[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Dias S.P.J. (President), Basnayake J., Gunasekara J., Pulle J. and de Silva J.**

PODISINGHO *et al.*, Appellants, *and* THE KING, Respondent

Appeals 45-48 with Applications 61-64 of 1951

S. C. 32—M. C. Ratnapura, 18,478

Criminal procedure—Joint trial of several persons—Discretion of Court to order separate trials—Criminal Procedure Code, ss. 184, 230.

Criminal Conspiracy—Circumstantial evidence—Abetment—Summing up—Proper direction to jury—Penal Code, s. 113B—Court of Criminal Appeal Ordinance, s. 5 (1), proviso—Criminal Procedure Code, s. 243.

Five persons were being jointly tried before a Judge and Jury. On the fifth day of trial the second accused took ill and it was reported that he would be unable to attend Court for about 28 days. Thereupon, the presiding Judge made order that the trial of the other four accused should proceed and that the second accused be tried separately.

Held (by the majority of the Court), that section 184 of the Criminal Procedure Code gave the Court the power to make such order. The discretion vested in the Court to order a separation of trials may be exercised not only before the accused is given in charge of the jury but also at any subsequent stage.

Held, further (by the majority of the Court), (i) that in a prosecution for criminal conspiracy, it is the duty of the trial Judge to explain to the jury in his summing-up the law relating to the offence of criminal conspiracy; merely reading the Penal Code definition of the offence is insufficient. Where there is such non-direction, there is a miscarriage of justice and the proviso in section 5 (1) of the Court of Criminal Appeal Ordinance cannot be applied.

(ii) that in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

(iii) that in a prosecution for abetment the trial Judge should, in his summing-up, explain to the jury the law relating to abetment.

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

M. M. Kumarakulasingham, with *J. C. Thurairatnam* and *D. W. F. Jayasekera*, for the 1st, 3rd and 4th accused appellants.—The prosecution asked for a separation of the trial under section 184 of the Criminal Procedure Code. Section 184 has no application to the present case. That section enables a trial Judge to exercise his discretion as to whether there should be a separation of trial. The Judge can only exercise his discretion before the accused persons are given in charge of the Jury. In the present case the Judge acted when the time for the exercise of his

discretion had already passed. Section 230 of the Criminal Procedure Code makes specific provision for a case like the present. The Jury should have been discharged in regard to all the accused and a new trial ordered. See *In the Matter of the Trial of Thomas Perera alias Banda* [1] and *The King v. Vidanagamage Edwin* [2]. As regards English procedure see *R. v. Ahearne* [3] and *R. v. Marian Grondkowski* and *Henryk Malinowski* [4]. English cases, however, are not applicable as section 6 of the Code comes in only where no specific provision is made in the Code. On the question of " prejudice " under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance it is submitted that the trial in the present case is a nullity because of absence of jurisdiction. The proviso does not therefore apply. Even if the trial is not a nullity it is submitted that in a conspiracy case evidence must be looked at as a whole in order to ascertain the common intention. The absence of the second accused caused prejudice to the other accused.

The trial Judge failed to explain the law of conspiracy to the Jury. He merely read the relevant section of the Penal Code. There was thus an absence of an adequate direction on the law relating to conspiracy. See section 243 of the Criminal Procedure Code and *Israr Husain v. Emperor* [5].

The trial Judge failed to point out to the Jury the evidence on which the Crown rested its charge of abetment. He also failed to explain to the Jury what constituted abetment.

The statement, P 12, was a confession and was improperly admitted.

Finally, it is submitted that the trial Judge's direction to the Jury, that any person who crossed the " dolla " on the night of the incident would be presumed to have had the common murderous intention, was inadequate and may have misled the Jury.

M. M. Kumarakulasingham, with *D. W. F. Jayasekera* and *Charles Jayawickreme*, for the 5th accused appellant.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *A. C. Alles* and *A. C. M. Ameer*, Crown Counsel, for the Crown.—The order of the trial Judge that the trial should proceed against the other accused can be justified under seection 184. The words " accusation ", " charge ". " indictment, " and " arraignment " are not synonymous. See *Archbold, 1951, ed., p. 398 ; R. v. William Stirland* 6 ; *Babulal Chankhani v. King Emperor* [7] ; *Tirlak Chand v. Rex* [8]. Section 184 must be construed with reference to its context. The word " charged " in that section does not mean the reading of the charge or indictment. The words " as the Court thinks fit " qualify the word " tried ". These words are of the widest possible import. It is to be presumed that the Court will " think fit " to adopt, in each particular case, whichever course it regards as most conducive to the ends of justice—*Emperor v. Har Prasad Bhargava* [9].

