[COURT OF CRIMINAL APPEAL]

1950 *Present:* **Dias S.P.J. (President), Gunasekara J. and Swan J.**

REX *v.* WIJEDASA PERERA *et al.*

Appeals 12-15 of 1950 with Applications 30-33

S. C. 1—M. C., Colombo, 1,035

Court of Criminal Appeal—Maxim that a man intends the natural and probable consequences of his acts—Rebuttable presumption—Evidence Ordinance, s. 114—Misdirection—Applicability of proviso to s. 5 (1) of Court of Criminal Appeal Ordinance, No. 23 of 1938—Conspiracy to commit murder—Murder committed by some of the conspirators—Another conspirator standing guard at a distance—Equally guilty of murder—Power of judge to put questions—Evidence Ordinance, s. 165—Duty of counsel to correct judge—Has counsel for appellant right of reply in Court of Criminal Appeal ?

The maxim that " a rational man should be presumed to intend the natural and probable consequences of his acts " is not a positive rule of law. It is

[1] *(1937) A. C. 26.* [2] *(1930) 9 Annotated Tax Cases, 43.*

nothing more than a presumption of fact of the kind referred to in section 114 of the Evidence Ordinance. *R. v. Steane* [1] and *40 M.C. Chilaw 41,865* [2] followed. It is, therefore, the duty of the Judge in charging the jury to make it clear that the presumption is not one of law which they are bound to act upon, but is only a presumption of fact which they are entitled, but not obliged, to act upon.

Held (by majority of Court), that on the facts of this case, when the impugned passage of the summing-up was considered as a whole, with the rest of the summing-up, it was plain that despite the incorrect direction it was made clear to the jury that they were at liberty to draw or not an inference in regard to murderous intention after considering the submissions made by the defence, and that therefore there was in effect no misdirection.

Held further (by whole Court), (i) that, even assuming there was a misdirection, this was a proper case to which the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance ought to be applied. *R. v. Heras* [3], *R. v. Karthigesu* [4] and *R. v. Athukorale* [5] referred to. *R. v. Stirland* [6] followed.

(ii) that where there was a conspiracy to commit murder and one of the conspirators, in pursuance of the common plan, stood guard on the road by an empty car on a lonely road while his companions took the deceased into the jungle and killed him, that man was equally guilty of the offence of murder along with his companions.

(iii) that where an accused, after he had been examined in chief, cross-examined and re-examined, was put a series of questions by the trial judge, the procedure adopted by the judge was lawful under section 165 of the Evidence Ordinance, if it caused no prejudice to the accused. *R. v. Namasivayam* [7] and *R. v. Dharmasena* [8] referred to.

(iv) that it is the duty of counsel on both sides to set the judge right if they find that he is making a gross error either on the facts or on the law. *R. v. Stirland* [6] and *R. v. Neal* [9] referred to.

(v) that, in the Court of Criminal Appeal, counsel for the appellant has no right of reply. It is, however, in the discretion of the Court, in proper cases, to allow him to be heard on any point or points on which the Court may wish to receive further assistance from the appellant after the prosecution has concluded its submissions. Counsel for the appellant may also state to the Court any point or points on which he wishes to address the Court, but the ultimate decision whether he should be heard or not rests with the Court.

APPEALS, with applications for leave to appeal, from certain convictions in a trial before a Judge and Jury.

Charles Jayawickrama, for the first appellant.

G. E. Chitty, with *K. A. P. Rajakaruna* and *Tissa Gooneratne*, for the second appellant.

Colvin R. de Silva, with *K. C. de Silva*, *J. W. Subasinghe* and *Vernon Wijetunge*, for the third appellant.

M. M. Kumarakulasingham, with *Mahesa Ratnam* and *J. C. Thurairatnam*, for the fourth appellant.

Sir Alan Rose, K.C., Attorney-General, with *T. S. Fernando*, Crown Counsel, and *Douglas Jansze*, Crown Counsel, for the Crown.

Cur. adv. vult.

