[COURT OF CRIMINAL APPEAL.]

1942 *Present:* **Howard C.J., Keuneman and Cannon JJ.**

THE KING *v.* PEIRIS APPUHAMY *et al.*

*13—M. C. Dandagamuwa, 9,841.*

*Accomplice—Question of mixed fact and law for Jury—Duty of Judge to warn Jury as to necessity of corroboration—To explain the law as to what constitutes corroboration—What association with crime constitutes a person an accomplice—Criminal Procedure Code, ss. 244 and 245.*

[1] *43 N. L. R. 73.*

The question whether a person is an accomplice is for the Jury to decide.

It is the duty of the Judge to direct the Jury as to what association with the crime would constitute a person an accomplice.

If a person is an accomplice it is the duty of the Judge to warn the Jury that it would be unsafe to convict without corroboration and to explain to them the law as to what constitutes corroboration.

Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.

A witness who merely assisted in the disposal of the dead body but who did not take part in the perpetration of the crime is not an accomplice.

The learned Judge was justified in the circumstances of the case in commenting on the failure of the accused to offer an explanation of their conduct by giving evidence.

CASE heard by a Judge and Jury before 1st Midland Circuit.

*F. W. Obeyesekere* for both accused, appellants, who are also applicants in the application.

*G. E. Chitty, C.C.*, for the Crown.

June 8, 1942. HOWARD C.J.—

This is an appeal on a question of law and an application for leave under section 4 (*b*) of the Criminal Appeal Ordinance against the conviction of the appellants on charges of murder. The first point taken by Counsel for the appellants was that it was erroneous on the part of the learned Judge to leave the question of an accomplice as a question of fact to the Jury. On page 42 of the charge the learned Judge stated as follows:—

> "I ought to point out to you that a great deal will depend upon the view you take of the actual position of Aron Appuhamy in this case, whether in your opinion he is an accomplice or not. That is the question for you to consider, whether Aron Appuhamy was an accomplice or not—an accomplice, remember, in the murder, not in the disposal of the body of the man Jamis Appu."

So, in view of this passage, there can be no doubt that the learned Judge left the question as to whether Aron was an accomplice as a question of fact to be decided by the Jury. In support of his contention that this was a misdirection, Mr. Obeyesekere has cited the case of the *Queen Empress v. O'Hara*[1]. In this case, the trial Judge charged the Jury that they were not to convict upon the evidence of G., if satisfied that he was an accomplice and uncorroborated, but coupled the direction with a strong expression of opinion that G. was not an accomplice. It was held that this constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner's case. The judgment of Norris J., who was the trial Judge and also sat as a member of the Appeal Tribunal, stated as follows:—

> "A careful consideration of the arguments addressed to us has satisfied me that I ought to have told the Jury that G. was an accomplice, and there is no doubt in my mind that that misdirection must have very seriously prejudiced the prisoner."

[1] *I. L. R. 17 Cal. 642.*

In the judgment of Petheram C.J., we find the following passage :—

> "Had the Jury not been told that, in the opinion of the Judge, G. was not an accomplice, it may well be that, having heard his evidence as that of a person who had been in that character given a conditional pardon under section 337, and who had been twice warned in their hearing that the pardon was subject to revocation, they might, as asked to do by the Counsel for the prisoner, have so treated them in their own consideration of the case, and required corroborative evidence, satisfying to themselves, of some of the material particulars of his evidence."

This passage indicates that the misdirection arose in the trial Judge expressing his opinion that G. was not an accomplice. The trial Judge should have set out the facts with regard to his association with the crime and conditional pardon so that the Jury might have formed their own opinion as to whether he was an accomplice. The passage cited from the judgment of Norris J. merely indicates that this Judge thought he should have expressed his opinion that G. was an accomplice instead of stating that he was not one. This case, therefore, does not assist the contention of Mr. Obeyesekere and, in fact, as far as it goes, it is authority for the proposition that the question as to whether a person is an accomplice is one for the Jury to decide. That, in fact, this is the law appears from the following passage from the judgment of Isaacs L.C.J. in *R. v. Charles Cratchley* [1]:—

> "We have come to the conclusion that the second boy was not an accomplice. There was in our view no evidence that he had a guilty knowledge fit to be left to the Jury, though it is true that, if there was any evidence of it, it was for the Jury to say whether he had a guilty knowledge or not; consequently he was not an accomplice."

Apart from the two cases I have cited, we have also come to the conclusion that the learned Judge's direction on this point was correct after a consideration of sections 244 and 245 of the Criminal Procedure Code. Section 245 places on the Jury the burden of deciding questions of fact. Section 244 (1) (*d*) states that it is the duty of the Judge to decide whether any question which arises is for himself or for the Jury. Sub-section (2) gives the Judge the right to express his opinion upon any question of fact or any question of mixed law and fact. We are of opinion that the question as to whether Aron was an accomplice was one of mixed law and fact which was quite properly left to the Jury by the learned Judge under the provisions of sections 244 and 245 of the Criminal Procedure Code.

