[COURT OF CRIMINAL APPEAL]

1947 *Present:* **Jayetileke (President), Canekeratne and Dias JJ.**

THE KING *v.* BELLO SINGHO *et al.*

Applications Nos. 236-239.

S. C. 55—M. C. Dandegamuwa, 18,885.

Court of Criminal Appeal—Charge of murder—Grounds of appeal—Not stated in notice of appeal—Provision of Ordinance No. 23 of 1938, section 8 (1)—Strict compliance insisted on.

A person who desires to appeal to the Court of Criminal Appeal must comply strictly with the provisions of the Ordinance. The Court will not hear any grounds of appeal which are not stated in the notice required by section 8 (1) of the Court of Criminal Appeal Ordinance.

APPLICATIONS for leave to appeal against certain convictions in a trial before a Judge and Jury.

H. V. Perera, K.C. (with him *M. M. Kumarakulasingham, Mahesa Rutnam* and *L. G. Weeramantry*), for the applicants.

T. S. Fernando, C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

Cur. adv. vult.

October 28, 1947, JAYETILLEKE J.—

The accused in this case were charged on an indictment which contained three counts. The first count charged them with being members of an unlawful assembly, the common object of which was to commit robbery. The second count charged them with, being members of an unlawful assembly, and, in prosecution of the common object, having committed murder by causing the death of one Bempy Singho. The third count charged them with having committed murder by causing the death of Bempy Singho in furtherance of the common intention of all. The jury unanimously found them guilty on counts 1 and 2 and not guilty on count 3. On the second count, the accused were convicted purely on circumstantial evidence. The material witnesses for the Crown were Ukku Banda, a brother of the deceased, Jayasekere, a son of Ukku Banda, and Nonohamy, a sister of the deceased.

Ukku Banda said that he lived at Pethigodagedera in the District of Kurunegala with his wife, who was insane, his son Jayasekere, and daughter Podi Nona. On March 28, 1946, he slept in the office room, his wife and son slept on the outer verandah, and his daughter in a room. Between 10 and 12 p.m. he was awakened by the report of a gun. He got up and went to the verandah when he was seized by someone, dragged into the compound, and struck several blows with clubs. He raised cries and fell on the ground. He then heard the sound of doors being broken open inside the house. There was starlight, and he was able to identify the third accused as one of those who struck him, and the fourth accused as one of those who went inside the house. After the thieves left, he saw Bempy lying dead on the compound, and several persons gathered there.

Jayasekere said that he was awakened by the report of a gun and almost immediately he was held by four persons, pressed against the wall, and struck several blows with clubs. One of them forced open the door of the house with a stone which he had brought with him from the firewood shed, and several of the thieves went inside the house. He then released himself, picked up his sword from under his mat, rushed up to a thief who was in the compound with a gun in his hand, and attacked him with the sword. The thief fell down, whereupon, he took the gun and ran towards the house. He then saw his uncle Bempy lying in the compound bleeding profusely, and also his father lying fallen in the compound. When he saw them he fell down in the compound in a faint. There was starlight at the time, and he clearly identified the first accused and second accused among the thieves.

Podi Nona, who was called by the accused, said that, as soon as the thieves entered the house, she ran out of the house into the jungle and came back towards morning.

Nonohamy, a sister of the deceased, said that the deceased lived in her house. On the night in question, hearing gunshots and shouts from the direction of Ukku Banda's house, the deceased went out of the house taking with him the club P 10. After the thieves left she went up to Ukku Banda's compound and saw her brother lying dead.

The medical evidence shows that the deceased had a pond-shaped depressed fracture on the right side of the head, roughly about two inches in diameter, with radiating fractures from the sides of this fracture running to either side of the base of the skull.

Dr. Thamotheram was of opinion that a very great degree of force had been used to inflict the injury. He was also of opinion that it was more probable that it was caused by the ring end of a mammotty than by the butt end of a gun. A mammotty belonging to Ukku Banda was found by the side of the deceased, but there was no blood on any part of it.

