[COURT OF CRIMINAL APPEAL]

1969 *Present :* **Alles, J. (President), Wijayatilake, J., and Pandita-Gunawardene, J.**

W. L. SIRISENA and 6 others, Appellants, *and* THE QUEEN, Respondent

C. C. A. APPEALS 41–47, WITH APPLICATIONS 54–60, OF 1969

S. C. 235/67—M. C. Horana, 45658

Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders —Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36.

(i) By section 122 (3) of the Criminal Procedure Code, " No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it ..... "

Held, that in the opening sentence of Section 122 (3) no distinction is intended between the oral statement or oral evidence of such statement and its written record. The statement therefore in whatever form cannot be used to *corroborate* the evidence of the witness. Such corroborative evidence may, however, be elicited by the Court in the course of contradicting a false answer given by the police officer when, while giving oral evidence, he refers to the written record for the purpose only of refreshing his memory, without the necessity of proving the written record.

Per Curiam : " In view of the frequent occasions when the interpretation of Section 122 (3) has come up for consideration in our Courts we are constrained to draw the attention of the legislature once again to the necessity of redrafting Section 122 (3). "

(ii) In a prosecution for murder, joint offenders can be convicted, by virtue of the provisions of section 32 of the Penal Code, of the lesser offence of culpable homicide on the ground of knowledge. In such a case, it is open to the Judge to direct the jury to consider the verdicts of murder, culpable homicide and grievous hurt on the basis of joint responsibility.

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

G. E. Chitty, Q.C., with *A. M. Coomaraswamy, K. Sivanandan, G. E. Chitty* (Jnr.) and *T. S. P. Senanayake* (assigned), for the accused-appellants.

A. C. de Zoysa, Senior Crown Counsel, with *Kenneth Seneviratne*, Crown Counsel, for the Crown.

Cur. adv. vult.

August 6, 1969. ALLES, J.—

Seven accused were charged in this case with the murder of one Jayasekera. At the conclusion of the trial by divided verdicts of five to two the 1st, 2nd and 3rd accused were convicted of culpable homicide not amounting to murder and the 4th to the 7th accused were convicted of voluntarily causing grievous hurt. The 1st and 2nd accused were sentenced to seven years rigorous imprisonment, the 3rd accused to five years simple imprisonment, the 4th and 5th to two years rigorous imprisonment and the 6th and 7th to six months rigorous imprisonment. Pending their appeal to this Court the 3rd accused died and the present appellants are the other accused. The 1st, 2nd and 4th appellants are brothers and the 5th and 6th appellants also brothers. The two sets of brothers are related to each other as cousins. At the hearing of this appeal Counsel for appellants commented on the strange coincidence of the able bodied men of two families being jointly charged, suggesting thereby that some of them may have been falsely implicated but this is a comment that should properly have been made to the jury for their consideration who, in spite of this relationship, chose to convict all the accused.

The deceased Jayasekera was the recently appointed watcher on Halbarawa Estate, to which post the 3rd accused had also been an applicant. As a result of a long standing feud, the families of the appellants were not well disposed towards the family of the deceased.

On the 28th of June, the deceased visited the house of his mother Sederawathie who lived in the neighbourhood of the estate, spent the morning at his mother's house and left for Halbarawa Estate about 2 p.m. About 4.30 p.m. Sederawathie and her daughter Kamalawathie were attracted by hoo shouts, the barking of dogs and the shouts of people from the direction of the estate and ran in that direction. When they had proceeded some distance they heard the voice of the deceased and saw the 6th and 7th appellants holding him from either side. The 5th appellant then jumped forward and struck the deceased on the head with a club. As he was assaulted the 6th and 7th appellants released him and immediately the 4th appellant Emis struck him again on the

