[IN THE PRIVY COUNCIL]

1951 *Present:* **Lord Simonds, The Lord Chief Justice of England (Lord Goddard), Lord Morton of Henryton, Lord Mac Dermott, Lord Tucker**

EBERT SILVA, Appellant, *and* THE KING, Respondent

PRIVY COUNCIL APPEAL No. 2 OF 1951

S. C. 13—M. C. Balapitiya, 57,809

Court of Criminal Appeal—Issue as to whether there is any evidence to justify verdict of jury—Question for Court to pose to itself—Indictment—Joinder of more than one count for murder.

If there is any evidence upon which a reasonable jury could have found a verdict of guilty it is not the function of the Court of Criminal Appeal, in the absence of any misdirection by the trial Judge, to enquire whether, in its own opinion, the offence is established beyond reasonable doubt.

There can be no objection to the joinder of more than one count for murder in the same indictment in a case where the charges arise out of the same set of facts, if the evidence led by the prosecution in support of the several counts would clearly have been admissible even if there had been separate trials on each count.

APPEALS, with special leave obtained, from a judgment of the Court of Criminal Appeal. The judgment appealed from is reported in (*1948*) *50 N. L. R. 457.*

Dingle Foot, with *Colvin R. de Silva*, for the accused appellant.

Frank Gahan, with *J. G. Le Quesne*, for the Crown.

In the application for special leave to appeal—

Dingle Foot, with *Colvin R. de Silva*, for the petitioner.

Frank Gahan, with *T. S. Fernando*, for the Crown.

Cur. adv. vult.

March 7, 1951. [*Delivered by* LORD TUCKER]

The appellant was charged on indictment in three separate Counts with the murder on October 17, 1946, of three persons who may for convenience be referred to as Muttusamy (Count 1), Baby Nona (Count 2),

and Hemalatha (Count 3). He was tried by a Commissioner of Assize and Jury and on October 8, 1948, was found guilty on all three Counts and sentenced to death. On appeal to the Ceylon Court of Criminal Appeal his conviction on Count 1 was quashed and his appeal against conviction on Counts 2 and 3 dismissed. The present appeal, which is brought by special leave granted by Order in Council dated May 31, 1949, is from that portion of the judgment of the Court of Criminal Appeal whereby his appeal against his conviction on Counts 2 and 3 was dismissed.

At the outset of the trial application for separate trials on each Count of the Indictment was made on behalf of the appellant and refused by the Commissioner of Assize in the exercise of his discretion. It appears that, contrary to the practice which prevails in this country in the case of charges of murder, there is no objection to the joinder of more than one Count for murder in the same Indictment in cases where the charges arise out of the same set of facts, subject always to the power of the trial Judge to order separate trials on each Count if he considers that the accused may be prejudiced by the simultaneous trial of two or more charges. In the present Case the evidence led by the prosecution in support of the three Counts would clearly have been admissible even if there had been separate trials on each Count so that no criticism can be made of the manner in which the learned Commissioner exercised his descretion by allowing the three Counts to be tried together.

The appellant was the conductor of an estate of some 50 acres at Porwagama belonging to his uncle Piyadasa de Silva. Muttusamy was an Indian Tamil employee on the estate working under the appellant and living in a hut with Baby Nona who was also employed on the estate. Hemalatha was the child of Baby Nona by another man and was aged about 5 years. The appellant occupied another hut on the estate just over 400 yards distant from Muttusamy's hut. With him in this hut lived his cousin Jayaratha and a boy aged 16 named Wilfred who was his cook. Wilfred and Jayaratha were witnesses for the prosecution.

The case for the prosecution depended largely on the evidence of Wilfred and his father named Banda and may be outlined as follows.

