[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Cannon J. (President), Jayetileke and de Silva JJ.**

THE KING *v.* PUNCHI BANDA, *et al.*

Applications 66–68—M. C. Kandy, 17,203.

Evidence—Statement to Magistrate, by accused, at preliminary stage of inquiry—Admissibility, at trial, against co-accused.

Criminal Procedure—Trial for murder—Several accused represented by one Counsel—Conflict of defences, during trial—Adjournment of trial desirable.

In a prosecution for an indictable offence, a statement made by an accused to the Magistrate is relevant evidence against the co-accused if, at the trial, the former gives evidence reaffirming the statement he made to the Magistrate.

Where, in a trial for murder, two or more accused are represented by one Counsel and, in the course of the trial, it is found, for the first time, that the defences of the accused conflict, the proper course for the Judge to take is to adjourn the trial to enable the accused's Counsel to reconsider his position.

Per Cannon J.—" This seems an appropriate occasion to mention the duties of assigned Counsel when Counsel is assigned to represent two or more accused in the same case whose defences conflict. We think that if the defences of such accused have conflicted at any stage, even though the accused endeavour to reconcile them when they are in consultation with assigned Counsel, nevertheless assigned Counsel should bring to the notice of the Registrar of the Court the fact that the defences have at some stage conflicted, in order that the Registrar may advise the Judge to have the accused separately represented."

APPLICATIONS, by three accused, for leave to appeal against their convictions by a Judge and Jury.

H. Wanigatunge, for the first and second accused, applicants.

M. M. Kumarakulasingham, for the third accused, applicant.

T. S. Fernando, *C.C.*, for the Crown.

May 14, 1946. CANNON J.—

The case for the Crown was that the three appellants went to a house in their village on December 15, 1944, which was inhabited by an elderly man named Kira and a little girl aged seven, named Laisa, whose death was the subject of this trial; that they went there for the purpose of theft as Kira was reputed to be a miser and that when Kira offered resistance they murdered him and, further, murdered the little girl in order that she should not be a witness against them. The Jury found all three accused guilty of murder. In considering the points raised on behalf of the appellants it is necessary to recount something of the events that preceded the trial and of the conduct of the trial. The accused were not arrested until January 29, and on January 31, each expressed a wish to make what has been called a " confession " to the Magistrate. The first and second accused's so-called confession took the form of a total denial of any knowledge of what had happened. The third accused alleged that the other two had murdered the little girl and that he, though one of the party of three which went to the house, was not a party to any killing; that he went there merely to steal and did so under duress of the other two. Obviously, then, the defences of the first and second accused were in conflict with that of the third. At the trial, however, all three accused were represented by one Counsel, and the statements which the three accused had made to the Magistrate were tendered in evidence by the prosecution. The attitude of the defence to the evidence of these statements is shown by the cross-examination of the two Police Officers, who it was suggested had endeavoured to persuade each of the accused to make a statement implicating the other two on the promise that if he did so he would be released, and, further, that the first and second accused declined to do so but the third accused gave way and signed a statement which was dictated to him by one of the Police Officers. The cross-examination, therefore, shows that although their defences were in conflict before the trial, at the trial they were unified and in fact identical, the damaging statement by the third accused being accounted for by the suggestion that it was a false statement made by him for promise of reward. We are not deciding whether in making these defences the

accused were wisely advised. What we have to determine is whether they or any of them were prejudiced by what happened subsequently at the trial. At the conclusion of the Crown case the defence was opened by Counsel for the accused stating that the three accused intended to make statements from the dock; and the first and second accused thereupon did so, both alleging that they had been asked by the Police to make statements implicating the other two in return for their release. When it came to the third accused's turn to make his statement, he is recorded to have said "I wish to get into the witness-box and give evidence on affirmation". He did so and the shorthand note, after recording a few sentences of evidence, reads as follows:—"(*Note.*—Mr. Gnanasekeram is not examining the witness.) At this stage—

Court to Mr. Gnanasekeram (Counsel for the accused): Do you wish him to give evidence in this way?

Mr. Gnanasekeram: He has taken me by surprise.

Court: It is very unusual for an accused who is appearing by Counsel to take the case out of his Counsel's hands.

Mr. Gnanasekeram: As far as I am concerned, My Lord, he wanted to make a statement from the dock. I do not know the nature of the evidence he is going to give. I shall have to follow it.

Court to Mr. Wijemanne (Crown Counsel): What do you suggest?

Crown Counsel: I do not know whether he can be restrained from giving evidence. He is at perfect liberty to give evidence.

