[COURT OF CRIMINAL APPEAL]

1942 *Present :* **Howard C.J., Soertsz and de Kretser JJ.**

THE KING *v.* PONNUSAMY SIVAPATHASUNDERAM

2—M. C. Point Pedro, 653.

Conspiracy—Charge of abetting as well as of committing murder—Count not illegal for multiplicity of charges—Suggestion by Crown Counsel in address—Character of accused—Penal Code, s. 113A.

The material parts of the first count in the indictment in this case were as follows :—

That one S. Ramasamy (since deceased) and you (*i.e.*, the appellant and his co-accused) did act together with a common purpose for, or in, committing or abetting the offences of murder of (five persons named), and that you are thereby guilty of the offence of conspiracy to commit or abet the said offence of murder and in pursuance of the said conspiracy the said Ramasamy did commit murder by causing the deaths of . . . and that you have thereby committed an offence punishable under section 113B, read with sections 296 and 102, of the Penal Code.

The basis of the case for the Crown was the allegation of a conspiracy between Ramasamy, the appellant, and the other accused.

The defence, as indicated by the cross-examination of the witnesses for the Crown, was that there was no conspiracy between Ramasamy and the two accused, but Ramasamy, acting alone at a time when he was very much under the influence of liquor, shot at the persons named in the indictment, killed some of them and then shot himself.

Held, that the first count in the indictment was not illegal either on the ground of multiplicity of charges or because it alleged that the accused persons and Ramasamy were guilty of the offences of conspiracy to commit murder as well as the conspiracy to abet murder.

Section 113A penalises conspiracy to commit an offence as well as to abet the commission of the offence.

The addition of the charges of murder to that of conspiracy to commit or abet the offence of murder was permitted by section 180 (1) of the Criminal Procedure Code.

Held, further, that the fact of Ramasamy's death was relevant under section 9 of the Evidence Ordinance and that the manner of his death was relevant to establish as a fact that Ramasamy was a victim of homicide and not suicide.

Held, also, that the suggestion of Crown Counsel that the appellant might have been the assailant of Ramasamy cannot be said to have compromised the character of the appellant, although it would have been better if he had abstained from making it.

APPEAL from a conviction for murder by a Judge and Jury before the 2nd Northern Circuit, 1942.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the accused, appellant.—The proceedings in this case offend against the provisions of section 178 of the Criminal Procedure Code. Count 1 of the indictment contains a multiplicity of charges. It includes two distinct offences, and a count which charges both in one count is bad—*Rex. v. Molloy*[1]; *Rex. v. Wilmot*[2]; *Rex. v. Ottoway*[3]. There is no offence of conspiracy as such *simpliciter*. Conspiracy to commit murder and conspiracy to abet murder are two distinct offences and cannot be included in the same charge. You can no more charge a man as an abettor as well as a perpetrator of the offence abetted than you can charge a man with an attempt to commit an offence and the commission of that very offence. See *The King v. Andree et al.*[4] and *King-Emperor v. Tirumal Reddi et al.*[5]. The whole indictment is bad for misjoinder of charges.—*Subramaniya Aiyar v. King-Emperor*[6].

The verdict on count 1 is too general and does not conform to the requirements of section 248 of the Criminal Procedure Code. When a count contains two charges and there is a general verdict of "guilty" one does not know of what offence the prisoner can be convicted. See *Rex. v. Sheaf*[7].

The admission of evidence suggesting that the death of Ramasamy was due to homicide and not suicide and thereby suggesting that the accused was responsible for the murder of Ramasamy also was improper and prejudicial to the accused. Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is inadmissible and vitiates the whole proceedings—*Makin v. Attorney-General for New South Wales*[8]; *Rex. v. Firth*[9].

E. H. T. Gunasekera, C.C., for the Crown.—With regard to the last ground of appeal the fact and manner of Ramasamy's death were relevant either under section 6 or under section 9 of the Evidence Ordinance. If suicide was a possible inference and negatived conspiracy it was open to the prosecution to show that Ramasamy was the victim of homicide. There was no prejudice caused to the appellant.

Count 1 of the indictment does not allege more than one offence. It was the single offence of conspiracy that was charged in count 1. Not two different offences but two different ways of committing the same offence are alleged. A count charging a man with one endeavour to procure the commission of two offences is not bad for duplicity, because the endeavour is the offence charged. *Archbold's Pleading and Practice* (30th ed.) 48.

