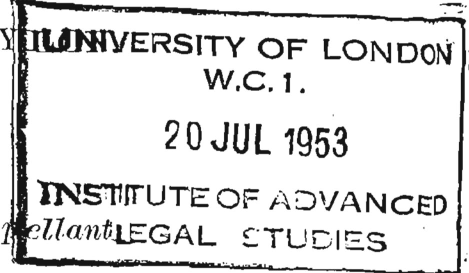
8, 1951

No. 2 of 1951. 31406

In the Privy Council.

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.



BETWEEN

LATHUWA HANDI EBERT SILVA - - - - *Appellant*

AND

THE KING - - - - - - - - - - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

10 1. This is an appeal by Special Leave from a Judgment of the Court of Criminal Appeal of Ceylon, dated 25th November 1948, dismissing an appeal against the Appellant's conviction on two charges of murder in the Supreme Court of Ceylon on the 8th October 1948.

2. Special Leave to Appeal to His Majesty in Council was granted by an Order in Council dated the 31st May 1949.

3. The Appellant was tried by a Commissioner of Assize and a jury in the Supreme Court of the Island of Ceylon sitting at Colombo. The indictment was framed as follows :— p. 29, l. 17.

(1) That on or about 17th October, 1946, at Porwagama, 20 Ambalangoda, in the district of Balapitiya, you did commit murder by causing the death of one Perumal Muttusamy of Porwagama ; and that you have thereby committed an offence punishable under section 296 of the Penal Code.

(2) That at the same time and place aforesaid and in the course of the same transaction, you did commit murder by causing the death of one Gardia Welligamage Babu Nona alias Baby Nona of Porwagama ; and that you have thereby committed an offence punishable under section 296 of the Penal Code.

(3) That at the same time and place aforesaid and in the course 30 of the same transaction, you did commit murder by causing the death of one Gardia Welligamage Hemalatha alias Hema of Porwagama ; and that you have thereby committed an offence punishable under section 296 of the Penal Code.

4. The principal questions to be decided in this appeal are as follows :—

(i) Whether the Court of Criminal Appeal did not, in the circumstances of the present case and in view of the provisions of section 243 of the Ceylon Criminal Procedure Code, exceed the limits of the appellate jurisdiction conferred on it by law and substitute trial by itself for trial by jury in respect of the conviction of the Appellant on Counts 2 and 3 of the indictment (the murder of Baby Nona and Hemalatha respectively).

(ii) Whether the Court of Criminal Appeal, in view of its finding that the evidence led at the trial could not sustain the conviction of the Appellant on Count 1 of the indictment (the murder of Muttusamy), was entitled to confirm the conviction of the Appellant on Counts 2 and 3 (the murder of Baby Nona and Hemalatha respectively) in the circumstances of the present case where :— 10

(*a*) the Crown case itself, as presented in Court from the beginning to the very end of the trial, made the allegation in Count 1 (that the Appellant had murdered Muttusamy) the very basis of the allegations in Counts 2 and 3 (that the Appellant had murdered Baby Nona and Hemalatha). 20

(*b*) the truth of the allegation in Count 1 (that the Appellant murdered Muttusamy) was in fact an essential link in the chain of circumstances from which the jury was asked to draw, as a necessary inference, the conclusion that the Appellant was guilty, as charged on Counts 2 and 3, of the murder of Baby Nona and Hemalatha.

(*c*) the trial judge in his charge to the jury not only failed altogether to put the case in respect of Counts 2 and 3 (the murder of Baby Nona and Hemalatha) to the jury from the point of view of the consequences flowing from an acquittal on Count 1 (the murder of Muttusamy), but also failed even to draw the attention of the jury to the intimate bearing that a finding of " Not Guilty " on Count 1 would have on the consideration of Counts 2 and 3. 30

(*d*) the trial judge, despite the statutory direction contained in section 243 of the Ceylon Criminal Procedure Code to " charge the jury summing up the evidence," failed altogether in his charge to the jury to marshal the evidence in relation to Counts 2 and 3 separately from Count 1. 40

(iii) Whether the facts as found by the Court of Criminal Appeal were such as would have entitled any Court to hold that the Appellant had murdered Baby Nona and Hemalatha.

