[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Fernando, J.**

REGINA *v.* PINTHERIS *et al.*

APPLICATIONS 93-95 OF 1955

S. C. 12—M. C. Matara, 1,810

Conviction for murder—Grounds of appeal—Time limit for stating them—Strict compliance necessary—Court of Criminal Appeal Ordinance, No. 23 of 1938, ss. 4, 5 (1), 8 (1), 16.

Evidence—Burden of proof—"Reasonable doubt"—Misdirection.

(i) *Held* (by the majority of the Court), that, in the case of a conviction involving sentence of death, fresh grounds of appeal, in addition to those stated in the notice of appeal or application for leave to appeal, will not be entertained by the Court after the expiration of the time limit of fourteen days laid down in section 8 (1) of the Court of Criminal Appeal Ordinance.

(ii) The three prisoners were convicted of murder. The defence of the 1st and 3rd accused was that they were not present at the scene of the offence and took no part in it, while the defence of the 2nd accused was that he killed the deceased in the exercise of the right of private defence. Of the three accused, only the second gave evidence at the trial. He stated that he acted in self-defence and that the 1st and 3rd accused were not present at the scene.

In the summing-up, the Judge stressed that if the jury accepted the evidence of the 2nd accused that the 1st and 3rd were not present at the scene they had to acquit the 1st and 3rd accused. He did not, however, direct the jury that if the version of the 2nd accused raised reasonable doubt as to the presence of the 1st and 3rd accused these two had still to be acquitted.

Held, that even if the jury held that the burden resting on the 2nd accused in regard to his own defence had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence it was nevertheless possible that he raised a reasonable doubt as to the presence of his co-prisoners. The 1st and 3rd accused were therefore entitled to succeed in appeal on the ground of misdirection.

APPLICATIONS for leave to appeal against three convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *R. A. Kannangara* and *W. D. Thamotheram*, for the accused-appellants.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

2——J. N. B 49373-1,598 (10/55)

August 25, 1955. PULLE, J.—

The three prisoners, of whom the first is the father of the second and the third, were convicted on the charge that they did on the 7th November, 1954, commit murder by causing the death of one Ganhewage Samson and were sentenced to death. The case for the prosecution was that the death of the deceased was caused by a joint attack of the prisoners, of whom the first and second were armed with katties and the third with a mammoty. The defence of the first and the third was that they were not present at the scene of the offence and took no part in it, while the defence of the second was that he killed the deceased in the exercise of the right of private defence. The principal submission made on behalf of the first and third is that the learned Commissioner in his charge to the jury failed to differentiate their defence from that of the second thereby creating an impression on the minds of the jury that if they rejected the defence of the second they had perforce to convict the first and the third. In regard to the second prisoner it was urged that the manner in which a statement made by him to the Police was elicited in evidence was gravely prejudicial to his defence and amounted to a miscarriage of justice. At the close of the argument we set aside the convictions of the first and third prisoners and dismissed the appeal of the second and refused his application for leave to appeal and intimated to learned counsel that we would deliver our reasons later.

To understand the submissions made on behalf of the prisoners it is necessary to state the evidence in greater detail. According to the prosecution the events which led to the death of the deceased happened in two stages. According to the witness G. H. Peter, the elder brother of the deceased, he was returning from a boutique with a bag of flour and sugar and some articles along a path running over a field when he met the second prisoner. The latter had a katty and some cassava. The witness taxed the prisoner with having behaved improperly towards his sister Sopihamy who was married to one Sumathipala Abeyagunawardena. Words passed between the two and a blow with the katty injured the right knee of Peter. The bag of sugar and flour fell down and then ensued a tussle for the katty. In response to the cries of Peter, Sumathipala ran up to the spot, wrenched the katty and threw it into the field. Thereupon the second prisoner ran across the field over a ridge towards the direction of his house where he was living with his father, the first prisoner. Sumathipala asked Peter to remain at the spot and set out to make a complaint to the Police.

About fifteen or twenty minutes afterwards Peter says he saw the deceased first at a distance of about 100 yards and also the three prisoners. The prisoners were converging towards the deceased from a route different to that taken by the latter. About thirty feet away from where Peter was lying the prisoner closed in on the deceased. The first blow was dealt by the father with a katty on the head of the deceased. He was felled to the ground whereupon the second prisoner attacked with a katty and the third with a mammoty. When the two sisters ran up to the

deceased they were also set upon. Peter says he too went up with some difficulty. He was injured by blows struck by the second and third prisoners.