[1] *(1947) 1 K. B. 997.*
[2] *C. C. A. Minutes of January 25, 1950.*
[3] *(1946) 47 N. L. R. 83.*
[4] *(1946) 47 N. L. R. 234.*
[5] *(1948) 50 N. L. R. at p. 257.*
[6] *(1943) 30 Cr. App. R. 40. (House of Lords)*
[7] *(1948) 49 N. L. R. 289.*
[8] *(1949) 50 N. L. R. 505.*
[9] *(1949) 33 Cr. App. R. at p. 195.*

July 26, 1950. DIAS S.P.J.—

Eight persons of whom the 5th to the 8th accused are the appellants, were charged on indictment with committing the following offences: (1) criminal conspiracy in or about the month of January, 1949, to rob cash and cheques belonging to the Ceylon Turf Club, in consequence of which conspiracy the robbery in question was committed on January 31, 1949—sections 113B, 380 and 102 of the Penal Code; (2) criminal conspiracy to commit murder in the course of the same transaction set out in (1) in consequence of which conspiracy the murder of one K. John Silva was committed on January 30, 1949—sections 113B, 296 and 102 of the Penal Code; (3) a charge of murdering K. John Silva, on January 30, 1949, as against the 5th, 7th and 8th accused—section 296 of the Penal Code; and (4) a charge of abetment of the murder of K. John Silva against the 1st, 2nd, 3rd, 4th and 6th accused—sections 296 and 102 of the Penal Code.

After a trial lasting over five weeks the jury unanimously convicted the appellants (5th to 8th accused) on the first two charges. They unanimously acquitted the 1st accused under all the counts of the indictment. The 2nd accused had pleaded guilty to the first count of the indictment only. At the close of the case for the prosecution, the learned trial Judge ruled as regards the 3rd and 4th accused, that there was no case to go before the jury and they were acquitted and discharged.

Under the first count the trial Judge sentenced each of the 2nd, and the 5th to the 8th prisoners to undergo 10 years rigorous imprisonment. Under the second count the appellants were sentenced to death. No verdicts were returned by the jury against them on the third and fourth counts, as it was unnecessary to do so.

Certain questions of law were submitted to us in these appeals. Two of them affect all the four appellants. One refers to the 5th accused solely and another to the case of the 6th accused. No questions were raised before us as to the correctness of the conviction of these appellants on the first count in the indictment, namely the conspiracy to rob the money of the Ceylon Turf Club. The correctness of that conviction or the *quantum* of the sentences imposed under that count are not in dispute. Furthermore, the 5th, 7th and 8th accused in regard to the second count concede that in law they must be deemed to have " caused the death " of K. John Silva. They admit that while they could have been convicted of committing culpable homicide not amounting to murder, they join issue with the Crown on the question that they are guilty of murdering John. Silva. Counsel for the 6th accused, while conceding that his client was privy to the robbery, submits that the case against 6th accused is distinguishable from the cases of the other appellants, and submits that he should not have been found guilty even of the lesser offence of culpable homicide not amounting to murder.

The first and substantial ground of appeal affecting all the appellants is that the learned trial Judge misdirected the jury on a question of law, and that in consequence of that misdirection the conviction on the capital charge cannot stand against the appellants.

Not only was the trial a lengthy one, but the summing-up of the learned Judge extends to over 113 pages of typescript. The alleged misdirection is said to consist of the following direction which appears at page 104 of the typewritten copy of the summing-up:—

> " Gentlemen, it is sound law that a man should be presumed to intend the natural and inevitable consequences of his acts. It is by that that you find the intention of a man. A man cannot say ' It is true I did this act; but I did not intend the natural and inevitable consequences of this act '. The law presumes, in the absence of evidence, that he did intend the natural and inevitable consequences of his acts ".

The complaint is that the language of the learned Judge was calculated to mislead the jury into believing that there was a presumption of law which left them no choice but to hold that in every case a man must be presumed to intend the natural and inevitable consequences of his actions, whereas that maxim is no more than a mere presumption of fact which entitled a jury, but did not compel them if they thought fit not to draw the inference, to find as a fact that a rational man must be assumed to intend the natural and probable consequences of his acts.

The effect of this well-known maxim of the law was dealt with by Sir Fitzjames Stephen in Volume 2 of his History of the Criminal Law at pages 110-111 in the following terms:—

> " This account of the nature of ' intention ' explains the common maxim which is sometimes stated as if it were a positive rule of law—that ' a man must be held to intend the natural and probable consequences of his act '. I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequences of his conduct ".

This question arose in a recent case in England in *R. v. Steane*[1] when the English Court of Criminal Appeal laid down the law as follows: Where an intent is charged in an indictment, the burden of proving that intention remains throughout on the prosecution. If the prosecution proves an act the natural consequences of which would be a certain result, and no evidence or explanation is given, then, a jury on a proper direction may find that the accused is guilty of doing the act with the intent alleged to obtain that result. But if on a totality of the evidence, there is room for more than one view as to the intent of the accused, the jury should be directed that it is for he prosecution to prove the intent charged to the jury's satisfaction, and, if on a review of the whole evidence they either think that the intent did not exist, or they are left in doubt as to the intent, the accused is entitled to be acquitted. The case of *R. v. Steane* [1] was considered in two local cases, one of which is reported and the other unreported. In the latter case—*40 M. C. Chilaw, 41,865* [2] the trial Judge in his summing-up told the jury: " It is a rule of law, and

