

[COURT OF CRIMINAL APPEAL.]

1948 *Present*: Jayetilleke (President), Canekeratne and Basnayake JJ.

THE KING *v.* PIYASENA.

APPLICATION 77 OF 1948.

*S. C. 7—M. C. Anuradhapura 20,011.*

*Court of Criminal Appeal—What is an accomplice—Question for Jury—Corroboration of evidence—Failure of Judge to warn Jury—Misdirection—Fresh trial.*

The question whether a witness is an accomplice or not is one for the Jury to decide. Where it has been suggested on behalf of the accused that a witness is an accomplice and the Judge has failed to warn the Jury that, if they found he was an accomplice, it was unsafe to act on his evidence unless corroborated, the omission is sufficient to vitiate a conviction.

<sup>1</sup> (1945) 46 N. L. R. 78.

**A**PPPLICATION for leave to appeal from a conviction in a trial before a Judge and Jury.

*H. V. Perera, K.C.*, with *M. M. Kumarakulasingham* and *K. A. P. Rajakaruna*, for the applicant.—On the only acceptable evidence in the case *Ran Banda* is clearly an accomplice. If the test that a person is an accomplice is that that person could have been charged with the accused in the same indictment *Ran Banda* is certainly an accomplice. There is no doubt that if *Ran Banda* had been charged with aiding and abetting the murder of the deceased *Ran Banda* would have stood in grave danger of being convicted unless of course he gave a satisfactory explanation of his previous and subsequent conduct.

The evidence against the applicant consists mainly of the statements made by the deceased and of the evidence of *Ran Banda*, the alleged eye-witness of the shooting. As regards the statements of the deceased, the reasonable conclusion that one can come to after a careful analysis of all the statements of the deceased is that the deceased was unable to identify the person who shot him but that deceased suspected or thought that it was the accused who shot him. It is only on this footing that the inconsistencies in the various statements can be reconciled. As regards *Ran Banda's* evidence, as already submitted, *Ran Banda* is clearly an accomplice and therefore the jury should have been cautioned that it was unsafe to act on the evidence unless he was corroborated in material particulars by independent evidence. The jury has not been so cautioned. This is a grave misdirection which vitiates the conviction. Even if *Ran Banda* is not manifestly an accomplice, as there was strong evidence of *Ran Banda's* complicity in the killing of the deceased the question whether or not *Ran Banda* was an accomplice should have been left to the jury. The learned Judge has withdrawn that question from the Jury. The Judge was not entitled to do so. See *King v. Tissera*<sup>1</sup>; *King v. Peries Appahamy et al.*<sup>2</sup>.

Apart from being an accomplice *Ran Banda* has been shown to be a thoroughly unreliable witness. That being the state of the evidence against the applicant, it would be impossible to say that the jury if properly directed could or would have returned the same verdict. The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot be invoked in such a case as this. See *R. v. Haddy*<sup>3</sup>; *R. v. Lewis*<sup>4</sup>; *Stirland v. Director of Public Prosecutions*<sup>5</sup>.

This is a case where the conviction should be quashed and a verdict of acquittal entered as there is not sufficient evidence to support a conviction.

*H. A. Wijemanne, Crown Counsel*, for the Crown.—Even assuming that *Ran Banda* is an accomplice there is in this case ample corroboration of *Ran Banda's* evidence. If there is, in fact, corroboration of an accomplice's evidence the court will not interfere even when the proper caution to the Jury has not been given. See *R. v. Thomas Kirkham*<sup>6</sup>.

On the evidence before the court *Ran Banda* is not an accomplice, as there is no evidence which shows that *Ran Banda* had the guilty

<sup>1</sup> (1935) 37 N. L. R. 233.

<sup>2</sup> (1942) 43 N. L. R. 412.

<sup>3</sup> (1944) 1 A. E. R. 319.

<sup>4</sup> (1937) 4 A. E. R. 360.

<sup>5</sup> (1944) A. E. R. (A.C.) 315.

