[COURT OF CRIMINAL APPEAL.]

1943 *Present :* **Soertsz S.P.J., de Kretser and Wijeyewardene JJ.**

THE KING *v.* ABEYWICKREMA *et al.*

104—M. C. Galle, 35,576

Abetment of murder—Circumstantial evidence—Proof of instigation to murder essential—Application for leave to appeal—Valid grounds therefor.

Where, in a charge of abetment of murder circumstantial evidence established a case of strong suspicion against the accused and the Jury convicted him under the impression that it was open to them to convict the accused as he refrained from going into the witness box,—

Held, that the conviction could not be sustained.

In such a charge the Crown is bound to establish as part of its case that the accused actually instigated the others to murder the deceased.

In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.

Applications for leave to appeal will not be granted unless the grounds suggested would, if established in the end, sustain the appeals themselves, that is to say, would show that the verdict of the Jury is unreasonable or cannot be supported having regard to the evidence or that there has been a miscarriage of justice.

APPEAL from a conviction by a Judge and Jury before the 1st Western Circuit, 1943.

N. M. de Silva, for first to sixth applicants.

H. V. Perera, K.C. (R. L. Pereira, K.C., with him *U. A. Jayasundera, M. M. Kumarakulasingham, and C. Renganathan)* for seventh applicant

M. W. H. de Silva, A.-G., K.C. and *T. S. Fernando, C.C.,* for the Crown.

Cur. adv. vult.

May 10, 1943. SOERTSZ S.P.J.—

In this case there are before us seven applications for leave to appeal against the conviction entered against the seven applicants, when the

Jury returned a unanimous verdict finding the first to the sixth applicants guilty of the offence of murder whilst being members of an unlawful assembly; and the seventh applicant guilty of abetment of that offence. There is also an appeal by the seventh prisoner on grounds of law.

So far as the applications for leave to appeal against the convictions are concerned, it is well established in the Courts of Criminal Appeal in England and here that applications for leave to appeal will not be granted unless the grounds suggested would, if established in the end, sustain the appeals themselves, that is to say, would show that the verdict of the Jury is unreasonable or cannot be supported having regard to the evidence, or that there has been a miscarriage of justice.

We have therefore examined with great care and anxiety—and in that matter we had much assistance from the Bar—all the evidence and matters that were before the Jury when they retired to consider thier verdict.

It seems to us that a very material question, perhaps, ultimately the most important question to consider and answer is this—did the deceased, escorted by some followers of his, invade the premises of the seventh applicant, and did he meet his death there in the course of a transaction which resulted from his invasion or was he taken on to that land in order that he might be put to death there and the defence set up that he was an aggressor and suffered the consequences to which his aggression made him liable.

The verdict of the Jury examined in the light of the direction they received from the trial Judge puts it beyond doubt that they took the latter view. There was ample oral testimony which, if it were accepted, justified that view. We were however, addressed in regard to the many infirmities of that evidence, such as the divergent accounts given by the witnesses concerning the manner in which such of the applicants as were said to have gone on to the deceased's land, went there; what they did there; how they took the deceased on to their land; and things like that. Our attention was also called to the contradictory statements made by those witnesses at different times; to attempts made by them to embellish and add to their evidence; and to more or less obvious falsehood indulged in by some of them on certain matters. There is no doubt that there is much force in that criticism of the evidence of these witnesses, and in the course of a very complete charge the learned Judge repeatedly called the attention of the Jurors to that aspect of the case. We have ourselves scrutinized the evidence. We find that the witnesses who spoke to the applicants entering the land of the deceased and leading him away spoke with definiteness on *that* point, although when it came to describing details, they gave different versions. This is a common experience in our Courts even in the case of educated and intelligent witnesses, and of the witnesses impeached in this case, one was a little lad of ten, and two others illiterate and—to judge from the impression they appear to have created in the mind of the trial Judge—stupid villagers.

We have gone further, we have tested the oral evidence in the light of probability, and the more we look at it in that way, the more we are satisfied that the view the Jury took was a view that, having regard to all the evidence and matters before them could by no means be said to be unreasonable or unsupported.

Mr. de Silva next asked us to consider whether the case as against the third and the fifth applicants should not be differentiated from that against the first, second, fourth, and sixth applicants inasmuch as, on the evidence before us, they appear not to have taken a very strong hand in the transaction that resulted in the death of the deceased. We see no good reason for such differentiation. Once they were found to be members of an unlawful assembly, the extent of their participation is immaterial when we are considering their liability in law. In regard to that liability they also serve who only stand and wait.

Finally Mr. de Silva, although his clients had not appealed on any ground of law, submitted to us that the trial Judge had not directed the Jury adequately on the right of private defence and the law relating thereto, and that the convictions entered against the first to the sixth applicants ought not to be sustained for that reason.