[1] *(1947) 1 K. B. 997.*

[2] *C. C. A. Minutes of January 25, 1950.*

I direct you as such, that a rational man must be presumed to intend the natural and reasonable consequences of his actions ". He then later modified the effect of this direction by stating that: " The jury were entitled to presume that the doer of the act intended those consequences in the absence of any other explanation ". He later directed them that " It will be your duty, in considering whether the 1st accused had a murderous intention or not, to have regard to that presumption that a rational man is presumed to intend the consequences of his act, taking it in conjunction with other circumstances ". The Court of Criminal Appeal said:

" The effect of these directions, in our view, was at the very least to leave the jury in doubt whether the presumption was one of law which they were obliged to act upon, or whether it was, as it in truth is, a presumption of fact which they were entitled, but not obliged, to act upon, and which might be rebutted by the circumstances of the particular case. In a straight-forward case of murder by shooting at close range, where the murdered man is in full view of the assailant who takes aim at him and fires, there would, ordinarily, be no circumstances to justify a jury in declining to act on the presumption that he intended the natural and probable consequences of his act, namely the death of the deceased, and the form of the present direction could not be held to have caused prejudice to the accused, or any failure of justice; but, in a case such as this, where there was no direct and insufficient circumstantial evidence that the appellant was firing at a spot (at a closed door-plank) behind which he knew that the deceased was standing, we feel that it would be unsafe to assume that the jury, had the evidence on this point been carefully reviewed to them, and had they been clearly told that the presumption was one which they were entitled, but not obliged to act upon, would have found a murderous intention to have been proved beyond reasonable doubt, and would have brought in a verdict on a capital charge ". In that case a new trial was ordered.

The other case in which *R v. Steane* [1] was considered is *R. v. Bello Singho* [2] when the Court of Criminal Appeal said: —

" Relying on the case of *R. v. Steane* [1] Mr. Perera argued that on the evidence taken as a whole, there was room for more than one view as to the intent of the assailant, and, therefore, the rule of law (*sic*) that a person must be taken to intend the natural and probable consequences of his acts did not apply. For instance, he said, the assailant may not have known where the blow would alight, or he may have inflicted the injury in the course of a struggle. We do not think that it was possible for the jury to take the view that the assailant may not have known where the blow would alight, as they had accepted the evidence that there was sufficient light at the time; nor do we think that it was possible for them to return a verdict favourable to the accused, even if they took the view that the assailant inflicted the injury in the course of a struggle, as the Exception relating to Private Defence is not available to a person who enters another's house with the intent to commit robbery ".

[1] *(1947) 1 K. B. 997.*

[2] *(1947) 48 N. L. R. at p. 545.*

It seems to us that these authorities make it plain that the maxim that a rational man must be presumed to intend the natural and probable consequences of his acts is not a rule of law giving rise to a presumption of law which leaves the jury no choice in the matter. It is nothing more than a presumption of fact of the class enumerated in section 114 of the Evidence Ordinance, which the jury may or may not draw. In the unreported Chilaw case we find one terminal of that principle. In that case the repeated directions of the trial Judge may have had the effect of misleading the jury, and, therefore, the conviction was quashed. On the other hand, *R. v. Bello Singho* [1] illustrates the other terminal. It is also clear that in many cases, even should the trial Judge make a slip when dealing with this maxim, where a man slays another under circumstances which leave no room for doubt as to what his intentions are, such a misdirection will not be regarded as being serious by the Court of Criminal Appeal.

It is to be observed that the passage to which exception is taken in this case occurs at page 104 of a lengthy summing-up consisting of 113 pages. As the Attorney-General pointed out, we should examine the summing-up as a whole to see whether the jury were in fact misled or fettered in the discharge of their duties by these four sentences.

At pages 13—16 the learned Judge defined to the jury what the offence of murder under our law is. At pages 16 and 17 he told them what "a murderous intention" was, and he ended up by saying "Of course, I will tell you later, how in these cases we try to find out whether a man had a murderous intention or not". At page 20 he told the jury that the burden was on the prosecution to prove each of the charges in the indictment beyond all reasonable doubt, the meaning of which he carefully explained to them. At page 21 he told them that they were the sole judges of the facts, and that the responsibility for finding the facts was their duty and not that of the Judge. At page 26 he adequately dealt with the presumption of innocence. At page 94 the learned Judge reverted to the question of murderous intention in the following words:—

> "Now, how do you find whether a man had a murderous intention? You do not get direct evidence . . . . I mean a man does not come up to the victim and say 'Here—now I am giving you this blow and cutting you in this way, because I have an intention to kill you,' . . . So that you must find out this murderous intention by looking at various circumstances connected with the transaction, and see whether from those circumstances *you can infer an intention;* because you cannot expect witnesses to come here and say 'We read the intention of the 5th, 6th, 7th and 8th accused at that time, and this was their intention'. *You have got to find it out from the circumstances*".