(iv) Whether the Appellant was not gravely prejudiced by the fact that three separate charges of murder were joined in one indictment, and whether such joinder has not resulted in a grave miscarriage of justice.

(v) Whether the Commissioner of Assize should not have directed the jury that, on one view of the facts which he indicated

in his summing up, the principal witnesses for the Crown were all accessories after the fact and that, in the absence of corroboration implicating the Appellant in some material particular such evidence should be treated with great caution.

5. The material sections of the Ceylon Criminal Procedure Code are as follows :—

" Section 180.—(1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial 10 for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for each such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(3) If several acts, of which one or more than one would by 20 itself or themselves constitute an offence, constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment."

" 243. When the case for the defence and the prosecuting counsel's reply (if any) are concluded the judge shall charge the jury summing up the evidence and laying down the law by which the jury are to be guided."

30 6. At the beginning of the trial in the Supreme Court Counsel for the Appellant applied for separate trials on the ground that the defence would be prejudiced by the simultaneous trial of three charges of murder. The Commissioner of Assize refused the application and gave his reasons as follows :—

p. 69, l. 36.

" Court : I stated yesterday that I would give my reasons in writing for the order I made permitting the trial of this prisoner on three charges of murder in the Indictment.

It is clear from the authorities that the matter is one of judicial discretion, which is to say that each application will be considered 40 upon its merits and upon sound and recognized principles. My present decision is limited to the case now before me.

The present application is on the ground of prejudice. I have read the depositions. I have heard learned Counsel on both sides of the Bar. I am satisfied that in the present case no embarrassment or prejudice whatsoever will be caused to the accused by his trial in the form proposed."

7. All three murders were alleged to have been committed in a hut which was occupied by Muttusamy, Baby Nona (a woman who was living with Muttusamy) and Hemalatha (her five year old daughter by another man). This hut stood on a newly opened rubber estate, some 50 acres in extent, called Heddagodakania situate in the village of Porwagama some 16 miles from Ambalangoda in the Southern Province. The Appellant who is a nephew of the proprietor of the estate was at the material time the Conductor (the person in charge) and Watcher thereof. Muttusamy and Baby Nona were resident labourers on the estate. Their aforesaid hut was about 418 yards away from the wadiya (bungalow) where the Appellant lived together with his cook, a boy named Wilfred about 16 years of age, and a rubber tapper named Jayaratna. Wilfred was the son of one Banda who lived near the estate with his daughter Jane and his son Edwin. Jane was a regular labourer on the estate while Banda and Edwin occasionally worked there. A path running through the estate connected the Appellant's wadiya with Muttusamy's hut and then ran on beyond the eastern boundary of the estate and past Banda's house.

8. The case sought to be established by the Crown was as follows :—

On the night of the 18th October 1946 the Petitioner went after dinner to Muttusamy's hut with a gun, a torch and four cartridges. He first fired a shot from his gun into the hut and the bullet went through the rear wall. Thereafter by some means as to which there was no evidence he killed first Muttusamy and thereafter Baby Nona and Hemalatha. Next morning he was seen by Wilfred and Samathapala coming from the jungle near Muttusamy's hut with soot on his body. On the afternoon of the same day he was surprised by Wilfred in the act of disposing of burnt portions of the corpses of Baby Nona and Hemalatha. Wilfred summoned Banda to the scene. The Appellant explained to them that Muttusamy had fled after killing Baby Nona and Hemalatha and that he (the Appellant) was disposing of their bodies. On or about the 17th December 1946, after a quarrel with Banda, the Appellant exhumed the remains of the bodies which he had buried together with various belongings of Muttusamy's family, ground the remains of the fragments and threw away such bones that survived the burning. On the 1st February 1947 information as to the alleged murders was conveyed to the police by one Nanayakkara Appuhamy who averred that he learned of the matter from Banda. Thereafter a police officer went to the estate and found a number of pieces of bone, some of which had been burnt, certain burnt pieces of cloth and a silver bangle. Some of the bones were those of an adult and some of a child.

p. 203, l. 40.

