[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present :* **Basnayake, C.J. (President), H. N. G. Fernando, J., and L. W. de Silva, A.J.**

THE QUEEN *v.* A. G. MARTIN SILVA and others

Appeals 64, 66, 67, 68, 69, 74, with Applications 73, 75, 76, 77, 78, 84

S. C. 33—M. C. Badulla-Haldumulla, 22,459

Evidence—Unsworn statement by accused inculpating co-accused—Evidential value—Misdirection—Penal Code, ss. 478A, 478D.

A statement made from the dock by an accused person inculpating a co-accused is not evidence against the co-accused, and the jury should be warned clearly and unmistakably not to take it into account against the co-accused.

APPEALS, with applications, against certain convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *V. Vidyasagara*, for 1st Accused-Appellant.

Colvin R. de Silva, with *M. L. de Silva*, for 3rd Accused-Appellant.

G. E. Chitty, Q.C., with *Colvin R. de Silva, D. J. Horagoda* and *A. M. Coomaraswamy*, for 6th Accused-Appellant.

2nd, 4th and 5th Accused-Appellants in person.

V. T. Thamotheram, Senior Crown Counsel, with *J. R. M. Perera*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 18, 1957. BASNAYAKE, C.J.—

All the six appellants were indicted on charges of conspiracy to commit an offence punishable under section 478A and of committing an offence punishable under section 478D of the Penal Code. An additional charge under section 478A of the Penal Code was made against the 2nd, 3rd and 4th appellants and a further charge under section 478D against the 5th appellant.

All the appellants were found guilty of the charges laid against them in the indictment.

On each of the charges the 1st, 2nd, 5th, and 6th appellants were sentenced to 8 years' rigorous imprisonment, and the 3rd and 4th

appellants to five years' rigorous imprisonment, the sentences to run concurrently. They have all appealed to this Court.

At the hearing of this appeal the 1st, 3rd and 6th were represented by counsel while the 2nd, 4th, and 5th were unrepresented.

Shortly the material facts are as follows: The 1st appellant is a well-to-do trader of Diyatalawa, the 2nd, 3rd, and 4th appellants are compositors by trade, the 5th appellant is a motor mechanic running a private motor repair workshop of his own at Bandarawela, and the 6th appellant is the owner of a printing press at Amunudowa in the same town.

On 1st April 1956 when a police party led by Inspector Thavarajah raided a house in Diyatalawa known as Down Patrick owned by the 1st appellant they found the 2nd, 3rd, and 4th appellants in a room of the house in which there was a platen printing machine. The 2nd appellant had his foot on the pedal of the machine (P. 26) and appeared to be working it. The 3rd appellant was behind the printing machine about one and a half feet away from it and the 4th appellant was close to him on his left. The witness Aloysius who is admittedly an accomplice and the star witness in the case was at the doorway leading from this room to another. On the feed-board of the printing machine were 58 partly printed one-rupee currency notes. There were 33 coloured sheets of paper on the left-hand side of the feed-board. The circular disc of the printing machine had a coating of fresh blue ink. There was on the machine a metal block bearing the impressions to be found on the reverse of genuine one-rupee currency notes.

There were on the floor about 2 feet away from the printing machine seven mounted blocks bearing impressions of the various designs of Re. 1 currency notes. Along with them were two moulds or rubber seals for impressing on paper the lion watermark found on one-rupee currency notes. There were several tins of coloured ink on an almirah near the printing machine and a bottle of white ink on the floor. On the floor was one inkduct. There were tools and a wealth of other materials used or to be used in connexion with the printing of currency notes. There were two almirahs in the room placed in such a way as to prevent the printing machine from being seen from outside. There was a window the blinds of which were drawn. Immediately above the machine was a device for giving a signal to those working at the machine. In the room adjoining on the floor were some sheets of paper, 2,472 in all, bearing some colours and an impression of one of the designs of a rupee note. They were spread out on sheets of old newspaper. In the same room was a cardboard box containing 2,359 similar sheets of paper. There were two sheets of corrugated zinc. On them were some charcoal and firewood.

The appellants and Aloysius were arrested and taken to the Police Station. Sergeant Milan Perera and two constables were left behind to guard the house and Sergeant Rupasinghe was sent to arrest the

1st appellant. While Sergeant Perera was guarding the house the 5th appellant arrived by car and entered the house carrying two bundles of paper which on examination were found to contain a watermark impression described by the Government Printer as the imitation of the watermark lion similar to the design of the watermark of the one-rupee currency note now in circulation. Each sheet had two such marks. The partly printed currency notes found in the house had the same watermark (P21, P22). There were 17,176 sheets of paper in all in the two bundles. Sergeant Perera arrested the 5th appellant and searched the car and found on the rear seat a gunny bag containing rice, brown sugar, Bombay onions, flour, coconuts, etc. He then telephoned the Police Station and informed Inspector Thavarajah of the arrest. Sergeant Rupasinghe came in response to the message and removed the 5th appellant to the Police Station with the bundles of paper he had brought.