Of the prisoners only the second gave evidence. According to him there was only one incident in the course of which he clashed with both Peter and the deceased under circumstances different to what was deposed to by the prosecution witnesses. He says that in the course of the struggle with Peter he did not lose hold of the katty and succeeded in escaping with it and ran along the field for some distance and got on to the foot-path. He continued his story as follows :

" Then I met a certain man whom I could not recognise. He said, 'Take this fellow to be eaten'. He came towards me. I jumped into the field. He had a katty in his hand. After I escaped from Peter, Sumathipala and Sopihamy went away. That man aimed a blow at me. Then I also struck him with the katty. I cannot say how many blows I dealt. I gave him more than one blow. "

He went on then to say that Peter and others came up to the spot and he attacked them as well. Then he threw the katty into the field and went home where he asked his father to accompany him to the Police. He next proceeded to Waralla Police Station and made a statement at about 7 p.m. The contents of this statement were elicited in the circumstances which will be referred to later.

When the charge to the jury is examined there are directions of a general character to the effect that the burden rested on the prosecution to prove its case against each accused beyond reasonable doubt. The Commissioner also stressed in a number of passages that if the jury accepted the evidence of the second prisoner that the first and the third were not present at the scene they had to acquit the first and third. The complaint is that, while it was obvious that if the jury thought that the version given by the second prisoner was probably true they had to acquit the first and the third, the Commissioner did not direct the jury that if the version of the second prisoner raised a reasonable doubt as to the presence of the first and third these two had still to be acquitted and that the failure so to direct amounted to a misdirection resulting in a miscarriage of justice. It was submitted with considerable force that the frequency with which the jury were told that, if they considered the evidence of the second prisoner to be probably true, then the first and third were entitled to be acquitted may have created the impression that if they rejected the plea of self-defence set up by the second prisoner, then they had necessarily to convict all three prisoners of murder. It suffices to quote only two or three passages from the charge on which learned Counsel for the appellants based his submission :

" You consider the whole case and see whether there is any truth in the second accused's story. If you do not accept his story then

you reject it. If you accept it, on the other hand, then the first and third accused are not guilty."

"You will ask yourselves the question whether the prosecution story is true, that proof must be to a high degree of certainty, or whether the second accused's story is probably true. It is a matter for you to decide."

"It is now for you to decide whether he (the second prisoner) acted in the right of private defence. He had that right at that stage, if what he says is true, and if you accept that he acted in the right of private defence then the first and third accused will get off."

After the second prisoner had given evidence and closed his defence, the prosecution had on his own admissions fully discharged its burden as far as he was concerned and his conviction for murder was inevitable, unless the jury were satisfied that he had proved the existence of either exculpatory or mitigatory circumstances. The first and third prisoners, however, were not in like peril. The burden was still on the prosecution to satisfy the jury that they were present in the company of the second prisoner and took part in a concerted attack on the deceased. Even if the jury had rejected out of hand the plea set up by the second prisoner, they had still to be satisfied that they could with confidence accept the evidence of the prosecution witnesses implicating the first and third prisoners. If the jury held that the burden resting on the second prisoner had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence, it becomes obvious that while his defence had in law to fail, he had nevertheless succeeded in raising a reasonable doubt as to the presence of his co-prisoners. In this view of the matter the first and third prisoners were entitled to succeed in this appeal on the ground of misdirection. There was nothing so very compelling in the evidence called for the prosecution to have justified us in applying the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938.

It is common ground that the first information connected with this case was given to the Police by the second prisoner. That fact was elicited by the prosecution from the police officer who recorded his statement. In the course of his evidence in cross-examination he stated,

"The 2nd accused made a complaint to me. I recorded his statement. I did not take him into custody."

At this point the record reads,

"At this stage court asks the jury to retire and they do so. Court explains the implications of that question to the defence counsel and asks whether he is going to call the accused and produce the statement. Defence counsel gives an undertaking to put in the statement

and call the accused. Jury returns. Court explains to the jury that a statement or confession made by an accused person cannot be put in evidence during the prosecution case. He states that the Defence counsel has given an undertaking to call the accused and produce that statement."

