# ILANGATILAKA AND OTHERS

v.

# THE REPUBLIC OF SRI LANKA

SUPREME COURT.
COLIN-THOMÉ, J., ABDUL CADER, J. AND RODRIGO, J.
S.C APPEALS 59/82 AND 62/82 – H.C. COLOMBO 3169.
MARCH 21, 1984.

*Criminal law – Evidence Ordinance, sections 114 (b) and 133 – Accomplice evidence – Corroboration – Failure of accused to explain his conduct – When may adverse inference be drawn ?*

The 2nd and 3rd accused-appellants along with the 1st accused were indicted before the High Court on two counts of housebreaking and theft punishable under sections 443 and 369 respectively of the Penal Code. All three accused were convicted on both counts and sentenced to imprisonment. The only independent evidence for the prosecution was given by one Abdeen. The other two witnesses for the prosecution were accomplices. The Court of Appeal dismissed the appeals of the 2nd and 3rd accused-appellants but granted them leave to appeal to the Supreme Court on the following grounds:–

(*a*) Whether those items of evidence of witness A. Abdeen relating to the 2nd and 3rd accused-appellants amount to corroboration ;

(*b*) If so, whether such corroboration is of such a high probative value as to justify the conviction of the 2nd and 3rd accused-appellants upon the charges framed against them.

**Held –**

(1) While it is legal to convict upon the uncorroborated evidence of an accomplice it is a rule of practice which has become virtually equivalent to a rule of law to regard it as dangerous to so convict. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

(2) The corroboration must proceed from an independent source, and it must be weighed as to its probative value. It must confirm in some material particular not only that the crime has been committed but also that the accused committed it. The corroboration need not extend to the whole story nor need it be by direct evidence that the accused committed the crime ; it is sufficient if the evidence is merely circumstantial

(3) The evidence of Abdeen coupled with the circumstances in which the crime was committed and the failure of the 2nd and 3rd accused to give an explanation constitute independent corroboration on material particulars both as to the identity of the accused and their connection with the crime

(4) Where a strong prima facie case has been made out against an accused and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it would justify the conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests

**Cases referred to :**

(1) *R v. Atwood and Robbins, (1787) 1 Leach 464 , 168 ER 334*

(2) *R v. Stubbs, (1855) Dears 555.*

(3) *In Re Meunier, (1894) 2 QB 415.*

(4) *P. Saravanamuttu v R. A de Mel, (1948) 49 N.L.R 529, 560.*

(5) *Rex v. Baskerville, [1916] 2 KB 658 : [1916 – 17] All E.R. 38.*

(6) *The Queen v. Liyanage, (1965) 67 N.L.R. 193, 212, 213.*

(7) *The Queen v. Jayasinghe, (1965) 69 N.L.R. 314, 325.*

(8) *R v. Lord Cochrane and others, (1814) Gurney's Reports 479.*

APPEAL from an Order of the Court of Appeal.

*Ranjith Abeysuriya* with *V. C. Ratnayake* and *P Abeykoon* for the 2nd accused-appellant.

*J. C. Boange* for the 3rd accused-appellant.

*Rohan Jayatilake*, D.S.G., for the Attorney-General.

*Cur adv. vult*

April 5, 1984.

COLIN-THOME, J.

The 2nd and 3rd accused-appellants along with the 1st accused were indicted before the High Court on two counts :–

(1) That between the 5th of March and 31st March, 1975, they did commit housebreaking by night by entering the Wekande Stores of the Sri Lanka State Trading (General) Corporation, an offence punishable under section 443 of the Penal Code

(2) That in the course of the same transaction, they did commit theft of pistons and piston rings valued at Rs. 62,500 which were in the possession of the Head Store Keeper S.L.D.E. Samarasekera of the Sri Lanka State Trading (General) Corporation, an offence punishable under section 369 of the Penal Code.

After the trial without a Jury the learned High Court Judge convicted all three accused on both counts and imposed sentences of one year on each count on the 1st accused, 2 years on each count on the 2nd accused and 3 years on each count on the 3rd accused ; all sentences were to run concurrently.