It is true that the learned Judge did not explain to the Jury the whole law relating to the right of private defence, but he put to the Jury the defence of the first to the sixth applicants and he told them that if they accepted that version they should acquit them. This direction was, in our view, unduly favourable to the defence for, it was open to the Jury to accept the evidence put forward in support of the right of private defence and yet to find that some lesser offence had been committed inasmuch as according to that evidence the deceased had been disarmed and was helpless at the time the first applicant stabbed him.

In these circumstances, we have no alternative but to refuse the applications of the first to the sixth applicants.

We now come to the case of the seventh applicant who has also preferred an appeal on grounds of law. His case depending as it does almost entirely on circumstantial evidence, is one of some difficulty. There was some little evidence of a direct nature led by the Crown on the issue of the seventh applicant's instigation of the murder, for the witness Charles stated in the course of his evidence at the magisterial inquiry on the night of the murder that the seventh applicant when driving off in his car to the Police Station, addressed his men saying, " Whatever has to be done must be done to-day. I will spend my whole fortune ". The learned Judge drew the attention of the Jury to the improbable nature of that evidence and it seems quite clear to us that he himself was not at all impressed by that evidence. We may therefore fairly assume that the Jury either rejected that evidence or considered it so doubtful as not to take it into consideration. Be that as it may, for ourselves, we prefer to consider the case of the seventh applicant disregarding this piece of evidence of the witness Charles as false or, to say the least, of a very doubtful character.

In order to sustain the conviction of the seventh applicant we must be satisfied beyond reasonable doubt that he intigated the other applicants to *murder* the deceased man, nothing less. In order to establish such instigation the Crown relied upon certain facts which may be briefly stated thus:—

(*a*) The fact that the seventh applicant had a strong motive for desiring to be rid of the deceased.

(*b*) The fact that about a month before the day of murder the seventh applicant went to the Superintendent of Police, Galle, and told him that "he must get rid of the deceased as he feared that the deceased might murder him if he continued to live there".

(*c*) The statement made by the seventh applicant at the Baddegama Police Station on the day of the murder and the manner in which that statement anticipated later events.

(*d*) The conduct of the seventh applicant in going off to Galle from the Baddegama Police Station instead of returning to his land when Simon Abeywickrema's telephone message was received at the Police Station and a constable was sent to the land.

(*e*) The circumstances in which the seventh applicant went to Mr. Karunaratne, Proctor, and the statement he made to him.

It is from these facts that we are asked to infer that it was the instigation of the seventh applicant that set the first to the sixth applicants in motion and that the instigation was that they should put the deceased to death.

On all the evidence and matters before us, there can be no doubt that the deceased was a man of very dissolute character and that he had for sometime been constantly harassing the seventh applicant and the sisters who lived with him. The fact that he was coming back to the outhouse to live there only a few yards away from the mulgedera in which the seventh applicant and his sisters lived must have filled them with apprehension and in that sense there was no doubt a motive for the seventh applicant desiring to be rid of the deceased. It is in that sense, we think, that the words he used according to the Superintendent of Police when he went to him, namely, that "He must get rid of the deceased" must be understood. He was extremely anxious to prevent the deceased coming there as his neighbour and the reasonable conclusion to which we are led by the facts (*a*) and (*b*) above is that the seventh applicant was very anxious even at the eleventh hour to find some means of preventing the deceased coming to live in the outhouse. They do not necessarily lead to the conclusion that he was prepared to go to the length of killing the deceased or causing him to be killed in order to prevent his coming to live in the outhouse. In this connection, that is to say, when we are examining the question of motive, we must not forget the fact that has been proved, namely, that the first applicant himself had a motive of his own for being ill disposed towards the deceased. Only a week before, that is to say, on September 29, 1942, he had made a complaint at the Police Station charging the deceased with having assaulted his mother and his little brother Jayanoris.

In regard to (c), namely, the statement made by the seventh applicant at the Baddegama Police Station, that certainly appears to us to be an incriminating circumstance against the seventh applicant for as we have already observed that statement anticipates events which had not yet happened with remarkable precision. But even so, it does not, in our view, do any more than show that before the seventh applicant left for the Baddegama Police Station he had conferred with the first to the sixth applicants, and that he knew that something was going to happen and that it would be wise for him to take the precaution of trying to exculpate

himself and also of helping the others with a defence in the event of a conflict between the deceased and them. We may even infer that the seventh applicant had instructed the first to the sixth applicants as to a course of action in the event of the deceased man becoming aggressive, but we do not think we can fairly infer that he had actually instigated them to kill the deceased and that is what the Crown must establish as part of its case.

