[FULL BENCH.] 1923.

Present : Bertram C.J., and De Sampayo, Porter, Schneider, and Garvin JJ.

[CROWN CASE RESERVED.]

REX *v.* UKKU BANDA *et al.*.

3—P. C. Kegalla, 33,011.

Evidence given by an accused which implicates a co-accused—Is evidence to be taken into account against the latter ? Evidence Ordinance, ss. 30 and 120.

Evidence given by an accused person on his own behalf which implicates a co-accused person can be taken into account as against the latter.

Where in a criminal trial two co-accused persons elect not to give evidence, but are content to rely either upon their statements in the Police Court or upon statements in the dock, the jury should be warned, where such a statement by one prisoner inculpates the other, that it should not be taken into account against him.

Where sworn evidence is in fact given by a co-accused, the proper direction to give to the jury in such cases is that they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, that subject to such warning, they must weigh and consider evidence so given against another prisoner.

THIS case was reserved for a Bench of five Judges by Bertram C.J. The facts are stated by the Chief Justice as follows:—

This is a reference made to a Court of five Judges in pursuance of section 355 of the Criminal Procedure Code and section 54A of the Courts Ordinance. The charge was a charge of a forgery of a deed, accompanied with other charges of abetting forgery. There were seven accused, comprising—

(*a*) The three fictitious vendors;

(*b*) The two witnesses;

(*c*) One Dingiri Appu, who gave the instructions for the forged deed; and

(*d*) Ukku Banda, an Arachchi, who is said to have organized the whole affair.

On the prisoners being called upon for their defence, Mr. Rajaratnam, who appeared for one of the witnesses, Ukkuwa, called his client, who admitted that he had signed as a witness to the deed without knowing the supposed vendors as he purported to know, but said that he did this on the invitation and assurances of Punchirala, the other witness, and Dingiri Appu, the fourth accused. He protested that he did not,

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in fact, realize that a fraud was being committed. Ukkuwa was acquitted. Punchirala, the other witness, in his turn, gave evidence, and said that he also had no idea that a fraud was being committed, and that he went to the notary's office as a witness on the invitation of the Arachchi. He also said that he was strongly pressed to sign by the vendees, and that the notary himself assured him that it did not matter, that he falsely asserted that he knew the supposed vendors, inasmuch as the vendees invited him to sign.

When Punchirala had given evidence-in-chief, Mr. Rajaratnam, on behalf of the Arachchi, submitted that there was no occasion for him to cross-examine the witness with regard to statements inculpating his own client, the Arachchi. I considered this contention, and ruled against it. My judgment will be found attached to this reference.

In charging the jury I told them that they must take into account the sworn evidence given by any of the accused in the witness box, which inculpated any of the other accused, but warned them that they should be careful before they acted upon such evidence, inasmuch as one of several co-accused was always under the temptation to exculpate himself by throwing responsibility upon the others. With regard to Punchirala, I said that if the jury really believed him, when he said that the notary pressed him to sign, although he knew that Punchirala did not know the vendors, and that the purchasers also pressed him to sign, although they also knew that he did not know the persons to whom they were paying their money, they would also, no doubt, attach weight to what he said against the Arachchi. But that if they did not believe him on the first two of these matters, they would probably disregard his evidence on the third.

The jury found all the accused guilty, except Ukkuwa, and Mr. Rajaratnam then made a further submission. He submitted that my direction to the jury was wrong, and that they ought to have been told that any evidence given by one accused person, for it was of such a nature that an inference of his guilt might conceivably be drawn from it must be regarded as a confession on the authority of *Rex v. Kalu Banda*,[1] and consequently the jury were precluded from taking it into consideration by section 30 of the Evidence Ordinance. Mr. Rajaratnam did not, I think, specifically argue that the evidence of Punchirala against the Arachchi was of this nature, but he suggested that the combined effect of the decision of the Full Court in *Rex v. Kalu Banda* (*supra*) and section 30 was such as to make it doubtful whether any evidence by one co-accused against another could properly be received against that other.

