

1935 Present: Maartensz and Koch JJ. and Soertsz A.J.

THE KING v. TISSERA et al.

8—P. C. Dandagamuwa, 15,723.

[SECOND MIDLAND CIRCUIT.]

Accomplice—Corroboration of evidence—Material particulars—Statement by one accused regarding confession by another—Misdirection by Judge.

Two persons were charged with the murder of B, a cattle dealer, who used to travel about in search of cattle, which he bought and sold for purposes of slaughter.

In a certain village B stayed in the house of C, with whom he set out on the day in question in search of cattle.

According to the evidence of C, B was killed by the accused on a certain path, which they were taking on their way to C's house. P gave evidence that on a day, which could not be fixed precisely, he met the prisoners walking along the path and that further on he met B and C, spoke to C and passed on. First accused made a statement to the effect that the second accused made a confession to him that he committed the murder.

Held, that P's evidence was no corroboration of the evidence of C, who was regarded by the jury under the direction of the Judge as an accomplice and that it was a misdirection to tell the jury that it amounted to corroboration.

Whether or not a witness, who denies complicity, is really an accomplice is an issue of fact solely within the province of the jury.

Held, further, that it was a misdirection to tell the jury that the first accused's statement was corroboration of C's evidence as against first accused in the absence of proof that the alleged confession was not made.

THIS was a case stated by the Attorney-General under the provisions of section 355 (3) of the Criminal Procedure Code. The facts appear from the head-note.

M. W. H. de Silva, Acting S.-G. (with him *Kariapper, C.C.*), for the Crown.—The questions of law submitted for the consideration of Your Lordships are—(1) Whether Cyril's evidence should in law be regarded as that of an accomplice; (2) Whether Peduru's evidence affords sufficient corroboration of Cyril's evidence against either accused; (3) Whether the first accused's statutory statement can be used against him as corroboration of Cyril's evidence.

J. R. Jayewardene, for first accused—After Cyril's evidence the learned Judge ruled that Cyril was an accomplice. This precluded Counsel from leading evidence that Cyril was an accomplice. The Judge's ruling had the effect of stopping Counsel from leading further evidence on that point. The trial proceeded from that stage on the assumption that Cyril was an accomplice.

The Judge directed the jury that Cyril was an accomplice and that his evidence must be corroborated, and that Peduru's evidence supplied the necessary corroboration. The Judge directed that Cyril's evidence with regard to the first accused's connection with the crime was supported

by the first accused's unsworn statement. The learned Judge goes on the basis that the first accused's statement was a confession. The first accused's statement cannot be used against him.

We cannot here go into the question whether Cyril was an accomplice. The question is whether Cyril has been corroborated. It is a misdirection to the jury that Peduru's evidence is sufficient corroboration of Cyril's evidence.

Peduru's evidence does not supply any corroboration at all; it is tautologous to speak of sufficiency of corroboration. Peduru's evidence does not show anything more than that the first and second accused were with the accomplice. There should be corroboration not only as regards the identity of the accused but also as regards their connection with the crime (*Henry Everest*¹; *R. v. Foulter*²; *Marikar v. James*³; *35 Cr. Law Journal* 317 (I. R.)). There must be a distinction between evidence which confirms the circumstances of the case and that which identifies the accused. The case reported in *35 Cr. L. J.* on the question of circumstances is exactly similar to the present case.

There must be corroboration of the accomplice's evidence against both the prisoners (*25 Madras* 143; *8 Ind. L. R. (Allahabad)* 306).

It is a question of law for the Judge to decide what evidence amounts to corroboration; and then for the jury to believe or disbelieve that evidence. (*8 Weekly R. (Cr. Sect.)* p. 19.)

[MAARTENSZ J.—Did the Judge say that if Peduru's evidence is believed then it is sufficient corroboration?]

The case is stated on the basis that the Judge had ruled that Peduru's evidence, if believed, was corroboration.

If the Judge ruled that Peduru's evidence, if believed, is corroboration of C's evidence, then it is a misdirection to the jury.

