

## [COURT OF CRIMINAL APPEAL.]

1941

*Present : Soertsz, Keuneman, and de Kretser JJ.*THE KING *v.* MARTHINO *et al.*29—*M. C. Anuradhapura, 2,880.*

*Court of Criminal appeal—Application for leave to appeal on the facts—Application to add fresh ground of appeal—Leave refused.*

Where, on an application for leave to appeal on the facts Counsel sought to amend the application by alleging misdirection in the charge to the Jury,—

*Held*, that the application to add a new ground of appeal should not be allowed, as the notice of appeal had been drafted by a lawyer.

*The King v. Burke* (43 N. L. R. 465) followed.

*The King v. Seeder de Silva* (41 N. L. R. 337) distinguished.

**A** PPEAL from a conviction by a Judge and Jury before the 3rd Midland Circuit, 1940.

*J. E. M. Obeyesekere*, for appellants.

*E. H. T. Gunasekera, C.C.*, for respondent.

*Cur. adv. vult.*

March 7, 1941. DE KRETZER J.—

Counsel first presented the application for leave to appeal on the facts and this was refused. He sought to amend his application by alleging misdirection by the presiding Judge in his charge to the Jury but the Court did not allow the amendment, acting on the authority of *Rex v. Burke*<sup>1</sup> which itself followed *Rex v. Wyman*<sup>2</sup> and *Rex v. Cairns*<sup>3</sup>. Counsel referred us to the earlier case of *Rex v. Seeder de Silva*<sup>4</sup>. This was one of the first cases argued before this Court and the objection of misdirection had been

<sup>1</sup> 43 N. L. R. 465.

<sup>2</sup> 13 Cr. A. R. 163.

<sup>3</sup> 20 Cr. A. R. 44.

<sup>4</sup> 41 N. L. R. 337.

taken as a point of law. This Court held that it was not a point of law but allowed argument. It held that this Court will as a general rule refuse to entertain grounds not stated in the notice of appeal but would relax the rule where the appellant was without legal aid and had drawn his own notice of appeal. In the case before us the notices had been drafted by a lawyer. The same advocate who appeared at the Assize trial appeared before us and would have noted any misdirection which was patent and not discovered as a result of diligent dissection of the charge as it appears after being typed.

Counsel next submitted his appeal on two points of law, viz.—

- (1) that the evidence in the case did not establish a common intention on the part of the accused, and
- (2) in particular it did not establish it in the case of the 9th, 10th, and 11th accused.

Having given the matter careful consideration, we are of opinion that there was evidence on which the Jury could have found common intention. It is impossible to place on record every bit of evidence which leads to a final impression. I shall set out the main outlines of the evidence.

There is one difficulty at the very outset and that is the fact that we have no indication as to what the view the Jury took of certain parts of the evidence, particularly the evidence of Ram Singh and Weerasinghe, two dismissed employees of Mr. Muhuseen & Co. We do know that Crown Counsel and the presiding Judge did not accept their evidence as being entirely satisfactory. This is an important matter to bear in mind, for appellants' Counsel drew very largely upon the evidence of these two witnesses, which in some respects was contradictory of the evidence given by the witness Buddadasa. The contradictions, however, did not affect the substance of the case.

The main points in the evidence are :—

1. The Mant Bus Company of which most of the accused are employees owns 18 buses, many of them plying between Matale and Anuradhapura and others plying between intermediate stations or along neighbouring routes. In 1939 a rival bus sought to ply between Matale and Anuradhapura. It was referred to during the argument as the M. M. Bus. The Mant Bus Co. objected to the grant of a licence but a licence was granted in December, 1939, for the year 1940. The licence required the M. M. Bus to leave Matale at 8 A.M. and arrive at Anuradhapura at 1 P.M. and to leave Anuradhapura at 4 P.M.

It was contended that the Mant Bus Co. could have had no grievance over such a licence. There was, however, no evidence on their part. On the contrary, Weerasinghe alleged that the M. M. Bus usually carried an extra number of men as they feared trouble and had to be prepared to retaliate. Appellant seized upon this evidence to suggest that the M. M. Bus had prepared to make trouble, but why it should do so if matters had been satisfactorily adjusted and why it should beard the lion in its den is not explained. One of the difficulties in the case is the wealth of suggestions unsupported by evidence and often not consistent one with another.

A reasonable view would be that feeling did exist between the two companies.

2. The M. M. Bus service started on January 25. The incident which forms the basis of the present charge occurred on February 3.