N. Nadarajah, K.C., in reply.—The trial Judge gave no direction at all on the count of conspiracy to abet murder. He confined himself solely to the point of conspiracy to commit murder.

Cur. adv. vult.

[1] *(1921) 15 Cr. App. R. 170.*
[2] *(1933) 24 Cr. App. R. 63.*
[3] *(1933) 24 Cr. App. R. 69.*
[4] *(1941) 42 N. L. R. 495 at 499.*
[5] *I. L. R. 24 Mad. 523 at 547.*
[6] *I. L. R. 25 Mad. 535.*
[7] *(1925) 19 Cr. App. R. 46.*
[8] *L. R. (1894) A. C. 57.*
[9] *(1938) All. E. R. Vol. 3, p. 783.*

October 10, 1942. SOERTSZ J.—

At the hearing of this appeal, Counsel for the appellant limited himself to two of the many grounds of appeal against the conviction, of which notice had been given from time to time.

The first objection he took was that the first count of the indictment, which is the count on which the appellant was convicted, was bad in law This objection was advanced on a supplementary notice of appeal tendered on the eve of the hearing, long after the time prescribed by the Court of Criminal Appeal Ordinance for giving notice of appeal had elapsed. We must invite attention again to the observation made by Howard C.J., in the case of *The King v. Seeder Silva*[1]:—

> "Generally speaking, this Court will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid, and has drawn his own notice, the Court will not, as a rule, confine him to the grounds stated in his notice."

This is hardly such a case. The appellant was defended in the Court of trial by Counsel and Proctor retained by him. The notice of appeal filed, within the prescribed time, appears to have been drawn by a lawyer. This ground of appeal is not stated even among the "further grounds in law" submitted on September 25, 1942, signed by Counsel. When the case came up for hearing before us on September 28 the appellant was represented by King's Counsel, assisted by the Counsel who had signed the statement of the grounds of appeal tendered on September 25. In these circumstances, we should have been justified in refusing to consider this objection but, although with some reluctance, we decided to hear Counsel on the question raised.

The objection taken by Counsel, as already indicated, relates to the first count of the indictment. The material parts of that count are these:—

> "That one S. Ramasamy (since deceased) and you (*i.e.*, the appellant and his co-accused) did act together with a common purpose for, or in, committing or abetting the offences of murder of (five persons named), and that you are thereby guilty of the offence of conspiracy to commit or abet the said offences of murder, and in pursuance of the said conspiracy the said S. Ramasamy did . . . . commit murder by causing the deaths of one or more of the following persons, to wit (three persons named), and that you have thereby committed an offence punishable under section 113B, read with sections 296 and 102, of the Penal Code".

There were three other counts in the indictment but they were obviously laid as *alternatives* to count 1, and were withdrawn, at the suggestion of the presiding Judge, when the Jury returned their verdict against the appellant on count 1. They do not arise in this appeal.

In regard to the first count of the indictment, Counsel contends that it is illegal because, (*a*) it contains a *multiplicity* of charges, and (*b*) it alleges that the accused persons and the deceased man were guilty of the offence of conspiracy to *commit* murder, *as well as* of the offence of

[1] *41 N. L. R. 337, at page 342.*

conspiracy to *abet* murder. In support of the first part of this contention, he relied upon (*a*) certain decisions of the Court of Criminal Appeal in England, namely, in the cases of *Rex v. Wilmot* (*supra*), *Rex v. Molloy* (*supra*) & *Rex v. Sheaf* (*supra*); (*b*) the opinion of the Judicial Committee of the Privy Council in *Subramaniya Aiyar v. King Emperor* (*supra*). For the second part of the contention he sought support in the judgment of Bashayam Ayyangar J., in *King Emperor v. Tirumal Reddi* (*supra*).

The English cases decided by the Court of Criminal Appeal deal with multiplicity of charges in cases under the Road Traffic Act, and the Larceny Act, and have scarcely any application to the case before us in which our Code of Criminal Procedure governs the framing of charges. The opinion of the Privy Council in case (*b*) above, concerned an indictment in which the two accused persons were charged " with no less than forty-one offences extending over a period of two years . . . . plainly in contravention of the Code of Criminal Procedure (Indian) Section 234." Their Lordships had no difficulty in refusing to treat this as a mere irregularity, and in quashing the conviction entered against the appellant. It is difficult to see how it is sought to make the ruling in that case applicable to this.

