[COURT OF CRIMINAL APPEAL]

1954 *Present :* **Rose C.J. (President), Gratiaen J. and Sansoni J.**

NAMASIVAYAM, Appellant, *and* THE QUEEN, Respondent

APPLICATION No. 35

S. C. 20—M. C. Jaffna, 26,940

Trial before Supreme Court—Indictment—Power of Judge to quash it—Power of Judge to stop a case—Effect of failure to exercise it—Separate trial of co-accused—Stage at which application for it should be made—Criminal Procedure Code, s. 234 (1).

An Assize Judge has no power to quash an indictment before the case for the prosecution is closed merely because he anticipates that the evidence would not support the charge.

Although the decision whether or not to stop a case against any particular accused person under section 234 (1) of the Criminal Procedure Code rests primarily with the presiding Judge, an erroneous decision that a *prima facie* case had been made out against an accused person does not constitute an illegality which vitiates the trial of his co-accused.

Where an accused person desires to call, as a witness for the defence, a person jointly indicted with him, the proper course for him to take is to invite the Judge at the outset to order separate trials.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *M. M. Kumarakulasingham* and *V. Ratnasabapathy*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Crown.

May 25, 1954. GRATIAEN J.—

The appellant and two others were jointly indicted with the murder of a man named M. Vaithilingam Chettiar, the case for the Crown being that the appellant had directly committed the offence, whereas the others were vicariously responsible for what he had done in pursuance of the common intention of them all. The appellant was convicted of murder, but verdicts of acquittal were returned in favour of the other accused. At the conclusion of the argument we affirmed the appellant's conviction but stated that the reasons for our decision would be pronounced at a later date.

After the accused persons had pleaded to the indictment, the jury were empanelled and Crown Counsel opened the case for the prosecution. Counsel for the defence, who at that stage represented all the accused, then moved that the case against the 2nd and 3rd accused be withdrawn *in limine* from the jury because the opening speech for the Crown seemed to indicate that no evidence of common intention (the only suggested basis of liability) would be available against them. This submission was

rightly rejected as premature, and the trial then proceeded. A presiding judge has no power to quash an indictment merely because he anticipates that the evidence would not support the charge—*Ex parte Downes* [1].

During the trial, arrangements were made for the separate representation of the 2nd and 3rd accused persons in view of a possible conflict between their defences and that of the appellant.

At the close of the case for the prosecution, the learned judge, who presumably considered at that stage that there was a case for each accused to meet, called for a defence. In the course of his charge to the jury, however, —i.e., after the appellant had led some evidence and after the closing speeches of Counsel—he directed them to return a verdict acquitting the 2nd and 3rd accused as there was "no evidence" of common intention against them. He also gave them adequate and proper directions as to the only basis on which the conviction of the appellant for murder (or in the alternative, a lesser offence) would be justified.

The summing-up with regard to the case against the appellant was free of misdirection, and the verdict against the appellant, who had not given evidence on his own behalf, is not open to criticism as "unreasonable". The main ground of appeal was, however, in the following terms :

> "By reason of the fact that the 2nd and 3rd accused were held as accused after the close of the case for the prosecution without being discharged, as they should have been, the appellant was deprived of his right to call the 2nd accused into the witness box to establish the fact that it was he and not the appellant who inflicted the injuries on the deceased *in accordance with the statement made by the 2nd accused to the police.*"

Mr. Chitty conceded that an application had not been made either on behalf of the appellant or on behalf of the 2nd and 3rd accused at the close of the evidence for the prosecution that there was no case for the latter to meet. Nevertheless, he argued, it was the judge's duty to direct the jury at that stage to return a verdict of "not guilty" in their favour. While we agree that the decision whether or not to stop a case against any particular accused person under section 234 (1) of the Criminal Procedure Code rests primarily with the presiding judge, we certainly reject the view that an erroneous decision that a *prima facie* case had been made out against an accused person could ever constitute an illegality which vitiates the trial of his co-accused. Besides, although the evidence of common intention against the 2nd and 3rd accused in the present case was weak, there was in fact sufficient evidence to justify the decision to call upon them for their respective defences. Indeed, the ultimate direction "as a matter of law" that there was "no evidence" against them was unduly favourable to them. But that is not a circumstance of which the appellant has cause to complain.

In this view of the matter, the entire foundation of the appellant's ground of appeal disappears. If the appellant had intended to call the 2nd accused as his witness, the proper course to have adopted was to invite the judge at the outset to order separate trials. *Archbold*

[1] *(1953) 3 W. L. R. 586.*

(*32nd Edn.*) *p. 53* mentions, as one of the reasons which would justify a discretion to order separate trials, a situation where one accused person desires to call for the defence a person jointly indicted with him. No such application was made on the applicant's behalf, nor was an intimation made to the presiding judge at any stage that the appellant might possibly be prejudiced (as he now says he was) if the trial took a course which would prevent him from calling the 2nd accused as a compellable witness to support his defence. Indeed, the appellant seems to be unduly optimistic in assuming that, if the 2nd accused had implicated himself in the witness box as the person who actually stabbed the deceased, such evidence would have been "*in accordance with the statement made by the 2nd accused to the police*". We have examined this statement on which the appellant had apparently hoped to rely, and it is quite clear that the 2nd accused said nothing to the police which either implicated himself or exonerated the appellant of responsibility for the stabbing.

For these reasons we made order dismissing the appeal and affirming the conviction.

Appeal dismissed.