[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Dias S.P.J. (President), Gratiaen J. and Gunasekara J.**

DAVID SILVA *et al.*, Appellants, *and* THE KING, Respondent.

Appeals 25 to 28 with Applications 39 to 42

S. C. 9—M. C. Kalutara, 7,083

Summing-up—Circumstances in favour of accused—Duty of Judge to refer to them—Misdirection—When not fatal.

In a trial by jury the defence put forward on behalf of the accused must be put to the jury in the summing-up and must not be excluded from their consideration.

In reviewing the evidence in the summing-up, it is the duty of the presiding Judge to refer not only to material portions of the evidence on which the accused relies but also to a material admission made by a prosecution witness which is favourable to the defence.

Where it is very far from " reasonably probable that the jury would not have returned the same verdict if properly directed ", a misdirection as to the evidence would not vitiate a conviction.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

H. V. Perera, K.C., with *Christie Fernando*, for the first accused appellant.

C. S. Barr Kumarakulasinghe, with *A. S. Vanigasooriyar*, for the second and third accused appellants.

M. M. Kumarakulasingham, with *J. C. Thurairatnam*, for the sixth accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 23, 1951. GRATIAEN J.—

These appeals relate to an incident which took place on the afternoon of April 16, 1950, when a bus belonging to the South Western Bus Company was carrying 55 passengers, including 14 children, from Aluthgama to Colombo. The driver of the bus was a man named Geedin Silva. I shall narrate the facts as they occurred, omitting at this stage any events which may be regarded as controversial. As the bus was proceeding along the public highway according to schedule it approached a spot very close to the house of the first accused. Geedin was then compelled to slow down his bus because its passage was obstructed by a bullock cart which had been left unattended on the road and because 6 or 7 men were preparing to cause further obstruction at the same spot by dragging a log of wood across the path of any approaching vehicle. As the bus slowed down, 2 or 3 of the passengers without any provocation assaulted Geedin while he was still at the steering wheel, causing him an injury on his head. He halted the bus, and at the same time a number of people standing on the road rushed up to the bus. They were armed with clubs and sticks, and it was clear from their attitude that their intention was to attack Geedin. He attempted to escape, but some members of the gang dragged him out of the bus to the side of the road, and, in the words of two medical officers who gave evidence at the trial, he was " badly beaten up ", sustaining a compound fracture and a number of contusions and lacerated wounds. The bus was also damaged.

Six persons, including the 4 appellants, stood their trial at the Colombo Assizes in connection with this incident on the following counts :—

(1) being members of an unlawful assembly the common object of which was to cause hurt to Geedin Silva and to commit mischief by damaging the bus ;

(2) rioting ;

(3) the attempted murder of Geedin Silva in prosecution of the common object of the unlawful assembly ;

(4) committing mischief by causing damage to the bus in prosecution of the common object.

There were two alternative counts of attempted murder and mischief simpliciter but no verdicts were pronounced in respect of them in view of the findings of the jury on the earlier counts.

The first question for the consideration of the jury was whether it had been proved that some persons (whoever they might be) had formed themselves into an unlawful assembly with the common object of committing the offences specified in the first count in the indictment. On this point it seems to us that there could be only one answer. The undisputed facts of the case lead to the irresistible conclusion that more than five persons, some of them passengers in the bus and others waiting in preparation on the public highway near the house of the first accused, had in accordance with a pre-arranged plan formed themselves into an unlawful assembly with the common object of assaulting Geedin and

damaging the bus in his charge. The preliminary assault on Geedin in the bus at the time and place of its occurrence, the calculated obstruction of the passage of the bus, the concerted removal of Geedin from the bus, and the subsequent assault on his person while he was lying on the side of the road could not have been merely isolated transactions, perfectly synchronized but conceived by separate individuals acting independently and without a common object in contemplation. The commission of the offences specified in the first and second counts in the indictment, and of the other offences in prosecution of the common object of the unlawful assembly, have been very clearly established by the prosecution. The only substantial issues for the consideration of the jury related to the alleged complicity of each accused in these offences.

The jury unanimously found the first accused and the second accused guilty on counts 1, 2 and 4, and on the third count of the lesser offence of grievous hurt. Similar verdicts, by a majority of 5 to 2, were pronounced against the third and sixth accused. The fourth and fifth accused were unanimously acquitted on all counts. The first, second, third and sixth accused have appealed against their convictions and sentences.

