[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present :* **Basnayake, C.J. (President), Pulle, J., and L. W. de Silva, A. J.**

THE QUEEN *v.* K. SIRISENA and another

APPEALS NOS. 131 AND 132 OF 1957 WITH APPLICATIONS NOS. 153 and 154

S. C. 19—M. C. Horana, 20,919

Court of Criminal Appeal—Grounds of appeal not stated in notice of appeal—Court cannot consider them—Remedy of appellant—Courts Ordinance, s. 36—Criminal Procedure Code, s. 355—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 2 (7), 8 (1), 20, 21—Rule 17.

It is not competent for the Court of Criminal Appeal to entertain grounds of appeal that are not specifically set out in the notice of appeal. The Court of Criminal Appeal does not have powers similar to the power of revision vested in the Supreme Court.

The provisions of sections 20 and 21 of the Court of Criminal Appeal Ordinance and section 355 of the Criminal Procedure Code afford adequate remedy when there is a good ground of appeal which merits a decision and which the Court of Criminal Appeal is precluded from considering owing to the failure of the appellant to specify it in his notice of appeal.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva* and *M. H. Amit* (Assigned), for Accused-Appellants.

V. T. Thamotheram, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 18, 1957. BASNAYAKE, C.J.—

The appellants are respectively the 1st and 2nd accused persons who were tried with two others on an indictment containing two counts. All were charged on the first count with having on 15th February 1957 committed murder by causing the death of one Hapuarachige Don Baron Gunatileke and the 1st appellant only on the second count under section 316 of the Penal Code with causing grievous hurt to the mistress of Don Baron Gunatileke, named Vithanage Agidahamy. Both appellants were convicted of murder and the 1st on the second count. On the second count the 1st appellant was sentenced to two years' rigorous imprisonment. The two co-accused of the appellants were acquitted.

No grounds of law were taken in the notice of appeal and at the argument before us learned counsel for the appellants stated that of the four grounds in the notice of appeal he would confine himself to the second,

namely, that the verdict was unreasonable and could not be supported by the evidence led in the case. He said he was not in a position to submit that the verdict against the 1st appellant was unreasonable but pressed on us strongly that the conviction of the 2nd appellant should be set aside.

The only eye witness in the case is Agidahamy. According to her the deceased left his home at about 11 a.m. on the day in question on a visit to his son. About five minutes afterwards she saw the appellants and two others going in the direction in which the deceased went. She saw the 1st appellant carrying a knife and the other three were armed with clubs. In view of the fact that owing to litigation between the deceased and the father of the 1st appellant she feared that the deceased would be set upon by these persons. She then ran in the same direction and saw the 1st appellant deal a stab blow on the back of the deceased who then began to run, whereupon the 2nd appellant chased him and felled him to the ground by striking him with a club and followed it up by stabbing him with a knife. The 2nd appellant thereupon ran away. The 1st appellant who still remained at the spot again approached the deceased who was fallen and began to strike him with a club in the course of which she received three injuries one of which fractured her right upper arm. She assigned no active part to the co-accused of the appellants.

For the cries raised by Agidahamy a crowd of persons collected among whom were three whose names are on the list of witnesses on the back of the indictment. They are Don James, a vel vidane, R. A. Babu Singho and David Singho. These witnesses were not called to give evidence at the trial, although according to Agidahamy she mentioned at the spot itself to these persons how the deceased and she were injured.

At 1.20 p.m. on the same day some information had been received at the Kalutara Police Station regarding the incident, but the contents of this information were not revealed at the trial. Agidahamy went to the Station at 2 p.m. where her statement was recorded at some length by the witness C. D. Gunasekara. She was despatched to the General Hospital, Colombo, where she had a visit at 3.10 a.m., the same night from the sub-inspector of Police investigating the crime. She made a second statement to him. The two statements were brought out in evidence and they were used apparently for both attacking her credibility and for corroborating her under section 157 of the Evidence Ordinance.

Learned counsel for the defence presumably were unaware of the contents of either statement. The record of the first statement was handed over by the learned trial Judge to counsel for the defence at the close of the examination in chief of C. D. Gunasekara. It was perfectly clear that Agidahamy who knew the 2nd appellant very well by his name, Piyasena, did not implicate any person by the name of Piyasena in that statement. She implicated two persons bearing the name Sirisena, namely, the 1st appellant who was described as "Sirisena son of Haramanis who is known as Vevadeniya Sirisena and another *Sirisena* son of Kirinelis of Godigamuwa."

