[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present* : **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *v.* S. VINCENT FERNANDO and 2 others

APPEALS NOS. 4, 5 AND 6 OF 1962, WITH APPLICATIONS NOS. 4, 5 AND 6

S. C. 78—M. C. Negombo, 2,686

Trial before Supreme Court—Inspection of scene of offence by jury—Procedure—Illegality of recording evidence at the scene—Criminal Procedure Code, ss. 153, 238—Courts Ordinance, ss. 52, 53, 85.

In a trial before the Supreme Court the recording of evidence at the place where the offence was committed is illegal and not warranted by the provisions of section 238 of the Criminal Procedure Code. Nor is it proper for the jury to be taken from place to place during the inspection.

Evidence Ordinance—Section 32—Statement of deceased person as to the cause of his death—Weight to be attached to it—Misdirection.

It would be a misdirection to tell the jury that the statement of a deceased person as to the cause of his death which is admissible under section 32 of the Evidence Ordinance as a relevant fact is diminished in weight by the absence of cross-examination or that it is an inferior kind of evidence which must not be acted upon unless corroborated.

Common intention—Meaning of term—Penal Code, ss. 30, 31, 32.

By section 32 of the Penal Code :—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Held, that, to be liable under section 32, a mental sharing of the common intention is not sufficient ; the sharing must be evidenced by a criminal act or illegal omission manifesting the state of mind.

Where the trial Judge, in the course of his summing-up, said :—

> " If there is a common intention, even if one of them does not do any act, he would still be liable as though he too committed the same act. The reason is the mere presence of those who shared a common intention gives encouragement and support and a sense of protection and security to the person actually committing the act."

Held, that the direction was wrong in law.

APPEAL against three convictions in a trial before the Supreme Court.

G. E. Chitty, Q.C., with *D. S. D. Senanayake* and *D. J. Walpola* (assigned), for Accused-Appellants.

S. S. Wijesinha, Crown Counsel, for Attorney-General.

Cur. adv. vult.

2—R 13116—1,855 (10/63)

May 13, 1963. BASNAYAKE, C.J.—

The appellants Vincent Fernando, Leelaratne Fernando and Godwin Fernando were indicted with jointly committing the murder of David Fernando on 1st November, 1960.

The case for the prosecution rests on the evidence of Mary Margaret and the statements of the deceased. All three accused gave evidence on their behalf and denied the charge. The 1st accused said he was at Puttalam and called a witness in support. The 2nd accused said he was at his father's house at Pottukulama and the 3rd accused said he was at his aunt's house at 91 Weboda Road.

The story for the prosecution is that on 18th September Thobias the father of Godwin Fernando the 3rd accused assaulted the husband of Mary Margaret. On that occasion the deceased helped to take the injured man to the Police Station and the hospital. The 1st accused, the 3rd accused and his father were warned by the headman, and on a complaint made by the 1st accused's wife the deceased was also warned by him. This incident estranged the parties. On 1st November, the day of the murder, the deceased and his household had their night meal at about 8.30 p.m. After dinner the deceased got out of the front entrance of his house, but soon returned saying that someone was going to the rear of the house with a gun. He picked up a pingo stick that was at hand and went up to the entrance followed by the witness Mary Margaret and his wife. At that moment a shot was fired in front of them. The deceased pushed the two women inside and was in the act of closing the front door when another shot was fired. The pellets from that shot struck the door and also injured Mary Margaret. Thereafter Mary Margaret heard Leelaratne the second accused say, "We have come to eat you today". Next she heard a sound which she described as "pattas" and when she looked in that direction she saw the window being forced open. At that time the deceased was bolting the front door. There were two lamps in the room—one on the sewing machine and the other on the dining table. The 1st accused Vincent Fernando inserted the barrel of a gun through the bars of the window that had been forced open and fired. The shot struck the deceased. The inmates of the house raised cries and the accused disappeared. The deceased was removed to the hospital almost immediately. There his statement was recorded by an unofficial Magistrate. It reads as follows :—

"ප්‍ර. තමාට තුවාල උනේ කොහොමද ?