<sup>6</sup> (1909) 2 C. A. R. 253.

knowledge that the deceased was going to be killed. See *Ameer Ali: Law of Evidence* p. 953 (9th edition); *Ramasamy Gourden v. The Emperor*<sup>1</sup>; *R. v. Charles Cratchley*<sup>2</sup>.

As to the circumstances in which the court will act under the proviso to section 5 (1) of Court of Criminal Appeal Ordinance see *R. v. Mohamed Farid*<sup>3</sup>; *King v. Herashamy*<sup>4</sup>; *King v. Carthigesu*<sup>5</sup>.

*Cur. adv. vult.*

May 11, 1948. JAYETILEKE J.—

The appellant was convicted of the murder of one Dingiri Banda at the Kandy Assizes on April 6, 1948, and sentenced to death by the presiding Judge.

The deceased was shot at about midnight on February 3, 1947, on the bund of the tank which is close to his house. The prosecution relied mainly upon two statements made by the deceased shortly after he was injured, and upon the evidence of one Ran Banda who claimed to be an eye witness of the whole of the incident.

The deceased was a cousin of the accused, and was employed by the accused as a caretaker on a land belonging to him in a village called Maha Bellankadawala. Ran Banda was employed on the same land as a labourer. The accused was a teacher in a school at Eppawela about six miles away.

About two years prior to this incident the accused arranged a marriage for the deceased with one Gunawathie who was employed under him as a cook. At the trial it was suggested as a motive for the shooting that the accused was on intimate terms with Gunawathie, but there was no evidence at all to support the suggestion.

The statement made by the deceased to the Inspector of Police at the hospital about 10 A.M. on February 4, 1947, shows that at about 8 P.M. on February 3, 1947, Ran Banda came to his house and told him that someone, who was dressed in a pair of trousers, was going towards the field. At about midnight Ran Banda came again and told him that someone wanted him to come to the bund. He went along with Ran Banda to the bund, but he did not see anyone there. Thereupon, he turned back and proceeded homewards when he heard footfalls behind him. He turned round and saw a man coming towards him with a gun in his hand. He asked "Who is that?", and, just then, he noticed Ran Banda, who was behind him, moving to a side. Almost immediately the man with the gun took aim at him and fired. The shot struck him, whereupon, Ran Banda took to his heels leaving him there.

The deceased's statement that Ran Banda came to the deceased's house twice that night was corroborated by the evidence of the deceased's wife, Gunawathie.

Podiappuhamy, who lives close to the deceased's house, said that he went up hearing cries and saw the deceased with gunshot injuries on his abdomen. The deceased told him that he went to the bund of the tank with Ran Banda because he was told that he was wanted by

<sup>1</sup> (1904) I. L. R. 27 Mad. 271 at 277.

<sup>2</sup> (1913) 9 C. A. R. 232.

<sup>3</sup> (1945) 30 C. A. R. 168.

<sup>4</sup> (1946) 47 N. L. R. 83.

<sup>5</sup> (1946) 47 N. L. R. 234.

someone, and, when he was returning he was shot by the accused. When he fell down Ran Banda ran away. Podiappuhamy then went in search of Ran Banda, and found him seated by the side of a plantain bush about 15 fathoms from his house. He asked Ran Banda what happened but he received no reply. He took Ran Banda with him, and handed him over to the headman.

Ran Banda said that the deceased came to his house at about midnight, and called him to go and bring something. Both of them went into the jungle, and the deceased looked for someone whom he expected to meet there. That person was not to be found and they proceeded along the bund of the tank. He then noticed the figure of a man about 100 feet in front of him. The deceased went towards the man and he followed. When they had gone up to about 11 feet of that man, a shot was fired by him which struck Dingiri Banda. Dingiri Banda fell down saying that he was shot by the accused. There was bright moonlight at the time, and he identified the accused as the assailant.

In cross-examination counsel for the defence suggested that Ran Banda was an accomplice. He put the following question to Ran Banda :—

Q.—I put it to you that you inveigled Dingiri Banda out of his house that night and got him shot ?

and Ran Banda replied.

A.—I deny it.