head with a club. Then the 1st, 2nd and 3rd accused who were present armed with knives stabbed the deceased. As he was stabbed, the deceased collapsed and Sederawathie and Kamalawathie ran towards the deceased to hold him. As they ran forward the 1st and 2nd appellants tried to stab them but failed. The two women went up to the deceased and raised cries. According to Kamalawathie at that stage the 4th appellant pushed them aside and the 1st and 2nd appellants carried the deceased and took him away. The two women followed the deceased some distance and then the 1st and 2nd appellants dropped the deceased on the ground and chased them with knives. An uncle of the 5th appellant then arrived on the scene and intervened saying, " Are you fellows trying to kill these two also after you killed that man ". The appellants then left the scene and went away. When the two women went up to the place where the deceased lay fallen they found him dying. There is no doubt that the deceased was the victim of a murderous attack with knives and clubs. The autopsy revealed that the deceased had six external injuries—four stab wounds on the chest and abdomen and two lacerated injuries on the head. The injury over the abdomen had cut the small intestine and the right lobe of the liver and two of the stab injuries on the chest had cut the lung. Underlying the head injuries was a linear fracture of the parietal bone. The Doctor expressed the opinion that the injury to the lung was necessarily fatal while the other injuries on the chest were sufficient in the ordinary course of nature to cause death. In regard to the injuries to the head the Doctor was of the view that it was the result of two separate blows although he did not exclude the possibility of both injuries being caused by one blow. It was the submission of the defence at the trial that Sederawathie and Kamalawathie were not eye-witnesses to the assault and that they were not present at the time of the transaction, having gone to attend a funeral at the relevant time. The jury however have discounted this suggestion and accepted their evidence and we must therefore proceed on the basis that their account of the transaction has been accepted by the jury.

The first matter raised by Mr. Chitty was that the defence was prejudiced by the inability of Queen's Counsel and Junior Counsel, who appeared for the appellants at the abortive trial, to appear at the present trial, thereby depriving the appellants of the services of Counsel of their choice. It was submitted that both Senior and Junior Counsel were unable to appear due to circumstances beyond their control and that the application for a postponement of the trial should have been allowed. It was also urged that Counsel who had been assigned to defend the appellants being a Tamil and unfamiliar with the Sinhala language was handicapped in the conduct of the trial by not being able to obtain instructions from his Sinhalese clients. We are unable to agree that this was a substantial ground for obtaining a postponement of the trial. If retained Counsel was unable to appear, the Proctor instructing them should have made an application for a postponement. At least he could have been present in Court to watch the interests of his clients. When

Counsel offered himself for assignment and when the appellants agreed to be defended by assigned Counsel of their choice, it must be assumed that Counsel was able to obtain proper instructions from his clients and that such instructions could properly be given by the clients to their Counsel. No such objection was taken by the appellants to the conduct of the trial by assigned Counsel, the only application being made by the second appellant for time to have the services of retained Counsel. From the conduct of the trial by assigned Counsel it is quite apparent to us that the proceedings had not in any way suffered by the trial being conducted by assigned Counsel. The witnesses for the prosecution have been cross-examined exhaustively on all relevant matters and relevant submissions have been made to Court. Mr. Chitty was constrained to admit that the trial had in no way been prejudiced by its conduct by assigned Counsel and was only able to base an argument on the rather tenuous ground that the appellants would have preferred Senior Counsel to conduct the trial. We are therefore unable to say that on this ground the appellants have in any way been prejudiced.

It was next submitted by Counsel that there was a misdirection in regard to the burden of proof. In explaining 'reasonable doubt' the learned Commissioner has given the following direction :—

> 'In fact a reasonable doubt means nothing more than a doubt for which you can give a *substantial reason*.'

It was the submission of Counsel that to require a 'substantial' reason for the creation of a doubt, the Jury were invited to expect a higher burden than was necessary from the defence to disprove the prosecution case. We are unable to agree with the submission in the context of this summing-up. It seems to us that what the learned Judge had in mind was a 'substantial reason' as opposed to a 'fanciful and imaginary reason'. Although the adjective 'substantial' is inappropriate, in the light of his very fair summing-up on the burden of proof, we are of the view that it could not have misled the jury and caused any prejudice to the accused. It was also submitted in this same connection that the learned trial Judge gave a wrong impression to the Jury when he referred to certain items of evidence which he described as coming from an independent source and tending to corroborate the evidence of the eye-witnesses. The evidence in point, to which attention has been drawn by the Judge, was the medical evidence of the injuries on the deceased and the circumstantial evidence of the presence of blood stains at the scene which were observed by the Police. As Counsel for the appellants correctly submitted this evidence could not be strictly designated as independent evidence which corroborated the evidence of the eye-witnesses. Even if the witnesses were not present at the time of the transaction, as suggested by the defence, they could have testified to these matters if they arrived on the scene at a later stage. Independent evidence that tends to corroborate a witness must be evidence which tends to connect the *accused* with the crime. This is the usual direction

given in those cases which require corroboration in law and learned Counsel for the appellants was justified in his criticism of the Judge's language. The language used by the Judge is no doubt unfortunate, but we do not think, having regard to the other parts of the charge where the Judge has correctly directed the jury on the burden of proof, that this direction would have misled the jury to accept the evidence of Kamalawathie and Sederawathie only for the reason that they testified to this so called ' corroborative evidence '.

