[COURT OF CRIMINAL APPEAL]

1965 *Present :* **Sansoni, C.J. (President), T. S. Fernando, J., and Alles, J.**

A. ETIN SINGHO and another, Appellants, *and* THE QUEEN, Respondent

C. C. A. APPEAL NOS. 64–65, WITH APPLICATIONS NOS. 77–78

S. C. 236—M. C. Horana, 38289

Evidence Ordinance—Section 27—" Fact discovered ".

At the trial of the 1st and 2nd accused on a charge of murder of one P, a prosecution witness Victor said he heard some cries and came up and then saw the 1st accused with a blood-stained sword standing by the deceased who lay fallen. At the same time he saw the 2nd accused raising himself up from a bending position and dealing a blow with a club at the fallen deceased. He was unable to say at which part of the deceased's body the blow was directed or whether it alighted on the body at all. Nor was he able to say what kind of a club it was. Club P1 was pointed out to him and he was asked whether it was something like that, and he said it was.

The deceased had 13 incised injuries and a non-grievous lacerated wound over the vertex of his head. His death was due to the incised injuries.

As against the 2nd accused the prosecution proved, in terms of section 27 of the Evidence Ordinance, a part (P17) of a statement he had made to the Police. P 17 was in these terms :—

" I left the club under a culvert which is on the estate road that leads to the Padukka–Horana road."

A police officer testified that club P1 was recovered by him as a result of P17.

The trial judge directed the jury thus :—

" What he said was proved and the police officer went and found the club. If you are satisfied that this is the club that was used—you see Victor says that this is the club ; it is a factor to be used against the 2nd accused. Victor says he saw a club like this, and the 2nd accused showed this club and that is a factor you will take into consideration *against* the accused."

Held, that if the jury believed that the 2nd accused made the statement P17, all that was proved was that he had knowledge of the whereabouts of club P1. The fact discovered as a consequence of P17 was confined to that knowledge on the part of the 2nd accused. There was no proof before the Court that P1 was in fact used in the assault on the deceased.

Held further, that the jury should have been told that the 2nd accused's knowledge of the whereabouts of the club should not be treated by them as an admission that he used that club to attack the deceased.

APPEALS against two convictions at a trial before the Supreme Court.

Colvin R. de Silva, with (*Miss*) *Manouri de Silva*, *I. S. de Silva* and *K. Charavanamuttu*, for the accused-appellants.

N. Tittawela, Crown Counsel, for the Crown.

Cur. adv. vult.

October 18, 1965. T. S. FERNANDO, J.—

At the conclusion of the argument on these appeals, the Court made order dismissing the appeal of the 1st accused-appellant but allowing the appeal of the 2nd accused-appellant, quashing his conviction and directing his acquittal. We now set down below the reasons for our order :—

Both accused stood charged with and were convicted of the murder of a man called Peiris Singho. This man died as a result of a severe attack on him in the course of which he received some 13 incised injuries and one other injury (injury No. 10) described as a lacerated wound, 2 inches long, scalp deep, over the vertex of the head. His death was brought about largely by the damage caused to his skull and brain by the incised injuries. Injury No. 10 was a non-grievous injury and could have made little, if any, contribution to the cause of his death.

Apart from some evidence of motive which really affected only the case against the 1st accused, and a part of a statement made to the police by the 2nd accused, the prosecution relied solely on the evidence of a witness of the name of Victor. Victor lived in a house about 75 yards away from the scene of the offence and stated that at about 5.45 a.m. on the day in question his attention was attracted by a wailing cry and, on coming in the direction from which the cry appeared to have been raised, he saw the 1st accused with a blood-stained sword in his hand standing by the body of a fallen man. At the same time he saw the 2nd accused raising himself up from a bending position and dealing at the fallen man a blow with a club which he had in his hands. He was unable to say at which part of the man's body the club was directed or whether it alighted on the body at all. According to the medical evidence, injury No. 10 could have resulted even from a blow with a sword if its blunt edge had alighted on the head of the deceased. Victor went on to say that he addressed the 2nd accused and asked "What are you doing, Harmanis ?" and that at that stage both accused persons prepared to leave the spot. Victor then addressed them and said "If you injure a man and leave him like this who is going to be responsible for the consequences ?" The second accused thereupon replied "We are going to the Police Station."

Counsel for the appellants raised three points which appeared to us to affect the maintenance of the conviction of the 2nd accused. The first of these was a complaint in regard to the direction of the trial judge in respect of part (P. 17) of a statement made by the 2nd accused and proved by the prosecution. It is reproduced below :—

> " I left the club under a culvert which is on the estate road that leads to the Padukka–Horana Road."

A police officer testified that club P1 was recovered by him as a result of this part of the 2nd accused's statement. That P. 17 was admissible under section 27 of the Evidence Ordinance was not doubted, but complaint was made that the judge's direction was capable of leading the jury to believe that the statement itself was of a confessionary nature. It could, in our opinion, have afforded at best some slight corroboration of the evidence of the sole witness, Victor. The judge omitted to make any reference to P. 17 by the time he concluded his charge but, before the jurors left their seats in order to deliberate upon the verdict, his attention was drawn thereto in the presence of the jurors by Crown Counsel in the following words :—

> " In regard to the evidence that had been led in terms of section 27 of the Evidence Ordinance, if the jury believes that the 2nd accused had the club P1, the evidence as to the statement made by the 2nd accused leading to the finding of the club P1 would be admissible against the 2nd accused."