9. That the principal witnesses for the Crown gave evidence (inter alia) as follows :—

p. 64, l. 38.

(A) Wilfred identified the gun which the Appellant was accustomed to keep in his house. He was accustomed to go out shooting at night. On the night in question he went out taking his gun and torch and four cartridges. At about 8 p.m. just as

he was falling asleep Wilfred heard the report of a gun shot from the direction of Muttusamy's hut. Early next morning the Appellant returned and said that he had shot at a bandicoot. He also said "that shot did not fell him. I must go again with the dog." Then he went out again. At about 9 a.m. Wilfred and Samathapala went to Muttusamy's hut where they noticed there was a stench. On peeping through the door they saw a heap of ash, blood on the walls and a hole in the back wall opposite the door. They next observed a track mark as if a log had been dragged along from the inside of the house to the outside. At the back of the house they saw the Appellant's dog which was swallowing some dark flesh. Shortly afterwards they met the Appellant coming up from the jungle dressed in a sarong. He had soot marks on his body and chest.

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At about 2 p.m. Wilfred saw the Appellant digging a hole in the jungle. He also saw various dismembered remains of human bodies, which included two heads. The large head appeared to be that of a grown up person. Wilfred informed Banda. p. 67, l. 28.

(B) Jayaratna Mendis deposed that he was living with Jane Nona, this having been arranged by the Appellant. About three months after the disappearance of Muttusamy the Appellant asked him to cut some firewood. The Appellant then brought from the jungle a gunny bag containing a pair of blue shorts similar to those that had been worn by Muttusamy and also a waistcoat and a raincoat which the witness identified as having belonged to Muttusamy. The bag also contained bones which appeared to have been burned. The accused then proceeded to burn the contents on the fire. The witness questioned the Appellant who said that Muttusamy had bolted after killing his wife and child. p. 112, l. 9.

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(C) Samathapala confirmed the evidence of Wilfred as to the state of Muttusamy's hut on the morning after his disappearance and as to seeing the dog eating. p. 133.

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(D) Banda deposed that on the day in question at about 2 p.m. Wilfred made a communication to him. As a result he spoke to the Appellant who said that Muttusamy had killed his wife and child and had gone away and that he (the Appellant) was covering them. About a month later the Appellant took his daughter Jane Nona as his mistress. Thereafter the Appellant handed over Jane Nona to Jayaratna. The witness was grieved because Jayaratna was a labourer and he made a complaint to the proprietor of the estate, Piyadasa De Silva. In the course of such complaint he told Piyadasa that Muttusamy had killed his wife and child and had gone away and that the Appellant had buried them. He later made further statements to Nanayakkara and the Police. p. 140, l. 31. p. 142, l. 15.

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(E) Jane Nona deposed that after Muttusamy and his family disappeared the Appellant asked her to scrape and mud Muttusamy's house. A short time afterwards the Appellant made arrangements for her to be taken as the mistress of Jayaratna and she and Jayaratna went and occupied Muttusamy's hut. p. 158, l. 12.

p. 169, l. 13.

(F) Lucy Nona, the sister of Baby Nona, deposed that sometime previously she had gone to the estate to see her sister. The Appellant then told her that her sister had left the estate without his knowledge and that she could not go along the path leading to their hut owing to some obstruction.

p. 170, l. 38.

(G) Dr. P. K. Chanmugam, a Professor of Anatomy in the University of Ceylon, gave evidence regarding the bones which had been found on the estate. Some of these were the bones of an adult but it was not possible to identify the sex. The remains also included a milk tooth of a child under eight years of age. Both 10 the bones and the tooth showed signs of charring and burning.

p. 175.