She referred to two persons, unknown to her, who were associated with the Sirisenas, and alleged that when the deceased lay fallen he was assaulted with clubs by the two unknown persons as well. In the re-examination of Gunasekara portions of the statement favourable from the prosecution point of view were elicited but who this Sirisena, son of Kirinelis of Godigamuwa, was remained unexplained until Agidahamy was recalled. She said that by a mistake she described the 2nd appellant as Sirisena and that she corrected herself when the sub-inspector of Police questioned her at hospital at 3.10 a.m. on 16th February. According to her one Kirinelis of Godigamuwa had three sons. The questions put to her by the court and the answers on this point are recorded as follows :—

" *Q.* Do you know the names of those three sons ?

A. I know that one is Carolis. I do *not* know the names of others.

Q. You know that one is Carolis. Do you know the names of any others ?

A. One is Martin.

Q. What is the name of the other ?

A. He is Piyasena. "

She had to admit that the statement she made to Gunasekara and repeated in the Magistrate's Court that at one stage the appellants and their two companions assaulted the deceased with clubs was factually, to say the least, incorrect.

The principal submission on behalf of the 2nd appellant was that the jury was unreasonble in acting on the sole testimony of Agidahamy. She had falsely implicated the persons who were acquitted by the jury by coming out with a story of assault by clubs on the deceased which did not bear scrutiny in the light of the medical evidence which showed that the deceased had received only one club injury and that injury was post-mortem. It was said that during the interval between the incident and her visit to the Police Station she had been tutored by the nephew of the deceased, the vel Vidane, to implicate persons who were not participants in the attack on the deceased. It was further submitted that the story of the part alleged to be played by the 2nd appellant is unreal and inherently improbable for the reason that, if he was armed with a knife he should first strike the deceased with a club. It was strongly commented that Agidahamy's statement to persons who came on the scene immediately after the crime would have been one of the best ways of testing the truth of her story as to the part played by the 2nd appellant but none of the three witnesses who came on the scene was called to testify to what she said to them although they were in attendance at the trial. It was argued that the evidence of the sub-inspector who visited Agidahamy at the General Hospital was so manifestly unsatisfactory as to raise the suspicion that she was tutored to say that one of the two Sirisenas she had described to Gunasekara was Piyasena, the 2nd appellant.

Although no matters of law were taken in the notice of appeal it was contended that the evidence of the sub-inspector, as to the reasons why he thought it necessary to question Agidahamy about the two Sirisenas mentioned by her to Gunasekara, imported hearsay into the case. It was argued that the sub-inspector's evidence was in effect that witnesses whom he had questioned prior to questioning Agidahamy had told him that Piyasèna, the 2nd appellant, was one of the assailants. Again it was submitted that the contents of the two statements made by her were allowed to be led *in extenso* not merely for the purpose of contradicting her evidence at the trial but also to corroborate her. It may here be mentioned that no objection was taken on behalf of the defence to the admission of these statements.

A third point taken related to the Judge's summing-up in which he put to the jury that if they came to an adverse finding against the 1st appellant they had perforce to come to a finding against the 2nd appellant also. He said :

> " . . . . if you hold that the act was committed by the 1st and 2nd accused or either of them—it is really difficult for you to find that the 1st accused only was involved in this incident because the evidence against the 1st and 2nd accused comes from the same source and you cannot accept the evidence against one and not against the other. "

It was submitted that while no doubt the evidence came from the same source the quality of the evidence as against each of the appellants was different and that it was a non-direction amounting to a misdirection not to have drawn the distinction in that particular context that while Agidahamy in her statement had implicated the 1st appellant by name she had failed to do so in the case of the 2nd appellant and that the circumstances in which she implicated the latter at the General Hospital were of a suspicious character.

On the grounds of fact urged we find ourselves unable to uphold the submission that the verdict is unreasonable. There remain only the points of law not specified in the notice of appeal, and the question that arises for consideration is whether it is competent for this Court to entertain them.

The attention of learned counsel for the appellants was drawn to the fact that these points were not specified in the notice of appeal and that he was precluded from arguing them. He relied on the authority of *Queen v. Gunawardena* [1] and said that it was his duty to bring the matters to our notice.

When we indicated to him that this Court had no power to entertain grounds of appeal not specified in the notice he submitted that the pronouncements of this Court as to the right of counsel to argue points of law not specified in the notice of appeal were not clear and invited us to clarify the position. In our view the decisions of this Court leave no room for doubt ; but we propose to amplify what has been said before.

