

[COURT OF CRIMINAL APPEAL.]

1948 Present: Soerets^z A.C.J., Cannon and Canakeratne JJ.

THE KING v. ENDORIS *et al.*

137-139—M., C. Ratnapura, 41,024.

Court of Criminal Appeal—Several accused—Liability of each—Common intention—Burden of proof—Penal Code, s. 32.

Where three accused were charged with committing murder, and the third accused was proved to have been in the presence of the first and second accused, who shot the deceased man, in circumstances indicating that he was sharing a common intention with them to cause the death of the deceased—

Held, that the third accused, if he wished his presence to be construed as innocent, should have given evidence in explanation of his presence.

APPPLICATION for leave to appeal against a conviction by a Judge and Jury.

R. L. Pereira, K.C. (with him M. M. Kumarakulasingham and H. Deheragoda), for the applicants.

H. W. R. Weerasooriya, C.C., for the Crown.

October 29, 1945. SOERTSZ A.C.J.—

Counsel appearing in support of these applications addressed us as if we were the Jury in the Assize Court, but our function, clearly, as laid down by the Court of Criminal Appeal Ordinance, is to examine the evidence in the case in order to satisfy ourselves with the assistance of Counsel that there is evidence upon which the jury could have reached the verdict to which they came, and also, similarly, to examine the charge of the trial Judge to satisfy ourselves that there has not been any substantial misdirection or non-direction. Examining the evidence and the charge in that way, we are of opinion that the convictions of the first and second applicants are clearly borne out by the evidence and that in respect of them there was nothing that could reasonably be described as a substantial misdirection or non-direction. It was, however, contended that in regard to the third applicant his case stood on a different plane because, as the evidence showed, he did not take any active part in the actual attack upon the deceased man. The evidence of the wife of the deceased and of his son was merely directed to speaking to his presence at the scene at the time the two shots were fired by the first and second applicants. The question then, in regard to the third applicant, is whether his presence was a guilty presence in the sense that he was there as sharing a common intention with the other two applicants to cause the death of the deceased man. It was submitted to us that the third applicant might well have been going along the path which it is said runs near the house from which the deceased man had stepped out in order to go to the rubber store on the night he was killed. But the evidence of the woman is clearly to the effect that the third applicant was with the other two applicants near the orange tree and that orange tree is a fair distance away from this path. Moreover, there is the evidence of the two witnesses I have just referred to to the effect that at that time he was armed with a club. There is also evidence to show that he was with them at the time the first as well as the second shot was fired and also that he fled along with the two others. In those circumstances there was an occasion clearly indicated for the third applicant, if he wished his presence there not to be construed in that manner, to give evidence in explanation of his presence. That he failed to do and in the circumstances I think that the dictum of Lord Ellenborough referred to by Crown Counsel and reported in the 43rd volume of the New Law Reports at page 418 applied.

In regard to this third applicant, it was also said that there was a substantial misdirection by the learned Judge when he told the Jury at page 13 of his charge "Let me remind you of the evidence that the third accused went with the first and second accused; he came with the first and second accused and he ran away with the first and second accused". In regard to that, it is quite clear, as submitted by Counsel appearing for him, that there is no evidence at all to show that he came to the scene with the first and second accused. But taking the direction given there as a whole, it seems to us that the learned Judge having pointed out to the jury that there was evidence to show that the third applicant was present with the first and second applicants and that he

ran away with them, invited them to draw the inference, as an inference they could reasonably draw, that he had come with them. We do not think that this can be described as a substantial misdirection.

We do not think we shall be justified in interfering with the verdict returned by the Jury in this case.

The applications are refused.

Application refused.