Peduru refers to *two* incidents, viz., his meeting the two accused and his meeting the accomplice. The first has no criminal significance while the second tends to prove that the accomplice can speak of the crime. Peduru does not corroborate Cyril as to the circumstances in which the crime was committed. There is nothing to show in his evidence that the accused participated in the crime.

The first accused's statement cannot be accepted in part and rejected in part. There must be independent corroboration of evidence against each accused; there is corroboration against the second accused only. The corroboration of an accomplice's evidence against either accused should be independent (*33 Cr. L. R.* 242). There is nothing which connects the first accused with the crime. It is only on condition that the first accused was at the spot and committed the crime that his statement could be used as corroboration. The statement of the first accused is undoubtedly inadmissible against the second accused. The Court should have directed the jury how they should deal with the hearsay statement of the first accused. It is only that which connects the first accused with the crime.

A. S. Ponnambalam, for second accused, adopted the above arguments.

¹ *2 Cr. A. R.* 130.

² *8 C. & P.* 106.

³ *7 Thambiah R.* 30.

M. W. H. de Silva, Acting S.-G., in reply.—The first accused's statement shows a knowledge of the circumstances connected with the murder. If the evidence establishes that he did not obtain this knowledge either from the second accused as alleged by him or from other sources, then it shows that he must have been present at the scene of the crime and this can be treated as corroboration of the evidence of the accomplice, (5 *W. R. (Sutherlands' Reports)* page 80). The evidence in this case does not, however conclusively establish that the second accused did not make this statement as alleged by the first accused or that there was no opportunity for the first accused to obtain information of the crime from other sources. It is therefore doubtful whether the first accused's statement affords any corroboration. The substance of the statement is heresay and would not afford corroboration.

Cur. adv. vult.

October 28, 1935. The judgment of the Court was delivered by MAARTENSZ J.—

This case was reviewed by us upon a certificate given by the Attorney-General in pursuance of the provisions of sub-section (3) of section 355 of the Criminal Procedure Code, 1898, that the questions of law hereafter set out which arose at the trial ought to be further considered.

The convicted persons, (1) Warnakulasooriya Elias Tissera and (2) Peter Mirando, were tried on September 9, 10, and 11 at the Criminal Sessions of the Supreme Court held at Kandy, and were by a unanimous verdict of the jury found guilty of committing murder by causing the death of one Thuppahige Don Bastian Appuhamy on September 18, 1934, at Dura Akkarawatta.

Don Bastian, who was a cattle dealer living near Kandana, in the District of Negombo, used to travel to Dandagamuwa and the neighbouring villages in search of cattle, which he bought from villagers and sold for purposes of slaughter. When in the village of Ellabodagama he usually stayed with a man named Cyril of that village.

Don Bastian and his nephew Rapiel came to Cyril's house on September 15. Rapiel returned home alone on September 17.

On the morning of September 18, 1934, Don Bastian and Cyril set out from the house of the latter in search of cattle. They were possibly seen in the forenoon by the witnesses Biya *alias* Bandiya of Koneduduwera, and about 11 or 11.30 A.M. by K. Elaris Perera of Pihimbiya at his boutique, where they had a chew of betel.

Bastian was not seen alive after September 18, 1934. According to the evidence of Cyril, Bastian was killed by the first and second prisoners about midday at the point A on the path which they were taking on their way to Cyril's house from the boutique of Elaris. The murder was, he said, committed shortly after they had at the point "K" met and spoken to Pedru, who was going in the opposite direction. After crossing Pedru, Cyril first saw the two prisoners at the point "E". The first prisoner was then carrying a katty—a little later he noticed that the prisoners were following them and mentioned it to Bastian. When he reached the point B in the plan, he heard Bastian cry out that someone

had struck him. On looking back he saw Bastian lying on the ground at A and the second prisoner about to strike him with a katty. The blow alighted on Bastian's neck.

