1931

Present : **Lyall Grant J.**

[2nd Midland Circuit, Kandy.]

KING *v.* ATTANAYAKE *et al.*[1]

50—P. C. Matale, 2,175.

Evidence—Uttering forged notes—Accused charged with aiding and abetting utterer—Statements by utterer—Things said in reference to the common intention—Res gestae—*Evidence Ordinance, ss. 6, 8, and 10.*

The three accused were charged together in the same indictment, the first accused with forging four currency notes, the second and third accused with aiding and abetting him. The third count in the indictment charged the three accused with having aided and abetted one D to utter the aforesaid notes. To establish the last count, the Crown led in evidence certain statements incriminating the accused, alleged to have been made by D, in the course of his attempt to pass the notes, to the witnesses called by the prosecution. These statements were denied by D in the witness box.

Held, that the statements made by D were admissible in evidence.

THE three accused were charged before the Supreme Court on three counts. The first count in the indictment charged the first accused with forging four 1,000-rupee currency notes at Matale. The second count charged the second and third accused for abetment of the offence of forgery. The third count in the indictment charged the three accused with aiding and abetting one Dantanarayana to utter the aforesaid four forged currency notes, which said offence was not committed in consequence of such abetment.

[1] *28 N. L. R. 339.*

The evidence given by two witnesses for the prosecution, Ramanathan and Canagaratnam, dealt with the attempt of Dantanarayana to utter the forged notes in Colombo.

After Dantanarayana had been called and had denied having given utterance to the statements alleged, counsel for the defence objected to the reception of the evidence.

R. L. Pereira, K.C. (with him *L. B. de Silva* and *Peter de Silva*), for second accused.—The Crown called Canagaratnam and Ramanathan, and led in evidence statements alleged to have been made by witness Dantanarayana. These statements were of such a nature as to inculpate not only Dantanarayana but also the accused in this case. No objection was raised to this evidence at the time it was given, as the defence believed that Dantanarayana would be called to corroborate this evidence. But Dantanarayana in his own evidence denied the statements alleged to have been made by him. In view of this denial, the evidence of Canagaratnam and Ramanathan as to these statements would be irrelevant under Chapter II. of the Evidence Ordinance. As confessions made by Dantanarayana, these statements would only be admissible in evidence against him and not the accused in this case.

These statements are undoubtedly " hearsay " and as such would be inadmissible in evidence unless corroborated by Dantanarayana (see *King v. Silva*[1]) or unless the Crown is in a position to specifically prove that this is hearsay made admissible by some section in Chapter II. of the Evidence Ordinance. Under section 6 of the Evidence Ordinance hearsay is admissible when it forms part of the *res gestae.* This section allows the admission in evidence of statements made by third parties in the course of the same transaction. But these statements of Dantanarayana are too remote to be said to form part of the same transaction—in the uttering of the forged notes. A statement can only be said to form part of the same transaction when it is a voluntary and spontaneous utterance arising from the transaction. These, however, are calculated statements made after due course and reflection for some personal motive of Dantanarayana and is not an unconscious expression of one's feelings—as in the case of the bystanders. In the words of Ameer Ali (see *Commentary on section 6, page 134*).—" They (statements) must stand on an immediate causal relation to the act—a relation not broken by the interpretation of voluntary individual witness, seeking to manufacture evidence for itself. " And later on the same page, he says, " Whenever recollection comes in, whenever there is opportunity for reflection and explanation, these statements cease to be part of the *res gestae.*

Under section 10 of the Evidence Ordinance, statements of a co-conspirator though hearsay would be admissible in evidence to establish the existence of the conspiracy and the complicating of any party to it. But it is a condition precedent to the application of this section that there is reasonable ground to believe that two or more persons have conspired to commit a wrong.

[1] *30 N. L. R. 193.*

In this case the accused are not indicted as being members of a conspiracy to commit an offence. The existence of the conspiracy must be an issue, and reasonable ground for the belief in the existence of the conspiracy must be proved before the statements of third parties could be used against the accused. The statements themselves cannot be used for this purpose. To reverse the procedure laid down as a condition precedent in section 10 would be to prejudice the accused, as irrelevant evidence would be then used to prove the grounds of belief in the existence of the conspiracy (see *Ameer Ali—Commentary on section 10, page 156.—References 9 and 10*).

Sri Nissanka associated himself with the argument of Pereira, K.C.