(H) W. R. Chanmugam, Government Analyst of Ceylon, deposed as to the finding of bloodstains in Muttusamy's hut and also as to the hole in the wall and certain strands of hair which he had found in the hut. These hairs could have been left by a person who had fallen down and struck his head a glancing blow against the wall but there were no scientific tests to distinguish between male and female hair. He had further examined the pieces of wadding found behind Muttusamy's hut and a number of slugs also found in the neighbourhood of the hut which appeared to have come from 20 home-made cartridges. In cross-examination the witness agreed that the shot must have come direct and struck the wall outside having struck nothing on the way.

p. 177.

p. 189, l. 16.

p. 193, l. 24.

(I) Piyadasa De Silva, the proprietor of the estate, deposed that shortly before Christmas 1946 Banda complained to him that the Appellant had kept his daughter on the estate for two days and that she was now living with Jayaratna. He appeared to be very angry about it. Banda further said that Muttusamy had run away after killing his wife and child. This witness did not believe Banda and did not question the Appellant or think it 30 necessary to inform the authorities.

p. 197, l. 3.

(J) David Nanayakkara, the Manager of the Co-operative stores at Porawagama, deposed that Banda gave him certain information as a result of which, on the 1st February 1947, he went to Galle and saw the Assistant Superintendent of Police.

p. 199, l. 43.

(K) M. C. Mahamoor, Sub-Inspector of Police, deposed as to the finding of the bones, and certain other exhibits, and the wadding and slugs.

(L) When questioned on the 4th December 1947 the Appellant made the following statement :— 40

p. 259, l. 21.

" A labourer named Muttusamy was living in this house with his wife and child. On the morning of 18th October, 1946, Banda came and informed me that Muttusamy and others have bolted away. This was about 7 a.m. I came to the house alone and found it was tied with a coir string. I opened the door found nothing inside the house. All the goods had been removed by them. I kept quiet as he used to go like this and return

later. His accounts were not looked into. I do not know where they have gone to. I did not search for them. I informed my master some time later when he visited the estate about this. This is all I have to state."

10. At the conclusion of the case for the Crown counsel for the defence submitted that there was no case to go to the jury on the first count inasmuch as there was no evidence on which the jury would be entitled to hold that Muttusamy was dead. The Commissioner of Assize ruled that there was evidence upon which the jury were entitled, if they were so disposed, to come to the conclusion that Muttusamy was dead and that the Appellant caused his death with a murderous weapon.

pp. 210–214.
p. 214, l. 26.

11. The Appellant in evidence deposed that on the night in question he made his usual round of the estate and when he arrived at Muttusamy's hut Muttusamy was not there. He there found the blood stained bodies of Baby Nona and the child. He ran back to his own wadiya where he saw Jayaratna and Wilfred. Banda was summoned next day and taken to see the dead bodies. Both had marks like knife wounds. Banda then said to the Appellant " Sir, you were also on terms of intimacy with this woman and that might also come out in this affair and it is generally a bad state of affairs. We do not know who will get caught to this. We are bound to be involved in trouble and therefore the best thing is to eliminate the dead bodies and say that they have run away." It was then agreed to hide the whole affair and Banda and his son helped to bury the corpses. In December 1946 he gave Jane Nona to Jayaratna. He then found that Banda was very angry and he became frightened and thought he might be caught for the " burial " incident. Then he, Jayaratna and Edwin dug up the corpses and burned them. They also burned all the things they found in the hut except a cane box in which Baby Nona used to keep her clothes and jewellery and this box was removed by Banda. In cross-examination it was suggested to the Appellant that he had first murdered Muttusamy on account of a quarrel of which Wilfred had spoken and had then murdered Baby Nona and the child so that they should not be witnesses against him.

p. 217.
p. 233, l. 33.

12. The Commissioner's summing up to the jury included the following passages :—

" In the course of this trial the names of Muttusamy, Baby Nona and Hemalatha have transpired. Incidents connected with them and relating to them have been spoken before you. Even as laymen, I think, you will appreciate that all the matters now placed before you would have been led in evidence where the indictment contains one charge or 2 or 3 charges. In so far as I understand the matter, there is not the slightest additional weightage of embarrassment or prejudice to this accused by reason of the fact that he faces 3 charges in the indictment. It has been said that there never has been a case like this in Ceylon. That may be so, but I am bound to say that cases like this are not unknown in other parts of the world. The rules which apply in this case are precisely those which apply in every other criminal case tried in these courts.

