[COURT OF CRIMINAL APPEAL]

1971 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Alles, J.**

E. ALFRED DE ZOYSA and 2 others, Appellants, *and* THE QUEEN, Respondent

C. C. A. Nos. 43–45 OF 1970, WITH APPLICATION Nos. 68–70

S. C. 135/68—M. C. Anuradhapura, 19471

Trial before Supreme Court—Summing-up—Evidence of bad character of accused—Non-direction as to effect of it—Burden of proof—Statutory statement of accused—Misdirection as to whether falsehoods in that statement could strengthen the case against the accused—Counteracting correct direction—Absence of miscarriage of justice—Question whether accused "were deprived of the substance of a fair trial".

The three appellants were convicted of conspiracy to commit murder. The 2nd and 3rd appellants were also convicted of murder, and the 1st appellant of abetment of that murder.

Certain items of evidence adduced by the prosecution which were relevant to establish motive and to explain the circumstances in which the alleged offences of conspiracy and murder came to be committed by the appellants showed at the same time that the appellants were persons of bad character. The trial Judge omitted to warn the Jury that the character of the accused should not be taken into account in the consideration of the question whether they were guilty of the charges in the present case. Nevertheless, in other contexts, the Judge did instruct the Jury with emphasis that inferences adverse to the accused should not be drawn from evidence showing them to be persons of bad character.

It was also evident that the statutory statement which the 1st accused had made to the Magistrate in the course of the non-summary proceedings contained a series of denials of some of the facts to which prosecution witnesses had testified. The trial Judge misdirected the Jury that if they were satisfied that the accused had told deliberate lies in that statement, then that was a matter which would strengthen the case against him. Despite this misdirection in regard to the burden of proof, the Judge stated more than once that, if the Jury did believe the prosecution witnesses beyond reasonable doubt on certain material points, the deliberate lies of the 1st accused on these same points strengthened the prosecution case.

Held, that the aforesaid non-direction and misdirection were not so material as to justify an opinion that the appellants were deprived of the substance of a fair trial.

APPEAL against three convictions at a trial before the Supreme Court.

E. F. N. Gratiaen, Q.C., with *A. H. C. de Silva, Q.C.*, *Sunil E. Rodrigo*, *Ananda Wijesekera*, *K. Sivananthan* and *J. W. Fernando* (assigned), for the 1st Accused-Appellant.

A. C. de Zoysa, with *Sunil E. Rodrigo*, *Sidat Sri Nandalochana*, *I. S. de Silva*, *Justin Perera*, *M. M. Deen*, *B. B. D. Fernando*, *Amara Wellappili*, *Neville Jayawardene* and *J. W. Fernando* (assigned), for the 2nd and 3rd Accused-Appellants.

P. Colin Thome, Senior Crown Counsel, with *Ranjit Abeysuriya*, *K. Ratnesar* and *Tilak Marapana*, for the Crown.

Cur. adv. vult.

April 5, 1971. H. N. G. FERNANDO, C.J.—

The three Appellants in this case appealed against their convictions on the first three counts of an indictment charging—

(1) that the three of them conspired to commit the murder of one P. K. D. Perera;

(2) that the 2nd and 3rd Appellants, together with another committed the murder of P. K. D. Perera;

(3) that the 1st Appellant abetted the murder charged in Count 2.

The remaining counts of the indictment related to the alleged murder of one Sandarasagara, but none of the Appellants were convicted on any of those counts. No point was taken during the argument of this appeal that there had been any misjoinder of charges, or that the joinder of the remaining charges and the leading of evidence pertinent to them had been prejudicial to any of the Appellants in respect of their trial on the first three charges. We nevertheless gave some consideration to this point. In our opinion, the verdict of acquittal on the remaining counts clearly established that the Jury resisted what might have been the natural inclination to utilise the grave conclusions on the first three counts, when they came to consider the remaining counts. We are satisfied that equally the conclusions on the first three counts were not influenced by any opinions adverse to the Appellants which the Jury might have formed upon evidence pertinent only to the remaining counts.

The gravamen of the principal complaint made, both by Mr. Gratiaen on behalf of the 1st Appellant, and by Mr. de Zoysa on behalf of the other two Appellants, was that in the language of Lord Devlin in the case of *Broadhurst v. The Queen*[1] (1964 A.C. 441), the Appellants "were deprived of the substance of a fair trial".