The main ground of appeal is that Ran Banda is an accomplice, and that the presiding Judge failed to direct the jury that his evidence was unworthy of credit unless it was corroborated in material particulars.

The proceedings show that, after the jury retired to consider their verdict, Crown Counsel brought to the notice of the presiding Judge that Ran Banda had been treated by the defence throughout the trial as an accomplice, and that he had failed to direct the jury in his summing up that it would not be safe to act on his evidence unless it was corroborated ; but the presiding Judge expressed the opinion that Ran Banda was not an accomplice. Mr. Perera urged that Ran Banda had made a persistent effort to take the deceased out of his house, and that fact, coupled with his subsequent conduct, both before and after the deceased was shot, shows that he was an accomplice. He urged further that the learned judge was not entitled to withdraw from the jury the question whether or not Ran Banda was an accomplice.

The term "accomplice" is not defined in the Evidence Ordinance. In Wharton's Criminal Evidence, 11th edition, Volume II, at page 1229, there is the following passage :—

"An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was even an admitted participant in a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."

In "Words and Phrases Judicially Defined", Volume I. at page 83, there is the following passage :—

"We do not think that . . . a narrow or precise definition of an accomplice should be, or indeed can be, laid down. We think however that a person implicated either as principal or as an accessory in the crime under investigation is an accomplice . . . though the degree and gravity of such complicity may vary."

In *Chetumal Rekumal v. The Emperor* <sup>1</sup> O'Sullivan A.J.C. said :—

"An accomplice is one who is a guilty associate in a crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused. It is admittedly not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed."

In the *King v. Loku Nona* <sup>2</sup> the Divisional Court held that the question whether or not a witness who denies complicity is an accomplice is one of fact, and therefore, solely within the province of the Jury.

At the trial of this case the question seems to have arisen whether or not Ran Banda was an accomplice. That question was, in our opinion, one for the jury to decide. If they believed the whole of Ran Banda's evidence they must necessarily have found that he was not an accomplice. If, on the other hand, they believed that he knew that the accused intended to shoot the deceased, and that he took the deceased out that night, at the request of the accused, on a false pretence, they might have found that he was an accomplice.

We are of opinion that the omission on the part of the learned Judge to direct the jury to consider whether or not Ran Banda was an accomplice, and that, if they found that he was, to warn them that it would be unsafe to act on his evidence unless it was corroborated by independent evidence which shows or tends to show that the accused committed the offence, amounts to a misdirection which prejudiced the accused and entitled him to an order that the conviction is bad in law.

Mr. Perera argued further that the verdict of the jury is unreasonable. He pointed out (1) that though the deceased in his earlier statements implicated the accused, in his later statements he admitted that he could not definitely say that it was the accused who fired the shot ; (2) that in his statement made that night to the village headman Ran Banda said that the person who shot the deceased was not known to him. The evidence does not show that at the time the deceased made the later statements his mind was not clear, nor are there any indications in the statements themselves that at the time he made them his mind was not clear. We, therefore, think that if the case for the prosecution rested entirely on these statements the verdict of the jury would have been unreasonable. With regard to the evidence of Ran Banda we are unable to say what view the jury took of it. Their verdict was unanimous, and it is possible that, in spite of the discrepancy referred to by Mr. Perera, they were so impressed by his story that they thought it would be safe to act upon it. There is, in addition to the evidence of

<sup>1</sup> (1934) A. I. R. Sind. 185 at 187.

<sup>2</sup> (1907) 1 P. N. L. R. 4.

Ran Banda, the evidence of Ranhamy that he saw the accused bathing in the tank close to the scene of the shooting at about 5.30 P.M. on February 3, 1947, and that, at that time, there was a gun close to the accused, and also the evidence of Police Sergeant Carolis that, as a result of a statement made to him by the accused at about 2.30 P.M. on February 4, 1947, he proceeded with the accused to the bund of the tank and found the accused's gun near a palmyrah tree about 500 yards from the scene of the shooting.

In all the circumstances of the case we are of opinion that the conviction and sentence should be set aside and that the accused should be retried. We would make order accordingly.

*Retrial ordered.*