උ. විත්සන්ට වෙඩි තිබිලා.

ප්‍ර. කොහේදී ද ?

උ. ගේ ඇතුලකදී—ජනේලෙ කඩලා තුවක්කුවෙන් වෙඩි තිබිලා. මම ගෙට වැදී දොර වහ ගත්තා. ජනේලෙ කඩලා වෙඩි තිබුවා. ඒ වෙලාවේ පස් දෙනෙක් සිටියා. ඒ අයගෙන් තුන් දෙනෙක් මම ඇදුරුවා—එනම් ඉග්නේෂියස්, ලීලාරත්න සහ වෙඩි තිබූ විත්සන්ට."

The translation of the above statement reads—

" Q. : How did you come by your injury ?
A. : Vincent shot me.
Q : Where ?
A : Inside the house, broke open the window and shot me with a gun. I got inside the house and closed the door. The window was broken open and the shot was fired. At that time there were five persons present. I identified three of these persons. They are Godwin, Leelaratne and Vincent who shot."

The deceased appears to have stated to the doctor who attended on him and the Inspector of Police who questioned him that the 1st accused shot him. To the Inspector he conveyed the additional information that he was shot through the window and that the 2nd and 3rd accused were with him.

Of the grounds urged on behalf of the appellants only the following need be considered—

(*a*) The procedure adopted by the learned Commissioner at the view by the jury of the place at which the offence was committed is wrong in law.

(*b*) The learned Commissioner misdirected the jury on—

(i) how they should treat the statement of a deceased person as to cause of death, and

(ii) the law as to the liability created by section 32 of the Penal Code.

On 27th December 1961, the second day of trial, the learned Commissioner stated—

" I think it is desirable to visit the scene for the jury to view the scene. How far is it from here ? "

The Crown Counsel informed him that it was about 5 or 6 miles. The learned Commissioner then decided that the view should take place at 9 o'clock in the morning of the following day. The trial proceeded that day and the prosecution closed its case. The 1st accused gave evidence and while the 2nd accused was being examined-in-chief the Court adjourned for the day. At 9.30 a.m. the next day the Commissioner, counsel, the jury, the accused, and the Court staff left for the place where the offence charged was alleged to have been committed. At a place described as " the scene " the learned Commissioner *ex mero motu* recalled the prosecution witness Mary Margaret and examined her himself and thereafter the defence counsel was permitted to question her. The Commissioner asked fifteen questions from her while defending counsel asked six questions. The following minute in the transcript states what happened thereafter :—

" 10.05 a.m. Court leaves the scene to view the witness' house and arrives in front of an abandoned house at 10.10 a.m."

Having reached that house the learned Commissioner recalled and examined Mary Margaret once more. The transcript reads—

"*Court :* 1436. Q : This is your house ?

A : Yes.

Counsel : No questions."

Court returns to the scene.

Court calls :

GAJASINGHAGE PEDURU SILVA : Sworn."

The witness is the village headman who gave evidence for the prosecution. After this witness had been examined the Commissioner proceeded to another place. The transcript reads—

"*Court :* We will go to the place where the accused were arrived (*sic*).

Court leaves the scene and arrives on the Negombo-Katana road near the tavern (10.25 a.m.) "

Here the Commissioner questioned the Inspector of Police who had given evidence for the prosecution and also the village headman for the second time. The Commissioner then moved to another place. The transcript reads—

"*Court :* We will go to Weboda Road.

Court goes to Weboda Road and looks at a house said to be the house of the 3rd accused's aunt.

(10.45 a.m. Court returns to court-house) ".

Thereafter the 2nd accused whose evidence was interrupted by the view of the scene was cross-examined by the Crown.

