[COURT OF CRIMINAL APPEAL.]

1941 *Present* : **Howard C.J., Moseley S.P.J., and Nihill J.**

THE KING *v.* MENDIAS.

29—M. C. Matara, 31,529.

Evidence—Acts connected with the guilty act to form part of the same transaction—Nature of injuries on persons other than deceased—Inadmissible to prove intent—Evidence Ordinance, s. 6.

In a charge of murder the defence of the accused was that he did not inflict the blow that caused the death of the deceased.

Evidence was led by the Crown to the effect that persons other than the deceased received injuries from blows struck by the accused on the same occasion as well as medical evidence as to the nature of the injuries.

[1] *42 L. R. Ch. D. 636.*

Held, **that the fact that other persons than the deceased received injuries was admissible in evidence under section 6 of the Evidence Ordinance as being so closely connected with the guilty act as to form part of the same transaction.**

Held, further, **that medical testimony as to the precise nature and extent of the injuries on other persons was not admissible in determining whether the accused had a murderous intent when he inflicted injuries on the deceased.**

APPEAL from a conviction for murder by a Judge and jury before the Second Southern Circuit.

C. S. B. Kumarakulasingham (with him *S. Saravanamuttu*), for applicant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

January 27, 1941. HOWARD C.J.—

This is an application for leave to appeal against a conviction for murder in a case tried by Mr. Justice Keuneman and a jury at Galle. At the commencement of his argument Counsel for the applicant with the leave of the Court proceeded to submit that on a question of law the conviction of the applicant could not be sustained. This is the main ground of the case put forward on behalf of the applicant. This question of law is connected with the following passage that occurs in the learned Judge's charge to the jury :

"There were further facts spoken to by the Doctor which have a bearing on the question of intention. If you accept the fact that this accused caused this injury in determining the question of intention you may bear in mind the other injuries which he is alleged to have caused. If you accept the fact that he caused injuries on Francis Hewa Abeykoon *alias* Hinni Appuhamy, and on Susana Jayasekera, then you will remember that in each case among the injuries suffered was a penetrating injury into the chest cavity. In the case of Francis Hewa Abeykoon—I had better call him Hini Appuhamy as you have known him as Hini Appuhamy in the course of the case—there was a stab injury just above the region of the heart, little higher than the heart region, which penetrated the chest cavity and endangered life. In the case of Susana, there was an injury on the back of the chest which also penetrated the chest cavity and endangered life. She gave her age as 78. Certainly she appeared to be an old woman.

"Now, those injuries also may throw some light on the question of intention of this accused when he inflicted the injury on Abraham's left thigh, and the only question which you have to determine is wherether you are satisfied beyond reasonable doubt that there was what I have generally called a murderous intention when the accused used that weapon.

"I do not think I need comment on the other injuries inflicted upon the others. It is sufficient to say that certain injuries were spoken to."

It would appear that in the trial Court, Counsel for the applicant before any evidence had been tendered objected to the admission of medical

evidence as to the nature and extent of the injuries on persons other than the deceased who were injured on the ground that the jury would be unduly influenced thereby. The learned Judge admitted this evidence inasmuch as the injuries were inflicted as a part of the same transaction which resulted in the death of the deceased and further that such evidence as to the nature of the injuries inflicted on the other persons is relevant to prove the intention of the accused. Counsel for the applicant has with considerable force maintained that such evidence is not relevant to prove the intention of the accused. By inviting the jury to gauge the intention of the latter from such evidence he contends that the learned Judge has misdirected them on a point of law and in such circumstances the conviction cannot be sustained.

The first point that arises for consideration is whether the objection raised by Counsel for the applicant at his trial with regard to the admissibility of this evidence should have been upheld. Section 5 of the Evidence Ordinance provides as follows :—

> " Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others."

Hence evidence is only admissible if it tends to prove a fact in issue or some other fact declared relevant by some subsequent section of the Ordinance. Other facts are declared relevant by the remaining sections in Chapter II. of the Ordinance, that is to say, sections 6-16 inclusive. The principles laid down in this Chapter of the Ordinance reproduce the English law. Thus in *Taylor on Evidence, 12th ed., p. 211*, it is stated as follows :—

> " The second general rule which governs the production of testimony both in civil and criminal cases is that evidence must be confined to the points in issue."

In this connection the law as stated by Lord Herschell L.C. in *Makin v. The Attorney-General for New South Wales* [1] is as follows :—

> ". . . . evidence tending to show that the prisoner has been guilty of criminal acts other than those covered by the indictment is inadmissible to lead to the conclusion that he is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. "

" The Law of England " said Lord Campbell in *R. v. Oddy* [2], " does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first ". This general rule, however, cannot be applied when the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible. So in a case *R. v. Whiley & Haines* [3], Lord Ellenborough cited a case where a man

[1] *(1894) A. C. 57.*

[2] *20 L. J. M. C. 198.*

[3] *2 Leach 983.*

committed three burglaries in one night and stole a shirt at one place and left it at another, and they were all so connected that the Court heard the history of all the burglaries and remarked that if crimes do intermix, the Court must go through the detail.