Mr. Perera contended that, upon this evidence, it was not open to the jury to say that every reasonable hypothesis consistent with the innocence of the accused on the charge of murder had been eliminated and that, therefore, the verdict is unreasonable. He said that the deceased may have been mistaken for a thief and struck by the wife of Ukku Banda or by someone who came up hearing cries. It must be remembered that the witnesses said that there was starlight at the time, which enabled them to identify these accused. It is, therefore, improbable that the deceased could have been mistaken for a thief. Having regard to the nature and position of the injury, it is equally improbable that it was inflicted by Ukku Banda's wife. She is over 50 years of age and has not been in possession of her senses for sometime. It is unlikely that she could have struck a blow with a very great degree of force. The suggestion that a neighbour may have inflicted the injury is not supported by the evidence. None of the witnesses said that any one came up before the thieves left. We, therefore, think that the first ground cannot be sustained.

The next point taken by Mr. Perera was that the presiding judge failed to direct the jury as to the facts and circumstances on which the jury could have based a finding as to the intention of the unknown assailant of the deceased.

On the question of intention, there is the following passage in the summing up :—

> " You have to ask yourselves first of all, was the assailant of Bempi one of the members of the unlawful assembly ? If he was a member of the unlawful assembly, did he intend to cause the death of Bempi or did he intend to cause Bempi bodily injury sufficient in the ordinary course of nature to cause death? In regard to intention, it is a matter for inference, and the case for the Crown as established by the medical evidence is that Bempi had received the wound on his head which made death inevitable. He must have died within a few minutes of having received that injury. In fact, I recall the very vivid manner in which

Crown Counsel referred to that part of the case, because he said when he was opening his case that Bempi's head had been bashed in. It was a very grievous injury that was inflicted on Bempi. He must have died more or less on the spot—so to speak—certainly he was dead by morning. His corpse was taken into the house of his brother at dawn. Now every man is presumed to intend the natural and probable consequences of his acts. So that, when you are considering the matter of intention, you will ask yourselves the question whether the assailant of Bempi intended to kill him or intended to cause bodily injury sufficient in the ordinary course of nature to kill. If you are satisfied on that point, then the assailant of Bempi would be guilty of murder. But in a case of this kind where the assailant of Bempi had not been identified, where the Crown alleges that a member of the unlawful assembly was the assailant of Bempi, you have to be satisfied that it was a member of the unlawful assembly that caused the death of Bempi, and you have also to be satisfied that the intention of that member was to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death . . . . But, suppose you are in doubt as to whether the assailant of Bempi intended to cause his death or to cause him bodily injury sufficient in the ordinary course of nature to cause death, then you may not find the assailant of Bempi or any other member of the unlawful assembly guilty of murder ; in that event, you will go on to ask yourselves the question whether the assailant of Bempi knew what he was doing was likely to cause the death of Bempi, and in that case, the assailant of Bempi would be guilty of culpable homicide not amounting to murder which is the lesser offence."

Relying on the case of *Rex v. Steane* [1], Mr. Perera argued that, on the evidence taken as a whole, there was room for more than one view as to the intent of the assailant, and, therefore, the rule of law that a person must be taken to intend the natural and probable consequences of his acts did not apply. For instance, he said, the assailant may not have known where the blow would alight or he may have inflicted the injury in the course of a struggle.

We do not think that it was possible for the jury to take the view that the assailant may not have known where the blow would alight, as they had accepted the evidence that there was sufficient light at the time ; nor do we think that it was possible for them to return a verdict favourable to the accused, even if they took the view that the assailant inflicted the inury in the course of a struggle, as the exception relating to private defence is not available to a person who enters another's house with intent to commit robbery. We are of opinion that the directions given by the presiding judge on the question of intention were quite adequate.

Mr. Perera sought to raise another point, namely, that, in the circumstances of the case, it could not be said that the Commission of the offence of murder was involved in the common object of robbery. Crown Counsel objected to the point being argued on the ground that it was not taken either in the petition which was filed on September 25, 1947, or in

[1] *(1947) 1 A. E. R. 813.*

the supplementary notice setting out a further ground of appeal which was filed, out of time, by assigned Counsel on October 19, 1947, and he stated that, in any event, he was not ready to argue the point on that day. Mr. Perera said that he could not take the point earlier as he had not studied his brief. We did not think that the reason given by Mr. Perera for not raising the point within the time prescribed was sufficient in law, and we decided to uphold the objection.