The learned Commissioner appears to have adopted a course for which section 238 offers no authority. That section reads—

" (1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the jury shall be conducted in a body under the care of an officer of the court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any member of the jury ; and unless the court otherwise directs they shall when the view is finished be immediately conducted back into court ".

The transcript does not show that the Judge made the order required by subsection (1). The order that the subsection requires the Judge to make is not a mere minute or record such as the one reproduced above,

but a formal order stating the reason or reasons why the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any transaction material to the trial is alleged to have occurred. The transcript does not also show that the jury were conducted to the place under the care of an officer of the Court as required by subsection (2), nor is there anything to indicate that the "scene" was shown to the jury by a person appointed by the Judge. These are imperative requirements of the section which must be strictly observed (*The King v. Seneviratne* [1]). It would appear from section 238 that it contemplates that the jury should proceed under the care of an officer of the Court to the place the Judge thinks they should view and be shown it by the person appointed for the purpose and be brought back thereafter. The words "the jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge" indicate that the section does not provide for anything more. The section does not provide for the *Court* visiting any place and therefore any proceedings that should be taken in Court should not be taken at the place which is being viewed by the jury merely because the presiding Judge happens to be present. The view by the jury is not a judicial act or judicial proceeding. The presence of the Judge does not alter its character. He has no power to exercise at the scene any of the functions of a Judge presiding over a trial by jury. Nor does the fact that the jury, Judge, counsel, witnesses and Court staff are present transform the place viewed by the jury into a Court. Criminal sessions of the Supreme Court are held in a place appointed for the purpose and it is not open to a Judge to exercise his judicial functions at any other place. In the case of the subordinate Courts also it is so provided. Section 52 of the Courts Ordinance provides that the District Courts, Courts of Requests and Magistrates' Courts shall be held at such convenient place or places as may from time to time be appointed by the Minister of Justice. There is an exception in the case of Magistrates who are empowered to hold Court at any convenient spot within the limits of their division (s. 53 Courts Ordinance, and s. 153 Criminal Procedure Code). Section 85 of the Courts Ordinance provides that the sittings of every Court shall be public and that all persons may freely attend the same. A place which is viewed by the jury is not a place which all persons may freely attend. Quite apart from other objections the holding of the Court at a place which all persons cannot freely attend would be a violation of section 85 of the Courts Ordinance. The recording of evidence at the scene is not contemplated nor warranted by the section. What is not warranted by a positive enactment is not legal (*Smurthwaite and others v. Hannay and others* [2]). In the instant case apart from the illegality of taking evidence at the scene the Commissioner kept on moving from place to place transforming the Supreme Court into a peripatetic Court. The section does not appear to provide for the jury to be taken from place to place as was done in the instant case. The learned Commissioner was therefore

[1] (*1936*) *38 N. L. R. 208 at 223.* [2] (*1894*) *A. C. 494 at 501.*

wrong in taking the jury from place to place, some of them not being places which under section 238 a jury may view, and examining and re-examining the witnesses. The course adopted by the learned Commissioner in holding Court at the various places he visited is contrary to law and is capable of causing grave prejudice to an accused person. What happened in the instant case may be described in the words of the Privy Council in *The King v. Seneviratne* (*supra*) as "a combination of a view and a further hearing with the introduction of some features permitted by neither procedure". What occurred here may also be described in the terms of the same judgment that "there are features in the proceedings of 28th December 1961 which were irregular in themselves and unnecessary for the administration of justice." Proceedings so conducted tend in the words of *Ibrahim's* case "to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

The second ground of appeal is that there was misdirection as to the use of the statement made by the deceased in regard to the cause of his death. Section 32 of the Evidence Ordinance declares that statements of a person who is dead are themselves relevant facts when they are made by him as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. In the instant case the prosecution proved the statements made by the deceased to the unofficial Magistrate as to the cause of his death. The Evidence Ordinance declares such statements themselves to be relevant facts. The jury are free to take such statements into account in arriving at the verdict like any other evidence placed before them. Like any other relevant fact they are entitled to weigh it and act on it or not when deciding which view of the facts is true. The learned Commissioner apparently in view of the decision of this Court in *The King v. Asirvadan Nadar* [1] directed the jury thus :

> "Now a dying deposition is certainly open to a certain amount of criticism because it has not been subjected to cross-examination. Really it amounts to the admission of hearsay evidence but section 32 of the Evidence Ordinance allows such evidence to be led."