[1] *(1927) 29 N. L. R. 6.*
[2] *(1947) 48 N. L. R. 211.*
[3] *(1852) 6 Cox. C. C. 6.*
[4] *(1946) 1 A. E. R. 559.*
[5] *(1941) 42 Cr. L. J. 728 at p. 732.*
[6] *(1943) C. A. R. 40 at p. 51.*
[7] *(1938) A. I. R. (P. C.) 130 at p. 133.*
[8] *(1949) A. I. R. Allahabad 187.*
[9] *(1923) A. I. R. Allahabad 91 at p. 107.*

The Judge can exercise his discretion once and he can exercise it either at the commencement of the trial or at a later stage. Assuming that section 230 is not applicable, if section 184 applies and there is a *casus omissus* then English law is applicable. As regards the English law see *Archbold, 1951 ed., p. 184 ; R. v. Marian Grondkowski and Henryk Malinowski* [1] ; and the English Indictments Act of 1915 in 6 Chitty's Statutes, 6th ed., p. 683. If the trial Judge exercised his discretion in the matter of separation of trial, the Court of Criminal Appeal should not interfere unless it is shown that the exercise of the discretion has resulted in a miscarriage of justice—*R. v. Marian Grondkowski and Henryk Malinowski* (*supra*). On the question whether a " joint trial " is a consolidation of several trials see *The King v. Pedrick Singho* [2]. In our Code the trial is of the " charge " not of the " accused ". Each individual is on trial on each individual charge. In *The King v. Nissanka Michael Fernando* [3] it was held that each count of an indictment is for the purposes of evidence and judgment a separate indictment. She also *The King v. Emanis* [4] and Lord Atkinson's remarks in *Crane v. The Director of Public Prosecutions* [5].

With regard to section 230 the " discharge of the Jury " contemplated in the section does not mean the physical removal of the Jury, but means the discontinuation of proceedings.

With regard to the question of " prejudice ", if the trial was conducted substantially in the manner prescribed by the Code, but some irregularity occurred in the course of such conduct, the irregularity can be cured—*Pulukuri Kottaya v. Emperor* [6].

A. C. Alles, Crown Counsel, continued for the Crown.—In the circumstances of this case the direction of the trial Judge regarding conspiracy was adequate. There was direct evidence of the conspiracy. No direction on circumstantial evidence was necessary. The only question was the credibility of the witness, Edwin. The duty of the Judge is to lay down the law in reference to the case presented to the Court and the facts of the case and not to perplex the mind of the Jury—*Emperor v. Upendra Nath Das* [7]. The question in the present case was whether on the evidence of Edwin there was a " plot ". The Judge not only read the section but also explained the law subsequently. Further, the omission to explain to the Jury all essential elements of an offence charged against an accused does not vitiate a trial if it has not occasioned a failure of justice—see *Emperor v. Jhina Soma* [8] and Lord Dunedin's judgment in *Shafi Ahamad v. King Emperor* [9]. The direction on the law of abetment was covered by the direction on conspiracy. There was also an adequate direction on the common intention.

M. M. Kumarakulasingham, at the request of Court, replied—In section 184 of the Criminal Procedure Code the words " as the Court thinks fit " qualify the word " charged " as well as the word " tried ". The language of the Code is conclusive and effect must be given to the

[1] *(1946) 31 C. A. R. 116 at p. 120.*
[2] *(1946) 47 N. L. R. 256.*
[3] *(1951) 52 N. L. R. 571.*
[4] *(1940) 41 N. L. R. 529.*
[5] *(1921) 15 C. A. R. 183 at p. 207.*
[6] *(1947) A. I. R. (P. C.) 67 at p. 69.*
[7] *(1914) 16 Cr. L. J. 561.*
[8] *(1939) A. I. R. Bombay 457.*
[9] *(1925) A. I. R. (P. C.) 305.*

plain meaning of the language used, unless there is ambiguity—***Babulal Chankhani v. King Emperor*** (*supra*). Regarding the failure of the Judge to direct the Jury on an important element in the case see *R. v. Morris Ferguson* [1] *and R. v. Alfred Hilliard* [2].

Cur. adv. vult.

September 17, 1951. DIAS S.P.J.—

Five persons were charged in this case in which the 1st, 3rd, 4th and 5th accused appeal against their capital convictions. There are also four applications for leave to appeal on various grounds.

The trial began on May 28, 1951, and while it was in progress it was reported on June 1, 1951, that the 2nd accused was suffering from mumps and would not be able to attend Court for 27 days. The trial then proceeded against the remaining accused and ended in the capital convictions of these appellants.