The third accused then continued to give evidence and it would appear from the record that he examined himself. It is a very intelligent statement in which he admits having made the statement to the Magistrate to which I have already referred and, further, he admitted that that statement was a true statement. The shorthand transcript proceeds:—

Court to Mr. Gnanasekeram: You will have time to consider your position with regard to this accused, bearing in mind the fact that you are defending all three of them. It is difficult to do so. During the adjournment you can consider what questions you wish to put to this accused.

The presiding Judge apparently was prompted to make this observation because the nature of the third accused's evidence was in contradiction of the nature of the defences which had been put forward up to the time he went into the witness-box. On the next day the proceedings opened as follows, according to the transcript:—

Court to Jury: Mr. Gnanasekeram informs me that the evidence given by the third accused yesterday afternoon came as a complete surprise to him and that he anticipated that the third accused would make a statement from the dock more or less on the lines as that made by the first accused and the second accused. It is quite obvious, of course, that if Mr. Gnanasekeram had realised when he undertook this defence that the third accused was going to adopt this attitude, then he could not possibly have appeared on behalf of all the accused because their defences are irreconcilable—in other words, the third accused has said something in the witness-box which implicates the

first and second accused, and therefore Mr. Gnanasekeram has been placed in an extremely awkward position. In these circumstances I have asked Mr. Carthigesu to undertake for the rest of the case the defence of the third accused. Mr. Carthigesu appeared in the lower court and therefore is familiar with the facts of this case and no injustice will be done to the third accused by his appearing for him instead of Mr. Gnanasekeram. Mr. Gnanasekeram, on the other hand, will now be able to devote his attention solely to the conduct of the defence of the first and second accused. I thought I would just explain that to you."

From that stage Mr. Carthigesu conducted the defence on behalf of the third accused. The Jury, however, found all three accused guilty of murder.

For the first and second accused it is pointed out that the Judge omitted to give any direction to the Jury as to the relevance of the evidence of the statement which the third accused had made to the Magistrate, viz., that it should not be taken into account in considering the cases of the first and second accused; and Mr. Wanigatunge contends that that omission prejudiced the cases of the first and second accused. This omission may have been fatal to the conviction of the first and second accused but for the fact that the third accused gave evidence reaffirming in effect the statement he had made to the Magistrate and that evidence was, of course, evidence which the Jury could take into consideration against the first and second accused provided that the Judge gave them a proper direction on the question of corroboration, which in fact the Judge did. Therefore, as Mr. Fernando submits, the point in these circumstances becomes one merely of academical interest.

For the third accused it is submitted that he took the case out of the hands of his Counsel when he went into the witness-box and that from that time he was not represented by Counsel, who, it is pointed out, did not examine him, and Mr. Kumarakulasingham submits that in thus entering upon what was perhaps the most important part of his defence he was without the assistance of Counsel—contrary to the practice of the Court which gives an accused person in a capital case the option of having Counsel assigned to defend him. This submission depends on a question of fact, viz., whether or not the third accused was represented when he gave evidence. We have given very careful consideration to that point. It will be noted that in the record his Counsel said when replying to the Judge on the matter of the third accused giving evidence "I shall have to follow it.". This would suggest that he had not retired from representing the third accused, but rather was going to conduct the case to the best of his ability, having regard to what the third accused had said. We agree with the submission of Mr. Fernando that it was not until after the third accused had completed his evidence-in-chief that his Counsel had any idea of retiring from the case and we cannot hold that because the third accused went into the witness-box after having agreed to adopt the advice of his Counsel not to go into the witness-box that he thereby ceased to be represented by his Counsel. We are of opinion, therefore, that he was represented by Mr. Gnanasekeram up to the moment when Mr. Carthigesu took over. We do, however, think

that it would have been the better course for the Judge to have adjourned the case when the third accused went into the witness-box to enable his Counsel to re-consider his position, but we are of opinion that even had that course been followed the Jury could have come to no other conclusion in view of the amply adequate independent evidence implicating all three accused in the crime. The applications are therefore refused.

This seems an appropriate occasion to mention the duties of assigned Counsel when Counsel is assigned to represent two or more accused in the same case whose defences conflict. We think that if the defences of such accused have conflicted at any stage, even though the accused endeavour to reconcile them when they are in consultation with assigned Counsel, nevertheless assigned Counsel should bring to the notice of the Registrar of the Court the fact that the defences have at some stage conflicted, in order that the Registrar may advise the Judge to have the accused separately represented.

Applications refused.