The first prisoner, who was about eight feet away from Bastian, said "Catch that fellow". Cyril said he was so frightened that he ran home, borrowed Rs. 2 from his sister Leelawathie, and went to Kuliypitiya and thence by bus to Negombo, where he slept in an outer verandah. Next day he went to his aunt Chalo's house in Tempola, five miles away from Negombo. After four or five days he found employment on Mr. Schröder's estate in Negombo.

We should mention here that the plan was not available to us, and the points referred to are taken from the statement of facts in the case stated by the Attorney-General.

A few days after he left the village Cyril was questioned by his brother Pathmasena, as his father had received information from the first prisoner that a cattle trader had been killed near the Akkarawatte tank. Cyril replied "I will mention it in the proper place" and told him to go away.

The Police were meanwhile in search of Cyril, as Rapiel had mentioned that Don Bastian was last seen in his company. He was arrested on Mr. Schrader's estate on October 4. Before his arrest a disjointed skeleton had been found in the jungle on September 29, 1934, at the points G, H, I, and J on the plan. Near the bones were a grey coloured cloth, a verti cloth with a red border, an umbrella, pieces of a sarong, and a sheath of a knife, which have been identified by Bastian's wife and Rapiel as belonging to Bastian.

The bones so found have been identified as those of Bastian on account of the identification of the articles found near the bones.

The cause of death could not be ascertained by an examination of the bones.

The presiding Judge ruled that Cyril was an accomplice. The first question of law submitted for consideration was "Whether Cyril's evidence should in law be regarded as that of an accomplice".

The Solicitor-General stated that this question was reserved with a view to obtaining a ruling as to the circumstances in which a witness who denies complicity is to be deemed an accomplice.

We are of opinion that a general rule or rules cannot be laid down as it is not a question of law but of fact. It was so held in the case of *The King v. Loku Nona and others*¹, where the Divisional Court affirmed the opinion of Wood Renton J. that whether or not a witness who denies complicity is really an accomplice is an issue of fact, and therefore solely within the province of the jury. We wish to say, with respect, that we are in complete agreement with this view.

In our opinion, therefore, this question should have been left to the jury for their decision. But, as the learned Assize Judge ruled that the witness Cyril was an accomplice, or at least, should be treated as such, we think that the second and third questions submitted for our consideration must be decided upon the assumption that the jury followed the direction of the Judge and regarded Cyril's evidence as that of an accomplice.

¹ (1907) 11 N. L. R. 4.

The second question reserved is whether Pedru's evidence affords sufficient corroboration of Cyril's evidence as against either prisoner. With regard to this, we wish to say that a note of the learned Judge's summing up was not available to us and we have been invited to consider the question on the assumption that the statement in the Judge's order on this point contains substantially his directions to the jury.

In this order he said, "Having ruled that Cyril was an accomplice I explained to the jury the law with regard to accomplices But in view of illustration (b) of section 114 I explained that it was the duty of the Judge to warn juries not to accept the evidence of an accomplice unless he was corroborated in material particulars, not merely with regard to the commission of the offence but particularly in connecting and identifying each of the two accused with the offence Pedru's evidence if believed corroborated Cyril as regards the connection of the two accused with the offence, because he saw both the accused at the spot and time where and when the crime was committed and he also saw Bastian and Cyril at about the same time and place. Pedru also saw a katty in the hands of the first accused. I asked the jury to apply the test of the eye in considering the evidence of Cyril. Were they satisfied he was speaking the truth and was it their experience that a youth like Cyril would behave in the way Cyril did? If they believed Cyril that was not enough; as he was an accomplice it was my duty to warn the jury not to accept an accomplice's evidence unless he was corroborated in material particulars connecting the two accused with the crime. Pedru supplied the necessary evidence. It was for the jury to say whether they believed Pedru".

"My summing up was to that effect"

The passages quoted indicate that the learned Judge directed the jury that, to use his own words, "Pedru supplied the necessary evidence".

Pedru's evidence is that on a day, which he cannot fix precisely, he was going along a path leading to Pihimbiya junction by the Akkarawatte tank and passed the first and second prisoners at the point F in the plan—the second prisoner being armed with a katty and first accused unarmed. Further on at the point K he met Bastian and Cyril going towards F and spoke to Cyril and passed on. The point E, where according to Cyril's evidence he first saw the prisoners, is 700 yards from K.