The first point which was argued appears as Ground No. 6 set out in the petition of appeal, namely, " that the learned trial Judge was wrong in law in allowing the Crown's application for a separation of the trial of Surabiel, the 2nd accused, on the fifth day of trial after the main testimony in the case had been led ". The relevant entries in the shorthand transcript of the record read as follows:—

> " 1.6.51—When the Court assembles the Clerk of Assize informs the Court that there had been a telephone message from the prison authorities that the 2nd accused was suffering from mumps and would not be available till the 28th ".

Thereupon Crown Counsel applied that the trial should proceed and he asked for a separation of the trial against the other accused under s. 184 of the Criminal Procedure Code. The learned trial Judge observed: " Of course I cannot adjourn the trial at this stage ". Thereafter an argument took place. Mr. Sivasubramaniam, who appeared for the absent 2nd accused, objected to the application of the Crown. Mr. A. B. Perera, who appeared for the 1st, 3rd and 4th accused, said that " so far as his clients were concerned he was not able to object to the application or to support it. He left it entirely in the hands of the Court. " Mr. Jayawickreme, who appeared for the 5th accused, stated that " he had no objection to the trial proceeding against his client. " The learned trial Judge then further questioned Mr. A. B. Perera, who stated: " I have no objection to the trial proceeding against my clients ". Thereupon the learned Judge made the following order:

> " I direct the trial to proceed against the 1st, the 3rd, the 4th and the 5th accused. I order the 2nd accused to be tried separately ".

The Court then suggested to Counsel and the Jury that for the rest of the trial whenever reference was made to the 2nd accused, he should be referred to by his name, Surabiel, and not as the 2nd accused. The trial then proceeded to its conclusion.

[1] (1913) 9 C. A. R. 113. [2] (1913) 9 C. A. R. 171.

Quite apart from the legal position, one point strikes the eye. Before these accused were convicted the learned counsel who appeared for them either left the matter " entirely in the hands of the Court ", or " had no objection to the trial proceeding ". After the trial ended in the conviction of the appellants, the procedure which they accepted and acquiesced in in the lower Court is now called in question by counsel for the appellants.

Mr. Kumarakulasingham, who argued the case for all the appellants, submitted that s. 184 of the Criminal Procedure Code has no application to the present case. According to his submission the application of that section is confined to a stage before the accused are given in charge of the Jury. He submits that the section which applies is s. 230 ; and that in a trial by Jury where several accused are jointly tried there is only one trial and not several trials proceeding simultaneously. He argues that when s. 230 provides that when the accused becomes incapable of remaining at the Bar, and when in the opinion of the Judge the interests of justice so require that the jury may be discharged, it means the discharge of the jury in regard to all the accused. He therefore submitted that in this case there was no option but to discharge the jury with regard to all the accused and order a new trial. The learned Solicitor-General submitted that the order of the trial Judge could be justified under s. 184. He submitted that the provisions of s. 184 were not confined to any particular stage of the proceedings but could be utilised at any stage of the trial.

We hold that the presiding Judge had a discretion to make the order that he did make directing that the trial of the appellants should proceed and that the 2nd accused should be tried separately. We are not agreed, however, as to the reasons for this decision. Four of us hold that section 184 gave the learned Judge the power to make this order. Our Brother Gunasekara disagrees with this view and is of opinion that the power given by that provision cannot be exercised after the accused have pleaded to the charges; but that the order in question can be justified as being in effect an order under section 230 discharging the jury in the trial of the 2nd accused, which up to that time was being conducted together with the trials of the appellants. The views expressed in the discussion that follows are those of the rest of us only.

The Solicitor-General argued that the language of s. 184 was significant and submitted that plain words should be given their plain meaning. In the case of *R. v. Shankhani* [1] it was held that the language of the Criminal Procedure Code of India is conclusive and must be construed according to ordinary principles so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity, that meaning which is more in accord with justice and convenience must be preferred, but in general the words used must be given their ordinary meaning.

Before proceeding to consider the main question raised under this ground of appeal we think it is necessary to clear the ground in regard to certain matters which appear to cloud the issue. If during a

[1] *(1938) A. I. R. Privy Council 130.*

non-summary inquiry before a Magistrate, or a trial before a Magistrate or a District Judge, one co-accused is taken ill it is open to the trial Judge under s. 289 of the Criminal Procedure Code to adjourn the trial. Furthermore, if in a trial by jury before the Supreme Court one co-accused is taken ill and the doctor reports that he would be capable of attending Court in a day or two, it would be possible under s. 289 to adjourn the trial of all the accused without discharging the jury who will be sworn not to communicate with any other person excepting a fellow juror regarding the case. The jury however are only summoned for a period of 14 days and if the indisposition or incapacity of a co-accused is such that the adjournment may have to last beyond the 14 days, then obviously the provisions of s. 289 would become impracticable. Moreover, under the Criminal Procedure Code, it is open to the trial judge, although this provision of law is not usually availed of, under s. 241 (1) to keep the jury together during an adjournment. It was obviously inconvenient in the present case to have kept the jury together until the absent co-accused was able to be present after 28 days.