After referring to section 32 he proceeded—

> "You will realise that in this case the cause of David Fernando's death is in question and therefore under this section his statement, both to Dr. (Mrs.) Fernando and to Inspector Tennekone, and to the unofficial Magistrate, the latter having been made on oath—you see the two statements made to Dr. (Mrs.) Fernando and Inspector Tennekone were not made on oath or affirmation but that made to Mr. de Soysa was, in fact, made after he was sworn. Of course when considering the weight to be attached to these statements, you would appreciate that the statements of the deceased have not been tested by cross-examination.

[1] *(1950) 51 N. L. R. 322.*

The power of cross-examination is a power as essential to the eliciting of truth as the obligation of an oath can be but you should take the other facts and surrounding circumstances proved in evidence and *if you find support in those statements or in the other evidence as to the truth or otherwise of the deposition you can act on it.*

Now, in this case, there is the evidence of that witness, Mary Margaret, which goes to support the statements, the three statements that have been made by David Fernando.

There is no rule of law under which evidence which is admissible under this section may not be acted upon unless it is corroborated by independent testimony. There is no such rule, there is no rule that it must be corroborated by independent testimony, *but if you can find support, then of course you are entitled to fortify yourselves with that support that has been derived from that.*

It is my duty to draw your attention to *the inherent weakness of a deposition made by a person who is not before you* and who cannot be cross-examined, but that is admissible evidence ; it is relevant evidence ; only the weight to be attached to it is always affected because it has not been tested by cross-examination. It is not possible to test it by cross-examination because the man has died. If he had not died, they would not rely on these statements and the charge would not be one of murder ; it may be one of attempted murder and he would be cross-examined on these and it may be led in evidence to corroborate his evidence that is given before you."

The directions given above find no support in the provisions of the Evidence Ordinance. The statement of a deceased person is not an inferior kind of evidence which must not be acted on unless corroborated. Like any other relevant fact it must be considered by the jury having due regard to the circumstances in which the statement was made, the character and standing of the person making it. It is wrong to give the statement of a deceased person an inferior status, as it is also equally wrong to give it an added sanctity. The prosecution was seeking to prove the fact that the 1st, 2nd and 3rd accused committed criminal acts in furtherance of their common intention to kill the deceased. In support of that fact the Crown placed before the jury evidence of the statements of the deceased and of Mary Margaret. It was open to the jury to return a verdict against the accused if they believed the statement of the deceased or the evidence of Mary Margaret or both. That being the case the question of corroboration of the deceased's statement did not arise. In the circumstances there was no need to over-emphasise the absence of cross-examination. The weight to be attached to such a statement would vary with the circumstances of each case and is a matter for the jury, and the absence of cross-examination does not diminish it even as the mere fact that a witness is cross-examined does not increase it.

The third ground is that the jury were misdirected as to the criminal liability created by section 32 of the Penal Code. That section provides—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. "