No more, no less. That you have a responsibility no one can deny, but it is really no heavier than the responsibility which falls upon every other jury."

* * * * *

p. 245, l. 15.

" The accused has given evidence before you, and you will pay every attention towards anything he said. One who gives evidence on oath when he is on his trial is entitled to have consideration given to his evidence just as much as any other witness and to a special consideration on the ground that he is a man on trial for his life. If his evidence raises a reasonable doubt in your minds or if upon a review of the case as a whole, i.e. the evidence for the 10 prosecution and the evidence for the defence as well as the submissions on both sides of the Bar, there is a doubt in your minds as to his guilt on one or other of the charges, it is your duty to resolve that doubt in the accused's favour, and to acquit him."

* * * * *

p. 253, l. 13.

" At the same time I am bound to point out to you that on the evidence before you in this court you may think that that cane box with its contents both of clothing and jewellery did find its way to Banda's house after Muttusamy and family disappeared from the estate."

* * * * *

p. 259, l. 38.

" It is now for you to say in respect of each of these charges 20 whether it is proved beyond reasonable doubt. If it is proved you will say so and if there is any doubt the accused must have the benefit of that doubt. If there is no doubt, justice must be done."

At no stage did the Commissioner direct the jury to consider the second and third counts on the basis that they might acquit the Appellant on the first count or invite them to consider what their verdict should be on the 2nd and 3rd counts if he were so acquitted.

13. The Judgment of the Court of Criminal Appeal contained the following passage :—

p. 272, l. 10.

" In the present case the death of Muttusamy has not in our 30 opinion, been established beyond all reasonable doubt. The bones discovered have not been identified as belonging to him. It is possible that on the night of the murder of Baby Nona and Hemalatha Muttusamy escaped and is in hiding through fear. There was no evidence of police or other search for Muttusamy. He may be alive. In these circumstances as he is not proved to be dead the question as to whether the accused is the killer does not arise. The verdict of guilty on count 1 must be set aside."

As regards the 2nd and 3rd counts the Court said :—

p. 272, l. 24.

" The question is whether the evidence established these 40 charges beyond reasonable doubt. The only evidence against the accused being of a circumstantial nature it must be only consistent with his guilt and incompatible with innocence. We think it was."

* * * * *

“ Even without the evidence of the accused the facts elicited by the Crown point to one direction and in one direction alone and that is to say the guilt of the accused.” p. 273, l. 25.

The Court therefore allowed the appeal against the conviction on the first count but dismissed the appeals with regard to the 2nd and 3rd counts.

14. The Appellant respectfully submits that this appeal should be allowed and his said convictions quashed for the following amongst other

REASONS.

(1) Because the Court of Criminal Appeal failed to consider whether a reasonable jury, properly directed would without doubt have convicted the Appellant on the second and third counts after acquitting him on the first count.

(2) Because the Court of Criminal Appeal substituted itself for a jury and arrived at findings of fact based on a supposition which had never been put to the jury at the trial.

(3) Because the Commissioner failed to direct the jury, and the Court of Criminal Appeal failed to direct itself, that the evidence was consistent with the Appellant being merely an accessory after the fact to the murders of Baby Nona and the child.

(4) Because the Commissioner failed to direct the jury that, if (as he indicated) the principal witnesses for the Crown were all accessories after the fact, their evidence should be treated with great caution in the absence of independent corroboration in some material particular.

(5) Because the Commissioner failed to direct the jury in relation to the 2nd and 3rd counts separately from the first count.

(6) Because the Appellant was gravely prejudiced by joinder of three separate charges of murder in one indictment.

DINGLE FOOT.

COLVIN R. DE SILVA.

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The Solicitors' Law Stationery Society, Ltd., Law and Parliamentary Printers
Abbey House, S.W.1. WL2853-23522