In case (*c*) Bashayam Ayyangar J. came to deal with two indictments that arose out of one and the same transaction, the second indictment becoming necessary because the accused concerned in it had not been arrested in time to be tried with the accused charged on the first indictment. The first indictment contained three counts. In the first count accused Nos. 1 and 2 were charged with having conspired with Subbi Reddi (*i.e.*, the accused in the other indictment), and with accused No. 9, to murder the deceased and that in pursuance thereof the deceased was murdered and it alleged that they thereby committed an offence punishable under sections 302 and 109 of the Penal Code. In the second count third, fourth, fifth, sixth, seventh and eighth accused, with first and second and Subbi Reddi, were charged with having murdered the deceased and committed an offence punishable under section 302 of the Penal Code. In the third count, another accused, namely, the ninth, was charged with having conspired with first and second accused and Subbi Reddi (all of count 1) to murder the deceased and that in consequence, the deceased was murdered and it alleged that the ninth accused by giving information of the movements of the deceased to the first accused enabled the first to eighth accused to murder the deceased and so abetted the offence punishable under sections 302 and 109 of the Penal Code.

In the indictment presented against Subbi Reddi, who was arrested later, there were two counts. The first charged him with conspiring with first, third and ninth accused in the other indictment to murder the deceased and, as in pursuance of it the deceased was murdered, with being guilty under sections 302 and 109 of the Penal Code. The second count charged him with the murder of the deceased, punishable under section 302.

The result of the two trials was that on the earlier indictment, first to eighth accused were convicted of murder and ninth accused of abetment of murder. The first, second and ninth accused were acquitted of

conspiracy. That is to say count 1 failed, count 2 succeeded, count 3 succeeded, the ninth accused being found guilty of abetment of murder. On the later indictment, Subbi Reddi was convicted on both the counts. There were appeals by all the parties concerned. The Government appealed against the acquittal of the first, second and ninth accused, and all the accused against the convictions entered against them. The learned Judge dismissed the Government Appeal, and quashed the conviction of Subbi Reddi on the count of conspiracy.

The only point of importance that emerges from all this is that, in a case such as that was, in which the conspiracy alleged was not the offence of conspiracy defined in section 113A of our Code and in 120 of the Indian Code, but only one species of the abetment of an offence as defined in section 100 of our Code and in section 108 of the Indian Code, "you can no more"—to use the words of Bashayam Ayyangar J.—"charge a man as an abettor as well as a perpetrator of the offence abetted, *and that not in the alternative but cumulatively,* than you can charge a man with an attempt to commit an offence and the commission of that offence". It was on that ground that Subbi Reddi's conviction on the charge of conspiracy was quashed, and his conviction on the charge of murder affirmed. But the position is entirely different here for, now, both our Code and the Indian Code have a distinct *offence of conspiracy* which penalises abetment of an offence, regardless of whether it is committed or not. It is that kind of conspiracy that is charged in count 1 here, and the allegation is made that the appellant and his co-accused conspired in that sense, with Ramasamy, to cause the death of the persons named, acting with a common purpose, taking, maybe, different individual parts and yet being liable as *co-conspirators* to be punished in the manner laid down by section 113B. The observation made by Perryn B. in the old case of *King v. Fuller*[1] supports the first count as it is framed in this case, for all the matters alleged are "parts of one endeavour". The evidence which the Jury, as their verdict indicates, accepted shows that the appellant was present as an abettor when the offences charged were committed and, in view of sections 102 and 107 of the Penal Code, "he must be deemed" to have committed the offences of murder with which he was charged, and so to have incurred the sentence passed on him. In regard to what was urged against this count 1, on the ground that it contained in addition to the charge of conspiracy to commit or abet the offences of murder, the three charges of murder set forth, we need say no more than this—section 180 (1) of the Criminal Procedure Code permits that to be done where the offences arise out of one transaction. For these reasons, we are of opinion that the first objection fails.

Secondly, Counsel contended that irrelevant evidence had been admitted and an improper suggestion made by Counsel for the Crown, and that it is impossible to say that the Jury would, necessarily, have come to the same conclusion if that evidence had been excluded and that suggestion had not been made.