Crossette Thambiah, C.C., for the Crown—The authority relied upon *King v. Silva (supra)* can easily be distinguished. In that case, admittedly the Crown sought to lead corroborative evidence and sought to do so in advance. In the present case, at no time has it been the case for the Crown that Dantanarayana is a witness upon whom the Crown relies. This was made clear at the outset, when the case for the Crown was opened to the jury. Indeed, this is clear from a perusal of the terms of the indictment. Further, on the back of the indictment are a number of witnesses called expressly and solely to discredit Dantanarayana. Further, with the acquiescence of the Court, Dantanarayana was treated as an adverse witness almost from the commencement of his examination-in-chief. Therefore, clearly, the Crown did not and does not rely on Dantanarayana. Nor did counsel for the Crown at any time concede that Dantanarayana would be called to corroborate Canagaratnam and Ramanathan. Dantanarayana was called for other good and sufficient reasons.

There is thus no analogy between the facts in *King v. Silva (supra)* and the facts of the present case. The ground on which this objection has been taken, therefore, fails.

It only remains to consider whether the evidence in question is admissible; and, if so, under what sections of the Evidence Ordinance.

Counsel then proceeded to argue that the evidence was admissible under sections 5, 6, 8, 9, and 10 of the Evidence Ordinance. Counsel cited *Rawson v. Haigh*[1]; *Regina v. Frost*[2]; *Rex. v. Murphy*[3]; *Emperor v. Datto Hanmant Shahapurkar*[4]; *King v. Aman*[5]; *Phipson on Evidence, 2nd ed., p. 75 et seq.*; *Woodroffe and Ameer Ali's Law of Evidence, 1925 ed., p. 106 et seq.*; *Taylor on Evidence, s. 590.*

Pereira, K.C., in reply.

November 16, 1931. LYALL GRANT J.—

I have to consider an objection which has been taken on behalf of the second and third accused to the admission of certain evidence. The evidence in question, namely, that of the witnesses Ramanathan and Canagaratnam, has already been taken and the contention of counsel for the defence is that in important particulars that evidence consists

[1] *1 C. L. P. 77.*
[2] *9 C. & P. 129.*
[3] *8 C. L. P. 311.*
[4] *30 I. L. R. (Bombay) 49.*
[5] *21 N. L. R. 375.*

of hearsay; namely, statements which incriminate the accused and which are alleged to have been made to these witnesses by one Dantanarayana. The objection was taken after Dantanarayana had been called and after it became apparent that he denied having given utterance to the statements which these witnesses alleged that he had made.

It is urged for the defence that the statements in question alleged to have been made by Dantanarayana could only be received in corroboration of evidence given by him and that as he has denied the fact of his having made them, the evidence in question is pure hearsay and must be ruled out.

It is further urged that as the statements in question have gone before the jury and have a vital bearing upon the case, it is impossible that the jury's minds would not be improperly influenced by those statements and accordingly I am asked to exercise my powers under section 230 of the Criminal Procedure Code and to discharge the jury.

Crown Counsel on the other hand argued that the statements in question are admissible independently of the evidence given by Dantanarayana on the ground that the statements form part of the *res gestae* and are admissible under section 6 of the Evidence Ordinance. Alternatively or additionally it is argued that they are admissible under section 8 or under section 10 of the Evidence Ordinance or under both these sections.

There are three accused—Attanayaka, Wimalasuriya, and Nagoor Meera. The first count of the indictment is a charge against Attanayaka of forgoing four 1,000-rupee currency notes bearing certain numbers in the month of August, 1930, at Matale. The second charge is against the second and third accused for abetment of the offence of forgery. The third count of the indictment reads:—" That between August 25, 1930, and September 12, 1930, at Matale, the first, second, and third accused did aid and abet one F. H. Dantanarayana to utter the aforesaid four forged 1,000-rupee currency notes, which said offence was not committed in consequence of such abetment, and that they have thereby committed an offence punishable under section 21 of Ordinance No. 18 of 1884 and section 109 of the Criminal Procedure Code."

The evidence given by Ramanathan and Canagaratnam deals with the attempt of Dantanarayana to utter the forged notes in Colombo. Ramanathan, who is a shroff in the Port Commission Office, alleges that Dantanarayana who was an acquaintance of his informed him on August 26, 1930, that a certain party had brought a 1,000-rupee forged note to be cashed and wanted to cash it and asked him to introduce him to some of his friends at the Bank or Treasury. Ramanathan introduced him to Canagaratnam, who is a shroff at the Treasury.

A number of interviews subequently took place between Canagaratnam, Ramanathan, and Dantanarayana in connection with the attempt to utter the note.