So far as (*d*) is concerned, the conduct of the prisoner in driving off to Galle instead of going to his land when he knew that something had happened there, that is conduct that involves him in suspicion, but we do not think it leads necessarily to the conclusion that he acted in that manner because he had instigated the others to *murder* the deceased. On occasions like these it is notorious that men act on the impulse of the moment, and it would be dangerous and unfair to draw an adverse inference against a man merely because he did not act in a way that commends itself to us. It seems to us therefore, that the fact that the seventh applicant drove off to Galle is too slender a read to rely upon for inviting us to draw the inference that he had instigated murder. Similarly in regard to the statement made by the seventh applicant to Mr. Karunaratne at Galle to the effect that he had come to him in order that he might retain his services to defend him in the event his being implicated and to the answer he gave Mr. Karunaratna when he was asked " What is this I hear in regard to the death of Arthur " ? " Yes, I heard that after I came to Galle ", we do not think we shall be justified in drawing the inference from this evidence that the seventh accused came to retain the services of Mr. Karunaratna because he was conscious of guilt. It may well be that as the seventh applicant himself says he realized that things having happened in that way, he might himself be implicated by his brothers Henry and Simon who were not well disposed towards him, although he had not been present on the land at the time of the conflict. In regard to the answer given by the seventh applicant according to Mr. Karunaratna that he had heard of the death of Arthur after he had come to Galle, it is suggested that he could not have heard from any one of the death of the deceased before he went to Mr. Karunaratna, and that therefore that by answering as he did, the seventh applicant betrayed himself by showing that he knew of the death of the deceased when he could not have known of it except as a man who had arranged for it. Here again we think that while that is a possible view, it is not the only reasonably possible view. He may have heard of the death of the deceased while he was on the green outside the Court-house for by then the Galle Police Station had been informed and news of this kind spreads like wild fire.

It is, as we have already observed, a point in favour of the seventh applicant, that while *he* had a motive for desiring to be rid of the deceased man, the first applicant himself had an independent motive against him and in those circumstances, it may well be that, assuming that the seventh applicant had instigated a certain course of action, the first applicant and those associated with him went beyond that instigation and acted in pursuance of the first applicant's own motive believing that they would be promoting the interests of the seventh applicant himself.

Scrutinizing the evidence and matters before the Jury in this way, we feel that they establish a case of strong suspicion against the seventh applicant but we are unable to say that they establish his guilt beyond reasonable doubt.

The learned Judge directed the Jury very fully in regard to the principles on which they should act when they were examining a case that depended on circumstantial evidence. He pointed out to them that in order to base a conviction on circumstantial evidence they must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence. We can, however, imagine how difficult it must be for a Jury completely to assimilate all the principles governing circumstantial evidence in the course of a charge however adequate it may be particularly if that Jury were dealing for the first time with a case of circumstantial evidence, and it is possible that despite the unexceptionable charge—if we may respectfully say—of the learned trial Judge in this case the Jury may have been under the impression that if there was a case of strong *suspicion* against an accused person and he refrained from going into the witness box it was open to them to convict him. But of course the charge said nothing of the kind, for it was clearly to the effect that if all the facts and matters before the Jury made out a *prima facie* case against an accused which case could, if at all, only be met by explanations from the accused and he appeared to be in a position to make his explanations if he was prepared to have them put to the test, and yet he offered no explanations then a verdict of guilty was justifiable.

The seventh applicant put his character in issue and nothing has been proved against him. He is quite a young man who appears to have led a respectable life in very difficult surroundings and that too is a fact which we must pay some attention to when we are considering what inferences should be drawn from such facts as the Crown relied upon to establish its case. To put it in a few words our view is that the most that can be said against the seventh applicant is that there probably was some instigation forthcoming from him. But that will not do. We ought to be able to say if we are going to sustain the conviction, that the instigation that was forthcoming from him was an instigation *to commit murder.*

To conclude we are quite satisfied that despite many deplorable attempts to cloud the real issues in the case by innuendoes and suggestion for which there does not appear to be the least scintilla of justification, the learned trial Judge saw to it that the case for the Crown and that for the defence were sufficiently before the Jury, and that he charged them, if we may so with respect, completely and correctly on all the important questions that arose in the case, but nevertheless to use the words of Lord Hewart "the conclusion at which we have arrived is that the case against the seventh applicant which we have carefully and anxiously considered and discussed was not proved with that certainty which is necessary in order to justify a verdict of guilty"[1].

[1] *(1942) 28 C. A. R. 141.*

We, therefore, are of opinion that this is a case which comes within the rule section 5 (1) of the Court of Criminal Appeal Ordinance. We give the seventh applicant the benefit of the doubt which we have in regard to his guilt and set aside his conviction and acquit him.