The language of s. 184 clearly indicates that it cannot have any application to a case where there is only one accused. It can only apply where *more persons than one* are proceeded against, and where more persons than one are accused of jointly committing the same offence, or of different offences committed in the same transaction, or where one person is accused of committing any offence and another of abetment of or attempting to commit such offence. The word " accused " must be contrasted with the word " charged " which appears later in s. 184. The two words are not exactly synonymous and the use of these two words in the same section indicates that they mean two different things. Neither of the words has been defined either in the Criminal Procedure Code or in the Interpretation Ordinance. The ordinary dictionary meaning of the word " accused " is " complained against ", or " found fault with ". The person who makes the " accusation " is the " accuser ".

When an accused pleads guilty before proof is led, ordinarily there would be no trial and he may be convicted on his plea—see ss. 205, 220. When however an accused pleads guilty during the course of a trial by jury, their verdict is necessary before he can be convicted. Otherwise his conviction is a nullity and renders it liable to be quashed. The case of *R. v. Sittambalam* [1] furnishes an example of the procedure a trial judge should adopt when in the course of a trial by jury a prisoner withdraws his plea of not guilty and substitutes a plea of guilty to a lesser offence. It must be noted however that in that case both the accused during the course of the trial pleaded guilty to lesser offences.

Section 184 vests a discretion in the trial Judge where several accused are jointly charged to decide whether they should be tried " together or separately as the Court thinks fit ". In *R. v. Kadir* [2] it was laid down that " upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately ". This is the

[1] *(1951) 52 N. L. R. 374.* [2] *I. L. R. (1886) 9 Allahabad 452.*

general rule laid down by s. 178 of the Criminal Procedure Code. It occurs in a group of sections, of which s. 184 forms a part. Exceptions to that general rule are to be found in ss. 179-184.

It is settled law that the words " may be tried together or separately as the Court thinks fit " confer a judicial discretion on the trial Judge. In the case of *R. v. Gibbins* [1] the Court said: " The rule is that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the Judge must exercise his discretion judicially. If he has done so this Court will not interfere, but that is subject to this qualification. If it appears to this Court that a miscarriage of justice had resulted from the persons being tried together, it would quash the conviction ". This case has been consistently followed in later cases such as *R. v. Thompson & Bywaters* [2] and *R. v. Brown & Kennedy* [3]. In the last case the Court of Criminal Appeal said after approving the decision in *R. v. Gibbins* [1] " In the present case the experienced Judge who had tried it had exercised his discretion judicially and there is not the faintest ground for the suggestion that any miscarriage of justice had resulted from his decision ". In *R. v. Grondkowski* [4] the Court of Criminal Appeal said: " When an application is made by a prisoner indicted jointly with another that he should be tried separately, it must be at the outset of the trial though not necessarily before the plea, and the Judge can only act upon the material before him which ordinarily will be the depositions and exhibits . . . The rule after all which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice ? If improper prejudice has been created, whether by a separate or a joint trial . . . this Court will interfere but not otherwise ". What this last case decides is that when there is an application by one prisoner for a separate trial under s. 184, that application must be made at the earliest stage and at the earliest opportunity. It is not an authority which helps us to solve the problem which arises in this case, namely, whether separation can be ordered at a later stage of the proceedings. The normal case of course would be where prisoners accused jointly ask for a separation but there is nothing in the language of s. 184 to confine its application to such a case. The problem in the present case is as to when the trial Judge " may think fit " to order a separation. Must that discretion be exercised before the accused is given in charge of the jury as argued for the appellants, or may it be used at any subsequent stage? Section 184 is silent on that point. Four of us are of opinion that there is no warrant for so restricting the scope of s. 184. Nor do we think, as was argued, that a duty is cast upon the trial Judge, before the prisoners are called upon to plead, to hold a kind of preliminary inquiry in every case to decide whether a joint trial should take place or whether separation should be ordered. We agree that once a trial Judge has exercised his discretion and ordered a separation of trials he cannot at a subsequent stage order such prisoners to be charged jointly, but the majority of us are of opinion that there is nothing in the language of s. 184 which prevents a trial

[1] *13 C. A. R. 134.*
[2] *17 C. A. R. 66.*
[3] *(1928) Notable British Trials at p. 21.*
[4] *(1946) 31 C. A. R. 116.*

Judge from exercising the discretion vested in him to order a separation of trials for an adequate reason after the trial has begun. In a trial by jury in such a case those prisoners whose separation has been ordered will be discharged from the charge of the jury. The Judge will decide this as a matter of law. The prisoners who are thus discharged stand in no jeopardy and can be proceeded against subsequently.