The evidence impeached as irrelevant is that given by the Medical Officer, Dr. Ponniah, in answer to questions put to him in examination-in-chief, to the effect that Ramasamy, one of the alleged conspirators,

[1] *(1797) 126 E. R. p. 847.*

who was found dead shortly after he is said to have committed the offence charged, died of a gunshot injury which, in view of its location, the Doctor thought, disclosed a case of homicide, rather than one of suicide. The Doctor did not, however, rule out suicide as impossible.

The objection taken, on appeal, to this evidence and the suggestion based upon it, is stated in the notice of appeal as follows :—

" (a) the evidence, *re* the homicide of Ramasamy, was irrelevant and immaterial to the charges in the indictment";

" (b) it tended to introduce the character of the appellant in so far as it was suggested that the appellant, having been found with the gun of Ramasamy soon after his death, may have been the murderer of Ramasamy".

"The appellant begs further to submit that, on this aspect of the case, His Lordship's charge to the Gentlemen of the Jury was inadequate and insufficient."

The first question that arises for consideration, on this objection, relates to the relevancy of this evidence, and in order to determine that, it is necessary to ascertain whether there was a fact in issue or a relevant fact on which this evidence could, reasonably, be said to have a bearing.

The basis of the case for the Crown was the allegation of a conspiracy between Ramasamy, the appellant, and the other accused. The defence, as indicated by the cross-examination of the witnesses for the Crown, was that there was no conspiracy between Ramasamy and the two accused, but that Ramasamy acting alone, at a time when he was very much under the influence of liquor, shot at the persons named in the indictment, killed some of them, and then shot himself. In short, that Ramasamy ran amok, and that such intervention as there was on the part of the appellant was in order to protect, as far as possible, Ramasamy's intended victims from his attacks. It is, therefore, obvious that the crucial fact in issue was whether Ramasamy and the two accused were, in the words of count 1 of the indictment, acting "together with a common purpose for or in committing or abetting the offences of murder" alleged in that count.

Section 9 of the Evidence Ordinance enacts that :—

"Facts necessary *to explain or introduce* a fact in issue or relevant fact, or *which support or rebut* an inference suggested by a fact in issue or relevant fact . . . . or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose."

As a matter of narrative, in order to introduce the facts in issue, it was necessary to establish the fact of the death of Ramasamy who, count 1 of the indictment alleged, was one of the conspirators "since deceased". *The fact* of Ramasamy's death was, therefore, relevant. The next question is whether *the manner* of his death was relevant. In regard to this question, the cross-examination of the medical officer shows that the defence, from the beginning, sought to establish the fact that Ramasamy had committed suicide. The purpose of that line of defence was to negative or, at least, to reduce the probability of the existence of a conspiracy. That *defence* would, in turn, be rebutted, to some extent at

least, if homicide were established as the cause of Ramasamy's death, for homicide would tend to rebut the inference sought to be drawn from suicide if that were established. That, undoubtedly, was the purpose behind the questions put to the Medical Officer by Crown Counsel. The question of the weight of this evidence was a different matter, and was a question for the Jury.

The majority of us are, therefore, of opinion that it cannot be said that it was irrelevant to seek to establish as a fact that Ramasamy was the victim of homicide as opposed to suicide. Thus ground (*a*) in the notice of appeal on the Law fails.

The other question for consideration is that raised in ground (*b*) in which the complaint is that Counsel for the Crown *suggested*, in the course of his observations on the case, "that the appellant having been found with the gun of Ramasamy soon after his death, *may have been* the murderer of Ramasamy". Here the objection is not merely that the Crown sought to establish that Ramasamy was the victim of homicide, but also that it made the *suggestion* that the appellant might have been the murderer. This objection does not relate to a point of evidence, but to an argument which Counsel thought fit to employ. Now, rules of evidence do not, and obviously cannot, set limits to argument. That, of course, does not mean that, quite apart from the adduction of evidence as such, something may not be said or done *during* a trial, in a manner or form, that would, in effect, amount to an improper introduction of evidence or, worse still, to an improper introduction of irrelevant evidence, and would so divert the trial from a fair course.