We have given careful consideration to the various other grounds raised in the appellants' notice of appeal. We do not consider there is substance in any of them. Our attention was invited to contradictions in the evidence of Aron. These contradictions were, however, before the Jury, who no doubt considered them and came to the conclusion that in spite of them reliance could be placed on his evidence. The question of the identification of the deceased by a photograph was immaterial if the evidence of Aron was acceptable to the Jury. There was no evidence on which the Jury could come to the conclusion that the appellants were

[1] *9 Cr. App. Rep. 233.*

guilty of a lesser offence than murder. We think that the learned Judge quite properly commented on the failure of the appellants to offer an explanation of their conduct by giving evidence. No case has been made in the proof of the assertion contained in the Notice of Appeal that the appellants did not have a fair trial. Apart from the grounds of appeal raised by Counsel for the appellants we have given careful consideration to one or two further matters which arise from the facts of this case. We think that it was not only the duty of the Judge to have left the question as to whether Aron was an accomplice to the Jury but also to have directed them as to what association with the crime would constitute him an accomplice. Further, if the Jury thought he was an accomplice, they should have been warned that it was unsafe to convict without corroboration and the law with regard to what constitutes corroboration should have been explained to them. It is also relevent to consider whether in fact there was corroboration. We have, therefore, been at pains to scrutinize the learned Judge's charge with a view to seeing whether it dealt with these aspects of the case. On pages 42–43 of the charge we find the following passage :—

> "If you accept that evidence, that he had not taken any part in the attack upon the man, then is he an accomplice in regard to the offence we are investigating, namely, the offence of murder ? There is no doubt, as Crown Counsel admitted, that he is an accomplice in respect to another offence, namely, the offence of disposing of evidence in order to screen an offender ; but that is not the offence we are investigating here. The offence we are inquiring into is the offence of murder, and if you believe the evidence of Aron Appuhamy, that he did nothing more than sit some distance away, an unwilling spectator of what was happening, then can you say he was an accomplice ? But, Gentlemen of the Jury, perhaps in view of the fact that he admittedly took part in the disposal of the body of the man, if a man had been killed, you will ask yourselves the question whether you can, beyond reasonable doubt, accepting the evidence of Aron Appuhamy, that he took no more, no greater part in this transaction than he says he did, whether he took no part in the actual attack upon the man. If, in your view, he was himself a party to the attack upon the man, which resulted in the death of the man, and if he took part with the others in the furtherance of the common intention of both, then, if that is your view, or if you have a reasonable doubt as to whether he took such a part yourselves, it would be safer for you to treat the evidence of Aron Appuhamy as the evidence of an accomplice."

We are of opinion that the learned Judge gave a correct disquisition of the law in regard to the manner in which the Jury should decide as to whether Aron was an accomplice. In this connection, our attention was invited to the case of *Ramaswamy Gounden v. Emperor*[1]. The case against the appellant in this appeal depended entirely upon the evidence of the first witness, who after the murder had assisted in the disposal of the body. It was held by the majority of the Court that the witness was not an accomplice in the crime for which the accused was charged, inasmuch

[1] *I. L. R. 27 Mad. 272.*

as he had not been concerned in the perpetration of the murder itself. Even assuming that after the murder had been committed the witness had assisted in removing the body to the pit and that he could have been charged with concealment of the body under section 198 of the Penal Code that was an offence perfectly independent of the murder and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was, therefore, not an accomplice and the rule of practice as to corroboration had no application to the case. It is difficult to distinguish the facts in the present case from those in the case I have cited. In these circumstances, it was open to the Jury to accept the evidence of Aron without applying the rule of practice as to corroboration.

The next question requiring consideration is whether if the Jury deemed Aron to be an accomplice they were given the proper warning. that it was unsafe to convict without corroboration. The necessary warning is to be found on pages 43-44 of the charge, when the learned Judge states as follows:—