It was submitted by Mr. Chitty that even accepting the evidence of Kamalawathie and Sederawathie, the complicity of the appellants was involved in some measure of doubt and consequently he urged that, at the least, the appellants were entitled to a re-trial.

In regard to the 6th and 7th appellants it was his submission that the evidence did not establish beyond reasonable doubt that they held the deceased with the intention of facilitating the 5th appellant to cause grivous hurt or that they shared a common intention with the other appellants to commit the offence of causing grievous hurt. In dealing with the case of the 6th and 7th appellants the learned trial Judge asked the Jury to consider whether they entertained a common murderous intention not only with the 4th and 5th appellants but also with the 1st, 2nd and 3rd appellants, in which case even though they held the deceased and moved away they would be guilty of murder. The alternative put to the jury was to acquit them. On the verdicts of the jury, it must be assumed that the jury negatived the possibility of a common murderous intention in regard to these two appellants but found that they shared a common intention with the 4th and 5th appellants to commit the offence of voluntarily causing grievous hurt, which was a verdict that was possible on the evidence. The convictions of the 6th and 7th appellants were therefore justified on the evidence.

In regard to the 4th appellant, the submission of Mr. Chitty was that there was inadmissible evidence led against him which prejudiced him in his defence. Kamalawathie had stated in cross-examination that she told the Police that the 4th appellant had hit the deceased on the head with a club. In the course of the trial it would appear that assigned Counsel had been furnished with the extracts of the Information Book by the Court. It is not clear, for what reason and on what ground, this concession had been made to the defence. When Police Inspector Perera who had recorded Kamalawathie's statement was being cross-examined the following question was put to her by Counsel :—

1043. *Q.* In the course of her statement did Kamalawathie tell you that the 4th accused Emis Singho dealt a blow on the head of the deceased with a club . . . . ?

Before an answer could be given Crown Counsel interposed and the record reads as follows :—

Crown Counsel :

My Lord, my learned friend is seeking to make a point of it that there is no reference to Emis giving a blow with a club. My learned friend should not create the impression that Emis is not mentioned totally.

Court to defence Counsel :

You can mark if you want this passage ' At the time of the attack I saw Emis armed with a club ', that Kamalawathie has stated in her statement that at the time of the attack she saw Emis armed with a club.

Defence Counsel :

Very well, I will mark that passage as D I A.

It is apparent from the record that although Crown Counsel did not dispute that Kamalawathie could be contradicted from her Police statement, he insisted and the Court agreed, that the written record should be produced lest a wrong impression be created if the answer to Question 1043 was in the negative that the 4th appellant was never at the scene.

It may now be accepted as settled law after the decision of the Privy Council in *Ramasamy* [1] that in regard to the 'statement' in the opening sentence of Section 122 (3) no distinction was intended between the oral statement or oral evidence of such statement and its written record. The statement therefore in whatever form cannot be used to *corroborate* the evidence of the witness. Mr. Chitty's complaint is that when the defence was compelled to produce D I A there was placed before the jury material which substantially corroborated Kamalawathie's evidence of the presence of the 4th appellant at the scene, which was categorically prohibited under the provisions of S. 122 (3). In his submission the defence could elect whether it should prove the contradiction by leading oral evidence through the Police officer or prove the written record. The *ratio decidendi* in *Ramasamy* was that a statement made by an accused under Section 27 of the Evidence Act was not subject to the prohibitions in Section 122 (3) of the Code by virtue of the application of the maxim 'Generalia specialibus non derogant'—a view which had commended itself to Pulle J. who was one of the five Judges who heard the earlier case of *Jinadasa* [2]. Viscount Radcliffe only confined his observations on Section 122 (3) to the limited purpose of considering the interpretation of the word 'statement' in the opening sentence of the sub-section and had no occasion to consider whether the oral statement of a contradiction could be proved. There is however a hint in the course of his observations at p. 274 that for the limited purpose specified in the sub-section a

[1] *(1964) 66 N. L. R. 265.* [2] *(1950) 51 N. L. R. 529.*

reference to the written record would be sufficient without the necessity of proving the written record. If it is sought to contradict a witness (which includes an accused person) from the written record the law requires that the passage should be put to the witness, produced and marked in evidence—Vide *Queen v. Wilbert*[1] and *Queen v. Jayasena*[2]. This is in conformity with the principle laid down in *Haramanisa*[3], that since the statement under Section 122 must be reduced to writing, no evidence can be given of it except the document itself. In regard to the production of the written record there are however two matters in regard to which one has to be cautious. The prosecutor who cross-examines an accused must guard himself against eliciting any material which is confessional in nature or so inextricably interwoven with the confessional part of the statement that the contradiction becomes inadmissible. Secondly, counsel must be careful in producing a contradiction that it does not contain material which is prohibited under the provisions of Section 122 (3).

