

1946

Present : Dias J. and Nagalingam A.J.

THE KING *v.* VAVUNIYAM.113—D. C. (Criminal) *Vavuniya, 109/19,411.*

Evidence—Hearsay—Things said or done by conspirator in reference to common design—Admissibility—Evidence Ordinance, s. 10.

The charge against the appellant was that he used as genuine a forged permit which purported to authorise him to transport paddy. The evidence established that there was a conspiracy to smuggle paddy and that the parties concerned were the appellant and two others, one of whom, P, was found by the police transporting some bags of paddy. When P was asked to produce his permit he produced the forged permit in question. The police then took P with the permit to the Kachcheri. At the Kachcheri, when he was requested to point out the person who gave him the permit, P was alleged to have pointed out the appellant.

Held, that the evidence alleging that P pointed out the appellant as being the person who gave him the permit was admissible under section 10 of the Evidence Ordinance, even though P, when he gave evidence, denied that he pointed out the appellant.

A PPEAL against a conviction from the District Court, Vavuniya.

G. E. Chitty (with him F. W. Obeyesekere), for the first accused, appellant.

J. A. P. Cherubim, C.C., for the Attorney-General.

Cur. adv. vult.

November 26, 1946. DIAS J.—

The appellant and one Muttu Seevaratnam were charged on an indictment containing four counts as follows:—

1. The appellant alone was charged under sections 457 and 459 of the Penal Code with having between January 12, 1944, and April 26, 1944, fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely, the document P 1 which is an application to the Assistant Government Agent, Vavuniya, for the removal of paddy purporting to have been signed by one A. Sabapathy.
2. The second accused, Muttu Seevaratnam, was charged with the abetment of the above offence.
3. The appellant was charged under sections 457 and 459 of the Penal Code with having on or about April 24, 1944, fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely, the document P 2 which purported to be a permit No. 078152 dated April 24, 1944, purporting to have been issued by the Deputy Food Controller, Mr. V. Kumaraswamy, in favour of the second accused authorising him to transport thirty-six bushels of paddy.
4. The second accused was charged with the abetment of the above offence.

The District Judge acquitted the appellant on count 1 and the second accused on counts 2 and 4. The appellant was convicted on count 3 and sentenced to undergo a term of six months' rigorous imprisonment. From that conviction the appellant appeals.

The charge against the appellant on the third count is based entirely on circumstantial evidence. The question I have to decide is whether the relevant and admissible facts which have been established at the trial are only consistent with the guilt of the appellant and are inconsistent with any reasonable hypothesis of his innocence having regard to the ingredients of the offence which the Crown had to establish beyond all reasonable doubt.

In order to prevent the smuggling of rice from the Vavuniya District a Food Control Department was attached to the Vavuniya Kachcheri. Mr. V. Kumaraswamy whose signature on the permit P 2 is alleged to have been forged was the Assistant Food Controller. The evidence establishes the following facts :—The second accused, Muttu Seevaratnam, and the witness Muttu Ponnambalam are brothers. The application P 1 was signed in blank by the second accused. It is dated February 16, 1944, at Kerudavil in the Jaffna District. It bears an endorsement addressed to the Assistant Government Agent (Emergency), Jaffna from the "D. R. O." giving certain details. It is quite clear on the evidence that the application P 1 was not received at the Vavuniya Kachcheri either by post from Jaffna or delivered by hand in the ordinary course of business. Had this been done, P 1 would have borne the date stamp of the Kachcheri showing the date it was received by post or handed in. Furthermore the receipt of the document would have been noted in the inward register of documents P 8 or P 9 which at the relevant dates were kept by the appellant. Had P 1 been dealt with in the Kachcheri in the normal way, it would have been submitted to Mr. Kumaraswamy who would by an endorsement have referred it to the D. R. O. of the place from where the paddy was to be obtained in the Vavuniya District. P 1 bears no such endorsement. The D. R. O. would return P 1 with his report. There is no such report in this case. The papers would then be resubmitted to Mr. Kumaraswamy who would check the papers with the assessment forms, and when he was satisfied that everything was in order, he would authorise the issue of the permit for transportation. None of these things happened in this case. It was the duty of the appellant to draft the permit which would be then submitted to Mr. Kumaraswamy through the Chief Clerk, Panchacharam, or in his absence through Mr. Thambi-pillai who acts for the Chief Clerk, whose duty it would be to give the papers a final check, signified by their initials on the foil and counterfoil of the permit book. This was not done in the case of the permit P 2. In fact the book from which P 2 was taken is not forthcoming. Mr. Kumaraswamy swears that the signature on the permit P 2 was not written by him. I see no reason for doubting his evidence on the point. His clerks, Panchacharam and Thambipillai, say that it is a good imitation of Mr. Kumaraswamy's signature. Page 1 of the application P 1 is in the handwriting of the appellant. Everything written on the reverse side of P 1, except the signature of the owner, is also in the handwriting of the appellant. The official witnesses who are familiar with the handwriting of the appellant have no doubt about the matter at all. The appellant has not given evidence nor denied that the writing is his. The permit P 2 is also in the handwriting of the appellant. There is no evidence from the appellant disputing that evidence.