All three accused appealed to the Court of Appeal. During the course of the argument in the Court of Appeal learned State Counsel submitted that he was restricting the case to the events of 31.3.75 and hence he had no objection to the appeal of the 1st appellant being allowed, as there was no corroboration of the evidence of the two accomplices in the case against him regarding the housebreaking and theft on 5.3.75. Furthermore, Samarasekera, Head Store Keeper, had stated at the trial that the goods were imported from India on 10th March, 1975, so that they could not have been stolen on the 5th March. Samarasekera, however, gave this evidence from memory without reference to documents. The accomplices did not implicate the 1st accused-appellant in the second housebreaking and theft on 31.3.75. The Court of Appeal allowed the appeal of the 1st accused appellant, quashed his conviction and acquitted him. The Court of Appeal dismissed the appeals of the 2nd and 3rd accused-appellants and thereafter ex mero metu granted the 2nd and 3rd accused-appellants leave to appeal to the Supreme Court on the following grounds :–

(*a*) Whether those items of evidence of witness A. Abdeen relating to the 2nd and 3rd accused-appellants amount to corroboration ;

(*b*) If so, whether such corroboration is of such a high probative value as to justify the conviction of the 2nd and 3rd accused appellants upon the charges framed against them.

At the time of the alleged offence the 1st and 2nd accused-appellants were security officers and the 3rd accused-appellant was a security guard attached to the Wekande Stores belonging to the State Trading Corporation. According to the witness Bernard, a security guard attached to the Wekande Stores, on 5.3.75 the 3rd accused-appellant suggested that they steal pistons from the store at Wekande by detaching a locked sliding door from its groove and causing an opening. The other accused-appellants and Bernard agreed to this suggestion and they abetted the 3rd

accused-appellant in removing 10 boxes containing pistons from the store. They also helped to put the door back in position. The 3rd accused-appellant then took these boxes to Mahatun outside the gate and Mahatun removed them in a taxi to his house in Kelaniya. Subsequently, the 3rd accused-appellant gave Bernard a sum of Rs. 2,000. According to Mahatun he sold the 10 boxes of pistons for Rs. 15,000 and gave Rs. 12,000 to the 3rd accused-appellant. Similarly, on 31.3.75, sometime after 10 p.m., Bernard together with the 2nd and 3rd accused-appellants once again broke into the store at Wekande in the same manner as they had done previously and removed 15 boxes of pistons and 18 or 19 boxes of piston rings from the store. Mahatun removed these boxes by taxi to his house at Kelaniya.

On 1.4.75 the Store Keeper Samarasekera discovered the theft of the pistons and piston rings which had been imported from India. The State Trading Corporation was the sole importer of this brand of pistons and piston rings valued at Rs. 62,500. Subsequently, on 8.4.75 Sub-Inspector Oorloff of the Slave Island Police recovered the 15 boxes of pistons and 18 boxes of piston rings from Mahatun's house at Kelaniya.

The learned Trial Judge had correctly regarded both Mahatun and Bernard as accomplices and looked for corroboration from the witness Abdeen and other circumstances in the case. Abdeen, a driver attached to the State Trading Corporation, was regarded as an independent witness. According to him he knocked off duty at 12.30 a.m. on the night of 31st March – 1st April, 1975. The 2nd accused-appellant was on duty at the Stores on the 31st night along with Bernard from 10 p.m. to 6 a.m. Abdeen saw Bernard that night going towards the store. He saw the 2nd accused appellant also go in that direction. The 3rd accused-appellant was on the premises that same night, although the 3rd accused-appellant was not on duty until the following morning. Furthermore, the 3rd accused-appellant made his presence felt by ordering Abdeen to go to the canteen and threatened Abdeen if he did not obey this direction.

Learned Counsel for the accused-appellants submitted that as both Mahatun and Bernard were self-confessed accomplices they could not corroborate each other. Corroboration had to proceed from an independent source. Abdeen was the only independent witness for the prosecution ; the totality of his evidence was of negligible probative value.