In our opinion the learned Commissioner should not have apprised the jury of what took place in their absence, for it defeated the very purpose for which they were asked to retire. The reference to a confession by an accused person would have had dangerous repercussions if, as fortunately it did not happen in this case, the jury were in ignorance of the statement which was definitely non-confessional. Again, there was nothing in the evidence given by the police officer which necessitated an undertaking by counsel to produce that statement. Eventually he kept his undertaking and proved that statement through the same police officer. The procedure adopted to obtain evidence of that statement is irregular but having regard to the terms of that statement which was not challenged as being an incorrect record and which might legitimately have been used to contradict the evidence given by the second prisoner, we are of the opinion that no prejudice of any kind was caused to him. It is manifest that the jury rejected the plea of self defence and we have seen no reason to doubt the correctness of the verdict against him.

There remains to be considered the preliminary objection taken by learned Crown Counsel that the court should not entertain the additional grounds of appeal on which it was sought to argue this case. The date of the convictions was the 2nd August, 1955, and a notice of appeal and applications for leave to appeal in Form XXXIII dated the same day were lodged with the clerk of assize. The prisoners were defended by counsel and proctor whom they had retained and with them was associated the proctor who had been assigned to defend them. It would serve no purpose to pursue the question whether the lawyers whom he had retained should have advised them early in regard to the grounds of appeal. If the lawyer who is assigned certifies that he has drafted the grounds of appeal he is entitled to a fee but he is under no obligation by reason of the assignment to settle the grounds of appeal. The fact that learned counsel for the prisoners did not rely on a single one of the grounds appearing in the notice suggests that they received no advice from any of the lawyers who took part in their defence, a situation which, whatever be the reason, is much to be deplored.

This appeal was set down for hearing on Monday the 22nd August. On that day learned senior counsel stated he wished to urge fresh grounds of appeal and asked for an adjournment until the next sitting commencing on the 5th September. We intimated to him that we were not prepared to grant the adjournment but only the concession of placing the case at the bottom of the list. On the 23rd August when the case was reached at the point at which it was originally listed counsel handed

up to the court the fresh grounds of appeal. Crown Counsel had been informed orally on the 22nd evening of the new points. We accept the statement of counsel that the transcript of the evidence and the charge was not ready until late on Friday the 19th August but not as justifying an application to add fresh grounds.

The objection taken by the Crown that the court should not entertain fresh grounds was supported on the authority of *The King v. Bello Singho et al* [1]. In that case in which the appellants had been sentenced to death the notice of appeal was filed on the 25th September, 1947. A further ground of appeal was filed out of time on the 19th October, 1947, and at the hearing counsel for the appellants sought to raise yet another point to which an objection was taken and upheld. In the judgment reference was made to *Rex. v. Cairns* [2] in which counsel for the prisoner in a capital case asked for leave to add at the hearing misdirection to the grounds of appeal, though it was not mentioned in the notice. The court granted leave as it was a capital case. At the conclusion of the judgment the Lord Chief Justice referred with approval to *Rex v. Wyman* [3] in which Darling, J. said,

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

Apparently one of the later cases was *Rex v. Benjamin Adler* [4]. After referring to a number of cases decided by this court the learned President (Jayetileke, J.) said,

> "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 . . . . We think it is desirable that this Court should act upon the words of the Lord Chief Justice in *Rex. v. Cairns* [2], and insist on a strict compliance with the provisions of the Ordinance."

Dr. Colvin R. de Silva conceded that the case relied on by Crown Counsel was in point but argued that it was wrongly decided. The

[1] *(1947) 48 N. L. R. 542.*
[2] *20 C. A. R. 44.*
[3] *13 C. A. R. 163, 165.*
[4] *17 C. A. R. 105.*

substance of his argument is that there is nothing in the Ordinance which ties an appellant down to the grounds set out in the notice of appeal and that once grounds for setting aside the verdict exist, even though they be raised for the first time at the hearing, the provisions in section 5 (1) of the Ordinance make it mandatory on the Court to set aside the verdict, the words being, "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal".

The majority of us are unable to accept this submission. It is elementary that there is no right of appeal from a decision of a judicial or other tribunal, unless such a right is conferred by statute. It flows from the bounty of the legislature and, therefore, the same legislature can impose any restrictions it pleases on the exercise of that right and hence no argument can be validly addressed to a court to the effect that the restrictions might work harshly in any particular case.