It was contended by Counsel for the prisoners that Pedru's evidence did not as a matter of law corroborate the evidence of Cyril and that the learned Judge should have so directed the jury. And it was urged that the omission to give that direction to the jury amounted to a misdirection which prejudiced the prisoners and entitled them to an order that the conviction was bad in law.

The Solicitor-General very fairly drew our attention to the fact that though Pedru's evidence corroborated Cyril's evidence that the prisoners were on the path on a certain day there was no evidence to corroborate him that Bastian was killed on the day of the meeting or that the murder took place on the path at all.

It was held in the case of *The King v. Loku Nona and others* (*supra*) that there is no difference between the law of England relating to accomplices and the law of Ceylon as embodied in sections 114 and 133 of the

Evidence Ordinance. It was also held that it was the duty of the Judge to warn the jury that they should not convict on the evidence of an accomplice unless corroborated by independent evidence in material particulars; that the corroboration of the evidence of an accomplice must consist in some circumstance that affects the identity of the party or parties accused, but that it is not necessary that the corroborative evidence should be conclusive against the accused. This principle was affirmed in the case of *The King v. Baskerville*¹. In all the cases cited to us it was insisted that the corroboration must consist of some independent evidence which points to the prisoner as the guilty person: because a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history without identifying the persons, that is really no corroboration at all. In all the cases cited there does not appear to have been any doubt as to the truth of the evidence of the accomplice regarding the circumstances in which the offence was committed. But in this case, apart from the evidence of Cyril, there is no evidence that Bastian was killed on September 18, 1934, at the time and at the place deposed to by Cyril; in short, Cyril's evidence as to the circumstances in which the crime was committed is not corroborated by independent evidence. Therefore, the evidence of Pedru that he saw the prisoners on the path where the crime was committed shortly before the time at which Cyril says the crime was committed is no corroboration of Cyril's evidence that the prisoners participated in the crime. It is quite possible that Cyril's evidence as regards the circumstances is entirely false. The evidence of Albert, Baiya *alias* Bandiya, Elaris and Leelawathie suggesting that Cyril was in the company of Bastian on September 18 does not corroborate his evidence as to the circumstances in which the crime was committed. There is one fact I would emphasize and that is the fact that Pedru cannot fix the date on which he met first the prisoners and then Bastian and Cyril. Bastian and Cyril were going about the villages between September 15 and 18, and there is nothing to exclude the possibility of Pedru having met them on a previous date. Moreover, Pedru has not stated in his evidence at what time he met Bastian and Cyril, and even if it can be said that the meeting took place on the 18th, his evidence does not establish that he saw the two prisoners in the neighbourhood of the place in which Cyril says the crime was committed at the time Cyril says it was committed.

In the view we have taken of Pedru's evidence it is immaterial whether the learned Judge directed the jury that Pedru's evidence, if believed, supplied the necessary corroboration, or whether he left it to them to decide the question, whether that evidence corroborated Cyril or not, even if believed. We are accordingly of opinion, with all due respect to the learned Judge that he should have told the jury that Pedru's evidence did not corroborate the evidence of Cyril.

In the case of *Elahee Buksh*, reported in *5 Weekly Reporter Criminal Rulings*, p. 80, it is pointed out, firstly, that it is the duty of a Judge not only to state to the jury all the evidence that has been given but to comment on its bearing and weight and not to leave it to them to decide

¹ (1916) L. R. 2 K. B. 658.

for themselves what the proper bearing and weight are; secondly, that it would be an "Error in a summing up if a Judge after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the jury that the evidence of the accomplice was corroborated by evidence of a fact which did not amount to any corroboration at all".