On April 26, 1944, one Tharmalingam went to the Vavuniya Police Station and gave information regarding an attempt illegally to transport paddy from Vavuniya—see Exhibit P 4. The gist of his information was that an unknown man whom he could identify was attempting to transport fifteen bags of paddy from Vavuniya to Kudiruppu in Jaffna. He also stated: "This was transported in one Muthari's cart from one Poopalasingam's house, who is a clerk in the Food Control Office". I agree with Counsel for the appellant that there is nothing stated in P 4 to the effect that the appellant was seen accompanying the cart. I also agree that Tharmalingam and the appellant are admittedly not on good terms. But the fact remains that the witness did mention the name of Poopalasingam who was described as being a clerk in the Food Control Office. The name of the accused as given in the indictment is Sabapathy Poopalasingam Vavuniyam.

The police acting on this information proceeded to the Vavuniya Railway Station and found the witness Muttu Ponnambalam handing over to the railway checker sixteen bags of paddy. When he was asked to produce his permit, Ponnambalam produced the document P 2. The police then took Ponnambalam with P 2 to the Kachcheri. At the Kachcheri when he was requested to point out the person who gave him P 2, Ponnambalam is alleged to have pointed out the appellant. This evidence has been objected to as being inadmissible particularly as Ponnambalam did not admit doing so. I shall deal with this question presently. Mr. Kumaraswamy at once denied that the signature on P 2 was his. The document being in the handwriting of the appellant he was requested to produce the connected papers. He did not do so at once, but after a delay of about two hours, he produced the application P 1 and P 3 the assessment form from his drawer.

At the trial the witness Ponnambalam did not support the prosecution. The late stage at which he was called indicates that the prosecution did not expect him to support the case for the prosecution. According to him, his brother, the second accused, signed P 1 in his presence. He then took P 1 to the D. R. O. of Point Pedro and after that officer had made his endorsement P 1 was handed back to the 2nd accused. The witness says he came to Vavuniya at the request of the 2nd accused but he denies that he brought the application P 1 with him. He says that he removed sixteen bags of paddy from Thandikulam to the Railway Station. According to him it was the Chief Clerk Panchacharam who gave him the permit P 2. He denies that he pointed out the appellant as being the person who gave him P 2.

In order to establish the guilt of the appellant under count 3 the prosecution had to establish (a) that the document P 2 was a forged document, (b) that the appellant knew that it was a forged document, and (c) that knowing it to be a forged document, he either fraudulently or dishonestly used P 2 as genuine.

The trial Judge has held that P 2 is a forged document and that the signature of Mr. Kumaraswamy appearing on it was not written by that officer. I think the evidence on that point is overwhelming. If Mr. Kumaraswamy signed the document, there would be his endorsements on the application on P 1 and his signature on the foil of P 2. The witness himself

swears that P 2 was not signed by him, and there is no reason whatever why his evidence should not be accepted. I hold that the prosecution has proved beyond all reasonable doubt that P 2 is a forged document.

Did the appellant know P 2 was a forged document? I think the evidence on this point is equally overwhelming. Taking all the established facts in combination they are only consistent with the view that the appellant knew P 2 was forged, and are inconsistent with any reasonable hypothesis to the contrary. It was his duty to write out the permits. P 2 is in his handwriting. The foil of P 2 would conclusively show that P 2 was signed by Mr. Kumaraswamy, but the book is not forthcoming. The application P 1 was found in the appellant's possession. The fact that the normal office routine was not followed in this case must have clearly indicated to the appellant, when he filled up the body of P 2, that there was something wrong with the transaction. How did the application P 1 reach the appellant? The evidence indicates that P 1 did not come by post nor was it handed in the normal way. Judged in the light of the other facts, the inference is irresistible that P 1 was directly handed to the appellant. How did P 2 leave the Kachcheri and reach the hands of Ponnambalam? How came Tharmalingam, an outsider, to implicate the appellant, in the statement P 4? It is to be observed that the appellant, who could have answered all these questions, chose to remain silent at the trial.

The defence argues that there is no evidence whatever to establish that the appellant used as genuine the document P 2. It is pointed out that even if the first two ingredients of the offence have been established, the Crown case fails on this point because there is no evidence whatever to show that the appellant on April 24, 1944, fraudulently or dishonestly used as genuine the document P 4. This is a question of vital importance and has received my careful and anxious consideration.

I agree with Counsel for the appellant that there is no evidence except that which is objected to, to show that after filling in the body of the document, he dealt with it in any way. It is at this point that the admissibility of the evidence objected to becomes material. If that evidence is inadmissible, I think the contention of the appellant is sound and the accused must be acquitted.