[1] *(1955) 57 N. L. R. 126.*

In *King v. Bello Singho* [1] this Court refused to allow counsel for the appellant to raise a point of law not taken in the petition of appeal. In doing so it said :

> "The law on the subject seems to be fairly clear. Section 8 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, provides that where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of Court, within 14 days of the date of conviction. Rule 3 of the Court of Criminal Appeal Rules, 1940, provides that the forms set out in the Schedule to the Rules, or forms as near thereto as circumstances permit, shall be used in all cases to which such forms are applicable. The forms relevant to appeals on questions of law and to applications for leave to appeal on the facts are Nos. IV and VI. They show that the grounds must be fully set out."

After referring to previous decisions of this Court and to some decisions of the English Court of Criminal Appeal the Court went on to say :

> "These decisions show that the practice of raising points which are not set out in the notice, which, I regret to say, seems to be growing, has been condemned in no uncertain terms."

The Court affirmed its adherence to the following pronouncement of Darling J. in *Rex v. Wyman* [2], cited with approval by the Lord Chief Justice of England in *Rex. v. Cairns* [3] :

> "The Court wishes it to be understood that in future substantial particulars of misdirection or of other objections to the summing up must always be set out in the notice of appeal or sent to the Registrar of the Court of Criminal Appeal with the notice of appeal, even if the transcript of the shorthand note of the trial has not then been obtained. Such particulars must not be kept back until within a few days of the of the hearing of the appeal. If counsel has a genuine grievance regarding a summing up he knows substantially what it is as soon as the summing up is finished, and can certainly specify his general objection when he settles the notice of appeal."

In the next case on this point, *Regina v. Pintheris et al.* [4], this Court, after an examination of previous decisions both here and in England, reiterated that grounds not included in the notice of appeal will not be entertained. That case, following the decisions in *Cosmas v. Commissioner of Income Tax* [5], *North Western Blue Line v. K. B. L. Perera* [6], *Goldman v. Eade* [7], and *Re Shanoff v. Glanzer* [8], applied the important principle that a rule governing procedure is mandatory and not directory and must be strictly complied with. Where the right of this Court

[1] *(1947) 48 N. L. R. 542 at 546.*
[2] *13 Cr. App. R. 163 at 165.*
[3] *20 Cr. App. R. 44.*
[4] *(1955) 57 N. L. R. 49.*
[5] *(1938) 39 N. L. R. 457.*
[6] *(1943) 44 N. L. R. 523.*
[7] *(1945) 1 All E. R. 154 (England).*
[8] *(1949) 1 D. L. R. 414 (Canada).*

to exercise its jurisdiction rests on compliance by the appellant with the mandatory provisions of the Ordinance which gives him the right of appeal, it has no power to admit an appeal that does not comply with the legal requirements of the enactment which confers the right of appeal (*Stone and another v. Dean* [1]). Both here and in England there have been, no doubt, instances in which the Court, while affirming the rule that a ground of appeal not set out in the notice will not be entertained, had proceeded to deal with the point as a matter of indulgence, although the Court had no power to do so. The subsequent case of the *Queen v. Gunawardene* [2] affirmed the principle of *Pintheris's* case (*supra*) in the following words :—

> " Although no appellant or applicant for leave to appeal may claim *as of right* to make submissions except on grounds particularised in compliance with the terms of the Ordinance ",

and went on to state,

> " this does not mean that the Court itself is powerless, when disposing of an appeal or application, to set aside a conviction on any other ground which is sufficiently substantial to justify a decision that the verdict under appeal should not be allowed to stand. "

We have since reconsidered the above observation which assumes that this Court has powers similar to the power of revision vested in the Supreme Court, and we have formed the conclusion that we have no such power. It is so stated expressly in the case of *King v. Namasivayam* [3]. A right of appeal from the decisions of a Court being a right that does not lie unless expressly conferred by statute, its exercise is entirely regulated by the statute that confers it and the appellant must comply with its reqirements before he can claim a hearing in the appellate tribunal. (*Attorney-General v. Sillem* [4]). We therefore think that this Court was construing its powers too widely when it stated that it had power to act on grounds not taken in the notice. We have searched in vain for a precedent or a principle on which the proposition can be founded and none was cited to us. We have therefore come to the conclusion that the dictum in *Gunawardene's* case (*supra*) should not hereafter be acted on. The Court of Criminal Appeal is a court of limited authority created by statute as would appear from the words of section 2 (7) of the Ordinance.