While I myself do not entertain any doubt with regard to this matter, yet, in view of the two dicta referred to in my attached judgment, and in view of other dicta cited by Mr. Rajaratnam, I think, with a view to the elucidation of this subject, the case should be referred to a Court of five Judges, and I refer it accordingly. I may add that I do not think that the jury in giving their verdict against the Arachchi was in any way materially influenced by the evidence of Punchirala against him. The decisive evidence against the Arachchi was that of one of the principal owners of the property conveyed, an *ex* Vidane Arachchi, named Banda. This man testified that he had known the Arachchi for years, that the Arachchi had stayed with him and that he had stayed at the Arachchi's house, that he had collected rent from the Arachchi at the time when the latter was lessee of the property for the benefit of himself and his co-owners, and that it was quite impossible for him to

[1] *(1912) 15 N. L. R. 422.*

have mistaken for the witness the man who personated him. Inasmuch as it is admitted that the Arachchi saw the parties before the deed was executed, firstly, at Rambukkana, where it was originally intended to execute the deed, and afterwards on the way to Kegalla, where it was finally executed, and that he travelled with the vendors in the bus from Rambukkana to Kegalla, it is clear that, if the evidence of Banda Arachchi is to be relied upon, the Arachchi must have been a party to the fraud.

I told the jury that all the other points against the Arachchi were capable of explanation, and that, but for the evidence of Banda Arachchi it would be impossible for them to convict him, and I told them that the substantial question for them was whether they were prepared to act on the evidence of Banda, the *ex* Arachchi.

Similarly, with regard to Punchirala, I do not think that the evidence of the co-accused, Ukkuwa, was what determined the minds of the ury against him. He was a nephew of Dingiri Appu, one of the principal accused, who was obviously one of the originators of the fraud and who put forward no substantial defence. It seemed impossible to believe that he was not one of the persons originally chosen as a witness. Two witnesses must have been ready to witness the deed at Rambukkana, but the execution proved impossible, as the notary was absent. It seems clear that Punchirala had been suborned as a witness from the start. Nevertheless, it is possible that the evidence of Ukkuwa, whom the jury acquitted, that Punchirala had invited him to be a signatory, may have had some effect as a make-weight in balancing their minds against him.

With regard to the prisoner, Dingiri Appu, who is also effected by evidence of a co-accused, the case against him is so overwhelming that the evidence of the co-accused cannot possibly have effected the result.

C. S. Rajaratnam (with him *Weerasuriya*), for the accused.—The evidence of Punchirala, the co-accused, should not be taken into consideration against the first accused. Section 120 (4) of the Evidence Ordinance, 1895, lays down the law dealing with the competency of accused persons to give evidence. The section limits the perpose for which an accused person can give evidence in his own behalf.

[GARVIN J.—The section merely removes the disability under which accused persons laboured prior to the Ordinance.]

[DE SAMPAYO J.— The words "in his own behalf" may mean that an accused person may call himself, but that another accused may not call him.]

The section must be read to mean that an accused is a competent witness only on his own behalf. The words " in his own behalf " have been inserted in the section with an object. And they cannot be ignored. [BERTRAM C.J.—The accused can be called only on his own application.]

If there is no evidence at the close of the prosecution, then the accused, against whom there is no evidence, is entitled to an acquittal. It would not be open to the prosecution to ask the Judge to make

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no order as to the acquittal till the other accused has given evidence implicating this accused. See Criminal Procedure Code, section 234.

Even if an accused goes into the witness box and implicates his co-accused, the verdict has to be returned against each person on what the prosecution was able to prove against him, or what he has proved against himself on his own behalf. The accused should be convicted on evidence tendered by the prosecution, and not by a co-accused. Counsel cited *Kalu Banda v. Arumugam*,[1] *Jayawardene v. Baba Appuhamy*,[2] *Karunaratne v. Appuhamy*,[3] P. C. Trincomalee 750,[4] *Amaris Appu v. Paulis Appu*,[5] *Rex v. Kalu Banda* (*supra*).

Akbar, S. G. (with him *Barber, C.C.*, and *Dias, C.C.*), for the Crown.—The cases cited are mostly on the interpretation of section 30. This section is borrowed from the Indian Evidence Act, and the interpretation of the Indian Courts may be followed. The cases cited do not apply to the case of a co-accused who gives evidence on oath as a witness.

