

## [COURT OF CRIMINAL APPEAL]

1951 *Present* : Dias S.P.J. (President), Gratiaen J. and H. A. de Silva J.

W. AVIS *et al.*, Appellants, and THE KING,  
Respondent

APPEALS 12-14 WITH APPLICATIONS 22-24

*S. C. 41—M. C. Panadure, 11,923*

*Evidence—Several accused—Evidence of same weight against each accused—Proper verdict—Misdirection.*

Five prosecution witnesses had purported to identify three accused persons jointly charged with the offence of attempted murder. The defence was that neither the 1st nor the 2nd nor the 3rd accused was present at the scene of offence. The jury acquitted the 3rd accused but convicted the 1st and 2nd accused.

*Held*, that the evidence against the 1st and 2nd accused could not be considered sufficient as the evidence against the 3rd accused whom the jury acquitted was exactly of the same weight.

**A**PPPEALS, with applications for leave to appeal, against three convictions in a trial before the Supreme Court.

*G. E. Chitty*, with *J. A. L. Cooray*, for the 1st and 2nd accused appellants.

4th accused appellant in person.

*H. A. Wijemanne*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

May 7, 1951. GRATIAEN J.—

There were four accused in this case. They were jointly tried at the Colombo Assizes (1) for the attempted murder of K. Jemis on 27th December, 1949, (2) for the attempted murder of K. D. Methias in the course of the same transaction.

As the learned presiding Judge pointed out in the course of his charge to the jury, the incident was a sequel to a land dispute between rival factions of co-owners of a land which had been surveyed by Surveyor Goonetilleke, with a view to division, a fortnight earlier. Jamis and Methias, who belonged to one faction, denied that the land had been surveyed by Mr. Goonetilleke, but the Crown conceded that their evidence on this point was false, and the jury were invited to assume that the evidence of Goonetilleke and the 4th accused stood unchallenged on the point. On 27th December, 1949, Jamis and Methias, together with other members of their faction, constructed a hut on that portion of the land which had apparently been reserved for the other group of co-owners of which the 4th accused was admittedly a member. In consequence, there was a clash on the land between certain individuals belonging to the two rival factions. Jamis and Methias were in one group, and the 4th accused in the other.

The clash took place in or in the vicinity of the hut which Jamis and Methias had erected earlier in the day in assertion of their alleged rights to that portion of the land on which it stood. Jamis and Methias both sustained serious gun-shot injuries in addition to other injuries which were by comparison less grievous.

The case for the prosecution was that the 4th accused's party consisted of himself, the 1st, 2nd and 3rd accused. It was alleged that the 1st accused was armed with a gun, the 2nd and 4th accused with swords, and the 3rd accused with a club. Jamis, Methias and other alleged eye-witnesses have given identical accounts of what took place on that occasion. Their case was that the accused's party arrived on the scene, armed with deadly weapons, with the common object of driving Jamis and Methias out of the disputed portion of the land and of killing them if they refused to leave the property. The evidence is that, in pursuance of this common object, the 1st accused fired a shot at Jamis from close range, and then re-loaded his gun and wounded Methias. Later, they say, he again reloaded his gun and shot Jamis in the thigh. Each of the other accused is also alleged to have caused certain injuries to Jamis or Methias or both of them with the weapons which he carried for the purpose.

The defence version is entirely different. Their position is that neither the 1st nor the 2nd nor the 3rd accused was present at the scene. The 3rd accused gave evidence on his own behalf and called witnesses to prove his *alibi*. The 4th accused also gave evidence and, while admitting that he took some part in the incident, he supported the *alibi* relied on by all the other accused. He admitted having caused certain minor injuries on some members of the rival faction, but says that he acted in self-defence and had for this purpose used a coconut rafter which he had picked up on the spot when he was about to be attacked. His explanation for the gun-shot injuries inflicted on Jamis and Methias is that no member of his party

carried a gun, but that while the clash between the opposing groups of co-owners was in progress Jamis and Methias were wounded by shots which were suddenly fired in their direction by an unidentified person from the jungle which came almost right up to the hut. He disclaimed all knowledge of the person responsible for shooting Jamis and Methias, and the defence relied strongly on the discovery of some spent cartridges at certain spots in the jungle not far from the hut. No cartridges were found near the spot from which the 1st accused is alleged to have fired a gun.

The trial continued for five days, and in the conflict of testimony on many disputed questions of fact it became necessary for the jury to decide as preliminary matters whether it had been proved beyond reasonable doubt (a) that the 1st, 2nd and 3rd accused were present at the scene at all, (b) that it was the 1st accused who caused the gun-shot injuries sustained by Jamis and Methias. If these issues were decided against the accused or any of them, the question would also arise whether the 2nd, 3rd and 4th accused shared the 1st accused's criminal responsibility for the serious injuries which he had inflicted on his victim.

Owing to the duration of the trial, and the difficult questions arising for decision, the learned Judge very properly thought it necessary to charge the jury at some length. The summing-up, allowing for an interruption for lunch, lasted approximately 2 hours and 15 minutes. The jury's deliberations, on the other hand, were exceptionally brief. They returned within five minutes and pronounced the following verdicts :—

- (a) that the 1st, 2nd and 4th accused were guilty of voluntarily causing grievous hurt to both Jamis and Methias ;
- (b) that the 3rd accused was not guilty of any offence.

