[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present :* Basnayake, C.J. (President), H. N. G. Fernando, J., and L. W. de Silva, A. J.

THE QUEEN *v.* E. H. ARIYAWANTHA

Appeal No. 59 of 1957 with Application No. 66 of 1957

S. C. 27—M. C. Matara, 42,113

Accomplice—Acts which make a witness an accomplice.

An accomplice is a guilty associate in the crime with which the accused is charged. Therefore, where the accused is charged with murder, evidence showing that a witness helped in disposing of the body of the deceased after the deceased was already dead is not sufficient to prove that the witness was an accomplice.

Res judicata—Applicability of rule to criminal proceedings—Common intention—Misdirection.

The maxim *Res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings.

A, B and C were indicted with the offence of murder. A was found guilty of murder, while B and C were found guilty of causing simple hurt and culpable homicide not amounting to murder, respectively. A appealed against his conviction and a retrial was ordered. At the retrial A was once more found guilty of murder. A thereupon appealed.

Held, that at the retrial the prosecution was bound to present its case on the basis that the unreversed part of the verdict at the earlier trial was correct. It was not open, therefore, to the trial Judge to direct the jury on the basis that there was a common intention on the part of A, B and C to commit murder.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva* and *J. N. David* (Assigned), for the Appellant.

A. C. Alles, Acting Deputy Solicitor-General, with *V. S. A. Pullenayegum* and *E. H. C. Jayatileke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 26, 1957. BASNAYAKE, C.J.—

The appellant, Egoda Hewage Ariyawantha, was along with two others indicted with the offence of murder of one Talpawila Hewa Kankanange Piyadasa. The appellant was found guilty of the offence of murder and sentenced to death while the two others were found guilty of the offence of voluntarily causing simple hurt and culpable homicide not amounting to murder, respectively. The appellant appealed against his conviction

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and it was quashed on the ground of non-direction on a question of law amounting to misdirection and a retrial was ordered. At the retrial the appellant was once more found guilty of the offence of murder and sentenced to death. He now appeals from that conviction.

The appeal is pressed on the following grounds :—

(*a*) That the witness Allison on whose testimony the prosecution almost entirely rested is an accomplice,

(*b*) That his evidence which relates to the offence committed by the appellant is uncorroborated,

(*c*) That the learned Judge was wrong in directing the Jury to find against the appellant on the ground of common intention,

(*d*) That the evidence does not disclose that it was the act of the appellant that caused the death of the deceased,

(*e*) That the only offence disclosed against the appellant is the offence of voluntarily causing hurt with a knife,

(*f*) That the learned Judge has misdirected the Jury on the failure of the appellant to give evidence on his own behalf.

The evidence discloses that the witness Allison held the legs of the deceased when his sarong was being removed and helped the three accused to carry the body of the deceased from the house in which he was killed to the river where they tied it to a canoe. Allison in answer to the question " Did you also assist them to carry the body ? " said : " I was asked to help in carrying the body. Through fear I followed and pretended that I was helping. " The request to help was made by the appellant. Under cross examination Allison gave the following evidence :—

" 608. Q. To remove the clothes did you help ?
A. No.

609. Q. You did nothing at all ?
A. At that moment I was stricken with fear. They asked me to help and I pretended to help but I did nothing.

610. Q. In what way did you pretend to help ?
A. I remained there. To their appearance I was almost ready to help in anything.

611. Q. You also got on to the verandah ?
A. Yes.

612. Q. You went right up to the man ?
A. Yes. Through fear when they asked me to later. . . .

613. *To Court :* Q. Not later, at that time ?
A. At the time the man was being stripped of his clothes I was asked to help and through fear I helped.

614. Q. You touched the body, that is the question ?
A. Yes.

615. Q. What part of the body ?
A. I held the legs. "

Now the burden of proving a witness to be an accomplice, for the purpose of inducing the jury to presume that he is unworthy of credit unless corroborated in material particulars, is upon the party alleging it. It is for the jury to determine whether a witness is in truth an accomplice. If they are in doubt and unable to decide, the witness should not be treated as an accomplice. If they form the view that he is an accomplice, they have to consider the further question whether in the circumstances of the case before them they should presume him to be unworthy of credit unless he is corroborated in material particulars.

Learned counsel contended that the acts which the witness committed make him an accomplice. We are unable to agree. An accomplice is a guilty associate in the crime with which the accused is charged. The offence alleged against the appellant is murder. The evidence shows that at the time Allison held the legs the deceased was dead and that though the man's private parts were cut off by the appellant after Allison held the legs that act did not cause his death. Similarly when Allison pretended that he was helping to carry the body to the river it was the corpse that he helped to carry. Apart from the fact that Allison says that he did whatever he did because he was overawed by fear, neither of the acts he performed can be said to amount to guilty participation in the offence of murder. It was therefore not open to the jury to presume that he was unworthy of credit unless corroborated in material particulars. They were free to assess his evidence in the same way that they would have assessed the evidence of any other witness free from the taint of guilty participation in the crime charged.

