

20 The 1st accused testified that the 1st Appellant was his brother and the 2nd Appellant was a relation of his and helped him in his business.

p.79, l.37

p.78, l.33

p.79, l.34

12. The 1st Appellant did not give evidence.

30 The 2nd Appellant gave evidence on his own behalf. He confirmed that he was a relation and business associate of the 1st accused. The 6th February 1961 was the day on which he went with the 1st accused to bring the Morris Minor from Punchibanda. The 1st accused was the owner of that car and Punchibanda had obtained possession of it by force. However, they did not repossess it by force. "It was a friendly dealing".

pp.88-94

p.88, ll.11-12

p.89, l.1

p.92, l.41 -

p.93, l.31

p.94, l.10

40 13. On the 5th January 1963 the learned District Judge delivered Judgment, convicting and sentencing the 1st accused and the Appellants as hereinbefore in paragraph 3 set out. In his Judgment the learned District Judge wholly rejected the 1st accused's evidence that he was the owner of the Morris Minor and also the defence evidence that Punchibanda had merely been asked to hand the car over to the 1st accused and had done so voluntarily and without the threat of force.

pp.99-105

p.103, ll.1-27

14. The Appellants appealed to the Supreme Court of Ceylon, which Court delivered Judgment on the

pp.109-15

pp.116-7

Record

25th January 1965 varying the Judgment of the District Court as hereinbefore in paragraph 4 set out.

15. The Respondent humbly submits that the said Judgment of the Supreme Court, save insofar as it relates to Count 2, should be affirmed and this Appeal dismissed for the following amongst other

R E A S O N S

1. Because there was no misdirection by the Courts below as to the state of mind required to constitute robbery. 10
2. Because the evidence for the Crown which the learned trial Judge accepted necessarily negated an honest intention on the part of the Appellants and proved a dishonest one.
3. Because the conviction of the Appellants upon the 1st and 3rd Counts was right for the reasons stated by the learned District Judge in his Judgment dated the 5th January 1963 and was rightly affirmed by the Supreme Court. 20
4. Because the conviction of the Appellants upon the 1st and 3rd Counts and the sentences passed thereon by the Courts below have not occasioned any miscarriage of justice.

MONTAGUE SOLOMON.

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BETWEEN:

PANDITHA APPUJAMILAGE DHARMASENA
(3rd Accused)
and
MALLAWANTHANTHRIGE SIRIPALA PERERA
(4th accused) Appellants

- and -

INSPECTOR OF POLICE, KEGALLA
Respondent

CASE FOR THE RESPONDENT

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