We are of opinion that the question whether there is a *casus omissus* does not arise for decision. It is therefore unnecessary for us to consider the scope and effect of the English Indictments Act of 1915.

We are of opinion therefore that the 6th ground of appeal fails.

The 2nd point argued is Ground No. 2 in the petition of appeal, namely that " the learned trial Judge had failed to sum up the facts and circumstances in relation to the first charge of conspiracy, nor was his direction as to the ingredients of the offence of conspiracy adequate in the circumstances of this case—more particularly as he failed to point out that the object of the conspiracy could not be determined by the fact that fatal injuries had been caused on Mudalihamy the deceased ". The 1st count of the indictment charged all the accused as follows :—

> That between February 26, 1950, and March 1, 1950, the accused did agree to commit or abet or act together with a common purpose for or in committing or abetting the offence of murdering one P. A. Mudalihamy—s. 113B read with ss. 296 and 102 of the Penal Code.

It would be convenient at this point to state briefly the salient facts on which the prosecution relied to establish the charges in the indictment, namely (*a*) the above count 1 of conspiracy, (*b*) that on or about February 28, 1950, the 3rd and 5th accused did in furtherance of the common intention of all commit the murder of P. A. Mudalihamy—s. 296 of the Penal Code, and (*c*) that in the course of the same transaction the 1st, 2nd and 4th accused did abet the murder of P. A. Mudalihamy by the 3rd and 5th accused—ss. 296 and 102 of the Penal Code. There was no direct evidence in respect of any of these counts. The Crown sought to establish the guilt of the accused on circumstantial evidence based on the testimony of a person called Edwin who admittedly was an accomplice. There was evidence of previous ill-feeling between the deceased man and the 1st accused. The 4th accused was related by marriage to the 1st accused, the 3rd accused is a brother of the 5th accused and the 2nd accused is a cousin of the 1st accused. There is not the slighest doubt that some person or persons had murdered the deceased on the night in question. The post-mortem examination revealed that he had received nine injuries, three of which were each necessarily fatal. The doctor was of opinion that the knife P1, which was found near the body of the deceased, could have caused those injuries. The prosecution contended that Edwin's evidence was corroborated by independent evidence which linked him with the accused at various stages of the transaction. Edwin says that the 4th accused promised to get him employment. He asked him to go to the house of the 1st accused. Edwin went there and the 1st accused asked him to stay in his house until the 4th accused came. He had dinner there and went to sleep. About midnight the 4th accused

woke him and told him to take two other men, namely the 5th accused and an unknown man, to the Udahagedera. Edwin did so and returned to the house of the 1st accused and went to sleep. The next day he went to the boutique with the 1st accused at 3 p.m. They bought provisions and were returning when they saw toddy being tapped on a hill top. As they were proceeding up the hill the 4th accused joined them and they all drank toddy which was supplied by a man called Sirisena. Thereafter the three of them went back to the house of the 1st accused. About 7 p.m. the 3rd and 5th accused and an unknown man came there. The 1st, 2nd, 3rd, 4th and 5th accused and the unknown man went inside the house while Edwin remained outside. He did not hear what was said. Then the 4th accused told Edwin to go with the 3rd and 5th accused and the unknown man, while the rest remained in the house. This quartet went along the path and then turned off along another path which led to the stream or dolla. There the 3rd accused told Edwin to wait, and added " If the baas (deceased) comes let him pass, but if it is anyone else give a cough ". Edwin says he knew the deceased man and he also realised that the cough was to serve as a warning. The other three, namely, the 3rd and 5th accused and the unknown man, crossed the stream and went on. Edwin then saw the deceased coming along the path and going across the dolla in the same direction as the other three men had gone. He was carrying a gun and a torch. Edwin remained where he was until he heard a cry of " Amme ". He then got frightened and left the place and returned to the house of the 1st accused. Later the 3rd and 5th accused and the unknown man arrived at the house from the direction in which they had gone. He saw that the 5th accused had a gun and a torch, which he did not have when he set out towards the dolla. He also saw blood on the 5th accused's clothes. He heard 5th accused say " we have done the work as Podisingho said. Now we must be gone before dawn ". The 2nd accused gave some money to the 1st accused who handed that money to the 5th accused. The 5th accused then took off his sarong and put on a sarong which the 1st accused gave him. He also handed his sarong, the gun and the torch to the 1st accused. Thereafter the 3rd and 5th accused and the unknown man left through the back compound. Edwin identified the knife P1 which was found by the body of the deceased as being the knife which the 5th accused had that evening. After the 3rd and the 5th accused and the unknown man left the rest went to sleep. Before dawn the 2nd and 4th accused got up and spoke to Edwin, and the 4th accused told him " Do not reveal anything that you know to anybody " and they went away. Edwin then went back to his village. He kept quiet and made no disclosures for three or four months.