The question, then, is whether this is such an instance; whether the suggestion of Counsel for the Crown could, reasonably, be said to have such an effect on the trial in this case. Here we are dealing with what was only a suggestion, and it is clear that when Counsel made it, he appears to have been anticipating a question that he thought might occur to the members of the Jury on his submission that Ramasamy was the victim of homicide, as to who could have been the assailant, and he suggested that it *might have* happened in one of several ways, for instance, at the hands of the appellant who, there was evidence, took measures to conceal the gun shortly after the death of Ramasamy. If Crown Counsel had paused to reflect he would, probably, have realised that this suggestion would support rather than rebut the inference which the defence was seeking to submit by establishing suicide, for if Ramasamy was shot by the appellant, that fact could reasonably be said to tend to rebut the allegation made by the Crown that they were co-conspirators.

While we think that this question, whether it was homicide or suicide, that brought about Ramasamy's death, and this suggestion that the appellant might have been the assailant, were inconclusive and remote, and that it would have been better if Crown Counsel, had abstained from them, the majority of us are of opinion that it cannot reasonably be said that the suggestion compromised the character, that is to say, the reputation, of the appellant. It is on that ground that the objection is taken:—

"it tended to introduce the character of the appellant".

We do not think it could have prejudiced the appellant in any way at all. The Jury had what was, on the whole, an adequate direction from the presiding Judge as to the manner in which they should treat this evidence, and the suggestion made upon it, when he directed them as follows :—

"I do not propose at this stage to deal with the injuries on Ramasamy. I shall refer to that before I have finished, but I do not think that it is necessary at this stage to go into the matter because, although what was done at the death of Ramasamy and, more particularly. after the death of Ramasamy, might have some bearing upon the case, and might throw some light on the case. You must remember that these accused are not charged in this case with the murder of Ramasamy or with conspiracy to murder Ramasamy. There is no indictment against them with regard to that particular offence, and it is to the extent that the subsequent action ascribed to the first accused could throw light upon his previous actions as regards Seethaletchumy, Maheswary and Kandasamy Durai that that evidence is relevant at all, and whatever conclusion you may come to upon the evidence, I wish you to remember this : that is, even if you come to the conclusion that Ramasamy's death was due to homicide, do not use that fact as anything which is admitted in the present case, except so far as the subsequent action of the first accused might have some relevance to this case ; you must not allow your minds to be prejudiced if you come to the conclusion that Ramasamy's death was due to homicide."

(*b*) "I am not quite certain whether it is of such importance to you to decide whether there was homicide or suicide. Crown Counsel suggested that if it was homicide, then, it may have been caused by the first accused. Of course, the only evidence that the first accused could have done it is the fact that the first accused was afterwards seen hiding the gun away in that store room. We have no evidence as to who pulled the trigger or who fired the shot. It does, however. appear that the action of the first accused may have some significance as to whether it was a case of homicide or suicide. If he was doing away with the gun in hiding it, certainly he was trying to confuse the issue and to get rid of what might have been a piece of material evidence in the case. That is to say, the possession of the gun, and, in my view, it may be possible—I do not say that you must—for you to say that this action of the first accused showed that he was very deeply implicated in an action done by Ramasamy. I do not say that you would be driven to that conclusion by that fact alone, but it may be reinforced by other facts affecting the first accused. Undoubtedly, if he did fire the shot himself and killed Ramasamy, then, he was trying to get rid of the gun. If he thought it was suicide., he may have tried to confuse the issue in some way—I do not know how. One cannot say why—but as far as he was concerned, he was probably creating evidence which may point to homicide than to suicide, because Ramasamy could not have carried the gun to the store room after he had shot himself. But whatever it is, as I said before, even if you come to the conclusion that it was homicide and

the first accused had fired that shot, do not let that fact prejudice you as regards this case itself. Merely consider whether you can draw some inference which impels you to think that the first accused was taking a very active part in the whole of the transactions of that day, or whether that fact reinforces the evidence which you may hold to have been established against the first accused. It is only for that purpose that you will use this fact and not for any other purpose in this case."

(c) " As regards the question of homicide and suicide, I have already warned you that even if you come to the conclusion that it was homicide you must not utilise that fact."

For these reasons, the majority of us are unable to sustain the second objection.

The appeal fails. It is dismissed.

The application is refused.

Appeal dismissed.