It must be mentioned that, when Victor was questioned in chief by Crown Counsel and asked what kind of club the 2nd accused had, his reply was that he could not say what kind of club but only that it was a club. Club P1 was then shown to him and he was asked whether it was something like that and he replied in the affirmative to that question. We must point out, with respect, that Crown Counsel's statement made to the judge in the hearing of the jury was itself capable of misleading a listener. What the prosecution was trying to establish was that the 2nd accused used club P1. Statement P. 17 was proved presumably towards inducing in the jury a belief that he used that club. In the way Crown Counsel put it the admissibility of P. 17 was dependent on the jury's belief that the 2nd accused had club P1 with him at the time of the offence.

After Crown Counsel had made the statement reproduced above, the learned judge addressed the jury thus :—

> " Then, gentlemen, the other matter is the finding of the club. You will remember the police officer said something which resulted in finding the club. What he said was proved and the police officer went and found the club. Well, gentlemen, if you are satisfied that this is the club that was used—you see Victor says that this is the club ; it is a factor to be used against the 2nd accused. Victor says that he saw a club like this and the 2nd accused showed this club and that is a factor that you will take into consideration *against* the accused."

This direction coming, as it did, at the closing stage of the charge was in our opinion unfortunate and laid itself open to the complaint made by counsel in relation to it. As it is by no means uncommon to find the prosecution in this Country making use of section 27 of the Evidence Ordinance, we think that its proper scope should be carefully appreciated. We would in this connection draw attention to the observations of the Privy Council in the Indian case of *Kottaya v. Emperor* [1] in relation to this section :—

> "In Their Lordships ' view it is fallacious to treat the ' fact discovered ' within the section as equivalent to the object produced ; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ' I will produce a knife concealed in the roof of my house ' does not lead to the discovery of a knife ; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ' with which I stabbed A ' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

If the jury believed that the 2nd accused made the statement P 17, all that was proved was that he had knowledge of the whereabouts of club P1. The fact discovered as a consequence of P 17 was confined to that knowledge on the part of the 2nd accused. There was no proof before the Court that P1 was in fact used in the assault on the deceased. The jury should have been told that the 2nd accused's knowledge of the whereabouts of the club should not be used by them as an admission that he used that club. We think there is substance in the argument that the jury might have been induced as a result of the direction given to them to use the fact of the 2nd accused's knowledge of the whereabouts of a club as indicative of an admission by him that he dealt a blow on the deceased with that club.

The second point related to the absence of a direction that the evidence against the 2nd accused was of a circumstantial nature. In our opinion, the evidence against both accused was purely circumstantial. The learned trial judge, on his attention being drawn thereto by Crown Counsel towards the close of the charge, directed the jury to approach the case of the 1st accused as one dependent solely on circumstantial evidence and he then proceeded to direct them on the manner in which such evidence has to be approached. As Victor had not seen even the 2nd accused dealing a blow which actually alighted on the deceased, the

[1] *(1947) A. I. R. (P. C.) at p. 70.*

jury should have been directed to approach the case against him too in the same way. As it is, the jury may have been led to think that the judge's view was that the case against the 2nd accused was one of direct evidence unlike that against the 1st accused.

The third point taken was in respect of the judge's direction on the question of common intention. The evidence taken at its best against the 2nd accused was that he was seen dealing a blow with a club which, had it alighted on the deceased, could have produced injury No. 10, a non-grievous injury. He could therefore have been convicted on the charge of murder only on the basis that, sharing in common with the 1st accused an intention to kill the deceased, he participated in the assault on the deceased. The sole evidence in regard to their complicity in the attack on the deceased being that of Victor who on approaching the fallen deceased only saw the 1st accused standing by with a blood stained sword and the 2nd accused dealing one blow with a club at the deceased, it is difficult to appreciate why the learned trial judge in his charge, when dealing with the question of common intention, came to use expressions like the following :—(*a*) " when the 1st and 2nd accused met the dead man ", (*b*) " if he (the 2nd accused) went with a man who was armed with a sword to attack another man ", (*c*) " do you think it is likely that these two people went together to thrash the man ? " and (*d*) " if the two of them went together ". The evidence did not exclude in any way the two accused persons reaching the scene quite independently of each other. Even if this third ground of complaint stood alone, we think the conviction of the 2nd accused for the offence of murder would have had to be quashed and a verdict that he was guilty only of causing simple hurt (section 314) substituted. The combined effect of the arguments on the three points relied on by counsel as stated above made it inevitable that the conviction could not be sustained and we, therefore, ordered his acquittal.

We saw no good reason to interfere with the conviction of the 1st accused and dismissed his appeal.

Appeal of 1st accused dismissed.

2nd accused acquitted.