The above observations do not meet the problem raised by Mr. Chitty but I do not think, having regard to the wording of Section 122 (3), it is without a solution. The law permits the police officer to refresh his memory from the written record. This may arise when the police officer is being examined in regard to his observations at the scene of the crime. It may also arise when counsel seeks to find out whether any part of the evidence of a witness is correct. When a Police officer refreshes his memory from the notes of his investigation it is in order to assist the Court by giving oral evidence in regard to relevant material. For instance if a witness has made a vital omission in his evidence, I see no objection to the Police officer refreshing his memory from his record and giving oral evidence of the omission. This is not evidence of a different statement made at a different time but the proper use of the provisions of the law in regard to the refreshing of memory. I am therefore of the view that the answer to Question 1043 was wrongly shut out by the Court and that the Police officer should have been permitted to give the answer in the negative. The law ensures that if a false answer is given by a dishonest police officer he could be contradicted by the Court.

In spite of the inadmissible evidence contained in D 1 A the question still arises whether this evidence would have affected the decision of the jury in regard to the culpability of the 4th appellant. The evidence of Kamalawathie is that the 4th appellant not only attacked the deceased but pushed her and her mother when they went to the assistance of the deceased. Sederawathie's evidence has not been contradicted as to the part played by the 4th appellant. We are therefore inclined to take the view that the production of D 1 A has not materially prejudiced the case against the 4th appellant.

In view of the frequent occasions when the interpretation of Section 122 (3) has come up for consideration in our Courts we are constrained to draw the attention of the legislature once again to the necessity of

[1] *(1962) 64 N. L. R. 83.* [2] *(1966) 68 N. L. R. 369 at 371.*

[3] *(1944) 45 N. L. R. 532.*

redrafting Section 122 (3). In 1944 in *Haramanisa* (supra) Howard C.J. observed that the sub-section bristles with difficulties and is so difficult to interpret that " in the view of the Court it is the duty of the legislature to redraft the section so as to make its meaning clear ". Since then there has been a violent controversy whether the statement referred to in the opening sentence of the sub-section referred to the oral statement or the written record and that controversy appears to have been now set at rest by the decision of the Privy Council in *Ramasamy* but it is open to lawyers to argue that the observations of the learned Law Lord though entitled to the highest respect is only *obiter*. In *Ramasamy* the Privy Council was compelled to have recourse to a legal maxim to enable Section 27 of the Evidence Act and Section 122 (3) to function side by side. In India this controversy has been set at rest by introducing a specific saving of Section 27 in the sub-section. Except for a minor amendment in 1961 caused as a result of the introduction of Section 122A and 122B in the Code, the section in its original form still adorns the statute book and continues to be a fruitful source of discussion for lawyers and raises difficult questions of interpretation. The legislature, in spite of the observations of a former Chief Justice and a judicial pronouncement from the highest tribunal, appears to be serenely complacent in regard to the controversy that has been raging in our courts with regard to the interpretation of this sub-section. It is hoped that even at this late stage the observations of Chief Justice Howard pronounced twenty-five years ago will receive serious consideration on the part of the legislature to ensure a redrafting of the sub-section.

Finally there remains for consideration the submission of Mr. Chitty that there was a misdirection in regard to the directions of the trial Judge on common intention and that the verdict against the 1st, 2nd and 3rd accused was both illegal and illogical and not in conformity with the directions of the trial Judge. The Crown presented the case against all seven accused on the basis that they all shared a common murderous intention to cause the death of the deceased. Although this was the basis of the Crown case it was open to the Jury, as judges of fact, to find a common intention to commit a lesser offence, and this they did when they found the 4th to the 7th appellants guilty of the offence of voluntarily causing grievous hurt—the injury caused to the head being a grievous injury. Logically therefore the 1st, 2nd and 3rd accused, who caused the serious injuries on the chest and the abdomen must have had at the least a common intention to cause grievous hurt. The learned trial Judge directed the jury that the basis of liability was under Section 32 of the Penal Code. In our view his directions on common intention were unexceptionable—he invited the jury to consider whether there was evidence of pre-concert; whether the accused shared a common intention among themselves and he distinguished between a common intention and a similar intention. He also directed them to consider the case of each accused separately. His directions are in conformity with the rules laid down by the Court of Criminal Appeal in *Queen v. Asappu* [1]. Mr. Chitty's

[1] *(1948) 50 N. L. R. 324.*

contention was that in the light of the directions of the Judge the first three accused could not have been found guilty of culpable homicide on ground of knowledge. In his contention such a verdict can only be founded if the basis of liability was under Section 33 of the Penal Code and for Section 33 to apply it must be established that each of the accused had the particular knowledge that their act was likely to cause the death of the deceased. This evidence was absent in the present case. It was his further submission that under Section 32, which refers to a ' common intention ' the offence of culpable homicide on the ground of knowledge could not be established.