> " The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes and subject to the provisions of this Ordinance, have full power to determine, in accordance with this Ordinance, any questions necessary to be determined for the purpose of doing justice in the case before the court. "

We wish to emphasise the words underlined. Our power to determine any questions necessary to be determined for the purpose of doing justice in the case before us is regulated by the Ordinance. In our desire to do

[1] (*1858*) *27 L. J. Q. B. 319.*
[2] (*1955*) *57 N. L. R. 126.*
[3] (*1948*) *49 N. L. R. 289 at 298.*
[4] *10 H. L. C. 703, 11 E. R. 1200.*

justice we are not free to exceed the powers conferred on the Court by the enactment constituting it and regulating its procedure. The fact that the Judges of the Supreme Court are also Judges of the Court of Criminal Appeal does not invest it with any greater power. The rule governing statutory courts of limited authority which is thus stated in Craies on Statute Law (5th Edn) p. 246 endorses this view :

> " When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with. "

In Maxwell on Interpretation of Statutes we find that much the same principle is expressed in these words :

> " If for instance, an appeal from a decision be given with provisions requiring the fulfilment of certain conditions, such as giving notice of appeal and entering into recognisances, or transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal. "
>
> (Maxwell—10th Edn., p. 379).

When we turn to section 8 of the Ordinance which prescribes the manner in which the right of appeal granted by section 4 may be exercised we find the following provision :—

> " Where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain leave of the Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of court, within fourteen days of the date of conviction. "

It should be noted that notice of appeal *must* be given in such a manner as may be directed by rules of Court within fourteen days of the date of conviction. The relevant rule of Court is Rule 17 which reads :

> " A person desiring, under the provisions of the Ordinance to appeal to the Court of Appeal against his conviction or sentence, shall commence his appeal by sending to the Registrar a notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notices shall be given, as the case may be, in the form of such notices respectively set forth in the Schedule, and in the notice or notices so sent, shall answer the questions and comply with the requirements set forth thereon subject to the provisions of rule 23. "

The rule requires that the appellant shall send to the Registrar notice of appeal or any of the other notices prescribed therein in the form of such notices respectively set forth in the Schedule. The form of notice of

appeal in the Schedule carries the following instructions as to the grounds of appeal :—

> " These must be filled in before the notice is sent to the Registrar. You must here set out the grounds or reasons you allege why your conviction should be quashed or your sentence reduced. You can also, if you wish, set out, in addition to your above reasons, your case and argument fully. "

Form No. XXXIII is attached to this Judgment. The Schedule is as much a part of the rules as the rules themselves.

There is a tendency to assume that the Court of Criminal Appeal has the same power as the Supreme Court under section 36 of the Courts Ordinance, viz, " the correction of all errors in fact or in law " committed by subordinate courts. It is not so. Its powers are confined to those expressly granted. The rule that grounds not taken in a notice of appeal will not be entertained is one that is observed by Appellate Courts in other parts of the Commonwealth. It would appear from the observations of Lord Birkenhead in *Wilson v. United Counties Bank Limited* [1] that this rule has a wider application and is observed by Courts other than those whose powers are strictly governed by statute :

> " I think it necessary to point out that, unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth. If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal. In the present case, both in the Court of Appeal and before Your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way. "

It has become an all too frequent occurrence in this Court for counsel in the course of an argument on a ground specified in the notice to argue grounds not taken at the trial and not specified in the notice of appeal. This practice should in our opinion be discouraged. This is not peculiar to Ceylon. If we may judge from the decisions of the Courts in other Commonwealth countries it would appear that they too are endeavouring to discourage it. They have indicated in no unmistakable terms that argument of grounds not specifically set out in the notice of appeal will not be permitted. It will be sufficient for the present purpose if we were

[1] *(1920) A. C. 102 at 106.*

to quote some of their dicta. In the Scots case of *Reilly & another v. H. M. Advocate* [1] the Court observed :