Both Ramanathan and Canagaratnam speak to Dantanarayana having pointed out the third accused to them as one of the parties concerned and Canagaratnam speaks to a meeting at the Gordon Gardens, Colombo, on September 11.

Previous to this meeting, he alleges that Dantanarayana had offered him half the value of the note as an inducement for him to change them at the Treasury.

At this meeting Dantanarayana endeavoured to persuade him to accept a smaller sum than Rs. 2,000 as a share of the proceeds, and in order to persuade him to do so he said the money had got to be divided among four people of whom he was one; one was Attanayaka, the first accused, another was Wimalasuriya, the second accused, and the other was the third accused, Nagoor Meera.

In corroboration of his statements he showed telegrams from the second and third accused. A subsequent discussion took place at Ramanathan's house and an arrangement was made for Dantanarayana to bring the notes to the Treasury on the 12th.

In consequence of this arrangement Dantanarayana came to the Treasury with the notes on the 12th and attempted to utter them. He was then arrested.

Crown Counsel contends that these statements made to Ramanathan and Canagaratnam are so connected with the fact in issue, namely, the question whether the accused aided and abetted Dantanarayana in attempting to utter the notes that they form part of the same transaction. He argued that the trasaction in question must be regarded as the whole series of events, beginning with the preparations of the forgery of the notes, including the forgery itself, and continuing to the time at which the attempt to utter them failed. He argued that in order to get a thorough view of what occurred one must consider everything that was said or done with a view to passing the notes.

He distinguished statements made by Dantanarayana after his arrest and after the transaction had broken down, from statements made in pursuance of the attempt to complete the transaction.

The former, he was willing to admit, might fall into the category of admission or confessions which would not be provable against anyone except the person who made them.

It may be convenient to mention here that Dantanarayana, while admitting having received the notes from the third accused and also admitting that they were received in connection with a transaction between himself and the second accused, has consistently denied that he knew them to be forged, and has given a totally different account of the nature of the transactions between himself and the second accused and third accused on the one hand, and between himself and Ramanathan and Canagaratnam on the other from the case put forward by the prosecution.

In particular, he denied that he pointed out the third accused at the Victoria Hotel and he also denied that he had a meeting at the Gordon Gardens with Canagaratnam or that he gave utterance there or anywhere to the statement spoken to by Canagaratnam. Dantanarayana has been tried for attempting to utter the notes and has been convicted, but the fact of his explanation in his own case having been disbelieved by another jury does not properly affect the point which has now to be considered. Its only importance is that, assuming Canagaratnam's statements to be admissible, the fact that they had been accepted by

another jury and that Dantanarayana's story has been disbelieved might have a prejudicial effect upon the minds of the jury, and that if the statements made are hearsay and not properly admissible, it would not be sufficient that I should caution the jury against accepting them as it will be morally impossible for them to avoid doing so.

I do not think it is necessary for me to decide whether the whole proceedings from the forgery of the notes to the attempted utterance form one transaction though there appear to be strong grounds for arriving at this view. The notes had been forged and an attempt was made to utter them; in fact the forgery without the utterance was of no value to the forger. It is sufficient however, I think, to decide whether the evidence is irrelevant in regard to the third count of the indictment—the aiding and abetting of Dantanarayana in his attempt to utter the notes. Under the third count of the indictment a fact which is undoubtedly in issue is the question whether Dantanarayana attempted to utter the notes. If he did not do so, the accused cannot be guilty of aiding and abetting. The question, therefore, arises what is the transaction which is dealt with in the third count of the indictment. It it merely the actual production of the notes by Dantanarayana at the Treasury on September 12 or is it the series of events spoken to by Ramanathan and Canagaratnam beginning with Dantanarayana's first introduction of the subject to Ramanathan on August 26.

It seems to me it is impossible to say that the transaction was merely the occurrence of September 12.

The attempt began when Dantanarayana sounded Ramanathan with a view to getting an introduction to someone employed at the Treasury. Everything that was said and done in pursuance of the attempt to utter the notes appears to me to form part of the same transaction.

If this evidence were to be excluded, it is difficult to see how one could arrive at an intelligible idea of how the notes came to be presented at the Treasury on the 12th.

I think one must admit all the evidence which has been led to show how these notes came to be presented.

It is not a question of corroborating Dantanarayana's statement. The fact in issue is the commission by him of an offence and the fact that, while admitting the actual physical presentation of the notes and also admitting various meetings with Ramanathan and Canagaratnam, he gives an account of the matter which exculpates him, does not, in my opinion, preclude the Crown from leading other evidence to show the real nature of the transaction.

