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Present: Pereira J.

PERIS *v.* SILVA *et al.*

848 and 849—P. C. Colombo, 43,145.

Conspiracy—Evidence—Statements made by one accused—Evidence Ordinance, s. 10—Misjoinder.

Where A and B were charged with attempting to extort money from C—*held* that the statements made by B to C implicating A, and disclosing a conspiracy on the part of A and B to commit extortion, were inadmissible as against A.

Section 10 of the Evidence Ordinance (No. 14 of 1895) applies when it is first established *aliunde* that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. The statements relied on cannot themselves be taken as evidence of the existence of such reasonable grounds. Such grounds must first be established in order to pave the way for the admission of the statements as evidence, and when so admitted they may be additional proof of the conspiracy.

The question of misjoinder of charges and of accused has to be looked at in the light of the case that the prosecution presented to the Court and endeavoured to establish. The mere fact that the prosecution failed to establish its case (that the accused were acting in conspiracy and that the acts were committed in the course of one transaction) to the satisfaction of the Court as regards some of the charges, or as regards any one of the accused, is not evidence either of misjoinder of charges or of accused parties.

THE first accused in this case was charged by the complainant with having committed theft of certain letters belonging to Mr. J. S. W. de Soysa (Penal Code, section 370), and further, with

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having aided the second accused in attempting to extort from Mr. J. S. W. de Soysa a sum of money (Penal Code, sections 374 and 102) in respect of the return of the letters.

The second accused was charged under section 374 with attempting to commit extortion, and also under section 396 of the Penal Code. After trial the learned Magistrate found first accused guilty under sections 374 and 102, and the second accused under section 374. Each accused was sentenced to six months' rigorous imprisonment.

The learned Magistrate (E. B. Sueter, Esq.) delivered the following judgmnt.—

Second Accused.—The case against the second accused is that he went to the house of Mr. Walter de Soysa (on October 22), who had the conversation reported in shorthand in the documents A and B. He said he came from Romeal Silva, the first accused, and he wanted money for the return of certain letters stolen from Mr. de Soysa and said to be with Romeal Silva. The threat used was that if the money asked were not paid the letters would be handed over to the other side. The second accused denies the correctness of the report of the interview . . . . . It appears to me the record of the interview is a true one . . . . . It seems to me that the charge of attempted extortion is proved against him . . . . . I find him guilty under section 374 . . . . . I acquit him of the charge under section 396 . . . . . .

First Accused.—The charges against the first accused are that he stole some letters of Mr. de Soysa while he was his clerk, and recently abetted the second accused in demanding blackmail. The second charge may be taken first. The evidence is of statements made at the interview against him by second accused. These in themselves might not be sufficient, as there would be no guarantee that they were true. But there are certain circumstances pointing to the first accused acting with the second accused. There is the fact that second accused had nothing to do with Mr. de Soysa, while first accused was his clerk. Then there is the significant statement by Mr. de Soysa that Romeal's uncle was watching the gate on the day second accused came. I see this is confirmed by a mention in the transcript B, and I accept it as true. I therefore find the first accused guilty of abetting the second accused in his offence under section 374, as he instigated and conspired with him to commit this offence. As for the charge under section 370, there is a certain amount of vagueness as to what these letters are. The letters found on the first accused at the search are ones that he accounts for under section 185 of the Criminal Procedure Code. I withdraw the charge under section 370, and I convict him under sections 374 and 102.

The accused appealed.

Bawa, K.C. (with him *D. B. Jayatilleke*), for the second accused, appellant.—The second accused was charged with attempting to commit extortion (under section 374), and with assisting in the concealment of stolen articles (under section 396). There is clearly

a misjoinder of charges against the accused. There is also a misjoinder of accused parties, as the first accused is charged with theft (under section 370).

There is no evidence to show that the two accused were acting in pursuance of a conspiracy. There is a misjoinder of charges and accused parties. Counsel referred to *King v. Mendis*[1].

H. J. C. Pereira, for the first accused, appellant.—The statements of the second accused are not admissible in evidence against the first accused. Before the statements of one accused can be admitted in evidence against another, there must be evidence outside the evidence objected to show that they were acting in pursuance of a conspiracy. There is no such evidence here.

Garvin, Acting S.-G., for the respondent.—There is evidence of conspiracy. The evidence objected to is therefore admissible under section 10 of the Evidence Ordinance.

There is no misjoinder, as the prosecution has proved a conspiracy between the accused, and the acts were done in the same transaction.

Cur. adv. vult.

December 3, 1913. PEREIRA J.—

In this case it is quite clear that the evidence as against the first accused is insufficient to justify the conviction. There are three reasons given by the Magistrate for his finding, and all of them are equally unsound. He first points to the statements made by the second accused to Mr. de Soysa. It is manifest that these statements are no more than mere hearsay as against the first accused. They are by no means evidence against him. With reference to them the Solicitor-General cited section 10 of the Evidence Ordinance, but that section applies when it is first established *aliunde* that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. The statements relied on cannot themselves be taken as evidence of the existence of such reasonable grounds. Such grounds must first be established in order to pave the way for the admission of the statements as evidence, and when so admitted they may be additional proof of the conspiracy.

In the next place, the Police Magistrate refers to the fact that the second accused had nothing to do with Mr. de Soysa, while the first accused was his clerk. There is no connection between that fact and the guilt or innocence of the first accused.

The third reason given by the Magistrate is that the first accused's uncle was watching at the gate of Mr. de Soysa's premises on the day on which the second accused went in there. There is no reason to suppose that the uncle went there in conspiracy with the first accused any more than in conspiracy with the second.

[1] *(1913) 16 N. L. R. 252.*

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The Solicitor-General himself was not impressed by the reasons given by the Magistrate, but he referred me to the evidence of the witness Francis. That evidence does not establish any connection whatever between the first accused and the second accused, nor is it clear that the letters referred to by Francis are identical with those referred to by the second accused at his interview with Mr. de Soysa.

On behalf of the second accused, it was urged that there has been a misjoinder of charges and of accused parties. The question of misjoinder has, of course, to be looked at in the light of the case that the prosecution presented to the Court and endeavoured to establish. The attitude of the prosecution was that the two accused were acting in conspiracy with each other, and that the acts forming the subject of the different charges were acts in the course of one transaction, the transaction being the committing of extortion, and for that purpose stealing certain letters belonging to Mr. de Soysa, and holding out threats to use those letters to his injury. The mere fact that the prosecution failed to establish its case to the satisfaction of the Court as regards some of the charges, or as regards any one of the accused, is not evidence either of misjoinder of charges or of misjoinder of accused parties.

The case as against the second accused is clear. He undoubtedly attempted to extort money from Mr. de Soysa by threats of injury to him by misusing his letters. True, the threat was that the first accused would use the letters to the injury of Mr. de Soysa, but the whole tenor of the conversation between the second accused and Mr. de Soysa supports the idea that either the second accused was in conspiracy with the first accused (and here I may observe that the fact of lack of evidence to convict the first accused of conspiracy is no bar to the conviction of the second accused of conspiracy with the first on evidence admissible as against him, the second accused only), or that the use of the first accused's name was merely a cloak to disguise the act that the second accused himself was capable of committing and actually intended to commit. Considering the gravity of the offence in the light of the circumstances disclosed, the sentence on the second accused is, if anything, inadequate, and I would enhance it if the Police Magistrate had jurisdiction to impose a longer term of imprisonment.

I set aside the conviction of the first accused and acquit him. I affirm the conviction and sentence in the case of the second accused.

conviction of first accused set aside.

conviction of second accused affirmed.