> " As your Lordships know, the time allowed for marking a criminal appeal is short, and what frequently happens is that the original note of reasons of appeal is either put in by the appellant himself or is put in somewhat hastily by his solicitor, and it generally contains sketchy and sometimes quite inadequate and unsupportable grounds of appeal. The practice—*Boyd v. H. M. Advocate*, (1939), S. L. T., p. 60—has arisen of counsel submitting supplementary reasons of appeal which they ask us to substitute for the original reasons. With regard to that I think I ought to say two things. The first is that, even inside the ten days which is allowed, there ought to be more satisfactory reasons stated than there frequently are. It is not necessary in all cases for the appellant to wait for the notes of evidence, particularly if a case has been conducted by counsel—he ought to know pretty well at the conclusion of the trial what the points are he wants to make. No doubt, there may be exceptional cases where some fundamental matter has been overlooked at the trial, but, broadly speaking, the function of the Court of Appeal is to deal with issues which were live issues at the trial and not with issues which are disinterred from the notes of evidence and the Judge's charge by the subsequent ingenuity of counsel. "

It should not be overlooked that even where the time for appealing is ten days—in Ceylon it is fourteen days—the Courts insist on strict compliance with the rules and forms. When we turn to cases in England we find the position was clarified so long ago as 1909 in the case of *Joseph Stoddart* [2]. There the Court said (p. 245) :

> " We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. "
>
> " Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. "

We think we have said enough to clarify the position in law in regard to grounds of appeal not specified in the notice. It might be asked what legal remedy is available to those having a good ground of appeal who fail to specify it in the notice. The answer to that question is to be found

[1] *(1950) Scots Law Times, p. 240.* [2] *2 Cr. App. R. 217.*

in sections 20 and 21 of the Ordinance and the powers conferred by section 355 of the Criminal Procedure Code both on the trial Judge and on the Attorney-General. In our opinion those provisions afford adequate means of bringing before this Court a point of real importance which merits a decision and which this Court has been precluded from considering owing to the failure of the appellant to specify it in his notice. There is no time limit for invoking the aid of those provisions and our Reports bear ample testimony to the fact that before the constitution of this Court section 355 of the Criminal Procedure Code was availed of for the purpose of correcting wrong decisions of law by the Supreme Court in its original jurisdiction. Those same Reports show that the Judges and the Attorney-General have not been slow to state cases when matters of real importance had been brought to their notice. In the result the appeals are dismissed and the applications refused.

Convictions affirmed.

FORM XXXIII*

IN THE COURT OF CRIMINAL APPEAL

Criminal Appeal No..... of 19.....

Regina *v*.....

(Supreme Court .....Circuit, 19 .....

Case No. .....of 19.....)

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION OR SENTENCE

To the Registrar of the Court of Criminal Appeal.

Name of Appellant : .....

Offence of which convicted [1] : .....

Sentence : .....

Date when convicted : .....

Date when sentence passed : .....

Name of Prison [2] .....

I the above-named Appellant hereby give you notice that I desire to appeal to the Court of Criminal Appeal against my conviction [3]

and

against my sentence [4]

on the grounds hereinafter set forth on page 2 of this notice.

(Signed) or (Mark) [5] .....

(*Appellant*).

Signature and address of witness attesting mark.

.....

Dated this [6].....day of.....,19.....

[1] *e.g.*, Theft, Murder, Forgery, &c.

[2] If not in custody here set out your address in full.

[3] If you admit that you are guilty, or only desire to appeal against your sentence cross out the words "against my conviction and".

[4] If you only desire to appeal against your conviction and not against your sentence cross out the words "and against my sentence".

[5] This notice must be signed by the Appellant. If he cannot write he must affix his mark in the presence of a witness. The name and address of such attesting witness must be given.

[6] If this notice is signed more than fourteen days after the conviction or sentence appealed against the Appellant must obtain and fill in Form IX and send it with this notice.

* *See page 205 (supra), line 8.*

The Appellant must answer the following questions :—

Question.	Answer.
1. Did the Judge before whom you were tried grant you a Certificate that it was a fit case for Appeal ?	
2. Do you desire the Court of Criminal Appeal to assign you legal aid ?	
If your answer to this question is "Yes" then answer the following questions :—	
(*a*) What was your occupation and what wages, salary or income were you receiving before your conviction ?	
(*b*) Have you any means to enable you to obtain legal aid for yourself ?	
(*c*) Is any Proctor now acting for you ? If so, give his name and address	
3. Do you desire to be present when the Court considers your case ?	
4. Do you desire to apply for leave to call any witnesses on your appeal ?	
If your answer to this question is "Yes" you must obtain Form XXVI, fill it up, and forward it with this notice.	

Grounds of Appeal or Application

These must be filled in before the notice is sent to the Registrar.

You must here set out the grounds or reasons you allege why your conviction should be quashed or your sentence reduced.

You can also, if you wish, set out, in addition to your above reasons, your case and argument fully.