[IN THE COURT OF CRIMINAL APPEAL]

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

THE QUEEN *v.* L. P. WILEGODA and another

APPEALS Nos. 112–113 OF 1957 WITH APPLICATIONS Nos. 134–135

*S. C. 19—M. C. Ratnapura 59,207*

*Joinder of charges—Murder—Giving false information concerning the murder—"Same transaction"—Penal Code, ss. 198, 296—Criminal Procedure Code, ss. 180 (1), 184.*

*Evidence Ordinance—Section 17—"Admissions".*

*Indictment—Amendment thereof—Procedure—Criminal Procedure Code, ss. 165 F (3), 172, 218 (1), 219.*

(i) The 1st and 2nd appellants (husband and wife) were charged with murder. The 1st appellant was also charged in the same indictment, on a second count under section 198 of the Penal Code, with giving false information with the intention of screening the offender responsible for the murder. The alleged murder and the giving of false information could not on the facts be said to have been one series of acts so connected together as to have formed the same transaction.

*Held*, that there was no authority in section 180 (1) or 184 of the Criminal Procedure Code for joining in the same indictment offences of different kinds committed in separate transactions.

(ii) Statements which are false cannot be regarded as admissions within the meaning of section 17 of the Evidence Ordinance.

(iii) An indictment served on an accused before trial cannot be amended under section 172 of the Criminal Procedure Code before the commencement of the trial. The proper course to adopt when the Crown applies to alter an indictment is first to arraign the accused on the indictment served upon him [section 218 (1)] and have it read and explained to him (section 219) and take his plea. At any time thereafter, before the verdict is returned, the Court can either *ex mero motu* or upon application of Counsel alter the indictment.

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

*Colvin R. de Silva*, with *P. B. Tampoe* and *S. M. H. de Silva*, for Accused-Appellants.

*E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

November 4, 1957. BASNAYAKE, C.J.—

The 1st appellant is the husband of the 2nd appellant. They were indicted by the Attorney-General on charges of the murder of a woman by name Kiriweldeniya Pinthu and of causing evidence of the commission of that offence to disappear.

Before the indictment was read and explained to the accused as required by section 219 of the Criminal Procedure Code, learned counsel for the Crown moved to substitute a new count for the second count of the indictment. That count as originally framed was against both accused and read—

"That at the same time and place aforesaid and in the course of the same transaction, you, knowing that an offence had been committed, to wit, murder, did cause certain evidence to disappear by removing the dead body of the said Kiriweldeniya Pinthu to a cadjan enclosure by the side of the latrine of your house and placing it in such circumstances as to suggest that the said Kiriweldeniya Pinthu had committed suicide, with the intention of screening the offenders from legal punishment, and that you have thereby committed an offence punishable under section 198 of the Penal Code."

The new charge, which is only against the 1st appellant, reads—

"That at the time and place aforesaid and in the course of the same transaction you the 1st accused abovenamed, knowing or having reason to believe that an offence had been committed, to wit, murder or culpable homicide not amounting to murder of Kiriweldeniya Pinthu did with the intention of screening the offender or offenders responsible for the commission of the said offence from legal punishment give information respecting the said offence which you knew or believed to be false, to wit, the information given by you on 23rd January 1957, to the Village Headman of Kuttapitiya to the effect that when you went to the lavatory on the morning of 23rd January 1957 you found the said Kiriweldeniya Pinthu of Sannasgama near the lavatory with a rope round her neck and that the reason why she should have so acted was that she was pregnant; and that you have thereby committed an offence punishable under section 198 of the Penal Code."

This application was allowed by the learned trial Judge after hearing counsel for both the prosecution and the defence. In fact counsel for the defence not only raised no objection to the substitution but also agreed to its being made. The indictment as served on the appellants under section 165F (3) was not read and explained to the appellants; it was only the altered indictment that was read and explained to them.