The appellant was on terms of intimacy with Baby Nona and used to visit her at her hut when Muttusamy was away. At the time of her alleged murder on October 17, 1946, she was pregnant. On the afternoon of that day there had been a quarrel between the appellant and Muttusamy with regard to the latter's treatment of Baby Nona. After his dinner at 7 p.m. the appellant left his hut carrying a gun with four cartridges and a torch. About an hour later the sound of a shot was heard coming from the direction of Muttusamy's hut. When Wilfred got up in the early hours of the next morning the appellant had not returned, but he came in shortly after and said he had shot at a bandicoot but had not felled it and must go out again with his dog. He had tea and left taking his gun and dog. The appellant not having returned by 9 a.m. Wilfred and a man named Samathapala went to look for him. They went to Muttusamy's hut where they noticed a foul smell. On

looking round the door they saw a heap of ash and blood and a hole in the back wall opposite the door. There was also a drag mark as if a log had been dragged through the ash from inside the hut. At the back of the hut the appellant's dog was devouring some dark flesh. They proceeded from there into the jungle where they met the appellant. He was wearing a sarong leaving the upper parts of his body bare and showing marks of soot all over his chest and the other exposed parts. He said he had been following a wild boar and had fallen over a heap of burnt logs crushing a quantity of bad smelling insects in his fall which accounted for his condition and the foul smell. Wilfred returned home but the appellant did not come in for his mid-day meal. About 2 p.m. Wilfred went again in search of him. He returned to Muttusamy's hut which he found padlocked. He went on to the place where he had met the appellant earlier in the day and found him digging a large hole in the bed of a drain in the jungle. Wilfred observed two human heads, one larger than the other, blackened by burning, the hand of a grown person, the hand of a child, the trunk of a grown person and two legs. Wilfred asked what the pieces were and appellant rushed at him saying " It is none of your business, you better go away ". Wilfred went to the house of his father Banda and they returned together to the spot where the appellant was digging. Banda questioned the appellant who at first denied that he was burying dead bodies but eventually said that Muttusamy had killed his wife and gone away and that he (the appellant) was " covering them up ". The appellant returned to his hut about 4 p.m. with his sarong washed.

According to the evidence of Jayaratha at about 9 a.m. in the morning the appellant after having his tea on returning to his hut had told him that Muttusamy and his family had disappeared. Three days later Wilfred and his sister, Jane Nona, at the request of the appellant, helped him to mend Muttusamy's hut. By that time the hole in the wall had been closed.

After the disappearance of Muttusamy and his family, Jane Nona, Wilfred's sister, spent a night with the appellant in his hut after which she became the mistress of Jayaratha and lived with him in the hut previously occupied by Muttusamy. Jayaratha gave evidence that about three months after the disappearance of Muttusamy the appellant asked him to cut firewood and then brought from the jungle a gunny bag containing some bones which he ground on a stone and then burnt. In the gunny bag there was also a waistcoat and a pair of blue shorts similar to garments worn by Muttusamy. On this occasion the appellant in answer to Jayaratha's questions said that Muttusamy had bolted after killing his wife and child.

The matter was brought to the notice of the police on February 1, 1947, by one David Nanayakara, the manager of the Co-operative Stores at Porwagama, as a result of a statement made to him by Banda. The first complaint by Banda appears to have related only to the appellant's action in giving Jane Nona, Banda's daughter, to Jayaratha as his mistress, and at a later stage the story with regard to the disappearance of Muttusamy and the appellant's connection therewith emerged.

The police found bones buried under a mound on the eastern side of Muttusamy's hut which the expert evidence proved to contain a piece of human adult bone from the head, sex indeterminate, showing signs of charring and burning, the right knee bone of an adult, a small portion of a human face, and the milk tooth of a child under 8 years of age.

When questioned by the police on February 4, 1947, the appellant said that on the morning of October 18, 1946, Banda came and told him that Muttusamy and the others had bolted. He went to the house and found it was tied with a coir string. He opened the door and found nothing inside, all the goods had been removed. He kept quiet as Muttusamy used to go like that and return later.

At the trial the appellant gave evidence to the effect that on the night in question he had gone out on his rounds as usual. On reaching Muttusamy's hut he found the door open and called out. He saw Baby Nona lying just inside the doorstep with blood stains on her jacket, the child was nearby with stains of blood on her. There were no signs of Muttusamy. He became frightened and ran back to his hut calling out for Jayaratha. Both Wilfred and Jayaratha came out and asked what was the matter. He told them what he had found. They decided to send for Banda. Next morning Wilfred fetched Banda and they all went to Muttusamy's hut. They found the place in disorder and the two bodies with stab wounds. Banda pointed out that he (the appellant) had been on terms of intimacy with the woman and this might come out and advised that they should eliminate the dead bodies and say all had run away. They all agreed to hide the whole affair. Later a grave was dug by Jayaratha and a man called Edwin who was Jane Nona's brother and the dead bodies were placed in it. Later he arranged for Jayaratha to take Jane Nona as his mistress and put them in Muttusamy's hut. This angered Banda and the appellant became frightened and dug up the bodies and burnt them with the help of Jayaratha and Edwin.