The strictness with which procedural steps required by statute to constitute an appeal are insisted on is exemplified in the case of *Coldman v. Kade* [1] in which a person who had been convicted before a bench of justices handed in their presence to the clerk of the court an application signed by him requesting them to state a special case. The clerk handed the application to the justices who stated a case, even though the applicant did not conform to rule 52 of the Summary Jurisdiction Rules which required him to serve on each of the justices a copy of the application. The appeal came on for hearing before the King's Bench Division consisting of Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ. The respondent took the preliminary point that the court had no power to hear the appeal as the rule in question was mandatory in character and had to be strictly complied with. For the appellant it was contended that the procedure followed was sufficient, since the rule had been complied with in substance. In rejecting this argument the Lord Chief Justice said,

> "Counsel for the appellant raised the point that, though the rules have not been complied with in their literal sense, something has been done which is sufficient to satisfy the substance of the intention of those rules. Cases have been cited to us which show that the court, including the Court of Appeal, have taken a stricter view than that of these provisions. We think that the objection taken by counsel for the respondent is one that stands good on the strength of those decisions, *and that we have no power to hear this special case.*"

The case of *Cosmas v. Commissioner of Income Tax* [2] followed in *North Western Blue Line v. K. B. L. Perera* [3] is illustrative of the same principle. In *Re Shanoff v. Glanzer* [4] it was laid down that a rule governing service of notice of appeal from a decision must be strictly complied with and that otherwise the appeal court has no jurisdiction to hear the appeal. One is also familiar with several decisions of the court of appeal in Ceylon

[1] *(1945) 1 All E. R. 154.*
[2] *(1938) 39 N. L. R. 457.*
[3] *(1943) 44 N. L. R. 523.*
[4] *(1949) 1 D. L. R. 414.*

to the effect that where a procedural step in the course of perfecting an appeal is not taken within the prescribed time it has no jurisdiction to extend the period. Craies on Statute Law [1] states the position as follows :—

> "When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with."

Now the substantive right of appeal conferred by section 4 must be read with the procedure laid down in section 8 (1) which states,

> "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 a manner as may be directed by rules of court*, within fourteen days of the date of conviction."

In our opinion the "appeal" referred to in section 5 (1) is one which conforms to the requirements of the Ordinance. The Court of Criminal Appeal Rules, 1940, before the amendment published in *Gazette* No. 9,130 of 4th June, 1943, provided for two separate forms,—Form IV giving notice of appeal on questions of law and Form VI for leave to appeal "on the grounds hereinafter set forth". It is perfectly clear that in Form IV the questions of law had to be set out and in Form VI the grounds for applying for leave to appeal. Since the amendment referred to Forms IV and VI have been superseded by Form XXXIII modelled entirely on the English Form XXXIV which as a matter of practice is used in England in place of the statutory Forms IV and VI. Our Form XXXIII is now used whether the notice is one of appeal or of application for leave to appeal or both and space is provided for setting out the grounds of appeal or application.

It is clear from the rules and the forms that the grounds of an appeal or application are an integral part of a proper notice under section 8 (1) and there is nothing in the Ordinance to suggest the contrary. Section 16, on the other hand, indicates that a notice of appeal on law alone must contain the grounds. It provides that if it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily. This power has been conferred on the basis that the grounds of appeal must be set out in the notice, for otherwise neither the Registrar nor the court would be able to act under the section.

[1] *5th Ed. p. 246.*

Again, the Crown has a right of audience in every appeal. If a point of law is taken just before or during the hearing, a miscarriage of justice may result unless an adjournment is granted to the Crown to meet the new point. If the appellants' submission is correct he may take a new point as a matter of right at the adjourned hearing as well and this process may go on indefinitely until every conceivable point of law has been exhausted. Such a procedure could not possibly have been contemplated by the Legislature.

If an appellant, as in this case, who has been convicted of murder is allowed by the court to raise fresh grounds of appeal delivered after the appealable time it would in effect be granting an extension of time for giving notice of appeal. This is prohibited by section 8 (1) of the Ordinance the second paragraph of which reads,

> " Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Criminal Appeal. "

On this point the observations of Lord Reading in the case of *Tweynham* [1] are apposite. The Lord Chief Justice said,

> " If it were possible to extend the time it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the court and not give the notice until the last moment, in order to provide for a further extension of time. "

The English Act and the rules thereunder are in all material respects identical with ours. The English authorities especially *Rex. v. Cairns* [2] and our own are entirely inconsistent with the construction sought to be placed by learned Counsel for the appellant on section 5. A practice had grown up in England which we have followed of showing indulgence under exceptional circumstances. There is nothing in any of the cases to indicate that this indulgence was shown in the exercise of a judicial discretion to give relief to an appellant who has failed to give a notice of appeal conforming to the requirements of the statute. Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of fourteen days.

Convictions of the 1st and 3rd prisoners set aside.

Appeal of the 2nd prisoner dismissed.

[1] *15 C. A. R. 38.*

[2] *20 C. A. R. 44.*