It will be convenient at this point to set out briefly the relevant facts. The appellants were teachers in the Pelmadulla Government Central School. The 1st appellant taught in the secondary school and the

2nd in the primary school. Their hours of work were in the case of the 1st appellant from 7.45 a.m. to 2.20 p.m. with an interval of 40 minutes for lunch and in the case of the 2nd appellant 7.45 a.m. to 1.15 p.m. They lived in a house at Kuttapitiya with two of their children (12 years and 10 years) and a nephew (11 years) all of whom attended the Central School. Their eldest child was a boarder at Ananda College, Colombo. The deceased had been their cook for about two years and had about a month prior to her death left for her home in Sannasgama about three miles away. She stayed with her parents for about a month and returned to the home of the appellants on 22nd January 1957. She reached Kuttapitiya about 5.30 p.m. on 21st January and stayed with the witness Loku Menike that night. She informed her that she had been asked by the 1st appellant to return and that if she went at that time (about 5.30 p.m.) the 2nd appellant would reprimand her. She had her dinner with Loku Menike on 21st January and left after her morning tea the next day. The deceased was pregnant and she told her mother that the 1st appellant was the father of the child. At about 10 a.m. she was seen by the witness Punchi Menike, a neighbour, taking a bucket of water from the well in the appellants' compound.

On the same day at about 3 p.m. the same witness Punchi Menike, who lived in a house situated above the house of the appellants, heard the 2nd appellant utter aloud the words, " Oki adala ganna mehata venna, mehata venna ". The words were addressed to the 1st appellant who was at the door leading to the kitchen. At that time the 2nd appellant was in the firewood shed attached to her kitchen and she had in her hands something similar to the rice pounder P4 produced at the trial. This shed had three entrances—one from either side of it and the third from the kitchen. Punchi Menike was about 40 feet away when she heard those words. The 2nd appellant next entered the kitchen and the witness heard her say, " Thota enna kivve kauda ". To that the deceased replied, " I came because the master sent me a message ". Next the witness heard a sound as if someone was being assaulted. She heard that sound twice. They were somewhat loud and they seemed to be sounds of blows. There was silence after that. She heard neither the voice of the 2nd appellant nor the voice of the deceased. On the same day at about 3.30 p.m. when the witness Punchi-appuhamy who lived near by happened to be passing the house of the appellants, he heard the 2nd appellant utter aloud the words, " Bahapiya dorata, Bahapiya dorata ". He did not see either her or the person whom she was ordering out ; but he recognised the voice as being that of the 2nd appellant. It came from the front doorway of her house. Punchiappuhamy proceeded to his field and attended to his work. While he was there he again heard the words, " Bahapiya dorata, Bahapiya dorata ", after an interval of about 5 minutes coming from the same direction.

Next day the dead body of the deceased was found in the cadjan enclosure adjoining the lavatory of the appellants. It was lying face downwards. The head was three feet from the entrance. There was a ligature round her neck, a single strand of coir string wound round the

neck four times and a granny knot at the middle of the nape of the neck, the second loop of which was loose enough to admit the little finger. The rest of the coir string was dangling in front of the body on its right side and underneath the right arm-pit.

She had two injuries—one external and the other internal. The former injury was post-mortem, the latter was ante-mortem. The external injury was a constriction mark of ligature round the neck horizontally placed below the level of the thyroid cartilage. The mark was $\frac{3}{4}''$ wide in front and $\frac{1}{2}''$ wide behind and $\frac{1}{4}''$ deep. The internal injury was a contusion $4'' \times 3''$ and $\frac{1}{4}''$ deep over the fundus of the uterus in front. There was no external injury corresponding to the internal injury. She was carrying a foetus of seven months' gestation. Death was due to shock from a contusion of a gravid uterus of seven months' gestation. The injury was sufficient in the ordinary course of nature to cause death.

The prosecution also led evidence of statements made by the 1st appellant to the village headman of Kuttapitiya and by both the 1st and 2nd appellants to Police Sergeant Sinnatamby. The statement to the headman was made by the 1st appellant at 6.30 a.m. on 23rd January. He stated—

"A girl named Kiriweldeniya Pinthu of Sannasgama, aged about 22 years, was under me working as a cook for about two years in my house. During this period, she used to come home once in 3 or 4 months and used to stay at home for a week or two and return to me. This time she went home on 10.9.56 and after her stay in her house returned to our house at about 8 a.m. day before yesterday. Having stayed till about 11 a.m. I returned home at about 11.30 a.m. for my meals. She was not at home at that time. Yesterday at about 9 a.m. Pinthu came again to our house. I was staying at home as I was ill. At 1.30 p.m. my wife returned home from school. Pinthu was told not to come here and she was asked to come with a guardian if she was coming and she was asked to go away. When this was said it was about 4 or 5 p.m. Without going away she sat on the bench in the firewood shed. During the night too she was in the shed. When I went to the lavatory in the morning I saw her dead near the lavatory with a rope round her neck. The reason why she should have acted like this was that she appeared to be pregnant. That was why we were unwilling to take her to our house."