The Crown sought to corroborate Edwin by the following items of evidence: Podinona, the mistress of the deceased, heard the murder being committed and although she went out and saw the figures of three persons she could not identify them. This evidence supports Edwin's story that three men crossed the stream before the murder. Podinona also stated that on the day following the discovery of the corpse the 1st accused making a warning gesture told her to keep silent. The witness Sirisena, who supplied toddy on the evening previous to the murder,

supported Edwin by bringing him into contact with the 1st and 4th accused. The witness Dingiri Mahatmaya, who is employed on an estate near the scene of this incident says that on or about the time the deceased must have been killed he saw a man walking away hurriedly along the path whom he identified as Edwin. This supports Edwin's evidence that he was going away from the scene of the murder alone. About 15 or 20 minutes later Dingiri Mahatmaya saw three other men pass. He identified the 3rd accused but not the other two. All of them came from the direction of Podinona's house which was near the scene of the murder. One of them had a gun and a torch. This evidence supports Edwin when he implicates the 3rd accused as being one of the men who crossed the dolla and also his evidence regarding the gun and the torch. The witness Rattaranhamy heard of the death of the deceased on March 1st. On that day he was in a bus and he saw the 2nd and 4th accused get into that same bus. The 2nd accused alighted *en route* and the 4th accused continued travelling after Rattaranhamy had alighted. He identified both of them at an identification parade. The Crown submits that this evidence affords some slight corroboration of Edwin's evidence when the latter says that the 2nd and 4th accused were engaged with others in this common enterprise.

There is the statement of the 5th accused, P12, which he made to the Magistrate before the commencement of the Magisterial inquiry. It was argued that P12 amounts to a confession and that it was wrongly admitted in evidence inasmuch as the presiding Judge did not consider the question whether it was voluntarily made before he admitted it in evidence. We are of opinion that it is not a confession and that it was properly admitted. According to P12 the 5th accused brings himself on the scene and he links himself with the accomplice Edwin. There is also a reference to Lewis the 4th accused. The trial Judge rightly told the jury that the statement of the 5th accused incriminating the 4th accused was not admissible evidence against the 4th accused.

The complaint of the appellants is that the summing up of the trial Judge in regard to the first charge of conspiracy was inadequate. The trial Judge said: " I shall take count 1 of the indictment and read to you the text of the Penal Code definition of criminal conspiracy. I will ask you to listen very carefully to the definition because counsel for the 1st, 3rd and 4th accused said there was no conspiracy or evidence of it. This is what the Penal Code says: (The Judge then read the definition of Criminal Conspiracy). It is for you to say, having heard the evidence, whether the facts placed before you would justify you in coming to the conclusion that there was a conspiracy to cause the death, to commit the murder, or abet the murder of Mudalihamy. That is entirely a question for you. . . I will summarise the entire evidence for you and you will deal with that evidence in the light of the submissions made by counsel for the 1st, 3rd, 4th and 5th accused ". Then again at page 31 of the transcript of the charge the Judge said: " It was also suggested that if Edwin stayed where he is alleged to have stayed he would have been seen. Do not forget that it was a narrow path flanked by shrubs. I would also ask you to follow this evidence carefully because it is upon this evidence that the Crown says there was a conspiracy.

It is from this evidence that you have to gather the conspiracy ". The Judge then proceeded to comment on the evidence of Edwin and proceeded, at page 32 of the transcript, as follows: " These are items from which the Crown wants you to infer that there was a conspiracy to murder or abet the murder of Mudalihamy ". Then at page 57 the following is recorded:

" *Foreman.*—My Lord, Crown Counsel said in his opening address that if we found a verdict of guilty on the first count we need not proceed to consider the other counts.

Court.—There are three counts in the indictment and I want you to return a verdict on each count. You may now retire and consider your verdict. (The jury retires.)

After some time the jury send word through the crier that they would wish to have further directions and the court sends for them and charges them further.

