[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Howard C.J., Cannon and de Silva JJ.**

THE KING *v.* HERASHAMY *et al.*

5–7—M. C. Gampaha, 24,265.

Evidence—Statement by a deceased person relating to circumstances of transaction which resulted in his death—In what circumstances admissible—When admissible as part of res gestae*—Alternative verdict possible—Duty of Judge to put it to the Jury—Trial of several accused for attempted murder—Directions regarding common intention—Evidence Ordinance, ss. 6, 32 (1)—Penal Code, s. 32—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 5 (1).*

The three accused were convicted of the offences of attempted murder and causing simple hurt.

According to the evidence, on the day of the offence, the injured man made a statement to the headman, who went to the scene for investigation, that the three accused had assaulted him. The injured man subsequently died, but with regard to the cause of his death the medical evidence was that the injury received at the hands of the accused had healed and that the death was caused by septic absorption due to bed sores.

Evidence was also given by S, who was the son of the deceased, that hearing cries on returning home he ran and saw his father lying fallen, that he spoke to his father and asked him who had assaulted him and his father said that the accused had done so, and that then the accused assaulted him (S). This assault, which was the subject of the second charge against the accused, took place within one fathom from his father.

Held, (i.) that as there was no proved connection between the bed sores and the injury inflicted by the accused on the deceased the statement made by the deceased to the headman that the accused had assaulted him was not admissible under section 32 (1) of the Evidence Ordinance ;

(ii.) that the statement was not admissible as part of the *res gestae,* under section 6 of the Evidence Ordinance ;

(iii.) that the statement of the deceased to S was inadmissible under section 32 (1) but was admissible, as part of the *res gestae,* under section 6 of the Evidence Ordinance.

Held, further, (*a*) that, although the statement made to the headman had been improperly admitted, the provisions of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance were applicable as there was no substantial miscarriage of justice ;

(*b*) that as the trial Judge had suggested that the accused or any one or more of them might, by reason of self-induced intoxication, have been incapable of forming a murderous intention he should have invited the attention of the Jury to the possible verdict of a lesser offence than attempted murder ;

(*c*) that, in view of certain confusion in a passage in the summing-up, it should have been made clear to the Jury that to convict all of the accused of the offence of attempted murder each one of them at the time of the assault was actuated by a common intention not merely to beat the deceased, but to cause his death or such bodily injuries as were likley to cause his death.

APPEALS from certain convictions by the Commissioner of Assize and Jury.

S. C. E. Rodrigo, for the 1st accused, appellant.

2nd accused, appellant, in person.

M. M. Kumarakulasinghum, for the 3rd accused, appellant.

H. H. Basnayake, Acting Attorney-General (with him *D. Jansze, C.C.*) for the Crown, respondent.

Cur. adv. vult.

February 25, 1946. HOWARD C.J.—

The accused appeal from their convictions by the Commissioner of Assize and Jury of the offences of attempted murder and causing simple hurt. After conviction each of them was sentenced to seven years' rigorous imprisonment on the first count and one year's rigorous imprisonment on the second count, the sentences to run concurrently. Three grounds of appeal have been taken by Counsel for the appellants as follows :—

(*a*) That the statement made by Godaudage Sedris Naide to D. S. Jayawardene was hearsay and inadmissible in evidence. That in consequence of the admission of this evidence there had been a substantial miscarriage of justice and the conviction cannot be allowed to stand :

(*b*) That the Commissioner failed to invite the attention of the Jury to the possible verdicts of attempted culpable homicide and grievous hurt :

(*c*) That the Commissioner failed to invite the attention of the Jury as to whether the appellants had a common intention to kill Godaudage Sedris Naide.

With regard to (*a*) it would appear from the evidence that D. S. Jayawardene, the Headman of Kalukondayawa, about 12 noon on July 3, 1944, the day of the offence received a complaint from one Richard, a witness for the Crown. After recording this complaint the Headman proceeded to the scene where he found G. S. Naide lying injured on a messa in his own house. The Headman spoke to him and he said that the three appellants assaulted him. G. S. Naide was admitted to the General Hospital the same day suffering from a fracture of the parietal

bone. He was at the General Hospital until July 18 when he was transferred to the Angoda Hospital. He stayed at Angoda till September 14, 1944, when he was discharged. On September 24, 1944, he was admitted to the General Hospital, Colombo, suffering from bed sores. He died at 5.30 A.M. on October 23, 1944. With regard to the cause of his death Dr. S. Thurairetnam says that he was unable to trace the exact cause of G. S. Naide's death, that he had an old depressed fracture that the fracture had healed and that he did not die of that injury. Dr. Sinnadurai, the Judicial Medical Officer, held the post-mortem examination and he was of opinion that G. S. Naide's death was due to septic absorption due to bed sores. In his charge to the Jury the learned Commissioner stated as follows :—

> "There is another line of evidence, but most unintelligently the Police fail to have Sedris' statement recorded while he was alive, in the proceedings of this case. It is a deplorable example of officiousness. There are two people to whom Sedris made statements. He made his first statement to his son, Subaneris, when Subaneris went up to him when he came back from the headman and ran up to his father, and he said these three men hit him, naming the three accused. Again when the Headman went to the spot he spoke to the injured man and the injured man said it was these three accused. That evidence appears to be hearsay evidence and therefore inadmissible, but that is not so. Those were statements made by a man now dead regarding the circumstances relating to his death, and that is a matter that is admissible."