The learned Judge then proceeded to enumerate the circumstances relied upon by the prosecution to prove murderous intention and then said:—

> "Ask yourselves 'On looking at all these can we or can we not say that the man had an intention to cause death, or at least to inflict an injury which is sufficient in the ordinary course of nature to cause

[1] *(1947) 48 N. L. R. at p. 545.*

death ?' . . . Well, if all those facts are proved, I do not know whether you will have much difficulty in reaching a decision on the question of murderous intention ".

Then at page 96 the learned Judge said :—

" Now, something that will help you . . . to reach a decision whether the assailants had a murderous intention or not, something that will help you to some extent—is the question ' How long after this happened, (i.e., after the deceased man was tied up to a tree in the jungle) did the deceased man die ?'—and that will help you to some extent I think, if you also remember the medical evidence and accept that medical evidence that this deceased man had no such disease as made his case different from that of a normal man of 56 ".

Then comes the passage in the summing-up which is objected to at page 104. Then there is the passag which immediately follows :—

" Well—consider all that, and ask yourselves, apart from the (gas—) mask, whether the assailants did not inflict on this man an injury sufficient in the ordinary course of nature to cause death ? Of course, the question of intention becomes still easier, if you accept the evidence with regard to the use of the gas mask (i.e., that the deceased was killed by suffocation by having a gas mask placed over his head with the supply of air cut off, as against the other view that the man was tied to a tree in a lonely jungle and died of asphyxia and/or shock.) The defence, gentlemen, draws attention to certain facts to show that the assailants had no intention to commit murder, had no intention to commit an injury sufficient in the ordinary course of nature to cause death ".

We agree that the passage which is objected to at page 104 of the summing-up contains incorrect statements of the law in that it states as *a presumption of law* what is only *a presumption of fact*, and that it states as an *irrebuttable presumption* what is in truth no more than a *rebuttable presumption* of the kind referred to in section 114 of the Evidence Ordinance.

This direction is of particular importance in ascertaining the intention of the assailants, if the jury rejected the evidence with regard to the murder of the deceased man by the use of the gas mask to suffocate him, and came to the conclusion that he died of asphyxia and/or shock as a result of his being tied up in the jungle. In such a case it seems to us to be vitally necessary that the trial Judge should have directed the jury that the maxim that rational man *may* be presumed to intend the natural and probable consequences of his actions is only a presumption of fact which they may or may not draw. We think that the language used by the learned Judge may have led the jury to believe that what he was laying down was a presumption of law which they were bound to follow, and in regard to which they could not exercise their independent judgment. The Attorney-General concedes that this direction was erroneous, but he contends that what is stated in page 104 of the transcript is really no misdirection when the summing-up is read and considered as a whole. The Attorney-General concedes that had the direction at page 104 stood alone

it may be open to objection, but he submits that when it is taken in conjunction with the rest of the summing-up it would amount to a miscarriage of justice to quash this conviction on the ground of misdirection. He submits that the Court of Criminal Appeal, even if it considered that there was a misdirection, would interfere only if there was a miscarriage of justice. He admits that if there was misdirection in law by the learned trial Judge it was incumbent upon him to satisfy this Court that there was no miscarriage of justice. In our opinion the impugned passage amounts to a misdirection and not to a mere error or slip as contended by the Attorney-General. We are of opinion that the principle laid down in *R. v. Steane* [1] is in point, and we are unable to draw a distinction between the language used by the learned trial Judge and the language used by the learned Judge in charging the jury in the unreported Chilaw case. We are therefore of opinion that there has been "a wrong decision of a question of law" within the meaning of section 5 (1) of the Criminal Appeal Ordinance, No. 23 of 1938. We would like to point out, however, that if it is a fact that the deceased man was suffocated by having a gas mask placed over his head and the supply of air was cut off by squeezing the tube, the misdirection in question would be innocuous, because in such a case there could be no question as to whether the person or persons who suffocated the deceased man had or had not a murderous intention, i.e., an intention to kill him. The importance of the misdirection is in regard to the other definition of murder which applies; that is to say, if the jury discarded the submission that the deceased was killed by suffocation, whether the appellants caused the death of the deceased by doing an act with the intention of causing him bodily injury, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.