Foreman.—My Lord, certain members of the jury have had a little difficulty as regards counts 2 and 3 and would wish you to give further directions on counts 2 and 3.

Court.—The first count is conspiracy to murder, either to commit or abet the murder of this man Mudalihamy. On count 2, the 3rd and the 5th accused are charged with the murder of the deceased man. That is to say that somebody, may be the 3rd, may be the 5th, or may be somebody else who went with them, caused the death of Mudalihamy with a murderous intention but that the two of them and the other man shared a common murderous intention. It is immaterial when the doctrine of common intention is applicable as to who actually dealt the fatal blow. I explained to you at the beginning of my summing up that the doctrine of common intention is defined in the Penal Code in these words. (Court cites section 32 of the Penal Code). "

The trial Judge thereafter gave further directions but he did not revert to criminal conspiracy.

It was argued that this was an inadequate summing up on the law of criminal conspiracy. It is submitted that merely reading the Penal Code definition of the offence of criminal conspiracy is insufficient and that the trial Judge should have explained the law. It was argued that under s. 243 of the Criminal Procedure Code a duty was cast on the trial Judge " to charge the jury summing up the evidence and laying down the law by which the jury are to be guided ". It was submitted that the learned trial Judge failed to comply with the requirements of this section. In the case of *R. v. Martin Appuhamy* No. 1 [1] it was held: "It is clear from this passage that the learned Judge had assumed that the jury understood what is meant by private defence. We are of opinion

[1] *(1949) 50 N. L. R. 456.*

that it was the duty of the learned Judge to explain to the jury in his summing up the law relating to private defence and that his failure to do so is a non-direction which amounts to a misdirection which vitiates the conviction ".—See also *R. v. Martin Appu* No. 2 [1]. It was contended that even if the jury accepted all the evidence which Edwin was in a position to give it would not necessarily follow that there was an agreement by these accused either to commit murder or to abet the commission of a murder or to act together with a common intention for or in committing or abetting murder ; and that the jury in this case, particularly as they were dealing with the tainted evidence of an accomplice, should have had explained to them the law and the inferences which might be drawn from the facts so as to afford them guidance and direction.

For the Crown it was argued that the summing up was adequate, that the case stands or falls on Edwin's evidence, that the jury had accepted his evidence, corroborated as it was, and that if they did so it followed that the ingredients of the offence of criminal conspiracy has been established. In any event, the Crown argued that this was a proper case for the application of the proviso to s. 5 (1) of the Court of Criminal Appeal Ordinance. The majority of the Court are of opinion that inadequate directions were given to the jury on this point and that the conviction on count 1 must be quashed. It was conceded by the Crown, that if the conviction on count 1 was quashed, the conviction on count 3 must share a similar fate. Judges have disagreed as to the meaning of s. 113B of the Penal Code. See *R. v. Andree* [2], *R. v. Cooray* [3]. The majority of us think that when learned Judges have found the definition of the offence of criminal conspiracy difficult to construe, a lay jury would stand in urgent need of proper direction and explanation from the trial Judge when a charge of criminal conspiracy is made. Merely to read the section is in the opinion of the majority of the Court inadequate. Furthermore, it is difficult to prove a criminal conspiracy by direct evidence. In the present case not only was the Crown driven to the necessity of proving the alleged criminal conspiracy by circumstantial evidence, but that evidence was given by an accomplice who was a tainted witness. Moreover, in the opinion of the majority of the Court, it was the duty of the trial Judge in the course of his charge to have told the jury that in a case of circumstantial evidence, such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. This warning the trial Judge in this case failed to bring to the notice of the jury.

In regard to the count of conspiracy the majority of the Court are of opinion (to adopt the language of Avory J. in *R. v. Finch* [4] and his quotation from *R. v. Bundy* (1910) 5 Cr. App. R.270) that " the jury were entitled to have the assistance of the presiding Judge in directing them, and that in the words of Pickford J. ' the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence '. In these circumstances a miscarriage of justice may well have occurred and the Court have therefore come to the conclusion that this

[1] *(1950) 52 N. L. R. 119.*
[2] *(1941) 42 N. L. R. 495.*
[3] *(1950) 51 N. L. R. 433.*
[4] *(1916) 12 C. A. R. at p. 79.*

appeal must be allowed and the conviction quashed ". In *R. v. Currell* [1] in which the accused had been tried on a charge of receiving stolen property, Lord Hewart reiterated what was said by Lord Reading in *R. v. Abramovitch* (1914) 11 Cr. App. R. 45 that " it is essential in cases of this character that there should be a careful and proper direction ". Though this case refers to a charge of stolen property knowing it to be stolen, the majority of us think that those observations may well apply to a charge of criminal conspiracy.