It will be convenient if we first dispose of the appeals of the third and sixth accused. The case against each of them, as well as against the fourth and fifth accused who were acquitted, rested solely on the evidence of the injured man Geedin and of Piyasena who was the cleaner of the bus. Both these witnesses stated at the trial that the third, fifth and sixth accused were the persons who had taken part in the original assault on Geedin while he was still in the bus in which they were travelling as passengers, and that the fourth accused was a member of that part of the unlawful assembly which had collected on the road and dragged Geedin out of the bus. By a remarkable coincidence, however, both Geedin and Piyasena had in their earlier versions before the committing Magistrate reversed the roles attributed to the fourth and fifth accused respectively. This serious contradiction was fairly and adequately put to the jury in the learned Judge's charge, and it is more than probable that their unanimous verdict acquitting the fourth and fifth accused was influenced by this circumstance which certainly justified doubts as to the reliability of the two witnesses when they purported not only to identify the fourth and the fifth accused but also to attribute to each of them particular acts allegedly committed in the course of the transaction.

The complaint made by learned Counsel on behalf of the third and sixth accused is that their respective defences, and the infirmities in the evidence of Geedin and Piyasena who alone implicated them, had not been put to the jury *at all* in the summing-up. For instance, Piyasena admitted that he had known the third and sixth accused previously by name. Nevertheless in his earlier statement which was recorded by a police officer at an investigation held on the day of the incident, he did not mention either the third accused or the sixth accused as having taken any part in the transaction. This was certainly a strong circumstance in favour of the defences of both these accused persons, and in the circumstances of the case it was the duty of the presiding Judge

to have directed the Jury's attention to it specifically. The defence of each prisoner should have been adequately put to the jury. Not only was this not done, but there is, in our opinion, much substance in the complaint that the learned Judge went further and in effect excluded the defence of the third and sixth accused from the jury's consideration. For instance, the learned Judge said at one stage " *it is clear that the third and sixth accused were two of the people who assaulted this man (Geedin) in the bus* ", and there are at least two other passages in the summing-up which could reasonably have been construed by the jury as direction to the effect that the only issue of fact which they were required to consider in connection with the assault which took place in the bus was whether either the fourth accused or the fifth accused was associated with the third and the sixth accused in that particular incident. Possibly, the learned Judge *intended* only to express a strong opinion which he himself may have entertained as to the guilt of these two men. But the language employed was, to say the least, calculated to give the impression that the jury were themselves precluded from arriving at their own independent decision on the point. In *R. v. Mills* [1], the Court of Criminal Appeal in England held that a conviction for murder must be quashed " on the ground that the defence put forward on behalf of the appellant was not put to the jury in the summing-up, and because a particular sentence (in the summing-up) excluded that defence from their consideration ". Similarly, in *R. v. Raney* [2], a conviction was quashed because the Judge, in reviewing the prisoner's evidence in his summing-up, had omitted to refer to a material portion of the evidence in the summing-up. The same principle would, of course, apply when a prisoner relies not on his own evidence but on a material admission, made by a prosecution witness, which was favourable to his defence. For these reasons we think that there was a grave misdirection resulting in a substantial miscarriage of justice. It is impossible to say that a reasonable jury, properly directed on the issue of identification, would not have acquitted the third and sixth accused as well as the fourth and fifth accused. In arriving at this conclusion, we cannot lose sight of the fact that both these accused, unlike the other appellants, had been found guilty on majority verdicts, and that in the case of one of them, a majority verdict acceptable in law was not reached until the jury had retired a second time. For these reasons the Court makes order quashing the convictions of the third and the sixth accused on all counts.

With regard to the appeal of the first accused, quite apart from the evidence of Geedin and Piyasena which seriously implicates him, there was a strong body of independent evidence, which the jury must be presumed to have accepted, to support his convictions. The witness Lionel Goonewardene, a store-keeper employed by the Co-operative Department, was a passenger in the bus and it is conceded that he gave a disinterested account of the incidents which he observed. He states that when the crowd came up to the halted bus in order to remove Geedin the first accused was standing and shouting " at the same exit of the bus as the one through which the assailants came ". He admittedly " did not see the first accused do anything to anybody or the bus ", but