It would appear that somewhere in 1955 about the month of October the 2nd appellant negotiated the sale of the printing machine found at Down Patrick for Rs. 2,150, the purchaser being the 6th appellant and the seller Mrs. Thejawathie Gunawardene. The 2nd appellant received a commission of Rs. 200. The printing machine was removed from Colombo on 26th October 1955. The 6th appellant paid for it by cheque in favour of Mrs. Thejawathie Gunawardene. The printing machine had three rollers when it was sold but when it was seized it had five rollers and a new inkduct suitable for multicolour printing. This machine was transported by a lorry belonging to the Bandarawela Co-operative Stores to the Singhagiri Printing Works owned by the 6th appellant at Amunudowa in Bandarawela.

In early December 1955 the 2nd appellant placed an order for an inkduct with the witness Aloysius who is a tinker by trade. He next brought a feed roller and wanted him to make the inkduct to fit the roller. It would appear that on this occasion he confided in Aloysius that it was required for counterfeiting notes. On a subsequent visit the 2nd appellant invited Aloysius to his room in Bloemendhal Road, Colombo. There he met the 4th appellant. The 2nd appellant told the witness Aloysius on this occasion that it would be necessary for him to come to Diyatalawa. About one and a half months later he actually invited him to go with him to fit the inkduct and roller to the machine. They travelled by bus to Bandarawela and thence to Diyatalawa. They got down near the Diyatalawa Post Office and the 2nd appellant fetched a key from a fish stall near by. Then they went to Down Patrick and the 2nd appellant opened the door with the key he had brought. Then Aloysius was asked to fix the inkduct; but he was unable to do so as the feed roller was missing. The feed roller could not be fitted as some bolts and screws were missing. The 1st appellant came there and entered the room in which the printing machine was while they were discussing the matter. He was informed of the defect and he said he would send the baas. Then two persons came in an Austin car No. EL 3075 and knocked at the door. The 1st appellant opened the door. The visitors were the

5th and 6th appellants. The 2nd appellant asked the 5th appellant to fix the feed roller. The 1st continued to talk to the 6th appellant in the hall. He did not enter the room in which the press was. The 5th appellant said that he would attend to the work early next morning and left with the 6th appellant in the car in which they came. The 1st appellant locked the door immediately they left and later he too left the house and sent food for the 2nd appellant and Aloysius in a tiffin carrier. Next morning about 8 a.m. the 5th appellant came and fixed the feed roller with bolts and Aloysius fitted the inkduct which was tested. The 1st appellant came at 10 a.m. On being told by the 2nd appellant that the machine must be tested he went out of the room and brought a parcel and handed it to the 2nd appellant. The parcel contained eight blocks. The 1st appellant brought sheets of paper bearing the lion watermark. After testing the blocks the 2nd appellant said that engraving tools were necessary to correct some flaws in the blocks. The 1st appellant said he would buy them from the town. Aloysius who was given the printed notes to be burnt retained two of them and put them in his box when he returned to Colombo and when he was arrested handed them to the Police. About 11.30 a.m. that day Aloysius left for Colombo. The 1st appellant gave him Rs. 20. The money was actually handed to him by the 5th appellant. Two weeks later Aloysius came to Down Patrick for the second time at about 8 a.m. He travelled by the night mail train from Colombo. When he tapped the door the 1st appellant opened it. On being asked where the others were he said they had gone to Colombo, and he complained about the delay. Together they went to the room in which the Press was. On this occasion Aloysius noticed the device for giving an alarm and on inquiring about it was informed by the 1st appellant that it was a device to give a signal to stop work if any one came. It was fitted by the 5th appellant, he said. He also explained that the firewood was for burning the counterfeit notes in case the Police came. Aloysius then left in the company of the 1st appellant and returned to Colombo. Aloysius's third visit was on 31st March. This time he entered the house by the back door which was open. He found the 4th appellant in the kitchen preparing tea, and the 2nd and 3rd appellants were inside the house near the printing machine. After tea the 2nd appellant started to print one-rupee notes, and the 3rd and 4th appellants stood by and put the printed notes to dry on sheets of newspaper in the adjoining room. About one thousand notes had been printed by the time the Police raided.

At the trial the 1st appellant gave evidence and called witnesses on his behalf. He disclaimed all knowledge of the crime and stated that at the relevant time the house was under a lease to the 5th appellant. The 2nd 3rd and 4th appellants also gave evidence while the 5th made a statement from the dock exculpating himself of the crimes with which he was charged. In the course of that statement he said that he transported the printing press which was packed in two boxes from the 6th appellant's printing establishment to the house of the 1st appellant at the latter's request. He also said that the paper found on him had been given to him by the 1st appellant on the day he was arrested when he was about

to close his workshop and that the 1st appellant asked him to take it and the bag of provisions found in his car as they were urgently needed. He referred to the deed of lease of Down Patrick in his favour and stated that it was a blind and was not meant to be acted on and that he did not occupy the bungalow at all.

