[COURT OF CRIMINAL APPEAL]

1971 *Present :* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Wijayatilake, J.**

D. C. M. SIRIWARDENA and another, Appellants, *and* THE QUEEN, Respondent

C. C. A. 70 - 71 OF 1971, WITH APPLICATIONS 100-101

S. C. 765/70—M. C. Tangalle, 46057

Trial before Supreme Court—Two accused represented by same Counsel—Evidence given by one accused implicating the other accused—Resulting position.

Where two accused persons are represented by the same Counsel at a trial before the Supreme Court and the 1st accused gives evidence from the witness box implicating the 2nd accused, the proper course in such a situation is to adjourn the trial in order to enable defence Counsel to consider his position.

APPEALS against two convictions at a trial before the Supreme Court.

Miss A. P. Abeyratne (assigned), for the 1st accused-appellant.

K. Kanag-Iswaran, with (assigned) *Miss A. P. Abeyratne*, for the 2nd accused-appellant.

Cur. adv. vult.

September 29, 1971. H. N. G. FERNANDO, C.J.—

The two appellants were convicted on a charge of murder and were sentenced to death.

One Counsel was on 26th April 1971 assigned by the Court to defend both these accused, and on that date the trial was fixed for 3rd May 1971. When the case was taken up on 3rd May, another Counsel, who had been retained, appeared for both accused. After the trial had proceeded for about one hour, this Counsel informed the Court that he had received the brief only that morning and had not sufficient time even to read his brief. He explained that the relations of the accused had not been able to retain him earlier because of "the present circumstances", thus referring obviously to the insurgent activities prevailing during that time. The learned Commissioner then stated " they cannot wait till the date of trial and then ask for dates ". Considering that 3rd May was fixed as the date of trial only one week earlier, and in view of the prevailing circumstances, we think that the Commissioner did not take sufficient regard of the right of accused persons to a reasonable opportunity to be defended by Counsel of their choice.

The learned Commissioner informed Counsel, however, that if he was in difficulty the trial could be adjourned for the following day, and a few minutes later the trial was so adjourned, and was resumed on the 4th May. After the case for the prosecution was closed on 4th May, defence Counsel informed the Court that he would call the 1st accused *to give evidence*. But at the commencement of proceedings on 5th May, he stated that the accused would make a statement *from the dock*. The accused however, when addressed by the Court, expressed a wish to give evidence from the witness box.

The 1st accused thereupon gave evidence, in the course of which he denied his own complicity in the offence charged; but he seriously implicated the 2nd accused. There was then cross-examination of the 1st accused by Crown Counsel, but no re-examination.

It will be seen that a most unfortunate situation arose when the 1st accused gave evidence implicating the 2nd accused, who himself was represented by the same Counsel. Our attention was drawn by Counsel who appeared before us for the 2nd appellant to the case of *The King v. Punchi Banda* [1] (47 N. L. R. 203), in which it was held that the proper course in such a situation was to adjourn the trial in order to enable defence Counsel to consider his position. Unfortunately, however, neither Judge nor Counsel realized the need for such an adjournment in the present instance.

It is manifest that the 2nd accused was gravely prejudiced by the fact that his Counsel, because he also represented the 1st accused, could not cross-examine the 1st accused in an attempt to refute the damaging evidence given against the 2nd accused. The circumstances also show that this evidence must have taken defence Counsel by surprise. If instructions previously given to him by the 1st accused had revealed that such evidence would be forthcoming, Counsel would obviously have taken steps to see that the two accused were separately represented. Indeed the situation which arose was probably due to the fact that defence Counsel had no sufficient opportunity to receive proper instructions from his clients.

In these very special circumstances, we came to the conclusion that neither of the accused substantially enjoyed his right to be defended, and we saw no reason to think that this grave disadvantage arose through any fault of either accused.

For these reasons we made order setting aside the verdict and sentences, and directing that both appellants be tried afresh on the same charge. It is scarcely necessary to add that the course of assigning separate Counsel should be considered before the fresh trial is held.

Case sent back for fresh trial.

[1] *(1949) 47 N. L. R. 203.*