A person who does a criminal act by himself is liable for that act if it offends any provision of the penal law. The above section does not deal with the liability of a person for the criminal act he himself does but with his liability for the criminal acts of others. What are the pre-requisites of such liability ? Several persons must have a common intention to do a criminal act, they must all do that act in furtherance of the common intention of all. In such a case each person becomes liable for that act in the same manner as if it were done by him alone. By virtue of the definition of " act " in section 31 of the Penal Code the application of the section also extends to a series of criminal acts done by several persons in furtherance of the common intention of all. There are more cases which fall within the extended application than within the unextended. Now where a series of criminal acts is done by several persons, each act would be done either jointly or severally. But whether the criminal acts in the series of criminal acts are done jointly or severally if each criminal act is done in furtherance of the common intention of all each of the persons sharing the common intention and doing any act in the series of criminal acts is not only liable for his own act but is also liable for the acts of the others in the same manner as if it were done by him alone. For instance, if a man is done to death by several blows struck by several persons in furtherance of the common intention of all, each person is liable not only for the blow dealt by him but he is also liable for each of the blows dealt by the others in the same manner as if all the blows were dealt by him alone, and where death results from the blow of one of them and it appears that the common intention of all was to cause death, each of those who did criminal acts in furtherance of the common intention of all is liable for the att of the person whose blow resulted in the death of the deceased. It is not necessary to prove who struck the fatal blow. A person who merely shares the criminal intention, or takes a fiendish delight in what is happening but does no criminal act in furtherance of the common intention of all is not liable for the acts of the others. To be liable under section 32 a mental sharing of the common intention is not sufficient, the sharing must be evidenced by a criminal act. The Code does not make punishable a mental state however wicked it may be unless it is accompanied by a criminal act which manifests the state of mind. In the Penal Code words which refer to acts done extend also to illegal omissions (s. 30). What has been stated above in regard to criminal acts therefore apply to illegal omissions as well. The statement of Lord Sumner in the case of *Barendra Kumar Gosh v. Emperor*[1], " They

[1] *(1925) A. I. R. Privy Council p. 1.*

also serve who only stand and wait" has to be regarded as applying not to a bystander who merely shares mentally the criminal intention of the others but to a person whose act of standing and waiting is itself a criminal act in a series of criminal acts done in furtherance of the common intention of all. The learned Commissioner's direction on this aspect of the case is as follows :—

". . . . 'Now, the evidence is that the 1st accused fired the shot. Now, even if we accept that, why are the other two being charged for the act of the 1st accused ?' This is what is known as vicarious criminal responsibility. Learned Crown Counsel referred to section 32 of the Penal Code, where a criminal act is done by several persons, that is more than one, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. When a criminal act is done by several persons in furtherance of the common murderous intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such common intention, in this case, in furtherance of a common murderous intention. If they acted with one mind or had a common design, namely to kill Jayaweera David Fernando, then they had what is known as the common murderous intention. The well-known words of Poet Milton, namely, 'They also serve who only stand and wait', would be applicable in cases where the charge is based on common intention acting in furtherance of a common intention. *If there is a common intention, even if one of them does not do any act, he would still be liable as though he too committed the same act. The reason is the mere presence of those who shared a common intention gives encouragement and support and a sense of protection and security to the person actually committing the act.*"

The direction contained in the words underlined is wrong in law. The wrong direction does not affect the 1st accused as the evidence is that it was he who fired the fatal shot. But it is not possible to say to what extent the verdict of the jury against the 2nd and 3rd accused was influenced by the wrong direction. The evidence is that both the 2nd and 3rd accused were present and that the former said before the shooting, "We have come to eat you today". There is no evidence that the latter said or did anything. It is not possible to say whether the jury believed the evidence of the 2nd accused's threat as on the learned Commissioner's direction it was open to them to return a verdict against both whether they believed that evidence or not. In the case of the 1st accused who shot the deceased we are satisfied that despite the fact that we uphold the grounds raised in appeal no substantial miscarriage of justice has actually occurred. The position is different in regard to the other two. We are unable to say that the jury did not act under the wrong direction of law in regard to their liability.

We therefore dismiss the appeal of the 1st accused and quash the conviction of the 2nd and 3rd accused and direct that a judgment of acquittal be entered in respect of them.

Appeal of 1st accused dismissed.

Convictions of 2nd and 3rd accused quashed.