Section 30 applies to confessions made before trial and tendered in evidence at the trial. The confession referred to in the section must be proved by the Crown against the prisoner. See *The Empress v. Ashootosh Shuckerbuthy*.[6]

Under the Indian law an accused cannot give evidence on oath on his own behalf. See *1 Bom. 618*.

The confessions with which section 30 deals are confessions made outside Court. The local cases (cited *Rex v. Kalu Banda* (*supra*)) have no bearing on the present question. Here, the accused gave evidence, and his evidence was tested by cross-examination by the co-accused. *Amaris Appu v. Paulis Appu* (*supra*) *and Rex v. Thegis* [7] are not express authorities on this point. The remarks are only *obiter*.

The words " in his own behalf " mean voluntarily. See *King v. Thegis* (*supra*.) If an accused gets into the box, he becomes an ordinary witness. There is no subtle meaning attaching to the word " in his own behalf."

Counsel *cited Rex v. Hadwen* and *Ingham*[8] and *Rex v. James Paul*.[9]

Section 234 of the Criminal Procedure Code is no authority for saying that the evidence led for the defence is not to be taken into consideration in arriving at a verdict. Compare section 210 which details the procedure in District Courts.

Counsel also cited *22 N. L. R. 353* and *Koch 91*.

[1] *(1907) 3. Bal. 66.*
[2] *(1917) 4 C. W. R. 235.*
[3] *(1918) 5 C. W. R. 206.*
[4] *2 Tam. 60.*
[5] *(1911) 15 N. L. R. 102.*
[6] *(1878) 4 Cal. 483 at p. 488.*
[7] *(1901) 5 N. L. R. 107.*
[8] *(1902) 71 L. J. K. B. 581.*
[9] *(1920) 89 L. T. K. B. 801.*

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The simple question referred in this case is whether evidence given by an accused person on his own behalf under section 120 (4) of the Evidence Ordinance and implicating a co-accused person can be taken into account as against the latter. Such a person giving evidence, according to the express terms of the section, does so " in the same manner and with the like effect and consequences as any other witness. " What is the basis of the suggestion that when he gives evidence directly implicating a person on his trial with him, that evidence shall not have its ordinary effect ? The suggestion is based on the words " in his own behalf, " and it is argued that these words limit the right of the accused person, in giving evidence, to exculpate himself and preclude him from giving evidence so as to inculpate another person, or, at any rate, preclude the Court from taking such evidence into account, if the prisoner gives it.

It is a sufficient answer to this contention to say, as was said by Moncreiff, in *Rex v. Thegis* (*supra*) " there is nothing to show that any subtle meaning was to be attached to the words ' giving evidence on his own behalf.' " The words simply mean that the accused may go into the box as an ordinary witness. "The ordinary meaning of the expression is that the party puts himself in the box, and gives such evidence as he thinks fit on his own side. " As it was put by my brother Garvin in the argument, before the enactment of the section, a prisoner could not give evidence in his own behalf. The section relieved him of that disability. The words certainly do carry with them this implication, that the prisoner must voluntarily tender himself as a witness ; he cannot be called by a fellow prisoner. This incidental effect is in England secured by a special enactment, namely, paragraph (*a*) of the proviso to section 1 of the Criminal Evidence Act, 1898. " A person so charged shall not be called as a witness in pursuance of this act, except upon his own application. "

Mr. Rajaratnam, who appeared for the accused person whose interests were chiefly concerned, based his argument, apart from the point just dealt with, partly on a supposed general principle of our system of criminal law, and partly on the trend of certain decisions.

The supposed principle of the criminal law to which he referred was that a person can only be convicted on evidence tendered against him by the prosecution. He drew attention to section 234 of the Criminal Procedure Code which declares that " when the case for the prosecution is closed, if the Judge considers that there is no evidence that the accused committed the offence, he shall direct the jury to return a verdict of ' not guilty.' " There is, however, no such general principle as that contended for. The enactment cited merely gives the prisoner an additional chance of escape at the close of the case for the prosecution. There is no reason either

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in a civil or a criminal trail why the evidence called on one side should not be supplemented by evidence which may incidentally be adduced on the other. If Mr. Rajaratnam were right, the jury would be required to exclude from consideration, not only any evidence given by the prisoner himself, but also the evidence of any witness called on the prisoner's behalf. This is not the English law, and it is on the principles of the English law that our own system is based.