3. The M. M. Bus was coming into Anuradhapura about 1 P.M. It was a time at which it was due and might be expected to arrive. According to Buddadasa there were only three employees in it, viz., himself, the conductor, Ram Singh, the driver, and Babanis, the cashier. According to Ram Singh and Weerasinghe there were 6 or 7. The only persons injured were the three named by Buddadasa. A Sergeant of Police was in a neighbouring hotel and rushed up, the Inspector of Police arrived very quickly, men alleged to be passengers were in the buses, but no unchallenged witness speaks to the presence of these additional employees. But assuming they were in the bus and took no part in the affray I fail to see how their presence affects the case.

4. When the M. M. Bus arrived at what is called the "Jaffna Junction" it saw bus T 207 driven by the 11th accused halted there and this bus followed it closely. On arriving opposite Mant's garage it found Z 1824 drawn up along the road at a halting place in front of the garage and just then E 671 driven by 10th accused emerged and going more or less across the road, halted. The road is said to be 24 feet wide. Owing to the positions of Z 1824 and E 671 the M. M. Bus found its way blocked and was brought to a halt abruptly. T 207 hemmed it in from behind. The three employees were immediately attacked, the assailants coming mainly from the garage premises.

5. The affray itself cannot be and is not denied. The defence suggested that the M.M. Bus conductor tried to secure two passengers for Matale whom the Mant Bus runner was trying to get for their bus and a fight ensued. This suggestion was before the Jury and always remained a suggestion only. Now is it likely that the M.M. Bus which was just coming in and which would not be leaving for Matale till 4 P.M. would try to secure passengers for Matale before 1 P.M. ? and is it likely that there being a Mant Bus leaving for Matale at 1.30 P.M. any passenger would wait till 4 P.M. ? and is it likely that the M.M. Bus would adopt those methods right opposite Mant's garage, even if they had seven men in the bus ? and would they try, them just when they were hemmed in on every side ? If then the Jury rejected this suggestion it can hardly be said they were not justified in doing so and if this suggestion be rejected there remains the sudden attack on the M.M. Bus and its employees, accounted for in only one way and that the case for the prosecution.

6. Now, is the position in which the M.M. Bus found itself due to a series of coincidences ? It was certainly hemmed in on four sides and it was undoubtedly attacked. Taking each item by itself it may be possible to give it an innocent interpretation but taking it in conjunction with others, as we must, the aspect is at once changed. Let us examine the case of the 9th, 10th, and 11th accused. It is urged that 9th accused was lawfully at a halting place and was not seen to take part in the attack

and that his presence was, therefore, as consistent with innocence as with guilt. That may be so if he is taken apart in that way. But once all the other circumstances point to a plan of attack it is difficult to believe that he alone of the Mant Bus Co. was ignorant of the plan or disapproved of it. The conductor of his bus and the runner were both accused. He gave no evidence explaining how he happened to be there or that he was unaware of any plan and in the circumstances of this case he should have given evidence if he had anything to say for himself. I have so far not questioned the propriety of his being at a halting place. But was that a proper place for him to be at? It was a halting place and not the starting place, the latter being apparently the bus stand. There is evidence that there is a hotel close by from which passengers might be expected and there is evidence that they enter the appropriate bus in the garage compound, why then take it to a halting place where it might displace another bus travelling along the road? E 671 scheduled to start at 2.30 P.M. was, it is alleged, leaving for the bus stand. It was going there 1½ hours ahead of time. Why then was Z 1824 scheduled to start at 1.30 still lingering there? This was the least old of the buses and this stood the least chance of a direct collision.

There were a number of circumstances which the Jury had before them and it is impossible to say that there was not sufficient evidence for them to arrive at the conclusion they did. The position of the 9th accused differed from that of the other two drivers only in the fact that he had completed his movement and taken up his position while they were seen in the act of moving.

It was alleged that the 11th accused was returning after having had his bus washed—again there was no evidence to this effect. It was proved he had halted near the “Jaffna Junction” and this was not denied. It was sought to explain his presence there by suggesting that passengers coming from Jaffna whose destination was Matale had to change at Anuradhapura and so T 207 was there to take them up. But surely the most convenient place at which to change would be the Hotel near the garage and the bus into which to change should have been Z 1824, if that was really going to Matale. And again if T 207 was waiting for the purpose suggested why did it not wait till the bus from Jaffna came? Why did it follow so closely the M. M. Bus? Its conduct is hardly explicable except upon the basis of a prearranged plan.

Then take E 671. Having a clear view before it, seeing Z 1824 taking up some of the road, why does it go across the road at the crucial moment? If it intended to go to Anuradhapura why did it not do so but halt across the road?

I have indicated sufficiently that the evidence is a substantial compact mass and to disintegrate the evidence into fragments and to examine each fragment is hardly to do justice to the evidence as a whole.

The appeal fails and is dismissed.

*Appeal dismissed.*