Since the decision of the Divisional Bench in *Attorney-General v. Munasinghe*[1] it has been authoritatively laid down that Section 32 only lays down a principle of liability and need not be mentioned in the charge containing the offence. As Tennekoon J. stated in that case "each accused is clearly given notice that the prosecution case against him is that he committed the crime jointly with the others and that the provisions of Sections 32, 33 or 35, as the case may be, would be relied on by it to establish his liability to be convicted and punished as though he committed the offence by himself alone". When directing a Jury therefore it is necessary for the Court to determine whether the basis of liability is under Section 32, 33 or 35, as the case may be. Too readily in our Courts do judges direct the jury only on the basis of liability contained in Section 32 ignoring the other sections relating to joint responsibility. In this case the trial Judge has referred particularly to Section 32 and directed the jury that if they could not find a common murderous intention it was open to them to convict all the accused of culpable homicide on the ground of knowledge. Mr. Chitty submits that since Section 32 refers to a common intention this direction is wrong. The common intention referred to in Section 32 must not be confused with the particular intention necessary to commit the offence of murder. In Section 32 the common intention contemplates a meeting of the minds and refers to the doing of separate acts by several persons and if all such acts are done in furtherance of a common intention each person is liable for the result of them as if he had done them himself—*Barendra Kumar Ghosh*[2]. The Supreme Court of India in *Afrahim Sheik v. The State of West Bengal*[3] which was relied on by learned Crown Counsel in dealing with Section 34 (which corresponds to our Section 32) stated :

"A person does not do an act except with a certain intention ; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act. That circumstance is completely fulfilled in a case like the present where a large number of persons attack an individual, chase him, throw him on the ground and beat him till he dies. Even if the offence does not come to the grade of

[1] *(1967) 70 N. L. R. 241.* [2] *A. I. R. 1935 P. C. 1.*
[3] *A. I. R. 1964 S.C. 1263 at 1268.*

murder, and is only culpable homicide not amounting to murder, there is no doubt whatsoever that the offence is shared by all of them, and Section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was caused as a result of the beating. This circumstance is completely fulfilled in the present case, and we are, therefore, satisfied that the conviction of the appellants was proper, and see no reason to interfere."

The facts in the Indian case are very similar to the present case. There were in both cases several persons who participated in the criminal act using different weapons and playing different parts. The Supreme Court did not accept the submission of Counsel that S. 34 did not apply to the offence of culpable homicide on the ground of knowledge. Hidaytullah J., who later became Chief Justice of India, in a very illuminating judgment indicated the difference in the basis of liability between Sections 34, 35, 37 and 38 of the Penal Code which correspond to Sections 32, 33, 35 and 36 of our Code. There is therefore high authority of the Supreme Court of India that under Section 32 of our Penal Code joint offenders can be convicted of culpable homicide on the ground of knowledge.

In the present case however a difficulty arises as the jury have separated the culpability of the 1st, 2nd and 3rd accused on the one hand and that of the 4th to the 7th accused on the other. The learned trial Judge in my view directed the jury correctly when he invited the jury to consider the verdicts of murder, culpable homicide and grievous hurt on the basis of joint responsibility. Having found the 4th to the 7th appellants guilty of grievous hurt on the basis of joint responsibility they should have found the other three accused also guilty of the same offence unless there was clear evidence that any one of them had gone beyond the common criminal intention to cause grievous hurt and caused injuries from which the murderous intention or the knowledge requisite for the offence of culpable homicide could be established, in regard to each one of them. There is no evidence which of them caused the particular knife injuries. Therefore following the *ratio decidendi* in the Indian case we would substitute convictions for grievous hurt under section 317 of the Penal Code in regard to the 1st and 2nd appellants. Since we have altered the verdicts in regard to these two appellants we would reduce their sentences to 5 years rigorous imprisonment each. There is a reasonable possibility that the learned trial Judge himself would have imposed on them a lesser punishment had they been found guilty of voluntarily causing grievous hurt. Subject to this variation in the convictions and sentences of the 1st and 2nd appellants the appeals are dismissed.

Subject to a variation in the convictions and sentence of the 1st and 2nd appellants, appeals dismissed.