The main ground of appeal pressed on behalf of the 1st appellant is that the learned trial Judge did not adequately direct the jury as to how the statement of the 5th appellant from the dock should be treated in so far as it affects the 1st appellant.

When dealing with the case against the 1st appellant the learned trial Judge after referring to it said:

> "Of course he stated all this in an unsworn statement made by him from the dock. Now, gentlemen of the jury, the weight to be attached to an unsworn statement is not the same as that you attach to the sworn evidence of an accused person. The most potent weapon that is available to a lawyer for the purpose of testing the evidence of a witness is cross-examination, but when an accused person makes an unsworn statement from the dock, he cannot be cross-examined. Therefore his evidence cannot be tested regarding its accuracy and truth, but you should not ignore an unsworn statement. Consider it for whatever it is worth . . . .
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> "On the other hand, gentlemen of the jury, do you believe the story of the 5th accused that he signed this deed in order to oblige the 1st accused to enable the latter to send away his wife and children from the house? The case for the prosecution is that that position is not true, that both the 1st and 5th accused knew the purpose for which this deed was executed. . . .
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> "Gentlemen of the jury, evidence of an accused person given on oath in this Court, you are entitled to make use of against his co-accused. Of course, you must always bear in mind that he is also an accomplice. Bear in mind that he is an accomplice and that his evidence must be treated as the evidence of an accomplice, but the unsworn statement made by the 5th accused, you are *not* entitled to make use of against the other accused. The evidence of a co-accused, you must treat in the same manner as you treat the evidence of an accomplice."

The last direction was given after learned Crown Counsel had on being asked whether there was anything else he should mention invited the learned trial Judge's attention to the difference between the evidence and the unsworn statement of a co-accused.

The statement of a co-accused inculpating another accused made from the dock is subject to the infirmity that it is the statement of an accomplice not on oath and not subject to cross-examination by the accused against whom it is made. It has been the practice both here

and in England to carefully warn juries not to take such statements into account. It was stated by a Bench of five Judges of the Supreme Court in the case of *Rex v. Ukku Banda* [1] "that where in a criminal trial two co-accused persons elect not to give evidence, but are content to rely either upon their statements in the Police Court or upon unsworn statements in the dock, the jury should be warned, where such a statement by one prisoner inculpates the other, that it should not be taken into account against him."

Though in that case the Court was considering the question of sworn testimony of a prisoner inculpating another, the opinion of the Bench with regard to unsworn statements is one with which we with great respect agree and we think that the trial Judge should warn the jury clearly and unmistakably that the unsworn statement of a co-accused should not be taken into account against another accused. In the recent case of *Sumatapalage Reginald Gunawardene* [2] the Court of Criminal Appeal in England ruled that in the case of a statement of a co-accused, "it is the duty of the Judge to impress on the Jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded". With that statement of the law we are in agreement. In the instant case the learned Judge did not clearly impress on the jury that they must disregard the statement of the 5th accused made from the dock in considering the case of the 1st accused. On the contrary he seems to have indicated that they might consider it as against him subject to its infirmities for what it is worth. That direction is wrong and the contention of learned counsel that there has been a misdirection in this respect is entitled to succeed.

Although at the end of the summing up the learned Judge gave an appropriate direction when his attention was drawn to the omission by learned Crown Counsel, he omitted to set right the irregular direction earlier given by him.

Learned Crown Counsel contended that the misdirection has caused no substantial miscarriage of justice because the other evidence conclusively establishes the 1st appellant's complicity in the crime. He invited our attention to passages in the evidence too numerous to reproduce here which go to establish his guilt conclusively. We are of opinion that no reasonable jury, after a proper direction, could have failed to convict this appellant. We accordingly dismiss his appeal and refuse his application. Learned counsel for the 3rd appellant has not urged any matter of importance on his behalf and we therefore dismiss his appeal and refuse his application.

We also dismiss the appeals and refuse the applications of the 2nd, 4th, and 5th appellants who appeared in person as they have not urged any good reason why the verdict against them should be set aside.

[1] *24 N. L. R. 327 at 334.* [2] *35 Cr. App. R. 80 at 91.*

In regard to the 6th appellant we are of opinion that the evidence does not support his conviction. The circumstances proved against him are all consistent with his innocence. The purchase of the printing machine, the sale of it to the 1st appellant, the visit of the 2nd appellant to his hotel, wrongly described as Singhagiri Hotel instead of Singhagiri Restaurant, his visit to Down Patrick with the 5th appellant when Aloysius was there for the first time, do not establish his complicity in the crimes alleged against him. We think that the verdict of the jury cannot be supported having regard to the evidence and we accordingly allow the appeal of the 6th appellant, quash his conviction and direct a judgment of acquittal to be entered.

Appeals of 1st, 2nd, 3rd, 4th and 5th appellants dismissed.
Appeal of 6th appellant allowed.