At the trial Counsel for the Defence submitted that there was no evidence fit to be left to the jury that Muttusamy was dead. The learned Commissioner of Assize ruled that there was a case to go to the jury, and the jury after a full and careful summing up found the appellant guilty on all 3 counts. On appeal in the Court of Criminal Appeal it appears from the judgment in that Court that the two main points argued by the Defence were (1) that on Count 1 there was no evidence that Muttusamy was dead and (2) that with regard to Counts 2 and 3 as the Crown had put forward as the motive for killing Baby Nona and Hemalatha the fact that they were privy to the killing of Muttusamy the convictions on these Counts could not stand if Muttusamy was not proved to be dead.

With regard to the first submission the Court, after considering a number of authorities and discussing the evidence, said " In the present case the death of Muttusamy has not, in our opinion, been established beyond all reasonable doubt." It may be observed with respect that this was not the issue before the Court, the issue was whether there was any evidence fit to be left to the jury from which they might infer that Muttusamy was dead. Their Lordships will, however, proceed on

the assumption that the Court of Criminal Appeal were right in quashing the conviction of Count 1. On this assumption the only question—apart from any misdirection by the Commissioner of Assize—which arises on Counts 2 and 3 is whether there was any evidence upon which a reasonable jury could find a verdict of guilty on each of these Counts.

The answer to this question sufficiently appears from the summary of the evidence set out above. There was clearly abundant evidence to justify a verdict of guilty on each Count whether Muttusamy was or was not proved to be dead. On this issue also the Court of Criminal Appeal do not, however, seem to have posed to themselves the right question. It was sufficient for them to have considered whether there was any evidence upon which the jury could find their verdicts. They, however, inquired whether the evidence established these charges beyond reasonable dobut and after a detailed examination answered the question in the affirmative. Their decision, however, necessarily involves that there was evidence sufficient to support the verdicts of the jury, and in the absence of misdirection no grounds for disturbing those verdicts have been disclosed.

On the present appeal Counsel for the appellant put in the forefront of his case the contention that the Court of Criminal Appeal had exceeded its function by substituting its own opinion for the verdict of the jury. It soon, however, became clear that he could not make good this submission unless he could show misdirection by the Commissioner in his summing up to the jury. This he sought to do on the basis that it was the duty of the Commissioner to direct the jury that if they acquitted the appellant on Count 1 for lack of evidence of Muttusamy's death they should approach Counts 2 and 3 on the assumption that Muttusamy was alive, and to point out that this was a matter vital to the appellant's defence, viz., that Muttusamy had murdered Baby Nona and the child. If this point was raised in the Court of Criminal Appeal it evidently did not figure prominently in the argument as the only passage in the judgment of that Court which could be read as referring to it is the penultimate paragraph which reads " In addition to the points I have mentioned Dr. Colvin de Silva made certain complaints in regard to the learned Commissioner's charge to the jury. Taking the charge as a whole we think that the case was fairly and squarely put to the jury."

Their Lordships take the same view of the summing up. The jury had clearly put before them the issue whether the appellant or, as he said, Muttusamy was the murderer of the woman and child. They were on three separate occasions, twice in the early stages and once at the end of the summing up, directed to consider each Count separately. At line 32 on page 243 of the Record the Commissioner said " It is for the prosecution to prove his guilt beyond reasonable doubt in respect of each of the three charges." At line 18 on page 244 he said " You will consider each Count separately and individually." And 5 lines from the end of his charge on page 259; " It is now for you to say in respect of each of these charges whether it is proved beyond reasonable doubt."

Their Lordship are of opinion that no criticism can properly be directed to the learned Commissioner's charge to the jury which contained a careful and detailed summary of the evidence, warning against coming to any conclusion on guilt or otherwise of an accused person upon the basis of motive alone and a proper direction on matters of law. No case of miscarriage of justice justifying the intervention of His Majesty in Council has been established and they have accordingly humbly advised His Majesty that the appeal should be dismissed.

Appeal dismissed.