There is no doubt, therefore, that in this case the fact that persons other than the deceased received injuries inflicted by blows struck by the accused was admissible in evidence as being so closely and inextricably mixed up with the guilty act itself as to form part of the same transaction. Such evidence would be admissible under section 6 of the Evidence Ordinance. The question, however, as to whether medical testimony as to those injuries was admissible involves an examination and inquiry into the relevance of such evidence. The precise nature and extent of these injuries were not in our opinion facts so connected with a fact in issue as to form part of the same transaction and so relevant under section 6. The learned Judge has, however, treated this testimony as evidence of similar facts relevant to show the state of mind or intention of the accused. The law with regard to such evidence is formulated in *Wills on Circumstantial Evidence, 7th ed., pp. 77, 78 and 79,* as follows :—

> "On the principle under consideration, all such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes, even though they may severally constitute distinct felonies, are clearly admissible in evidence. Such evidence is known as 'evidence of similar facts'; and although it is inadmissible where it amounts to evidence of distinct and different offences against other persons, unconnected with and unrelated to the particular act in question, it is held to be relevant, and is frequently received, not for the purpose of showing a pre-disposition to commit such a crime as the offence charged, but to show the character of the act or the state of mind with which it was done; either to show guilty knowledge or a wicked system, or to rebut obvious defences, such as mistake or accident. For these purposes evidence of similar acts, whether previous or subsequent to the act charged, may be received on any criminal charge, or in any civil action or proceeding."

The passage cited from *Wills* is based on the law laid down in numerous English cases. In *R. v. Geering* [1], the accused was charged with the murder of her husband with arsenic in September, 1848. Evidence tendered of arsenic having been taken by the prisoner's three sons, two of whom subsequently died, on subsequent dates was held admissible for the purpose of proving (1) that the deceased husband actually died of arsenic, (2) that his death was not accidental and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. *R. v. Geering* was followed in *R. v. Richardson* [2], a case of embezzlement in which it was held that evidence of errors made by the accused in entering payments in the books before and after those mentioned in the indictment was admissible to explain motives and intentions. In *R. v. Frances* [3], in an indictment for attempting to obtain money by false pretences from a pawnbroker to show guilty knowledge evidence of offers of articles to other pawnbrokers was held to be properly

[1] *(1849) 18 L. J. M. C. 215.*
[2] *(1860) 175 E. R. 1088.*
[3] *12 Cox 612.*

admissible. In *R. v. Cotton* [1], where a prisoner was charged with the murder of her child by poison and the defence was that its death resulted from the accidental taking of such poison, evidence to prove that two other children and a lodger had died previous to the present charge from the same poison was held to be admissible. The same principle was affirmed in the judgment of Lord Herschell L.C., in *Makin v. The Attorney-General for New South Wales (supra)*. In the course of his judgment the Lord Chancellor stated as follows:—

> "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Makin v. The Attorney-General for New South Wales was followed in *R. v. Wyatt* [2], where in an indictment for obtaining credit by fraud, evidence of similar acts committed by the defendant at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, and as negativing any accident or mistake or the existence of any reasonable or honest motive on his part. The whole question was exhaustively considered by the Court for Crown cases reserved in *R. v. Bond* [3] by a bench composed of seven Judges. In this case the accused was indicted for procuring the miscarriage of J. The evidence was that the accused, a Surgeon, had used certain instruments on J. The defence was that the accused was performing a lawful operation on J. Evidence tendered by the prosecution that the accused had on a previous occasion used the same instruments in the same manner on one T., with the avowed intention of procuring her miscarriage was held by a majority of the Judges to be admissible because it negatived the defence set up by the accused that his intention was to perform a lawful operation. Kennedy J., one of the majority Judges, in the course of his Judgment, when referring to previous decisions, stated as follows:—

> "In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with intent on the part of the accused, so repeated and connected with the offence for which the person was on his trial that, according to justice as well as common sense, there could be no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment."

The learned Judge then proceeded to cite the following passage from *Stephen's Digest of the Law of Evidence*, Art. 12:—

> "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is deemed to be relevant."

Kennedy J. later in his judgment stated that in *R. v. Bond (supra)* there was not in dispute a question of accident or mistake. The question was

[1] *12 Cox 400.*
[2] *(1904) 1 K. B. 188.*
[3] *(1906) 21 Cox 252.*

whether the accused used the surgical instruments for a lawful or for an unlawful purpose. That was the sole issue ; in other words had he or had he not in using them the *mens rea.* In his opinion, if the evidence had consisted solely of the single act alleged by Gertrude Taylor as to the act done to her nine months before, it ought not to have been admitted because a single isolated act is not just ground for any inference, and an act from which an inference is not justly to be drawn ought not to be allowed to go before the jury.