The 1st appellant stated to Police Sergeant Sinnatamby:

"I went for a call of nature at about 2 a.m. today and found her sleeping on the bench over a gunny bag ("her" referring to the deceased). Then I closed the kitchen door and slept."

The 2nd appellant stated—

"She was sleeping in the cadjan shed adjoining the kitchen. At about 2 a.m. I went out with my husband to urinate. At that time I saw her lying on the bench on the gunny bag. Then we came and slept."

On this evidence the jury returned a verdict of culpable homicide not amounting to murder by a majority of 6 to 1 against the 2nd appellant alone and a unanimous verdict under the charge under section 198 of the Penal Code against the 1st appellant. In the course of his address the learned Deputy Solicitor-General appears to have told the jury that there was no case against the 1st appellant on the charge of murder and asked them to return a verdict of not guilty on that count, but as he did not formally move to withdraw the charge, under section 217 (3) of the Criminal Procedure Code, the verdict was taken.

Of the grounds of appeal taken in the petitions of appeal, the following only need mention :—

(*a*) that the verdict is unreasonable and cannot be supported having regard to the evidence,

(*b*) that separate trials should have been ordered and in any event count 2 should have been tried separately,

(*c*) that the admission into the case of the statement of the 1st accused to the Village Headman gravely prejudiced the 2nd accused resulting in a miscarriage of justice.

Learned counsel strenuously urged that the evidence led by the Crown did not establish any charge whatsoever against the 2nd appellant.

The undisputed facts in the case are—

(*a*) that the deceased had been the cook of the appellants for about two years and that she had returned on 22nd January after more than a month's absence,

(*b*) that on 23rd January she was found dead near the appellants' lavatory,

(*c*) that the deceased did not commit suicide by hanging,

(*d*) that at the time of her death the deceased was pregnant, and

(*e*) that the 1st appellant was responsible for the pregnancy of the deceased.

The rest of the evidence is not free from difficulty. According to the witness Punchi Menike when the 2nd appellant and the deceased were in the kitchen she heard twice a sound as if someone was being assaulted. That sound was loud enough to be heard 40 feet away, for that was the distance from Punchi Menike to where the appellants and the deceased were. If those were the sounds of blows received by the deceased from the rice-pounder or any other weapon wielded by 2nd appellant there should have been some marks on her. But the medical evidence discloses no external marks of any ante-mortem injury. The only ante-mortem injury could in the opinion of the doctor have been caused by a prod or dig with force on the abdomen of the deceased with the rice-pounder (P 12). But he does not exclude the possibility of its having

been caused by accident. In cross-examination the doctor mentioned the following as some of the ways in which the injury could have been sustained :—

(*a*) if she stumbled and fell against the corner of a table heavily ;

(*b*) if she stumbled anywhere and fell ;

(*c*) if she had been pushed against a wall suddenly ;

(*d*) if she stumbled and fell against some hard object.

The doctor also expressed the opinion that the deceased would not have been able to move after she received the fatal injury till she died. Punchiappuhamy's evidence that the 2nd appellant was at about 3.30 p.m. at the front door of the house ordering some one out of the house, presumably the deceased, creates a difficulty for the prosecution. The prosecution case is that Punchi Menike speaks to events anterior to those spoken to by Punchiappuhamy. Punchiappuhamy's evidence negatives the theory that the fatal injury was inflicted by the 2nd appellant in the kitchen at about 3 p.m. before he heard the 2nd appellant's voice at the front door, for if the deceased received the injury in the kitchen the medical evidence is that she could not have moved out of it. There is no evidence that the 2nd appellant struck the deceased after 3 p.m. nor are there any circumstances from which it can be inferred that she struck her at any time thereafter. There is therefore no clear and certain evidence on which the conclusion that the deceased suffered the fatal blow at the hands of the 2nd appellant can be based. In the opinion of the majority of us the verdict of the jury against the 2nd appellant cannot be supported having regard to the evidence.