The third question of law reserved is "whether the first prisoner's statutory statement can be used against him as corroboration of Cyril's evidence". Counsel who appeared for him conceded that if the first prisoner's statutory statement was of an incriminatory character it could be used against him to corroborate the evidence of Cyril. He contended, however, that the statement being of an exculpatory nature the evidence of Cyril was not corroborated by it. The statutory statement made by the first prisoner is as follows:—"I am not guilty. Peter Mirando the second accused was working under me in clearing my residing land. He is related to my wife Baby Margaret. On a Tuesday, i.e., on September 18, in the morning I asked the second accused Mirando to clear the land saying that I was going to the land commonly known as Parewatte of which I am the watcher. I went to that land at about 7 A.M. and returned home at about 1 or 2 P.M. that day to take my midday meal. The second accused Mirando was not to be seen in the house, so I asked my wife where the second accused was. She told me that second accused told her that he was going to Kuliapitiya and that he had asked her, if any outsider was to inquire as to where he was, to say that he had gone to Kuliapitiya two or three days before that day. I asked her why he had left so suddenly. I told her that there must be some reason for his sudden departure. Then she told me that she saw the second accused, Cyril, and a cattle dealer who was blind in one eye talking together on the road opposite my house, and that the second accused saying that he was going with the other two men in search of cattle took a table knife and a banian and went away with the two men. I was thinking over as to why the second accused had gone away. On the following day at about 10.30 A.M. the second accused came to my residing house by the main road with half a bottle of arrack tied up in a handkerchief. He came and sat down on a bench and said that the bottle of arrack was a present for me. I asked him where he had gone to so suddenly. He asked me whether there was no trouble (කලබෙල) this side. I asked him what the trouble was about. He said that he was going with a cattle dealer and Cyril. Cyril was going ahead, and the cattle dealer was following Cyril while the second accused was going behind the cattle dealer. Then he (second accused) struck the cattle dealer on the head with a club and the latter fell on his knees and pulled out a pointed knife and turned to stab him (second accused). Then he (second accused) struck the cattle dealer again on the other side of the head with the club. Then he (second accused) got on his (cattle dealer's) chest and cut the neck. When he looked round to remove the body he saw that Cyril had run away through fear and was looking on from a distance. Then he asked Cyril to come up. Then Cyril came up. He said that he first hid the head close to the spot where the man was killed. Then he and Cyril carried the trunk and hid it among 'Iluk' bushes near the tank. Then I told the second accused that he had done a fine thing and that he had

put the noose round my neck, as the Arachchi, if he came to know of the murder, would make up evidence and implicate me. I asked him to go somewhere and save himself. I sent him away the same day. He returned four days later to my wife's residing house. I live in the house by the main road while my wife lives in another house. My wife told me that she asked the second accused about the table knife that he had removed. He then pulled it out of the roof and handed it to my wife. My wife told me so. Then I was wondering as to what should be done. I came to Kuliypitiya about five or six days after the murder with the intention of giving a petition. I came and told Wilbert, the clerk of Mr. Sandaratne, Proctor, about the murder and asked him what I should do. He asked me to give a petition. I told him that if I did so the Arachchi might put me into trouble, as he is angry with me. Then he asked me to get out of the trouble as best as I could and that he could not advise me on the matter. Last Saturday I went to Muruthona near Kochchikadde and returned home on Monday at about dusk. Then the murder had come to light. The Police had discovered the bones and the Magistrate had gone to the spot for inquiry. On the same evening at about 7 p.m. Inspector Mendis and Constable Carolis came and questioned me. I told Inspector Mendis that I would speak the truth and I would tell him what I know about the murder but asked him not to disclose my name as my wife would get angry with me as the second accused was related to her. I made the same statement to the Inspector as the one I am making now. I made a mistake in that I forgot to mention about the money in this statement of mine. The second accused told me that the cattle dealer had Rs. 20 and a few cents with him. The second accused told me that he took that money and divided it between him and Cyril. This is all I have to say. My witnesses are Fidelis Tissera, my brother, my wife Margaret, Podiya of Akkarawatte. They were present when the second accused came to the residing house of my wife from Kuliypitiya about four or five days after the murder, and spoke about the murder".