The Attorney-General however argued that when the summing-up is read as a whole and the impugned passage is read alongside with the other passages which we have indicated above, the effect of the misdirection is nullified. We are agreed that what the learned Judge stated at pages 94 to 103 and the last paragraph of page 104 of the summing-up do not assist us in solving the problem whether the impugned passage can be said not to be a misdirection. There are, however, passages at page 105 of the summing-up which in the opinion of the majority of us have the effect of negativing the misdirection on page 104. The learned Judge stated :—

> "The defence, gentlemen, draws attention to certain facts to show that the assailants had no intention to commit murder, had no intention to commit an injury sufficient in the ordinary course of nature to cause death. They say 'Look at the evidence given by Rupananda and Wijedasa ; all that was said at these conferences before the robbery was that the driver was going to be tied to a tree, not that the driver was going to be killed'. Well, you must consider this carefuly. Does the fact that people when they are considering a robbery and discussing the plan for carrying out the robbery and then discussing as to how to get rid of this inconvenient driver and get hold of a convenient police inspector, when they are discussing that plan and they

say as far as the driver is concerned ' We will take him to Puttalam and tie him up to a tree '—does it exclude any inference that they want to kill the driver ? . . . . ''

It has been submitted that the effect of the summing-up on the question of murderous intention was to direct the jury that they could only draw an inference from the circumstances, but that if they found the existence of one of the circumstances relied upon by the prosecution, namely that death was the natural and inevitable consequence of the tying up, that the law permitted them to draw no other inference except an inference of murderous intention. Therefore, it is submitted that the outstanding question is whether the passage quoted from page 105 negatives the impugned passage at page 104 and leaves the jury free to draw an inference one way or another. The majority of us are of the view that what the learned Judge stated at page 105 was to make it clear to the jury that, despite what was earlier stated at page 104, the jury were at liberty to draw or not to draw an inference in regard to murderous intention after considering the submissions made by the defence. The majority of us are, therefore, of opinion that when the summing-up is read as a whole there is in effect no misdirection.

Nevertheless, we are unanimously of opinion that if the impugned passage at page 104 is in truth a misdirection, then this is a proper case for the application of the *proviso* to section 5 (1) of the Court of Criminal Appeal Ordinance which reads:—

'' Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred ''.

The principles upon which this *proviso* should be applied have been settled by a series of decisions both locally and in England, and may be stated as follows: The *proviso* to section 5 (1) applies if the Court of Criminal Appeal is satisfied that no reasonable jury properly directed would or could have given any other verdict than that which was in fact given, and no substantial injustice has been done—*R. v. Heras Hamy* [1] and *R. v. Kartlıigesu* [2]. If there has been misdirection in a charge, not otherwise open to criticism, which may have turned the scales against the appellant, and the Court of Criminal Appeal cannot say that with a proper direction the jury may have reached the same conclusion, the *proviso* to section 5 (1) will not avail the Crown—*R. v. Atukorale* [3]. As to whether a new trial should or should not be ordered will depend on whether the Court of Criminal Appeal is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed—Section 5 (2), *proviso*. We would draw attention to the decision of the House of Lords in *R. v. Stirland* [4] where Lord Simon, Lord Chancellor, held:—

'' The provision that the Court of Criminal Appeal may dismiss an appeal if they consider that no substantial miscarriage of justice has

[1] *(1946) 47 N. L. R. 83.*
[2] *(1946) 47 N. L. R. 234.*
[3] *(1948) 50 N. L. R. at p. 257.*
[4] *(1943) 30 Cr. App. R. 40.*

actually occurred in convicting the accused assumes a situation where a reasonable jury after being properly directed would on the evidence, properly admissible, *without doubt* have convicted ".

Therefore, the question which we have to ask ourselves in the present case is whether, despite the alleged misdirection, a reasonable jury after being properly directed would on the evidence *without doubt* have convicted these appellants ? We are of opinion that that question should be answered in the affirmative.

In dealing with this question it will be necessary to recapitulate briefly the facts of this case:

The Ceylon Turf Club holds a race meeting on certain Saturdays of the month. At the close of the day of such race meets there would be available in the hands of the officials of the Club a considerable sum of money in cash and cheques which they send to their bank on the following Monday. The procedure observed was for a motor car to be hired from the Armstrong's Garage. Into this car the money in boxes or cases was loaded and placed in charge of a servant of the Club who had a police inspector as an escort. Another car or van would be detailed to follow the car containing the money as a greater precaution. Anybody who desired to ascertain the routine followed by the Turf Club in sending this money to the bank could easily obtain the requisite information.