Under section 133 of the Evidence Ordinance :

"An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

This is read with section 114 (*b*) of the Evidence Ordinance :

"The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars :"

These statutory provisions have adopted the common law of England relating to accomplices. There is no doubt that the uncorroborated evidence of an accomplice is admissible in law : See *R v. Atwood and Robbins* (1). But it has long been a rule of practice at common law for a judge to warn a jury that it is extremely dangerous to convict a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence ; the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence : *Reg. v. Stubbs* (2), *In re Meunier* (3). This rule of practice has become virtually equivalent to a rule of law.

The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal who has cast his erstwhile associates and friends to the wolves in order to save his own skin. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

There is also a rule of common sense that one accomplice cannot corroborate another accomplice. Tainted evidence is not made better by being double in quantity. Corroborative evidence against some of the accused cannot be used to accept the evidence of the accomplice as regards the other accused. It will suffice if the accomplice is corroborated on one or more material particulars as regards each of the accused persons he implicates. The corroboration need not extend to the whole story : See *P. Saravanamuttu v. R. A. de Mel* (4).

The best exposition of the nature and extent of corroboration yet to be found is in *Rex v. Baskerville* (5). Lord Reading, C.J. giving the judgment of a very strong Court of Criminal Appeal, said :

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it. . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be by direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstancial evidence of his connection with the crime."

This decision of the Court of Criminal Appeal in England has been followed in several decisions in India and Sri Lanka : See *R. v. Liyanage* (6) and *R. v. Jayasinghe* (7) where Sansoni, C.J. observed that :

> "Corroboration like all evidence. . . . . had to be weighed. It may be legally admissible for the purpose of corroboration, but its probative value as corroboration may be very slight or even nil."

It now remains to examine the facts against each appellant separately in the light of the above dicta. The 2nd accused-appellant was a security officer attached to the State Trading Corporation. He was on duty on 31.3.1975 from 10 p.m. to 6 a.m. at Wekande, when a store on the premises he was guarding was broken into and a large quantity of motor spare parts in boxes were removed from the store and taken out of the premises, and subsequently traced to the house of Mahatun at Kelaniya. In order to break into the store several persons had to lift a heavy sliding door, derail it, and move it to a side to effect an opening. One of the conspirators then entered the store and removed as many as thirty three boxes containing motor spare parts (18 boxes of pistons and 15 boxes of piston rings). Thereafter,

the sliding door had to be replaced in its original position. According to Mahatun the motor spare parts were then taken in a taxi to his house in Kelaniya. All these events which would have taken some time took place while the 2nd accused-appellant was on guard duty on the premises. It is inconceivable that this large quantity of motor spares could have been stolen, undetected by the 2nd accused-appellant, while he was on duty on the premises. According to Abdeen his duty period on 31.3.75 ended at 12.30 a.m. when he handed over the vehicle in his charge to the Corporation. The persons on duty at that time were the 2nd accused-appellant and Bernard. He saw Bernard going towards the store. The 2nd accused-appellant also went that way. Abdeen also noticed a taxi halted by the gate when he was leaving the premises.

Abdeen saw the 3rd accused-appellant on the premises late at night, although the 3rd accused-appellant was not on duty until the following morning. The unauthorised presence of the 3rd accused-appellant on the premises would have been observed by the 2nd accused-appellant. The 3rd accused-appellant acted in a strange manner. He ordered Abdeen to remain in the kitchen of the canteen without leaving the premises and threatened him if he did not do so. There was no one else in the canteen at the time.

The 2nd and 3rd accused-appellants did not give evidence at the trial. The 2nd accused-appellant did not offer any explanation how the store was broken into and 33 boxes of spare parts removed from the premises when he was on security guard duty. Similarly, the 3rd accused-appellant offered no explanation to his unauthorised presence on the premises late at night on the 31st and why he directed Abdeen to go to the canteen when no one was there.

The irresistible evidence in this case justifies the application of the dictum of Lord Ellenborough in *R. v. Lord Cochrane and Others* (8):

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him ; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

In the circumstances of this case I hold that there was independent corroboration on material particulars both as to the identity of the accused and their connection with the crime.

The appeals of the 2nd and 3rd accused-appellants are dismissed. Their convictions and sentences are affirmed.

**ABDUL CADER, J.** – I agree.
**RODRIGO, J.** – I agree.

*Appeals dismissed.*
*Convictions of 2nd and 3rd accused affirmed.*