The second count of the indictment against the 1st appellant is dependent on the first, and the acquittal of the 2nd appellant must necessarily result in the acquittal of the 1st appellant on the second count, for if there is no convincing evidence of an offence committed by the 2nd appellant to the 1st appellant's knowledge the very foundation of the charge disappears—the essential ingredients being—

(*a*) knowing or having reason to believe that the murder of Kiriweldeniya Pinthu had been committed, and

(*b*) giving information respecting the offence with the intention of screening the offender or offenders responsible for the commission of the said offence from legal punishment.

Further the prosecution failed to prove that the information that when the 1st appellant went to the lavatory he found Kiriweldeniya Pinthu near the lavatory with a rope round her neck, was false.

Learned counsel also argued that the appellants should not have been tried together and also that the counts 1 and 2 should not have been joined in the same indictment. The rule laid down by the Criminal Procedure Code is that for every distinct offence of which a person is

accused there must be a separate charge and every charge must be tried separately except in the cases mentioned in sections 179, 180, 181 and 184. Sections 179, 180 (2) and (3) and 181 have no application to this case. Sections 180 (1) and 184 remain to be considered. We shall first consider whether the joinder of the charge of murder against the 1st appellant with the charge under section 198 was legal. It would be legal only if the two offences were committed in one series of acts so connected together as to form the same transaction. The murders, if murder there was, and the giving of false information cannot on the facts stated above be said to be one series of acts so connected together as to form the same transaction. The learned Deputy Solicitor-General does not appear to have claimed that they were the same transaction although the substituted charge in terms said so. In fact he appears to have stated to the trial Judge in the course of the argument that the acts charged in count 1 and the acts charged in count 2 constituted separate transactions, but that they could be joined. We can find no authority in section 180 (1) or 184 for joining in the same indictment offences of different kinds committed in separate transactions. The joinder of the two appellants in the first count of murder is authorised by section 184 and is not open to objection.

In regard to the ground of appeal relating to the reception in evidence of the statement made to the village headman and the statements made to Police Sergeant Sinnatamby, learned counsel for the Crown sought to introduce them in evidence as an admission under section 17 of the Evidence Ordinance. We cannot agree that the statements set out above are admissible in evidence under section 17. The purpose of the evidence seems to be to show that the statements are false because according to the medical evidence the deceased could not have been alive at 2 a.m. if she sustained this fatal injury at 3 p.m. and that an adverse inference should be drawn against the appellants from the fact that the statements are false. Statements which are false cannot be regarded as admissions of facts which the prosecution has to prove. These statements were therefore not admissible under section 17 of the Evidence Ordinance.

There is one further matter which was argued before us, viz., the legality of the amendment of the indictment, to which we wish to refer, though it is not expressly stated in the grounds of appeal, as it involves an important question of procedure. The fact that we refer to a question not taken in the grounds should not be regarded as a relaxation of the rule that this Court does not entertain grounds of appeal not set out in the notice of appeal.

The application for the amendment of the indictment was made before the indictment served on the appellants under section 165F (3) was read to them as required by section 219 of the Code. The appellants were arraigned on the indictment as altered. The power to alter an indictment is vested in the Court by section 172 of the Code. Sub-section (1) of that section provides that in the case of a trial before the Supreme Court an indictment may be altered at any time before the

verdict of the jury is returned. It can only mean at any time after the trial has commenced for the court has no seisin of the matter until the trial commences. That provision cannot be regarded as authorising an amendment of the indictment before the indictment is read and explained to the accused. Section 218 (1) requires that where the case comes before the Supreme Court on the committal of a Magistrate's Court the accused shall be arraigned on the indictment served upon him as provided by section 165F. In the instant case this was not done and the alteration was made before the commencement of the trial. Alteration at that stage is unwarranted by the Code and is illegal. The proper course to adopt when the Crown applies to alter an indictment is first to arraign the accused on the indictment served upon him [section 218 (1)] and have it read and explained to him (section 219) and take his plea. At any time thereafter before the verdict is returned the Court can either *ex mero motu* or upon application of counsel alter the indictment.

For the above reasons we allow the appeals, quash the convictions of the appellants and direct a judgment of acquittal to be entered.

*Appeals allowed.*