The case for the prosecution is that the eight accused and others formed a conspiracy to waylay and rob the money of the Turf Club on Monday, January 31, 1949, when it was being conveyed to the bank. It was a prize worth winning for the amount involved in this case was about three lakhs in cash. This money the robbers succeeded in obtaining.

The evidence proves that in pursuance of this conspiracy they secured the services of the accomplice Rupananda de Silva. The conspirators met on the 22nd and 24th of January, and at the behest of the 7th accused, Rupananda on January 25 went to Armstrong's Garage and booked a large car, No. Z 6033, of which the driver was the deceased, K. John Silva. The car was booked for Sunday, January 30, by Rupananda in a false name for a trip to Puttalam which is about 80 miles from Colombo.

The race meet took place on Saturday, January 29, and on the same day the 7th accused hired the small car, which was owned and driven by the 2nd accused—car No. CE 7577, also for a trip to Puttalam on the following day.

On Sunday, January 30, 1949, at about 2 p.m., Rupananda went to the Armstrong's Garage, and obtained the car Z 6033. The car was driven by the deceased man. The 6th accused, who is an *ex*-policeman, and to whom was assigned the role of impersonating the Inspector of Police at the hold-up on the following day, sat in the back seat with Rupananda. At the Victoria Bridge exit from Colombo, the 5th accused, who was waiting there by arrangement, entered the car and sat besides the deceased. The case for the prosecution is that the 5th accused, who is an *ex*-army driver, was needed to drive this car after the deceased man had been murdered. To him it is alleged was assigned the role of driving the car on the following day.

In the meantime, motor car No. CE 7577 driven by the 2nd accused with the 7th and 8th accused had independently started off for Puttalam. At Ja-ela the big car Z 6033 overtook the small car.

Motor car Z 6033 reached Puttalam at about 5 p.m. well ahead of the small car. They halted near the Victory Hotel at Puttalam in order to kill time. They had a meal of fish and eggs and a drink of arrack, and the deceased man was invited to partake of it. Thereafter Rupananda and the 6th accused left the hotel to contact the 7th and 8th accused. The prosecution submits that at that meeting the final details of the plan regarding the elimination of the deceased were decided upon. The plan was that the small car with the 7th and 8th accused was to proceed ahead along the Puttalam-Anuradhapura Road—a desolate and lonely road with dense jungle on both sides—and await the other car at culvert No. 13/4. In order to synchronise the times, Rupananda was handed the wrist watch P7. Rupananda, the 5th and 6th accused in car Z 6033 were to proceed along the Puttalam-Anuradhapura Road, and the 5th accused was told to keep complaining about a stomach ache, which would serve as an excuse for stopping car Z 6033 at culvert No. 13/4.

After receiving their instructions Rupananda and the 6th accused returned to the Victory Hotel, and car Z 6033 started off according to plan, the 5th accused complaining that he had a stomach ache.

The 2nd accused stated in evidence that the 7th and 8th accused on the pretext of meeting a timber contractor asked him to drive the small car along the Puttalam-Anuradhapura road, and at the culvert they alighted and ordered him to turn the car. Second accused says that as he could not turn the car at that spot, he proceeded some distance when one of the sparking plugs of his car began to give trouble. He, therefore, pleaded ignorance of what took place thereafter near the culvert. It is immaterial to this appeal whether this story is true or false.

It is clear that the 7th and 8th accused having alighted from the small car were hiding in the jungle disguised. The 8th accused was wearing a service gas mask P8 and had a rope with him. The 7th accused had covered part of his face with a black handkerchief.

Car Z 6033 came along, and at the culvert the urgencies caused by the bogus stomach ache made it essential that the 5th accused should alight to enable him to ease himself in the jungle. The other occupants of the car including the deceased man also alighted to stretch their limbs. It is to be noted that the deceased man, who was 56 years old, had been driving over one hundred miles that day.

The case for the prosecution is that for the success of the conspiracy to rob the Turf Club of its money on the following day, it was absolutely essential for the robbers (*a*) to substitute another of Armstrong's cars for the car which would go to the Club to take the money, (*b*) to substitute a bogus police inspector for the real police officer who was to be the escort, and (*c*) to substitute with their own man (the 5th accused) a new driver for the car which was to take the money, in place of the deceased John Silva. As regards the substitution of the driver, the submission for the Crown is that it was a fundamental point that John

Silva had to die. The Crown submits that this conspiracy had been planned with the greatest care. The object of the robbers was to avoid detection. The whole plan would come to naught unless John Silva was completely eliminated. There was no point in abducting him temporarily, and then letting him loose to appear as the chief witness against the conspirators at their trial—" Dead men tell no tales ".