In *Regina v. Burdett* [1] Jervis C.J. said, with reference to evidence so called, "that evidence became tacked as it were to the case for the prosecution." On this point there is a case remarkedly in point referred to in *Archbold's Criminal Pleading, Rex v. Martin.*[2] Unfortunately, the report is not available, but the note in *Archbold* is as follows :—

> "Where two persons were jointly indicted and tried together for an offence under 52 and 53 Vict., c. 44 (*i.e.*, "The Prevention of Cruelty to Children Act, under which, even before the Act of 1898, accused persons were competent witnesses), and at the close of the case for the prosecution there was no case made out against one of the prisoners, and the other prisoner elected to give evidence; it was held that the prisoner against whom no case had been made out by the prosecution was not entitled to be discharged, but must take his chance of the other prisoner's evidence making against him."

I am not to be taken as ruling that a decision upon the express terms of section 234 would necessarily be the same, but, at any rate, that case indicates that it is not a principle of the English law that the only evidence to be taken into account against the prisoner is the evidence adduced by the prosecution.

With regard to the cases cited, they were as follows:—*Kalu Banda v. Arumugan* (*supra*) which was a decision on section 30 of the Evidence Ordinance. *Jayawardene v. Baba Appuhamy* (*supra*) where, on the special facts of the case, De Sampayo J. ruled that after one accused person had closed his case, the evidence called by another accused on his own behalf should not have been considered against him. *Karunaratne v. Appuhamy* (*supra*) which was also a case on section 30 of the Evidence Ordinance, and above all the judgment of Middleton J. in P. C. Trincomalee, 750 (*supra*) that "the evidence given on oath by one accused against another is, on the principle of section 30 of the Ceylon Evidence Act, not evidence against such other, the first accused, giving such evidence not having been pardoned, convicted, or acquitted." These cases were, to a certain extent, supported by two dicta—one of Wood Renton J. in *Amaris Appu v. Paulis Appu* (*supra*) and the other of Lawrie A.C.J. in *Rex v. Thegis* (*supra*), which suggested that if what a prisoner said, when giving evidence, amounted to a confession affecting himself and any other

[1] *6 Cox's Criminal Case 458.*

[2] *17 Cox 36.*

accused jointly tried with him, such evidence should not be taken into consideration against such other accused. It was urged in the Court below, at any rate, that the suggested trend of these decisions was reinforced by the very wide interpretation given by this Court to the word " confession " in the case of *Rex v. Kalu Banda* (*supra*).

It is not known by what reasoning Middleton J. supported the decision above cited, but this case and almost all the other cases, as well as the two dicta referred to, are all based on some supposed effect imputed to section 30. It is clear, however, that section 30 has nothing whatever to do with the matter. Section 30 relates solely to confessions made before the actual trial and tendered in evidence at the trial by the Crown against the prisoner. It relates to confessions which are " proved " in the case. See *per* Garth C.J. on the corresponding section of the Indian Evidence Act in *The Empress v. Ashootosh Chuckerbutty* (*supra.*) " The word ' proved ' in section 30 must refer to a confession made beforehand. " Section 30, therefore, may be entirely left out of the case, and in deciding this question we are in no way embarrassed either by decisions or dicta as to its supposed effect.

So also with regard to the decision of this Court in *Rex v. Kalu Banda* (*supra*). That decision relates solely to statements made before the trial, and sought to be proved at the trial. What I take *Rex v. Kalu Banda* (*supra*) to have decided is this: That if the Crown at the trial of a prisoner tenders in evidence a statement made by the prisoner, whether self-inculpatory or self-exculpatory in intention, with a view to an inference being drawn by the Court from that statement against the prisoner, that statement becomes *ex vi termini*, as defined by section 17 (2), a " confession, " and that if it was made to a police officer it cannot be received in evidence.