We now come to the ground of appeal based on the wrong direction on the law as to common intention. The evidence from which the jury were invited to infer a common intention to murder was a conversation between Dairis, the second accused at the first trial, and Arnis, the third accused at the same trial, which the present appellant, who was the first accused at that trial, may have heard. It was after that conversation that Arnis invited him to his house when the appellant wanted to go to his own house. It is unnecessary for the purpose of this judgment to refer in detail to what happened at Arnis's house; but it is sufficient to state that the deceased was inside the one-roomed house with Arnis's wife and some time after they had knocked at the locked door he came out of it and, under the cover of darkness, got on to a cot which was in the verandah. Noticing the deceased on the cot by the aid of a lamp Arnis's wife Amarawathie had placed on a chair in the verandah after he came out of the room, the appellant went up to him, pulled out a kris knife from his waist and stabbed him on the chest. The deceased raised a cry of "murder" and was thereafter silent and motionless. Arnis then came up and stabbed the man a number of times all over the body above the waist and Dairis drew a knife across the man's body, arms and legs. Thereafter the appellant cut off the man's private parts.

It was submitted on behalf of the appellant that, as the evidence does not disclose that it was the injury inflicted by the appellant that caused the death of the deceased, the only basis on which the jury could have returned a verdict of murder was that the act of the appellant was committed in furtherance of the common intention of all to commit the offence

of murder. It was further submitted that as the jury acquitted the 2nd and 3rd accused of the offence of murder and thereby rejected the evidence of common intention at the last trial it was not open to the prosecution to present the case against the appellant (who was the first accused at the last trial) at his retrial nor to the learned Judge to direct the jury on the basis that the evidence disclosed a criminal act committed by the appellant in furtherance of the common intention of all to commit murder. In support of his submission counsel referred us to the following observations of the Privy Council in the case of *Sambasivam v. Public Prosecutor, Federation of Malaya* [1] :

> " The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim ' Res judicata pro veritate accipitur ' is no less applicable to criminal than to civil proceedings. Here the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. "

The maxim cited in the reasons of the Board delivered by Lord Mac Dermott is one that has not been applied before in a criminal case in this country nor are we aware of any case in which it has been applied in criminal proceedings in England. But that is no reason why we should refrain from applying it in a suitable case. The instant case is one such. The maxim is not in conflict with the provisions of our statute law which govern criminal proceedings and has the merit of sound good sense to commend its application to criminal proceedings. It is of Roman Law origin (Digest L. Tit. XVII, S. 207) and is well known to both the Roman Dutch (Voet Bk XLII, Tit. I, S. 29) and the Scots systems of Law (Stair—Moore's Edn—Vol. II, S. 554 ; MacDonald on Criminal Law of Scotland, 5th Edn. pp. 272-273) though instances of its application to criminal proceedings are rare. It will lead to queer results if in a case such as that before us the prosecution is not bound to accept as correct so much of the verdict at the previous trial as remains unreversed and is permitted to challenge it. We are of opinion that the prosecution was bound to present its case on the basis that the unreversed part of the verdict at the earlier trial was correct and it was not open to the learned trial Judge to direct the jury on the basis that there was a common intention on the part of all the accused to commit murder.

As this disposes of the appeal it is unnecessary to consider the other grounds urged on behalf of the appellant.

The only question that remains for us to decide is whether we should allow the appeal and direct a judgment of acquittal to be entered or instead of allowing the appeal substitute under section 6 (2) of the Court of Criminal Appeal Ordinance for the verdict found by the Jury a verdict of guilty of the offence committed by the appellant and of which the

[1] *(1950) A. C. 458.*

jury could, on the indictment, have found the appellant guilty. To enable us to apply this provision we must be satisfied on the finding of the jury before us that they must have been satisfied of facts which prove him guilty of the offence which we mean to substitute. Learned counsel for the appellant suggested that the verdict should be one of voluntarily causing hurt by means of an instrument for cutting punishable under section 315 of the Penal Code while learned counsel for the Crown suggested that the verdict should be one of attempted murder punishable under section 300 of the Penal Code.

The jury appear to have been satisfied that the accused stabbed the deceased in the way described by Allison. But beyond that there is nothing in their verdict which indicates to us that they were satisfied of the existence of the ingredients of the offence of attempted murder. The submission of learned counsel for the Crown must therefore be rejected.

We accordingly substitute a verdict of guilty of the offence of voluntarily causing hurt by means of an instrument for cutting, punishable under section 315 of the Penal Code.

As to the sentence, we do not think that the mitigating circumstances that availed the 3rd accused Arnis who at the previous trial was convicted of culpable homicide not amounting to murder and sentenced to undergo one year's rigorous imprisonment exist in the case of the appellant. He cannot therefore be dealt with as leniently as Arnis.

We accordingly impose on the appellent a sentence of one year's rigorous imprisonment. We direct that the period between the date of the decision of the last appeal and the date of this Judgment be deducted from his sentence.

Conviction altered.