In the course of the argument we have been referred to sections 32 and 6 of the Evidence Ordinance (Cap. 11). The first part of section 32 is worded as follows :—

> "Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—
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> (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

It is contended by Counsel for the appellants that, as the death of G. S. Naide had, according to the medical testimony, no connection with the injury he stated he had received at the hands of the appellants, it was not a "statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in a case in which the cause of that person's death comes into question." The acting Attorney-General has contended that the bed sores from which G. S. Naide died were the result of his having to lie in bed consequent on the injuries he received on July 3 and hence the injuries so received were the primary cause of his death. We do not

think this argument is tenable. The connection between the bed sores and the lying in bed consequent on the injuries received on July 3 was not proved and even if proved, the connection would be too remote to make the statement relevant. The cases of *The King v. Samarakoon Banda* [1] and *Nga Ba Min v. Emperor* [2] cited by the Attorney-General are not in our opinion in point. In the Ceylon case it was held that the dying declaration of B was admissible under section 32 (1) in a case where the accused was charged with the murder of A in the course of which he inflicted fatal injuries on B. The statement by B gave the circumstances in which he met with his death and which also brought A to the scene. This statement related to a circumstance of the transaction which resulted in B's death and was therefore admissible. In the Rangoon case the deceased died from abscess of the brain as the result of injuries, received in the course of a robbery at her house, becoming septic. It was held that a statement of the deceased before her death regarding the circumstances of the robbery was relevant under section 32 (1) even though death was caused remotely by the wounds received at the robbery. In his judgment in this case Dunkley J. distinguished the facts from those in *Imperatrix v. Rudra* [3]. In that case a person who received wounds during a dacoity made a statement before death. The medical evidence was that this person died of pneumonia aggravated by a stab wound, but there was no evidence as to how the pneumonia was aggravated by the stab and no explanation as to how the opinion was formed that the pneumonia was aggravated by the injury. In these circumstances it was held that the statement should not have been admitted. In the present case as there is no proved connection between the bed sores and the fracture the facts are more in line with the Bombay than the Rangoon case. In our opinion, therefore, the statement was not admissible under section 32.

The Attorney-General, however, further contends that if not admissible under section 32 (1) the statement was admissible under section 6. This section is worded as follows :—

> " Facts which though not in issue are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

In regard to this contention our attention was invited to the case of the *Queen v. Appuhamy* [4]. The facts in that case were that a Police Constable coming to the spot found the deceased lying on the road with a fractured skull which, according to the medical evidence, was the result of a blow or fall. In reply to the Constable the deceased said " Appuhamy assaulted me." It was held that this statement is, as part of the *res gestae*, admissible in evidence in support of the contention that the injury the deceased had received was the result of an assault and not of a fall. It is, however, clear from a perusal of a report of this case that the Court was of opinion that the name of the assailant should not have been admitted in evidence, and that the statement as to the assault was admitted as part of the

[1] *44 N. L. R. 169.*
[2] *(1935) A. I. R. (Rangoon,) 418.*
[3] *(1901) 25 Bombay 45.*
[4] *1 S. C. R. 59.*

res gestae because it was a charge of assault laid by the deceased. We do not think that the statement made to the Headman by G. S. Naide formed part of the *res gestae*.

A further point has arisen with regard to the evidence of Subaneris, the son of G. S. Naide. He states that hearing cries on returning home, he ran and saw his father lying fallen. He spoke to his father and asked him who had assaulted him and his father said that Herath, Sethan and Themis had done so. Then Herath came to him and said "I will tell you who assaulted him" and gave him a blow on the head. Then Sethan struck him with a club on the head and Themis struck him on the back of the head. This assault, which was the subject of the second charge against the three accused, took place within one fathom from his father. It was maintained by Counsel for the appellants that the statement of G. S. Naide to Subaneris was inadmissible. We think it was inadmissible under section 32 (1), but was admissible as part of the *res gestae* under section 6 of the Evidence Ordinance.

The Attorney-General has called in aid the proviso to section 5 (1) of the Criminal Appeal Ordinance and contended that even if the statement to the Headman was inadmissible, there has been no miscarriage of justice, inasmuch as on the evidence it cannot be said that the Jury could or would have arrived at any other verdict. It this connection our attention was invited to the case of *R. v. Haddy*[1]. In this case the proviso to section 4 (1) of the Criminal Appeal Act, 1907, was considered. This proviso is worded similarly to the proviso to our section.