One further case deserved consideration. In *R. v. Samuel Voke* [1], where the indictment was for maliciously shooting, it was held that if it be questionable, whether the shooting was by accident or design, proof may be given that the prisoner at another time shot at the same person.

Careful examination of the various decisions indicates that in the majority of cases the purpose for which evidence of similar acts has been admitted is to negative accident or design. When evidence has been admitted showing systematic conduct of the prisoner at the time of the offence charged, such evidence is admissible merely to negative accident or mistake on his part. The judgment of Kennedy J. in *R. v. Bond* at first glance seems to indicate an extension of this principle inasmuch as he states that in this case there was not in dispute a question of accident or mistake. The question was whether the instruments were used for a lawful or an unlawful purpose ; in other words the sole issue was whether in using them the accused had the *mens rea.* The evidence was, therefore, admitted to rebut the defence of innocent user of the instruments put forward by the accused and hence within the ambit of the principle formulated in the other cases. Lawrence J. held that the evidence showed the illness of the prosecutrix was the result of design and not of accident. The evidence tended to rebut the defence set up of innocent operation and to negative any reasonable or honest motive for its performance. Bray and Jelf JJ. held that the evidence was admissible as proving a system or course of conduct.

That the principles laid down by the English cases are applicable to the Ceylon Evidence Ordinance is clear from a consideration of the case of *Emperor v. Panchu Das & another* [2]. The following passage from the judgment of Sanderson C.J. is in point :—

> "The learned Judge admitted the evidence as showing identity, design and motive and illegal association, and that a system had been pursued by them. It was first argued that the evidence of the three above-named women was admissible under section 15, Evidence Act. In my judgment this argument should not be acceded to. In this case there was no question of the act being accidental or intentional. The woman was undoubtedly murdered in a brutal way ; her head was practically severed from her body ; the deceased woman's room had been rifled and practically everything she possessed both in her room or on her person had been stolen. There was no room for any doubt that the acts with which the accused were charged were intentional. The only real question was, who was the person or who were the persons

[1] *168 E. R. 934.*

[2] *(1920) I. L. R. 47 Cal. 671.*

who committed the crime. Next it was urged that section 14, Evidence Act, applied. In my judgment this section does not apply. There was nothing in the evidence of the three women to show the state of mind of the accused towards Dakho, or with reference to the particular matter in question."

Mookerjee J. also held that reliance by the Crown on section 15 was of no avail inasmuch as there was no room for any hypothesis that the death of the woman, whoever might have caused it, was accidental or unintentional. With regard to section 14, the same Judge stated that this section was of no assistance as the defence was a complete denial and no question of the character contemplated by section 14 did or could possibly arise.

The question, therefore, of the admissibility of the evidence of the extent and nature of the injuries on persons other than the deceased must be considered in relation to the circumstances of the offence with which the accused was charged and his defence. The accused maintained that he did not inflict the blow causing the death of the deceased. No question arose as to whether the blow inflicted on the deceased was accidental or by design. Nor was the lawfulness of the blow in issue. Hence no evidence of system or a course of conduct was admissible to rebut a defence of accident or a blow lawfully given. One of the other persons alleged to have been stabbed by the accused received non-grievous injuries, but no mention was made in the charge to the jury of the non-grievous injury. The question the jury had to decide was whether the accused had a murderous intention when he inflicted the injuries on the deceased. In *R. v. Samuel Voke* [1] evidence was admitted of another attempt to shoot the same person to prove the general malicious intent of the prisoner. The malicious intent was the intent as regards one particular person. The injuries inflicted in this case on other persons do not prove malicious intent of the accused towards the deceased. It seems to us that the jury, if they adopted the suggestion of the learned Judge, would be accepting evidence of one crime to raise a presumption that another crime had been committed by the perpetrator of the first.

For the reasons given in this judgment the evidence to which I have referred was not admissible. This in itself would not in the circumstances of this case justify us in quashing the conviction. The direction of the learned Judge with regard to the relevancy and effect of this evidence, however, is another matter. It is not possible to say that without this direction the jury must have arrived at the same conclusion. The various other points raised by Counsel for the applicant with regard to the facts are without substance. In view of our decision on the point of law, the conviction for murder is quashed. In pursuance of the powers vested in us by section 6 (2) of the Court of Criminal Appeal Ordinance, we substitute for the verdict found by the jury a verdict of guilty of culpable homicide not amounting to murder and pass a sentence for such offence of 10 years' rigorous imprisonment.

Sentence varied.

[1] *168 E. R. 934.*