[1] *(1935) 25 C.A.R. 138.* [2] *(1942) 29 C.A.R. 14.*

" amongst the crowd he saw the first accused and the crowd shouting ". Another passenger in the bus was Nicholas Silva, the Superintendent of the Government Leather Factory. He had not met the first accused previously but identified him at an identification parade. He too testifies to a crowd coming up to the bus " armed with clubs and iron bars ", and says that he " saw the first accused near the bus creating a scene . . . . . and shouting and doing something ". A third disinterested witness who was a passenger in the bus at the time of the incident was Edward Jayawardene, an insurance assistant. He " saw a gang of men coming towards the bus armed with iron bars and sticks. Suddenly people came and surrounded the bus . . . . and there was a struggle inside the bus with the driver ". He too identified the first accused at the identification parade, and says that " the first accused was running about shouting near the exit of the bus while the struggle was continuing inside the bus ". The learned Judge told the jury in the course of his summing-up that Jayawardene claimed to have seen the first accused " in front of the gang ", and we have observed that this statement does appear in the learned Judge's notes of Jayawardene's evidence, although no statement in precisely those words has been recorded in the transcript of the proceedings. The first accused was in any event entitled to rely on Jayawardene's admission, which was specially brought to the jury's notice, but he did not intend to convey the idea that the first accused had taken any part in the actual attack on Geedin. The evidence of Sub-inspector Liyanage, who arrived on the scene by chance in the company of Inspector Mendis shortly after Geedin had been attacked on the side of the road, also implicated the first accused. He says that on his arrival he saw the first accused " in the centre of the road away from the bus gesticulating and shouting out". His evidence continues that when the police car drove up towards the first accused " he was adopting a threatening attitude. He was holding forth and shouting out abuse ". Liyanage then observed Geedin lying on the side of the road with bleeding injuries and attended to him. In the meantime, he says, " the first accused had run away ". Finally the evidence of Geedin must be considered. Even if we assume that his testimony should have been approached with great caution (as the learned Judge seems to have suggested to the jury) a circumstance which lent considerable weight to his testimony against the first accused was that, as soon as the police officers went up to the injured man at the scene, he said to Sub-inspector Liyanage that " David (i.e., the first accused) and his party had assaulted him ".

Admittedly, then, the first accused was present at the scene where some members of an unlawful assembly were lying in wait in order to hold up the bus and assault its driver. He has given no evidence and offered no explanation of his boisterous behaviour during the transaction except to suggest that his conduct was equally consistent with that of " a peacemaker ". It seems to us that he has no cause for legitimate complaint if the jury rejected this as a fanciful theory, having regard particularly to the circumstance that he did not choose to deny the allegation that, on the unexpected arrival of the police officers, he vanished from the scene. It must be remembered that, in addition to the evidence to which I have already referred, the jury had before them

Geedin's unchallenged evidence that there was pending at the time a criminal prosecution against the first accused on a charge of causing damage to a bus belonging to Geedin's employers, and the uncontradicted evidence that on the previous day after a quarrel with Geedin, he had threatened to "*teach him a lesson*" or words to that effect. In our opinion there is no substance in the complaint that the verdict against the first accused was unreasonable. Nor are we satisfied that there was any misdirection in the summing-up as to the nature and effect of the witness Jayawardene's evidence which implicated him. Such an alleged misdirection would not in any event have amounted to a misdirection as to the law, and in accordance with the principles laid down in *R. v. Cohen* [1], we are content to say that it is very far from "reasonably probable that the jury would not have returned the same verdict if properly directed" on the point. We dismiss the appeal of the first accused.

We also take the view that there is no merit in the appeal of the second accused. The only ground on which he sought to challenge his conviction was that the verdict against him was unreasonable. He is a brother of the first accused, and he too was admittedly present when the incident occurred. Here again, quite apart from the evidence of Geedin and Piyasena against him, which he did not choose to contradict, his unexplained conduct, as testified to by Sub-inspector Liyanage, in relation to the cart which was obstructing the passage of the bus, might well have influenced the jury's verdict against him. Liyanage says that he saw the second accused trying to push the cart while another man was attempting to prevent him from doing so. Liyanage's impression of the second accused's behaviour was that he was trying to push the cart against the bus to make it look as if there had been a collision between the two vehicles. Liyanage's uncontradicted evidence that when he "rushed up" to the second accused on observing this incident, the second accused "ran away" was a further circumstance which the jury was entitled to act upon. Indeed, the opinion of this Court is that the learned Judge's charge on this aspect of the case was unduly favourable to the second accused, and that the jury, as the judges of fact, were entitled to take a different view of the effect of Liyanage's evidence. There was evidence upon which the jury could reasonably hold that the second accused was identified with the members of the unlawful assembly and with their common object. We therefore dismiss the appeal of the second accused.

In the result, we affirm the convictions of the first and second accused and quash the convictions of the third and sixth accused. We refuse the applications of the first and second accused for leave to appeal against their sentences. Learned Counsel made no submissions to us in support of these applications, and our own opinion is that the sentences passed on these men erred on the side of leniency.

Convictions of 1st and 2nd accused affirmed.

Convictions of 3rd and 6th accused quashed.

[1] *(1909) 2 C.A.R. 197.*