The appellant in that case, who was charged with the wilful murder of his wife, was unanimously acquitted of that charge, but was convicted of causing grievous bodily harm by a divided verdict. The verdict clearly involved a finding by the majority of the Jury that the appellant had deliberately thrown or pushed his wife down the stairs which gave access to the Flat occupied by the couple. This despite the complete lack of evidence showing a motive for such an assault. There was instead evidence that the appellant and his wife had been an affectionate couple, although they had displayed an unusual propensity for "sky-larking", in the course of which they used to chase and thump one another.

The appellant testified at the trial that he and his wife had been at a party from which the wife returned home alone. He himself had several drinks at the party and left the party later, and he could remember some incident which took place while he was on his way home. Thereafter, he said, he remembered nothing except that at some stage he saw his wife lying injured on the landing of the stair-case of their Flat. He carried her up to the Flat, and then called for help from the neighbours, a couple named Mckinnel.

It will be seen that the appellant did not himself testify that his wife's fall down the stairs had been caused either deliberately or involuntarily by himself, or accidentally in circumstances for which he was not responsible. His position at the trial was simply that he did not know how she had fallen.

[1] *(1964) A. C. 441.*

The majority verdict of the Jury, involving the finding that the appellant did throw or push his wife down the stairs deliberately depended entirely on the evidence of Mr. and Mrs. Mckinnel, who testified both to physical sounds and words which they claimed to have heard, and to an admission made by the Appellant that he had " thrown " his wife down the stairs. That vital testimony was assailed on two grounds, the first that Mckinnel had after the incident made a remark " I hope he (the appellant) will hang ", and that he was a biassed witness for this reason; and secondly, that the evidence of " sky-larking " supported a possibility either that the appellant had pushed his wife involuntarily or that she had fallen down the stairs accidentally.

In our understanding, the conclusion of Their Lordships of the Privy Council that Broadhurst had been deprived of the substance of a fair trial depended principally on the following matters :—

(1) The defence adduced the evidence of a witness Barker, that Mckinnel did made the remark attributed to him, and this evidence was " conclusively corroborated " by a reluctant admission made in cross-examination by Mrs. Mckinnel. Nevertheless the trial Judge presented Mckinnel to the Jury as being more credit-worthy than Barker, despite the proof that Mckinnel had deliberately lied in Court when he persistently denied having made the remark. Moreover, the trial Judge expressed his firm opinion that the alleged remark had been made jokingly, although that explanation did not appear from the evidence of either Barker or the Mckinnels.

(2) The trial Judge virtually withdrew from the Jury's consideration the possible verdicts of involuntary homicide or accident, despite the fact that the circumstantial evidence may well have justified such a verdict. Instead the Judge strongly indicated his own opinion that the case was one of wilful homicide.

(3) It was " quite incorrect " for the trial Judge to direct the Jury that loss of memory was the appellant's substantial defence, when in fact loss of memory was only the appellant's explanation for his inability to give direct evidence concerning his wife's injuries.

(4) In consequence, the Jury were not properly directed that the substantial defence of the appellant rested on inferences available from the evidence and the challenge of the credibility of the evidence of the Mckinnes.

(5) There was misdirection when the trial Judge stated that to accept the suggestion of accident was to disregard the nature of the injuries. In fact, the medical evidence did not controvert the possibility of accident.

Mr. Gratiaen relied also on the decision of this Court in *The Queen v. Jayasinghe and others* (69 N.L.R. 314), in which the convictions of a number of persons on counts of conspiracy to murder and of murder were quashed. This Court, in its concluding statement in the judgment adopted the observation in *Broadhurst's* case that " the appellants have been deprived of the substance of a fair trial ".

Without discussing the facts of *Jayasinghe's* case, it suffices to point out certain matters upon which the decision of this Court relied :—

(*a*) The case for the prosecution rested almost entirely on the evidence of a witness Daniel, who was a self-confessed accomplice in the commission of the offences charged.

(*b*) Daniel had a personal motive against one Silva, whose death was the subject of some of the charges against the accused in the case.

(*c*) The very improbability of Daniel's story was held out in the summing-up as a guarantee of the truth of his evidence.

(*d*) Unusual stress was laid in the summing-up that corroboration of accomplice evidence is not essential. Such a direction was all the more unfavourable to the accused, because the trial judge repeatedly " went to the defence of Daniel the accomplice", and because he failed " to draw attention to aspects of Daniel's conduct and evidence which could shake confidence in his credibility."

While the judgments in appeal in the cases of *Broadhurst* and *Jayasinghe* did deprecate the strong expressions of opinions by the trial Judge in each case on questions of fact, that was certainly not the substantive ground on which the verdicts were reversed. In each of those cases, there were mis-directions as to the weight and effect of evidence on which the defence relied, and in *Jayasinghe's case*, there was the grave misdirection that the Jury were somewhat forcefully invited to act upon the uncorroborated and doubtful testimony of an accomplice.