> "The position then in law is this. You can, if you believe the evidence of an accomplice, regard him as an accomplice none the less so implicitly that you feel you can act upon that evidence. You are entitled to act upon the evidence and a conviction upon that evidence is not illegal. But just as that is a rule of law, it is a rule of practice in all Courts for a Judge to caution jurors about the evidence of an accomplice and to point out to them that it is unsafe to act upon the evidence of an accomplice unless the evidence is corroborated in material particulars. Once a Judge has drawn the attention of the Jury to the fact that it is not safe to convict upon the evidence of an accomplice unless it is corroborated, if the Jury after careful consideration are prepared, notwithstanding the caution addressed to them by the Judge, to act upon the evidence of the accomplice, even if it is not corroborated in material particulars, the Jury are quite free to do that; but, it is always better to see whether the evidence of an accomplice is corroborated,
>
> "Therefore, Gentlemen of the Jury, one question which you have to consider seriously is, in your opinion is Aron Appuhamy an accomplice or not an accomplice in regard to this offence of murder ? If he is not an accomplice, and if that is your opinion, you are entitled to act upon his evidence even if it is not corroborated: but if he is an accomplice, you are nevertheless entitled to act upon his evidence if you believe it so implicitly as to feel that you are able to act upon his evidence, despite the caution I have addressed to you that it is unsafe to act upon the evidence of an accomplice unless corroborated. You are entitled to do that, but if you treat him as an accomplice and you say to yourselves, 'We are not disposed to act upon his evidence, unless he is corroborated', then you will go on to examine the matters which have been put before you in order to see whether in these matters you can find corroboration in material particulars."

The only points that remain for consideration are (*a*) whether the learned Judge gave a proper direction to the Jury as to what constituted

corroboration, and (*b*) whether there was in fact corroboration. With regard to (*a*) I need only refer to page 45 of the charge, where the learned Judge says :—

> " You must have corroboration which connects the accused persons with the crime and which brings the accused persons in contact with the accomplice. "

Also to a passage on page 55, where it is stated :—

> " You will then go on to see whether you have sufficient corroboration to satisfy you that these accused were in contact with Aron Appuhamy that night ; and, secondly, whether they were connected with the offence that night. "

What amounts in law to corroboration was given exhaustive consideration by the Court of Criminal Appeal in the case of *R. v. Baskerville*[1] Lord Reading, in his judgment, stated as follows :—

> " We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. "

Later on in his judgment, Lord Reading says that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. The learned Judge then states that a good instance of this indirect evidence is to be found in *Reg. v. Birkett*[2]. In that case, the prisoner was indicted for receiving stolen sheep. The evidence consisted of the statement of an accomplice and to confirm it it was proved that a quantity of mutton, corresponding in size with the sheep stolen, was found in the prisoner's house. Patteson J. said : " If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient . . . but here we have a great deal more ; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the Jury ".

We are of opinion that the direction of the learned Judge that the Jury must look for evidence that not only brought the accused into contact with the accomplice but also connected them with the crime, complied with the requirements formulated in *R. v. Baskerville* (*supra*) and *Reg. v. Birkett* (*supra*).

I will conclude this judgment by a brief reference to the corroborative evidence before the Jury. In this connection, it is relevant to bear in mind the following passage from the *7th Edition of Wills on Circumstantial Evidence, pp. 432–433* :—

> " If it be proved that a party charged with a crime has been placed in circumstances which commonly operate as inducements to commit the

[1] *(1916) 2 K. B. 658.* [2] *8 C. & P. 732.*

act in question—that he had so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime—that he has possessed the requisite means and opportunities of effecting the object of his wishes—that recently after the commission of the act he has become possessed of the fruits or other consequential advantages of the crime—if he be connected with the *corpus delicti* by any conclusive mechanical circumstances, as by the impressions of his footsteps, or the discovery of any article of his apparel or property at or near the scene of the crime—if there be relevent appearances of suspicion connected with his conduct, person, or dress and such as he might reasonably be presumed to be able, if innocent, to account for, but which, nevertheless, he cannot or will not explain—if, being put upon his defence, *recently* after the crime, in circumstances raising an adverse presumption, he cannot show where he was at the time of its commission—if he attempts to get rid of the effect of those circumstances by false or incredible pretences, or by endeavours to evade or pervert the course of justice—the concurrence of all or of many of such cogent facts, apparently inconsistent with the supposition of his innocence, in the absence of facts leading to a counter-presumption, reasonably and naturally leads to but one conclusion—the moral certainty of his guilt; if not with the same kind of assurance as if he had been seen to commit the deed, as least with all the assurance which the nature of the case and the vast majority of human transactions admit."

We are of opinion that there was ample corroboration of Aron's story. The fact that the first appellant was seen travelling in a cart requisitioned for the disposal of the body of the deceased, in our opinion not only confirms the accomplice as to matters connected with himself but also connects the first appellant with the crime. Moreover, the appellants, although entitled to testify on their own behalf, failed to do so and explain their presence in the cart. In these circumstances, the Jury were entitled to draw an unfavourable conclusion, as was stated by Lord Ellenborough in *R. v. Lord Cochrane & Others*[1] in the following passage:—

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong *prima facie* case has been made out, and when it is his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.".

For the reasons I have given, the appeals and applications are dismissed.

*Appeals dismissed.*

[1] *Gurney's Rep. P 479.*