The case for the Crown is put in this way: It is alleged that three persons, the 2nd accused, Ponnambalam, and the appellant engaged themselves in a conspiracy to smuggle rice from Vavuniya to Jaffna. In pursuance of their common design it is alleged that the 2nd accused signed the application P 1 and obtained the Point Pedro D. R. O's endorsement on it. P 1 was then handed to the appellant who wrote out the permit P 2 which bore the forged signature of Mr. Kumaraswamy. There is no proof that the appellant forged this signature. P 2 was then handed to the third conspirator who, under cover of P 2, conveyed sixteen bags of paddy to the Railway Station when he was detected.

Section 10 of the Evidence Ordinance provides that "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence . . . anything said, done, or written by anyone of such persons in reference to their common intention, after

the time when such intention was first entertained by any of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". It is not easy to prove a conspiracy by direct evidence. In most cases it can only be inferred from circumstantial evidence—*Appuhamy v. Appuhamy*¹. Are there reasonable grounds for believing that the appellant and the other two men had conspired together to commit the offence of smuggling paddy from Vavuniya to Jaffna? "Belief" is something more than "suspicion". The circumstances must be such that a prudent man would feel reasonably convinced that a conspiracy exists—see *Kartigesu v. Alwis*². Therefore, the foundation must first be laid by the prosecution to induce a reasonable ground for the belief that the parties concerned are conspirators—*Peris v. Silva*³. For the sake of convenience, however, such evidence may be led before sufficient proof is given of the conspiracy on the prosecutor's undertaking to lead such evidence at a later stage—*R. v. Attanayaka*⁴. I think the evidence in this case when considered as a whole establish beyond a reasonable doubt that there was a conspiracy to smuggle paddy out of Vavuniya and that the parties concerned are the witness Ponnambalam, the second accused, and this appellant. In fact, without the co-operation of the appellant, the fraud could not be perpetrated. Once that is established anything said or done by Ponnambalam, one of the conspirators, in reference to the common intention of all of them, is admissible evidence against the appellant not only for proving that he was a conspirator, but also to show that he was a party to it.

The charge against the appellant is that he did on April 24, 1944, use as genuine the forged permit P 2. One of the conspirators, Ponnambalam, when asked who gave him the permit P 2, pointed out the appellant as the man. Once the conspiracy was established, I am of opinion that evidence was admissible, even though the witness went back on his having done so when he gave evidence. The question is not whether Ponnambalam is to be believed, but whether the witnesses are to be believed who say that Ponnambalam pointed out the appellant to the police at the Kachcheri. On that point the District Judge has accepted the evidence of those witnesses who are corroborated by the action taken immediately thereafter, when the Assistant Food Controller called upon the appellant to produce the connected documents. The evidence therefore establishes that on that day the appellant did use as genuine the forged document P 2 by handing it over to Ponnambalam to enable that person to smuggle the rice out of the Vavuniya District.

I am, therefore, of opinion that the conviction is right and should be affirmed. The appeal is dismissed.

The cases cited by the appellant⁵ to show that hearsay in advance of calling the witness is not permissible have no application in the circumstances of this particular case.

¹ (1920) 21 N. L. R. at p. 438.

² (1929) 30 N. L. R. at p. 508.

³ (1913) 17 N. L. R. 139.

⁴ (1931) 34 N. L. R. at p. 26.

⁵ *R. v. Silva* (1925) 30 N. L. R. 193 at p. 195; *R. v. Haramanisa* (1944) 45 N. L. R. at p. 537; *R. v. Don Samei* (1946) 47 N. L. R. at p. 452.

I desire to deal with a matter which was stressed by Counsel for the appellant. He pointed out that the trial was concluded on July 9, 1946. The verdict of the Judge convicting the appellant was pronounced on July 10. Counsel stated that the petition of appeal was filed on that day and that the reasons for the conviction were only delivered on July 13. It was suggested by Counsel that this delay in giving reasons for the verdict was due to the Judge taking time to peruse the petition of appeal and adapting his judgment to meet the points made therein. That is a serious allegation to make against a judicial officer. A perusal of the record shows that it is unfounded. Immediately after pronouncing his verdict on July 10, the Judge recorded: "I have to start now by train to Chilaw on official duty, and I shall be coming back on the 13th instant on which date I shall give reasons. In the event of an appeal accused will give bail in Rs. 1,500. If no appeal is preferred direct the Superintendent of Prisons to produce accused on July 13, 1946, before this Court." The journey from Vavuniya to Chilaw and back is a long and tedious one. The District Judge clearly stated that he would not be returning to Vavuniya until July 13. Obviously, he intended to write his judgment during the interval probably at Chilaw. There is no evidence at all that the District Judge would have seen or would be in a position to peruse a petition of appeal filed with the Secretary of the District Court of Vavuniya. With these facts before him, I consider it improper that Counsel should have made this insinuation against the learned Judge.

NAGALINGAM A.J.—I agree.

Appeal dismissed.