In the instant case, our attention was drawn to some specific matters in regard to which the summing-up of the trial Judge was in Mr. Gratiaen's submission unfair to the defence. One statement of the trial Judge was that it was not illegal for a police officer to take a prospective witness away from the place in which the witness was found, and to record the statement of the witness elsewhere. If there had been any evidence that any witness had been compelled by Police intimidation or violence to accompany the Police to the place of interrogation, the question whether such compulsion was lawful and whether the evidence of that witness and of others should in consequence have been suspect would have needed consideration. In fact, however, no witness in this case

[1] *(1965) 69 N. L. R. 314.*

testified to any such compulsion ; moreover in our opinion certain witnesses were taken to the place of their interrogation purely for reasons of official convenience, and not for any sinister reason.

In this same context, the trial Judge did strongly criticise suggestions for the defence that the police had suborned material witnesses to make false statements and to give false evidence at the trial. But, while we agree with the points made by the trial Judge in this connection, we are also satisfied that, had there been such " fabrication " the statements and the evidence of those witnesses would have been far more definite and incriminatory than their evidence actually was. In our opinion therefore, the criticism by the trial Judge of the defence suggestion of the fabrication of evidence by the Police was beyond reproach.

The opinion we have just expressed was stated from the Bench during Mr. de Zoysa's address on behalf of the 2nd and 3rd accused, and Mr. de Zoysa did not attempt to substantiate the suggestion of fabrication. Nevertheless, the Counsel (Mr. Gratiaen's junior at the appeal) who had represented the 1st accused at the trial, having obtained permission to make a personal explanation, made the surprising statement that an examination of the totality of the evidence would establish that there had been fabrication of evidence by the Police. It suffices to record that Mr. Gratiaen at this stage stated that he had in his earlier address presented the relevant submissions on behalf of his client. Those submissions did not include any argument that the suggestion of fabrication could be supported by an examination of the evidence in this case. But we agree with Mr. Gratiaen's further observation that the suggestion of fabrication was made in good faith at the trial.

The prosecution adduced evidence which no doubt established that these accused had been concerned in the illicit distillery of liquor, in the theft of a motor car, in the commission of a daring robbery of money, and in the burial of the motor car in order to conceal evidence of the robbery. Mr. Gratiaen agreed that these items of evidence were relevant and admissible, and in our own opinion the prosecution had perforce to adduce the evidence in order to establish motive and to explain the circumstances in which the alleged offences of conspiracy and murder came to be committed by the appellants. But he submitted that since this evidence showed the accused to be persons of bad character, the learned trial Judge should have warned the Jury that their character should not be taken into account in the consideration of the question whether they were guilty of the charges in this case. No such warning was actually given in connection with the evidence to which we have just referred, and the summing-up was perhaps defective to that extent. Nevertheless, in other contexts, the trial Judge did instruct the Jury with emphasis that inferences adverse to the accused should not be drawn from evidence showing them to be persons of bad character.

It was urged also that the learned trial Judge was unfair to the defence in his presentation of the evidence of the witness Gunadasa. This witness had nothing to say about the alleged murder of P. K. D. Perera in November 1966. His evidence only was that about the middle of January 1967, he had been severely beaten up by and at the instigation of the 1st accused on suspicion of having stolen a bicycle, and that on that occasion the 1st accused had said to him "I am the man who killed and burnt P. K. D. Perera and Sandarasekera; I will do the same to you". According to the evidence, this witness was found by the Police in a severely injured condition, tied up in premises over which the 1st accused had control. The witness was then questioned by the Police, but did not in the statement which he then made, mention this important admission alleged to have been made to him by the 1st accused. Mr. Gratiaen's substantial complaint in this connection was that the trial Judge's direction only posed to the Jury the question whether Gunadasa's failure in his first statement to mention the 1st accused's admission "entitled" the Jury to reject Gunadasa's ultimate evidence of that admission. We agree that the direction on this point should have been more properly phrased. But we see a perfectly valid reason (not mentioned by the trial Judge) for Gunadasa's omission to mention this admission in his first statement; while it was necessary for him to tell the Police that he had been "beaten up", and why he had been "beaten up", and who was responsible for that, the alleged admission of the 1st accused referred to an extraneous matter. Moreover, there was the evidence of the witness Juwan Appuhamy, who, at the instance of the 1st accused visited Gunadasa in hospital; Juwan testified that on that occasion, Gunadasa did tell him of the 1st accused's remark that he had killed and burnt P. K. D. Perera and Sandarasekera. No suggestion was made during the argument of the appeal that Juwan gave false evidence on this point. There was thus corroboration of Gunadasa's evidence concerning this remark of the 1st accused. In all the circumstances, we are unable to say that the directions given by the trial Judge regarding the evidence of Gunadasa were prejudicial to the defence.