While it is of interest to note the principles of English law, we have, on the particular point under consideration, no actual occasion to have recourse to them. The point is provided for by the express words of section 120 (4), namely, that the accused " may give evidence in the same manner and with the like effect and consequences as any other witness. " It is, however, interesting to note that in the English Act of 1898, section 1 (*f*) (3), the giving of evidence by one accused person against another is expressly contemplated. There was one case, however, under the English law which gave us some occasion for thought. I refer to *Rex v. Hadwen and Ingham* (*supra*) which decided that when one prisoner gives evidence on oath inculpating another charged in a joint indictment, he is liable to be cross-examined by or on behalf of the other. Lord Alverstone C.J. there said:—

> " The direction of the Judge at the trial that criminating evidence given by one prisoner is not evidence against the other may not be so effective a protection as would be afforded by cross-examination of the prisoner giving evidence. "

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Wright J. referred to—

> " The old rule of common law that the evidence of one defendant in a criminal trial cannot be used against another a rule, one of the grounds of which was the great danger that one defendant would be tempted to exculpate himself and inculpate his co-defendant. "

The explanation of these dicta is, I think, as follows: Under the English law, before the Act of 1898, prisoners, except in special cases, could not give evidence. They might make statements in the dock (as they may still do), but it was customary to warn jurors that such statements should not be taken into account as against any other prisoner. See *Allen v. Allen.* [1]

> " In the case of prisoners jointly charged with an offence, the jury are always most carefully warned that what one may say inculpating the other is not evidence against that other. The reason is because one prisoner cannot cross-examine another, and, therefore, their statements condemnatory of each other, unassailable by cross-examination would be valueless. "

Lord Alverstone did not mean to suggest that it is still the duty of a Judge to address such a warning to the jury. Both he and Wright J. were considering whether if a person gave evidence against another he might be subjected to cross-examination. It was recognized that if it was decided that cross-examination of the prisoner was allowable, the old rule would necessarily be abrogated. He considers, in the first place, the general interests of justice, and he expresses the opinion that cross-examination would be a more effective protection to the prisoner than the direction hitherto customarily given to the jury. He does not suggest in any way that, if the evidence given by the prisoner was decided to be subject to cross-examination, it would still be the duty of the Judge to give such a direction. Wright J.'s reference to the old rule of common law as being that " the evidence of one defendant in a criminal case cannot be used against another " is somewhat loosely framed. By " evidence " he means not evidence given on oath, but a statement made in the dock. These dicta, therefore, have no application to present circumstances. This case is, however, a useful reminder of this fact: that where in a criminal trial two co-accused persons elect not to give evidence, but are content to rely either upon their statements in the Police Court or upon unsworn statements in the dock, the jury should be warned, where such a statement by one prisoner inculpates the other, that it should not be taken into account against him.

[1] *(1894) Probate 253.*

Where sworn evidence is in fact given, the English law goes to what may be almost described as extreme lengths. When once the prisoner enters the witness box, he becomes a witness in every sense of the term, and there are no restrictions to the questions which he may be asked, except those which are prescribed by law. Thus, in *Rex v. James Paul* (*supra*), a prisoner went into the box, and simply said that he was guilty, and had nothing more to say. It was held that counsel for the Crown might thereupon cross-examine him, with a view to making him inculpate another prisoner jointly indicted with him. See *per* Reading C.J.:—

> "As soon as a prisoner goes into the witness box as a witness for the defence and is sworn, counsel for the prosecution is entitled to cross-examine him. It was also contended that counsel for the prosecution is not entitled to cross-examine a prisoner called as a witness for the defence so as to incriminate a person charged jointly with him. This contention is a novel one. No case was cited in support of it, and it is also contrary to the usual practice, and in the opinion of the Court it entirely fails."

I venture to doubt whether in our own Courts this procedure would be followed in similar circumstances without an expression of opinion on the part of the Court that the right so given to the Crown ought not to be exercised.

In my opinion, therefore, the proper direction to give to the jury in such cases is that while they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, that subject to that warning, they must weigh and consider evidence so given against another prisoner. In my opinion the judgment and sentences in the case should be confirmed.

DE SAMPAYO J.—I concur.

PORTER J.—I concur.

GARVIN J.—I agree

SCHNEIDER J.—I left Colombo on circuit within a day or two after this appeal was argued. I made no attempt to write any judgment owing to the want of the necessary books for the purpose of reference. I have now received and read the judgment of my Lord the Chief Justice while I am still here on circuit. I feel I have nothing which I can usefully add to what he has said. I entirely agree with his judgment.

Conviction affirmed.