Therefore, the majority of us think that merely to read the definition of the offence of criminal conspiracy to the jury is an inadequate direction. The majority of us are therefore of opinion that there has been a non-direction on count 1 which amounts to a misdirection. The majority of us also feel that this is not a case to which the proviso in s. 5 (1) of the Ordinance could apply. We therefore quash the conviction of all the accused under count 1 of this indictment.

The third point argued is ground No. 3 in the petition of appeal, namely " that the learned trial Judge had failed to point out to the jury on what evidence the Crown rested its charge of abetment nor did he explain to the jury as to what constituted abetment ".

The prosecuting counsel had told the jury that if they convicted the accused under count 1, there would be no necessity for them to consider counts 2 or 3. At page 9 of the summing up the trial Judge stated : " Under count three the first and the 4th accused are charged with having abetted the other two to murder the deceased. Although counsel for the Crown told you that if you found on the evidence the charge of conspiracy has been established you need not consider the other two charges, I tell you as a direction of law that you must bring in a verdict on all three counts. I will ask the clerk of assize to ask you when you come back from the retiring room what your verdict is on each count of the indictment, that is counts 1, 2 and 3. Merely because you find all these accused guilty on count 1 of the indictment your duty does not cease there. You will have to consider every count of the indictment because the case has proceeded to trial on an indictment consisting of three counts none of which have been withdrawn ". Now this is a perfectly correct view to take, but it also follows that therefore the jury would expect the learned trial Judge to sum up the case to them on count 3 and explain to them what were the ingredients of abetment. At page 57 of the summing up, as we have already pointed out, the jury, at the close of the Judge's summing up and after they had retired, came back and desired further directions on counts 2 and 3, but while the Judge further directed them on count 1, he failed to do so on count 3. It is conceded by the Crown that there is no adequate direction in that part of the summing up with regard to the law of abetment, and that they stood in need of direction. The majority of us are of opinion therefore that the conviction under count 3 of the 1st and 4th accused must be quashed on the ground of non-direction. The majority of the Court are also of opinion that this is not a case to which the proviso under s. 5 (1) can be applied.

[1] *(1935) 25 C. A. R. at p. 118.*

The 4th ground argued is ground No. 8 of the petition of appeal, namely " that the statement P12 was wrongly admitted by the learned trial Judge and prejudiced the case against the accused ". We are all of opinion that there is no substance in this contention. The summing up at pages 54 and 55 of the transcript deals with the statement P12 made by the 5th accused. The trial Judge also pointed out that that statement was only admissible against the 5th accused. We are of opinion that P12 does not amount to a confession. This objection therefore fails.

The 5th and final point argued consists of ground 10 in the petition of appeal, namely " that the learned trial Judge's direction to the jury that any person who crossed the ' dolla ' that night would be presumed to have had the common murderous intention irrespective as to who it was who caused the injuries, was inadequate and may have misled the jury ". The summing up on this point is to be found at page 58 of the transcript. The Judge explained the provisions of s. 32 to the jury and said " If somebody caused the death of Mudalihamy and the two accused who are charged under count 2 shared with that person a common murderous intention then the two of them would be guilty of murder because is is quite clear from the section which I have just read to you . . . . It is immaterial, if there is a common intention, who carried that common intention into execution so to speak. But you must be satisfied that the intention was common and the intention was murderous. Two people may have a very similar intention but it may not be shared in common. If you are satisfied that of the three people who went beyond the dola *one man caused the death of* Mudalihamy and all three shared a common murderous intention, that is, an intention of causing his death or causing bodily injury sufficient in the ordinary course of nature to cause death, all would be guilty of murder. With regard to count 2 it is a charge of murder against the 3rd and 5th accused. In other words the Crown says that one or other of them or somebody else caused the death of Mudalihamy but these two accused shared that common intention. If it was the third accused who did it the 5th and the other man shared that intention. If it was the 5th who did it the 3rd and the other man shared that intention. It is immaterial who did it if they had a common intention of causing the death of Mudalihamy. It is immaterial who carried that common intention into execution, who gave effect to that intention ". We are all agreed that there is no substance in the complaint that on this point the summing up was inadequate. This ground of appeal therefore fails.

In the result we quash the convictions of all the accused on count 1, and the convictions of the 1st and 4th accused on count 3 of the indictment. We affirm the convictions of the 3rd and 5th accused on count 2.

Convictions of all the accused on count 1 quashed.

Convictions of 1st and 4th accused on count 3 quashed.

Convictions of 3rd and 5th accused on count 2 affirmed.