It is implicit in these verdicts that in the jury's opinion it had been proved beyond reasonable doubt that the 1st, 2nd and (admittedly) the 4th accused were present at the scene, that it was the 1st accused who inflicted the gun-shot injuries on Jamis and Methias (but not with a murderous intention or even the knowledge that death was a likely consequence of his actions) and that the 2nd and 4th accused shared the criminal responsibility of the 1st accused for these injuries because he had acted in pursuance of their common design to cause grievous injury to Jamis and Methias. It is also implicit in the verdict that the jury were not satisfied beyond reasonable doubt that, as alleged by the same witnesses for the prosecution, the 3rd accused was present and took part in the incident.

Mr. Chitty, who argued the appeals of the 1st and 2nd accused, invited us to quash their convictions on the ground that, in the course of a long charge which was in many respects detailed, helpful and unexceptionable, the learned Judge had misdirected the jury on a fundamental matter—namely, the manner in which they should approach the case against the 1st and 2nd accused if they decided that the case against the 3rd accused had not been established beyond reasonable doubt. We think that the objection is sound, and that the misdirection on this point vitiates the verdict against the 1st and 2nd accused.

That part of the charge to which objection has been taken by Mr. Chitty is in the following terms :—

“ If you are satisfied in your mind that the 3rd accused did not take part, then you ask yourselves how can all five witnesses make the same mistake on the matter? How one of them who went to the police station did not mention the name of the 3rd accused. After taking all the circumstances together if you are satisfied, you may think the 3rd accused’s evidence is true that he was not there. That is a very strong circumstance against the prosecution case and that circumstance will justify in creating a doubt about the evidence as to whether the 1st and 2nd accused were also there. *But, gentlemen, if you do not come to such a strong conclusion with regard to the 3rd accused—I mean if you can go so far as to say we accept that story is true, the position is we are doubtful. He may or may not have been at the Owita and being doubtful we acquit him. If that is the view you take, then I do not see how it could affect the credibility of the witnesses with regard to the 1st and 2nd accused and it will not prevent you from holding that the 1st and 2nd accused were there.*”

In our opinion the Judge had in this passage correctly directed the jury as to the effect which their unqualified acceptance of the 3rd accused’s *alibi* must necessarily have on the strength of the case against the 1st and 2nd accused. It seems to us, however, that in the concluding words which I have italicized there was misdirection. In the facts of this case, the credibility of the five prosecution witnesses who implicated the 1st and 2nd accused as well as the 3rd accused would in some degree be affected even if the jury, without expressly believing the evidence of the defence witnesses who supported the 3rd accused’s *alibi*, considered that evidence sufficient to create a reasonable doubt as to his complicity in this transaction. All the accused were equally well known to the prosecution witnesses who claimed not only to have seen them at the spot but also to have observed each of them, including the 3rd accused, commit individual unlawful acts against Jamis and Methias. Moreover, the incident is alleged to have occurred at an hour when the possibility of an honest but mistaken identification can safely be discounted. If therefore the jury took the view (as they must have done) that it was not safe to act upon the evidence of the prosecution witnesses who implicated the 3rd accused, they should not have been directed that this circumstance did not necessarily affect the weight of their testimony against the 1st and 2nd accused. The present case is very similar to that of *R. v. Margulas*<sup>1</sup> where all the alleged eye-witnesses had purported to identify two accused persons jointly engaged in broad daylight in the commission of the offence of burglary. The jury convicted the 1st accused but acquitted the 2nd. The Court of Criminal Appeal quashed the conviction of the 1st accused on the ground that “ *the evidence against him cannot be considered sufficient if those against the man whom the jury acquitted was exactly of the same weight*”. In *Margulas*’ case no complaint was made of the summing-up, whereas in the present trial there is the additional complication that the jury were not properly directed on this aspect of the case.

<sup>1</sup> (1922) 17 C.A.R. 3.

The convictions of the 1st and 2nd accused must be quashed and we make order acquitting them. This is not a case in which we can with propriety affirm the convictions notwithstanding the misdirection to which I have referred. There was misdirection on an important aspect of the case at a late stage of the summing-up, and having regard particularly to the remarkable brevity of the jury's deliberations after a long trial, we find it impossible to say that they may not have been unduly influenced by the misdirection. What view they would have taken had they been properly directed remains a matter for conjecture. If I may adopt the observations of Lord Macdermott in *Sambasivam v. Public Prosecutor*<sup>1</sup> "the uncertainties are sufficiently reasonable to jeopardise the verdict reached and to justify the view that it ought not to stand".

There remains for consideration the verdict against the 4th accused. He was admittedly present at the scene and he does not deny that he took some part in the transaction. On the other hand, it is more than probable that his convictions were based largely, if not entirely, on the jury's view that he was criminally responsible for the gun-shot injuries allegedly inflicted on Jamis and Methias by the 1st accused. We therefore think that he is entitled to claim the benefit of our order acquitting the 1st accused. We accordingly quash the convictions of the 4th accused and acquit him of both charges.

In the view which the Court has taken, it is not necessary to express any opinion on the other points raised by Mr. Chitty at the hearing of the appeal.

*Appeals allowed.*