It is, however, argued that these statements are not in fact so connected with the issue, namely, the attempted utterance of the notes, as to render them admissible, that they are mere admissions affecting other persons which cannot be proved except by the person making the admission, apparently proved as against them. This is the point which has given me most trouble in connection with this objection.

I have come to the conclusion, however, that the evidence is admissible under sections 6 and 8; under section 6, because these statements were

made for the purpose of endeavouring to persuade Canagaratnam to accept a smaller sum than had been previously mentioned as his reward for putting the transaction through.

In other words, these statements are part of the acts which led up to the attempt at utterance. They are part of the negotiations which at that time was not completed and which might have broken down, and they were statements made by Dantanarayana for the purpose of putting the transaction through on his own terms and in the interests of the accused in the present case.

These statements, therefore, as well as the other statements made by Dantanarayana appear to me to be part of the *res gestae*.

Section 8 provides that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The fact of those statements shows preparation for the fact in issue, namely, the attempted utterance of the notes. The section makes the conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein relevant, if such conduct influences or is influenced by any relevant fact, whether it was previous or subsequent thereto. Even if sections 6 and 8 are insufficient to make these statements relevant, I think they are made so by section 10.

That section deals with conspiracy to commit an offence and provides that where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done, or written by any one of such persons with reference to the common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

It was argued by the defence that it cannot be said that, apart from the statements alleged to have been made by Dantanarayana, there is any reasonable ground to believe that the accused conspired to this offence.

Ameer Ali's *Commentary* on the Code states that the existence or fact of conspiracy must be proved before evidence can be given of the acts of any person not in the presence of the prisoner, but he admits that deviations have been allowed from this rule owing to the difficulties in the way of such proof, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy before the proof of the defendant's privity, but he continues :—" in respect of such conduct a distinction has been made between declarations accompanying acts (which are admissible) and mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, and which being 'hearsay' are not evidence even to prove the existence of a conspiracy."

Apart from anything that the witnesses Ramanathan and Canagaratnam say that Dantanarayana said to them, evidence has been given of certain facts. On August 27, after the day on which Canagaratnam says

he first met Dantanarayana, he informed the Head Shroff that Dantanarayana proposes to pass a forged note. There is also the evidence as to the visit of the Criminal Investigation Department Inspector de Silva to the Victoria Hotel on August 30 when a trap was set by him in conjunction with Canagaratnam and Ramanathan for Dantanarayana. This is evidence inconsistent with the account given by Dantanarayana that on these dates he was either not in possession of forged notes or totally ignorant of the fact that the notes in his possession were forged.

There is the evidence of Mr. Bertus, Manager of the Prince of Wales Hotel, that on September 4 a room in that hotel was occupied jointly by the third accused and Dantanarayana. There is Dantanarayana's own evidence which admits a series of transactions between himself and the second and third accused between August 25 and Septemper 12, including the passing between him and the second and third accused of various telegrams. There is also evidence by him of having seen the first accused sitting at a drawing board in the house of the second accused.

It is true that Dantanarayana strenuously denies the existence of a conspiracy, but his account does not explain the fact that the police were informed by August 30 that he was attempting to pass forged currency notes. There are also other items of evidence which have already been led, and Crown Counsel states that further evidence will be led to prove the finding of forged notes in the house of the first accused at Maho and the connection of the second and third accused with these notes.

I think that sufficient evidence has been led to establish the fact that there is reasonable ground to believe that a conspiracy to forge and utter notes existed.

Taylor on Evidence (section 590) states that before any act or declaration of one of a company of conspirators in regard to the common design as affecting his fellows is led, a foundation should first be laid by proof, sufficient, in the opinion of the Judge, to establish *primâ facie* the fact of the conspiracy between the parties, or, at least, proper to be laid before a jury, as tending to establish such fact. The connection of the individuals in the unlawful enterprise being shown, every act or declaration of each member of the confederacy in furtherance of the original concerted plan and with reference to the common object is, in contemplation of law an act and declaration of all and this is evidence against each other.

This statement of the English law has, I think, exactly the same effect as section 10 of our Code. Taylor proceeds :—" Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the case."

I think that sufficient evidence has been led or has been undertaken to be led to justify me in saying that there is a *prima facie* case of conspiracy against these accused, or at any rate, a case to be put before the jury and that sufficient evidence has been led to allow the statements made by Dantanarayana in the course of his attempt to pass the notes to be admitted in evidence against these accused.