The first prisoner did not give evidence himself nor did he call witnesses to prove that the second accused had made a confession of the crime to him. According to the order which I have already referred to, the presiding Judge directed the jury as follows:—"There were three alternatives the jury had to consider. If they agreed with the suggestion of the first accused's Counsel that the Police had promised first accused a pardon on condition that he implicated the second accused and that was the reason why the first accused made the long and detailed statement, then of course his statement was of no value. If they did not fall in with this suggestion it was open to them to draw the conclusion that first accused corroborated Cyril because he himself was there and saw the murder or took part in it. In other words I pointed out to the jury that the first accused's statement could be used only against the first accused to see whether it supplied the necessary corroboration of Cyril's account of the murder. I also pointed out to the jury that if they preferred they could entirely ignore the first accused's statement and consider Cyril's evidence and Pedru's evidence only".

It was contended that the learned Judge's direction to the jury that if they did not fall in with the suggestion of the first accused's Counsel it was open to them to draw the conclusion that the first accused's statement corroborated Cyril amounted to a misdirection. It was urged in support of this contention, first, that there was no evidence direct or indirect other than the evidence of the accomplice Cyril upon which the jury could hold that the first prisoner's statement regarding the confession made to him by the second accused was false and it was argued that unless the confession was proved to be false it could not be inferred that the first prisoner's knowledge of the circumstances in which the crime was committed was because he was there himself as a spectator or a participator in the crime; second, that even if the first prisoner's statement was false it could not be used as affirmative corroboration of the evidence of Cyril.

As regards the first point urged by Counsel for the first prisoner, the Solicitor-General admitted that he could not refer us to any evidence direct or indirect that disproved the truth of the first prisoner's statement. In the case of *Elahee Buksh* already referred to corroboration of a statement similar to that of the first prisoner in this case, was obtained from a piece of circumstantial evidence. *Elahee Buksh* had made a certain statement to the Inspector of Police and in the circumstances of that case, it was found that he could not have obtained the information he conveyed in the manner he alleged, and the only way of accounting for his knowledge was by assuming that he was a party to or an abettor of the offence. In this case, the prisoner's statement that what he knew of this incident was knowledge derived from a confession made to him by the second prisoner, may well be true. There is nothing to show or suggest that it is impossible or even improbable. We think that such proof was necessary before the burden of proving the truth of his statement could be said to have devolved on the first prisoner.

In view of our opinion on the first point urged by Counsel for the first prisoner no useful purpose would be served by a discussion of the second point urged by him. We accordingly hold, with due deference, that the jury should not have been told that if they did not fall in with the suggestion of the first accused's Counsel it was open to them to draw the conclusion that the first accused corroborated Cyril because he was there and saw the murder and took part in it.

There remains the question whether the conviction should be quashed on the ground of misdirection. A conviction is not illegal merely because it is based on the uncorroborated evidence of an accomplice if the jury had been duly warned, as was done in this case, that they should not convict on the evidence of an accomplice unless corroborated by independent evidence in material particulars (*The King v. Loku Nona and others (supra)*): Had the learned Judge after warning the jury directed them that there was no evidence to corroborate the evidence of the accomplice and the jury had convicted the prisoners, we could not have interfered with their conviction. But in this case the jury were told that there was evidence which corroborated the evidence of the accomplice Cyril, namely, the evidence of Pedru, if believed, as against both the prisoners, and the statutory statement of the first prisoner, if the jury

did not fall in with the suggestion of his Counsel as to his reasons for making that statement. We are therefore unable to say that the jury convicted the prisoners on the uncorroborated evidence of Cyril alone.

We have for the reasons given by us come to the conclusion (1) that the presiding Judge should not have told the jury that the evidence of Pedru, if believed, corroborated the evidence of the accomplice against both the prisoners; (2) that he should not have told the jury that if they did not fall in with the suggestion of the first prisoner's Counsel it was open to them to draw the conclusion that the first accused's statement corroborated Cyril. These directions clearly prejudiced the case for the defence. We accordingly quash the conviction of both the prisoners.

Conviction quashed.