The burden of proof was on the prosecution to establish beyond reasonable doubt that the deceased man was murdered. There is no burden cast on the prosecution to go further and to establish the manner in which the deceased was killed, provided the prosecution was able to prove that the man was in fact murdered. We are mindful of the words of Scrutton J. in charging the jury in the case of *R. v. George Joseph Smith* [1]:—

> " I direct you . . . . . that it is not necessary that you should be satisfied exactly how the death was caused, if you are satisfied that it was caused by a designed act of the prisoner. I direct you that in my own words and I also direct you in the words of a judgment which I regret has not been more widely circulated in England—the judgment of Mr. Justice Windeyer of the Australian Courts:—' All that the law requires is that the offence charged must be proved. In proving murder the exact mode of killing becomes immaterial if there is sufficient evidence to satisfy a jury that there was a killing by the prisoner under conditions which make it murder ' ".

No exception was taken in the English Court of Criminal Appeal to that summing-up which we think lays down the correct principle of law. We agree with learned counsel for the 6th accused that there, however, may be cases in which in proving the murderous intention of the prisoner, the mode of killing may become relevant and necessary.

The case for the prosecution was that the deceased man did not die a natural death—for he had no disease; that he did not die of suicide, because it is inconceivable that a Colombo motor car driver would go a 100 miles into the wilderness and commit suicide by tying himself to a tree; or that he died by some accidental means. The evidence clearly negatives those three causes of death. Therefore; what remains must necessarily be a death due to homicidal violence which, of course, may be murder or culpable homicide not amounting to murder, or even something less. The case for the prosecution was that it was a fundamental necessity for the successful carrying out of the conspiracy that John Silva should not live to testify. By the time the body was discovered, namely on the afternoon of February 3, 1949, it was in an advanced state of decomposition.

The case for the prosecution was that the deceased man having been lured into the jungle, was tied to a tree and then suffocated by means of the gas mask P8 which was placed over his head, and by the squeezing of the tube which admitted air for breathing. At the scene were the 5th, 7th and 8th accused and the accomplice Rupananda, while the 6th accused, who was privy to the conspiracy, waited on the roadside by the big car, while the 2nd accused (if this story is true) was cleaning a defective sparking plug further down the road.

[1] (*1915*) *Notable British Trials, pp. 271–272.*

[The Court then considered the evidence in detail, and pointed out that not only did the scientific and other evidence corroborate the accomplice Rupananda de Silva, but also that the uncontradicted medical evidence conclusively proved that the deceased man had died at or about the time he was tied to the tree in the forest, and not, as contended by the defence, several hours after the appellants had left the scene. The Court then continued:—]

Therefore, taking all the facts and circumstances as a whole, we are of opinion that despite the alleged misdirection a reasonable jury having all these facts and circumstances before them without doubt would have convicted these appellants of committing the murder of the deceased man by suffocating him with a gas mask at or about 6 or 7 p.m. on January 30, 1949. We therefore think the convictions under Count 2 must be affirmed.

We are unable to distinguish the case of the 6th accused from that against the other three appellants. It is true that he was physically not present at the time the deceased man was murdered but we are of opinion that having regard to all the facts and circumstances he was an abettor of this murder, and as such equally liable with his co-conspirators. His learned counsel conceded that the 6th accused was privy to the tying up of the deceased in the jungle. It is clear that not only was it the intention of the robbers to tie up the deceased man in the jungle but it was also their intention to kill him there, and, therefore, the 6th accused is equally guilty with his co-conspirators in everything they did in order to give effect to their common plan. We agree with the submissions of the Attorney-General with regard to the 6th accused. He knew that the deceased had to die. He gave no evidence at the trial. He is an *ex* police officer and with true police caution he did not like to be seen carrying the incriminating suit case in which the uniform which he was to use the following day was packed. We do not think the fact that the 6th accused was on the road by the car while the others murdered the deceased makes any difference to his case. Somebody had to be by the big car. This is a main road and any passer-by who saw a large car standing unattended on a lonely forest road, might be tempted to stop and make inquiries which would be extremely inconvenient for those who were murdering the deceased in the jungle. Therefore, the 6th accused or some other person had to be by the car. The Attorney-General argues that if his companions told him that they had merely tied the deceased to a tree, the 6th accused as an *ex* police officer would never have kept quiet for his own safety, because if John Silva remained alive he would indubitably have given evidence against the 6th accused whom he saw in circumstances in which he would have been able to identify him.