The Court of Criminal Appeal held that, upon the true construction of the proviso to the section, the Court is entitled to give effect to the proviso if it is satisfied that no reasonable Jury, properly directed, would or could have given any other verdict than that which was in fact given and no substantial injustice has been done. The Attorney-General contends that having regard to the evidence of Ensa, Subaneris, Sarohamy and Richard no reasonable Jury could have arrived at any other verdict. Sarohamy is a witness who went back on the statement she made to the Magistrate and Crown Counsel was allowed to treat her as hostile. Her testimony was so full of contradictions that no reasonable Jury could place any reliance on it. The case therefore depended on the view the Jury formed of the testimony of Ensa, Subaneris and Richard. The first accused went into the witness box and denied that he took any part in the assault. Neither the second nor third accused tendered any evidence. It is unfortunate that the learned Commissioner in his charge to the Jury has somewhat emphasized the statement made by G. S. Naide to the Headman. But at the same time we do not think, having regard to the evidence of Ensa, Subaneris and Richard, and the fact that the 1st accused's alibi was unsupported and that no evidence was called by the other two accused any reasonable Jury would, if the statement of G. S. Naide to the Headman had not been admitted, have come to another conclusion. There has been, therefore, no substantial miscarriage of justice by reason of the admission of this statement.

[1] *(1944) 1 All England Reports 312.*

With regard to (*b*), at page 23 of the charge to the Jury the learned Commissioner has suggested that the accused or any one or more of them may, by reason of self-induced intoxication, have been incapable of forming a murderous intention. In such circumstances the Jury were told that the offence was not attempted murder, but attempted culpable homicide not amounting to murder. But nowhere in the charge is there any reference to the fact that, if the Jury thought there was no murderous intention but merely knowledge that their acts were likely to cause death the offence was one only of attempted culpable homicide not amounting to murder. And again if knowledge was not established the offence was one of voluntarily causing grievous hurt. In fact on p. 22 of the charge the learned Commissioner told the Jury that if the prosecution failed to prove any of the ingredients indicated to them, it was their bounden duty to acquit the accused. The Jury were, therefore, given no option. They must either find the accused guilty of attempted murder or acquit them. We are of opinion that there was a basis for a finding on Count 1 of a lesser offence than attempted murder. Following *The King v. Bellana Vitanage Eddin*[1] the learned Commissioner should have put this alternative to the Jury.

With regard to (*c*) we think that the learned Commissioner's directions on Common Intention are open to criticism so far as the facts in the present case are concerned. At p. 15–16 of the charge the following passage occurs :—

> " So, gentlemen, here if the evidence irresistibly leads you to the inference that those three accused on that day were armed, were present at the spot, and in pursuance of a common intention to give Sedris a beating and that when the son Subaneris came up, turn on him also in pursuance of the common intention, it matters not whose hand inflicted which blow. That is the law with regard to common intention.
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> Now, gentlemen, what has the prosecution to prove in this case? First of all, the prosecution must prove beyond reasonable doubt that on this day Sedris and Subaneris were assaulted ; secondly, they must prove beyond reasonable doubt that these three accused were present at the spot ; they will next have to prove that the three accused were actuated by the common intention in the sense in which I have described it to you, and they will also have to prove that in pursuance of that common intention, murderous intention under Count 1, or, with the intention or knowledge under Count 2, they made an attack on the father and the son. If the prosecution succeed in establishing all these ingredients to your satisfaction beyond reasonable doubt, then the case for the prosecution would be proved. If not, the case for the prosecution will not be proved, and remember that on any point, if there is a reasonable doubt, you must give the accused the benefit of that reasonable doubt."

The learned Commissioner states that it does not matter who inflicted the blow if the evidence leads to the inference that the accused were armed, were present and in pursuance of a common intention to give G. S. Naide a beating, it matters not whose hand inflicted the blow.

[1] *41 N. L. R. 345.*

Later the Commissioner says that the prosecution must prove that the three accused were actuated by a common intention in the sense in which he described it to the Jury and also that in pursuance of that common intention, murderous intention under Count 1 or with intention or knowledge under Count 2. There seems to be some confusion in this passage and the Jury may well have been in some doubt as to whether the common intention amounting in law to a murderous one that the prosecution had to establish was an intention to give Sedris a beating. It should have been made clear to the Jury that to convict all of the accused of the offence of attempted murder each one of them at the time of the assault was actuated by a common intention not only to beat but also to cause his death or such bodily injuries as were sufficient to cause his death.

Having regard to the failure of the learned Commissioner to put the alternative to a conviction on Count 1 to the Jury and the unsatisfactory treatment of what amounts to Common Intention, we set aside the convictions and sentences of all three accused on Count 1 and substitute therefor convictions for intentionally causing grievous hurt under section 317 of the Penal Code. In respect of this count we sentence each accused to five years' rigorous imprisonment to run concurrent with the sentence of one year's rigorous imprisonment imposed under Count 2.

Verdict altered.