A further matter urged by Mr. Gratiaen was that the trial Judge misdirected the Jury with regard to the statutory statement which the 1st accused had made to the Magistrate in the course of the non-summary proceedings in this case. That statement contained a series of denials of some of the facts to which prosecution witnesses had testified, and the trial Judge directed the Jury that if they were satisfied that the accused had told deliberate lies in that statement, then that was a matter which would strengthen the case against him. In our opinion, the learned Judge ventured to tread on unsure ground, and apparently

without due appreciation of the circumstances in which such a venture may be justifiable. He relied only on the decision of the Supreme Court of New Zealand in the case of *R v. Dehar*[1] (1969) New Zealand Law Reports, page 763 which contains no helpful explanation as to the occasions on which a venture of this unusual kind would be appropriate. If, for instance, an accused person sets up an alibi or furnishes an explanation which is proved to be deliberately false by evidence distinct from the evidence which incriminates him of the offence actually charged, then the falsity of the alibi or explanation might fortify an already strong prosecution case. But in the instant case, the 1st accused's denials could be regarded as deliberately false only because they controverted evidence showing or tending to show his guilt. We much doubt whether the trial Judge would have given his direction if he had been aware of Lord Devlin's observations in the *Broadhurst case* :—

> " It is very important that a jury should be carefully directed upon the effect of a conclusion if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct of state of mind, his untruthfulness is a factor which the Jury can properly take into account as strengthening the inference of guilt. "

Nevertheless, the actual direction of the trial Judge (stated more than once) was that, if the Jury did believe the prosecution witnesses on certain material points, the deliberate lies of the 1st accused on those same points strengthened the prosecution case. Considering the several correct directions that belief of a prosecution witness means belief beyond reasonable doubt, the direction had the effect in this case only of instructing the Jury that evidence already accepted as true and establishing the guilt of the 1st accused was strengthened by the 1st accused's false denials. But if, as we confidently think, the Jury did accept as true the prosecution evidence on the material points, then the further wrong instruction could have contributed little to the Jury's ultimate verdict.

While being of opinion that there was misdirection in regard to the statutory statement of the 1st accused, we are satisfied that no miscarriage of justice occurred on that account.

[1] *(1969) New Zealand Law Reports 763.*

Mr. de Zoysa, on behalf of the 2nd and 3rd accused, relied upon the failure of the learned trial Judge to direct the Jury that the alleged admission made by the 1st accused to the witness Gunadasa was not evidence which could properly be taken into account against the 2nd and 3rd accused. Though no direction had been given at the time when the trial Judge first referred to Gunadasa's evidence on this point, we find that he had given the requisite direction a little later when he dealt with an attempt to bribe Gunadasa in order to shut out evidence of this admission. We note also that the failure of the trial Judge to give a direction on this matter is not referred to in the petitions of appeal filed by the 2nd and 3rd accused.

In any event, the alleged admission of the 1st accused in no way implicated the 2nd and 3rd accused, because in substance the 1st accused's admission was "*I* killed P. K. D. Perera". To some extent, therefore, the admission by the 1st accused might have served to exculpate the other two accused.

In our opinion, the prosecution adduced evidence which clearly established that P. K. D. Perera's death was caused by the 2nd and 3rd accused, acting together with some person referred to in the evidence as "Wije". The admission of the 1st accused served only to confirm the strong inference, arising from several other items of evidence, that the 1st accused had instigated the murder.

We invited Mr. de Zoysa to point to any unfairness in the directions of the trial Judge concerning the evidence of the two witnesses whose testimony the Jury obviously accepted in reaching the conclusion that the 2nd and 3rd accused participated in the murder of P. K. D. Perera. But Mr. de Zoysa was unable to point to any such unfairness.

The arguments of Counsel did not persuade us that there is any justification for an opinion that the accused in this case were deprived of the substance of a fair trial. On the contrary, we were satisfied that the verdict of the Jury was perfectly reasonable, having regard to the evidence concerning the murder of P. K. D. Perera and to the matters upon which the prosecution relied to establish that there had been a prior conspiracy to commit that murder. Despite the misdirections and omissions in the charge to the Jury which have been discussed, we were satisfied that any Jury properly directed would have reached that same verdict. For these reasons, we made order dismissing the appeals at the end of the hearing.

Appeal dismissed.