It was further contended that with regard to the 2nd definition of murder, it would be applicable to this case in the event of the jury rejecting the case for the prosecution that the man had been deliberately suffocated by means of the gas mask. The words of this 2nd definition require that death should be caused by the "doing of an act with the intention to cause bodily injury and the injury intended to be caused is sufficient in the ordinary course of nature to cause death". The learned

trial Judge did not use these words. It was argued for the appellants that the jury might understand this to mean that, if the assailant inflicts an injury by an intentional act, and the injury inflicted is sufficient in the ordinary course of nature to cause death, then, there is a murderous intention irrespective of whether the injury intended to be inflicted would be sufficient or not. It was submitted that if the jury held that it was an intentional act of the accused which caused the injury (asphyxia and/or shock) they may not have gone on to consider the further question whether asphyxia and/or shock was intended, or whatever bodily injury was intended would be sufficient in the ordinary course of nature to cause death. For the reasons we have given we do not think it is necessary to consider this question any further. We would, however, point out that in view of the manner in which count 2 of the indictment in this case has been framed, it appears to be doubtful whether count 2 brought into operation this 2nd definition of murder at all which would more appropriately be caught up within the ambit of count 3 and 4. We however do not decide this point. We are of opinion that the jury without any doubt on these facts and circumstances would have held that it was the 1st definition of murder which applied, namely causing death by doing an act with the intention of causing death.

Mr. Jayawickrema who appeared for the 5th accused submitted that the learned trial Judge after his client had given evidence subjected him to a series of questions after what counsel characterised " as the ineffective cross-examination of the 5th accused by the Crown ". He submits that this act of the learned trial Judge caused his client prejudice. We are unable to agree with this contention. Section 165 of the Evidence Ordinance clearly entitles a trial judge to put such questions. Obviously the trial judge must not put questions so as to afford grounds for the legitimate criticism that the accused had not had the benefit of a fair trial—*R. v. Namasivayam* [1]. Furthermore, it was held in *R. v. Dharmasena* [2] that unfair or hostile cross-examination of the accused by the trial judge might amount to a miscarriage of justice. Neither of these cases has any application to the facts of the present case. A trial judge must be allowed the utmost freedom to ask questions, provided it is done fairly ; and we have neither the power nor the inclination to ignore either the letter or the spirit of section 165 of the Evidence Ordinance.

It was also argued that the verdict of the jury in this case was unreasonable. For the reasons we have given at length we find it impossible to accede to that argument.

During the argument the question was raised as to whether it was proper for learned counsel to stand by without interrupting the trial judge if they found that he was making a gross error either of fact or of law. We do not wish to say anything more on this question than to point to the observations of Lord Simon, Lord Chancellor, in *R. v. Stirland* [3] where he said: " The failure of counsel to object may have a bearing on the question whether an accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the

[1] *(1948) 49 N. L. R. 289.* [2] *(1949) 50 N. L. R. 505.*
[3] *(1943) 30 Cr. App. R. 40.*

time in order to preserve a ground of objection for a possible appeal ". No doubt that *dictum* was pronounced in regard to the putting of an improper question to a winess, but it seems to us that that *dictum* is sufficiently wide to include a misdirection on a question of law or fact by the learned trial Judge in his summing-up—see *R. v. Neal* [1]. We must not be taken to imply any censure on learned counsel for the defence who, if we may say so, conducted the defence of their clients with conspicuous ability. It is obvious that the passage in the summing-up which is now objected to passed unnoticed at the time by counsel on both sides, and it is to be observed that even in the petitions of appeal no specific reference has been made to this misdirection.

Finally, the question was raised as to whether in the Court of Criminal Appeal the appellants have a right of reply ? We decided this point in a short judgment after the argument. We repeat that the appellants have no right to be heard in reply in an appeal before the Court of Criminal Appeal, but that it is in the discretion of the Court in proper cases to allow the appellants to be heard on any point or points on which the Court may wish to receive further assistance from the appellants after the Crown has concluded its submission. In such cases we think the appellants should state to the Court on what point or points they wish to address the Court, but the ultimate decision whether the appellants should be heard or not must rest with the Court. Learned counsel for the 6th accused referred to section 10 (1) of the Court of Criminal Appeal Ordinance where it is provided " For the purpose of this Ordinance the Court of Criminal Appeal may, if they think it is necessary or expedient in the interests of justice ", do certain things, " and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals in civil matters ". Learned counsel did not seek to argue that this provision brought into operation the right of reply given to the appellant in civil appeals under section 769 of the Civil Procedure Code. We are of opinion that the provisions of section 769 of the Civil Procedure Code relating to the right of reply cannot be regarded as " powers of the Supreme Court " which are referred to in section 10 (1).

The applications and appeals are dismissed.

Applications and appeals dismissed.