

## [COURT OF CRIMINAL APPEAL]

1950 Present : Nagalingam J. (President), Gratiaen J. and Palle J.

GUNAWARDENE *et al.*, Appellants, and THE KING, Respondent

Appeals 39-40, 42-44 of 1950 with Applications 80-81, 83, 85-86

*S. C. 24—M. C. Ratnapura, 16,250*

*Court of Criminal Appeal—Accomplice—Misdirection as to meaning of term—Conviction vitiated—Divided verdict—Applicability of proviso to section 5 (1) of Court of Criminal Appeal Ordinance, No. 23 of 1938.*

A guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had been planned.

Held further (by majority of Court), that the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict, unless the evidence against the accused is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse.

**A**PPPEALS, with applications for leave to appeal, against certain convictions in a trial before a Judge and Jury.

*M. M. Kumarakulasingham*, with *C. M. Dharmakirti-Pieris*, for the 1st and 2nd appellants.

*M. M. Kumarakulasingham*, with *A. B. Perera* and *T. B. Dissanayake*, for the 3rd appellant.

*M. M. Kumarakulasingham*, with *T. B. Dissanayake*, for the 4th appellant.

*M. M. Kumarakulasingham*, with *Austin Jayasuriya*, for the 5th appellant.

*H. A. Wijemanne*, Crown Counsel, with *A. C. M. Ameer*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

November 13, 1950. GRATIAEN J.—

There were six accused in this case. They were charged (1) with the offence of conspiracy to cause the death of two persons named Don Chandradasa Samarasinghe Appuhamy and Pitigala Arachchillage Simon Singho, in pursuance of which conspiracy both persons were in fact murdered; (2) with the murder of the said Don Chandradasa Samarasinghe Appuhamy; (3) with the murder of the said Pitigala Arachchillage Simon Singho; (4) alternatively to the second count, with abetment of the murder of Don Chandradasa Samarasinghe Appuhamy; (5) alternatively to the third count, with abetment of the murder

of Pitigala Arachchillage Simon Singho. The alternative charges of abetment were withdrawn in the course of the trial. On the outstanding charges the 6th accused was unanimously acquitted by the jury of the charge of conspiracy, and the other five accused (who are the appellants) were found guilty of conspiracy by a divided verdict of 5 to 2. No verdict on either of the charges of murder has been recorded, but it is not necessary for the purposes of the present appeals, which relate solely to the convictions on the charge of conspiracy, to decide what consequences result from the omission on the part of the jury to comply with the imperative requirements of section 248 (1) of the Criminal Procedure Code.

One of the principal witnesses called for the prosecution was the witness Maddumage Dias, and there is no doubt that his evidence, if acted upon by a jury properly directed, points strongly to the guilt of the appellants. Certain other witnesses were called to support Dias' version of the events which took place during the crucial period preceding September 23, 1949, on which date Don Chandradasa Samarasinghe Appuhamy and Pitigala Arachchillage Simon Singho were killed. The Jury were not, however, invited by the learned Judge to consider whether, apart from the evidence of Dias, the guilt of the accused was established by the evidence of those other witnesses alone.

It is necessary to refer only to the main ground of appeal which was urged before us. Admittedly, the circumstances in which Dias claimed to be able to testify to certain incidents alleged to have taken place during the crucial period September 19 to 23, 1949, were such as prominently to raise the question whether his evidence should be regarded as that of an accomplice. The learned Judge very properly directed the jury that they should give their careful consideration to the question whether Dias was in fact an accomplice, and the jury were cautioned as to the manner in which the evidence of an accomplice should be assessed. Counsel for the appellants contends, however, that the following passages in the learned Judge's charge were likely to have confused the jury on the matters to be taken into account by them in deciding whether Dias should be regarded as an accomplice:—

1. " You will have to ask yourselves, gentlemen of the jury, whether in the circumstances of this case Dias is an accomplice or not. You would look at it this way; to what extent did Dias identify himself with the conspiracy on that count? How far did he go? What was his participation? Did he go so far as to make him a guilty associate? He tells you that on that last fateful day he turned back. If he was the only person who said that you might have been very doubtful. But Gunasekera also says that he turned back. In those circumstances would " you say that he was a guilty associate in either of the murders? "
2. " About the meeting of Gunasekara and Piyadasa on the 23rd he (i.e. Dias) said that when he met them he took advantage of the fact of meeting Gunasekara to stay behind. Gunasekara says he actually stayed behind. If that is so, you will ask yourselves, ' did Dias' part in the conspiracy stop at that point? If so, is he an accomplice? ' "

After very careful consideration we have come to the conclusion that this complaint is justified. It seems to us that these passages (*and particularly the second of them*) might well have misled the jury into thinking that they need not regard Dias as an accomplice if, in their view, he had been a guilty associate in the original plot to cause the death of Appuhamy and Simon Singho but was not a guilty associate in the actual commission of the murders. The correct position, of course, is that the jury should have approached the evidence of Dias with caution even if they believed him to be an accomplice in respect of the offence of conspiracy alone. A guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murders which had been planned.

In our opinion the passages which I have quoted from the learned Judge's charge amount to a misdirection which vitiates the conviction unless, in accordance with the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, we can hold that no substantial miscarriage of justice has actually occurred. The majority of the Court have come to the conclusion that this is not a case to which the proviso should be applied. As an appellate tribunal, we lack the advantage of having seen and heard the witnesses for ourselves, and we are not convinced that the evidence in the case was so "convincing, cogent and irresistible" (*R. v. Lewis*<sup>1</sup>) that "no reasonable jury would or could have come to any other conclusion" than that all five accused are guilty. (*R. v. Haddy*<sup>2</sup>; *Stirland v. Public Prosecutor*<sup>3</sup> and *R. v. Wijedasa Perera et al.*<sup>4</sup>.) It is important to remember that at the trial two of the jurors did not return a verdict against the appellants, and were presumably not prepared to act on the evidence for the prosecution. In our opinion the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict unless the evidence against the accused is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse.

We are all agreed that the evidence in the case, if accepted by a jury upon proper directions, was evidence upon which the accused might reasonably have been convicted. We accordingly order that the conviction on the charge of criminal conspiracy be quashed and that the appellants be re-tried on this count. We express no opinion as to whether it is open to the Crown to claim that the appellants should also be tried afresh on the 2nd and 3rd counts on which no verdict was returned by the jury at the conclusion of the original trial.

*Re-trial ordered.*

<sup>1</sup> (1937) 26 Cr. A.R. at p. 113.

<sup>2</sup> (1944) 1 A.E.R. 319.

<sup>3</sup> (1944) 2 A.E.R. 13.

<sup>4</sup> (1950) 51 N. L. R. 29.