The law on the subject seems to be fairly clear. Section 8 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, provides that where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of Court, within 14 days of the date of conviction. Rule 3 of the Court of Criminal Appeal Rules, 1940, provides that the forms set out in the Schedule to the Rules, or forms as near thereto as circumstances permit, shall be used in all cases to which such forms are applicable. The forms relevent to appeals on questions of law and to applications for leave to appeal on the facts are Nos. IV and VI. They show that the grounds must be fully set out.

There are several decisions under the corresponding section of the English Act.

In *Rex v. Wyman* [1], the following passage appears in the judgment of Darling J. :—

> "The Court wishes it to be understood that in future substantial particulars of misdirection, or of other objections to the summing-up, must always be set out in the notice of appeal, even if the transcript of the shorthand note of the trial has not been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If Counsel has a genuine grievance regarding a summing-up, he knows substantially what it is as soon as the summing. up is finished, and can certainly specify his general objection when he settles the notice of appeal."

In Rex v. Cairns [2], an application was made for leave to add misdirection to the grounds of appeal. The Court granted leave as it was a capital case. The Lord Chief Justice, after citing the passage quoted above, said :—

> "This direction the Court has repeated in later cases. In future it will act upon it."

There are several local decisions, too, on the point. In the *King v. Seeder de Silva* [3], which was the first case to be heard under the Court of Criminal Appeal Ordinance, No. 23 of 1938, Howard C.J. said :—

> "Generally speaking this Court will refuse to give effect to grounds not stated in the notice, but where the appellant is without means to

[1] *13 C. A. R. 165.* [2] *20 C A. R. 44.*

[3] *(1940) 41 N. L. R. 337.*

procure legal aid and has drawn his own notice the Court will not as a rule confine him to the grounds stated in his notice."

In the *King v. Burke*[1], in which the appellant was convicted of attempted rape, an application was made for leave to amend the notice of appeal on questions of law by adding a further ground. After consideration of *Rex v. Wyman* (*supra*) *and Rex v. Cairns* (*supra*), the application was refused.

In the *King v. Marthino*[2] an application to amend an application for leave to appeal on the facts by alleging misdirection in the charge to the jury was refused on the authority of *Rex v. Wyman* (*supra*) and *Rex v. Cairns* (*supra*).

In the *King v. Hemasiri*[3], four grounds of appeal were set out in the notice of appeal. After a copy of the proceedings was obtained a supplementary notice setting out a further ground of appeal was filed. In the course of the argument in appeal, Counsel sought to address the Court on a point not set out in the notice of appeal. It was held that, the case not being a capital case, application to argue the new ground of appeal should not be allowed as there was delay in applying for a copy of the proceedings. It does not appear from the judgment whether the observations of the Lord Chief Justice in *Rex v. Cairns* (*supra*), quoted above, were considered by the Court.

In the *King v. James Singho*[4] a statement filed out of time setting forth four additional grounds of appeal was rejected. In the course of his judgment, Soertsz J. said :—

> "This Court has repeatedly laid down that it will not entertain additional grounds of appeal, except in very exceptional circumstances unless a substantial question of law is seen to arise."

These decisions show that the practice of raising points which are not set out in the notice, which I regret to say, seems to be growing, has been condemned in no uncertain terms. In *Rex v. Sella hurai*[5], the Court had to adjourn to enable Crown Counsel to study a question which was raised by Counsel for the appellant without previous notice. We think it is desirable that this Court should act upon the words of the Lord Chief Justice in *Rex v. Cairns* (*supra*), and insist on a strict compliance with the provisions of the Ordinance.

The applications are refused and the appeals are dismissed.

Dismissed.

[1] *(1940) 43 N. L. R. 465.*
[2] *(1941) 43 N. L. R. 521.*
[3] *(1942) 43 N. L. R. 457.*
[4] *(1942) 44 N. L. R. 54.*
[5] *73-83 Mallakam 1092 S. C. M. 20/10/47.*