

[COURT OF CRIMINAL APPEAL.]

1946 Present : Wijeyewardene J. (President), Cannon J.
and Canekeratne J.

THE KING *v.* CASSIM *et al.*

Appeal No. 52, with Applications 195, 196 and 198.

S. C. 57—M. C. Galle, 50.

Evidence—Hearsay evidence led on material point—Jury invited to consider all the evidence, which included the hearsay evidence—Probability of prejudice to accused by such direction.

Where hearsay evidence formed part of the evidence upon which the Jury were invited to decide a vitally important question which arose in the case—

Held, that it was likely that the Jury were influenced by the reference to the hearsay evidence.

APPEAL, with applications for leave to appeal, against three convictions in a trial before the Supreme Court.

H. V. Perera, K.C. (with him *J. Fernandopulle*), for the second accused in Appeal No. 52 and Application No. 195.

F. A. Hayley, K.C. (with him *H. W. Jayewardene*), for the third accused in Application No. 196.

H. W. Jayewardene, for the first accused in Application No. 198.

H. A. Wijemanne, C.C., for the Crown in Appeal No. 52.

Cur. adv. vult.

December 12, 1946. WIJEYWARDENE J.—

The first accused was charged with attempting to commit murder by causing the death of one Mohammadu and the second and third accused were charged with abetting the first accused. All the accused were convicted and each of them was sentenced to six years' rigorous imprisonment.

The first accused has applied for leave to appeal against the sentence and the third accused for leave to appeal against conviction and sentence. We refuse those two applications.

The second accused has appealed against the conviction on questions of law and has also applied for leave to appeal against the sentence and against the conviction on matters other than law.

According to the evidence given by Mohamadu, there was some unpleasantness between him and his father-in-law, the second accused, over certain money transactions. In November, 1945, Mohamadu caused his Proctor to send a letter of demand to the second accused for Rs. 4,000. On December 24, the second accused sent him a message through one Samath inviting him to meet the second accused at the latter's residence on the following day between 2 and 4 p.m. When he went there at the appointed time, the second accused offered him a seat in the sitting room and said, "It is useless our going to Court. I will settle all matters today.

I will bring a lawyer". The second accused then went to the verandah, giving him the impression that the second accused wanted to see if the lawyer was coming. The second accused returned to the sitting room within a few minutes and sat close to him. Immediately afterwards, the third accused came and with the active assistance of the second accused held him down, while the first accused "rushed" from the direction of the verandah and stabbed him once on the chest. He released himself from the grip of the second and third accused and stood up when these two accused ran away. He walked up to the gate of the compound and laid himself on the ground when Azeez, the Crown witness, came there. Pointing to the first accused who was close by he told Azeez, "Father (first accused) stabbed me while Cassim (second accused) and Sameen (third accused) held me". Azeez put him into a rickshaw and took him to the Police Station and then to the Hospital.

Azeez who is a tenant of Mohamadu was called as a witness by the Crown. He said that the second accused came to his house that afternoon—about fifty yards from the second accused's house—and asked him "to come and intervene" as Mohamadu "was creating a disturbance". He went to the gate of the second accused's compound, when Mohamadu pointed to the first accused and said, "This man stabbed me". Just then, one Sheriff came and both he and Sheriff accompanied Mohamadu to the Police Station and the Hospital. According to Azeez, it was when Mohamadu had gone about a quarter of a mile from the second accused's house that he said that the second and third accused held him down when the first accused stabbed him. Under cross-examination, Azeez admitted that he made two statements to the Police that day—a short statement when he accompanied Mohamadu to the Police Station and a longer one when he returned to the Police Station after leaving Mohamadu at the Hospital. Azeez admitted further that he did not mention to the Police in either of those statements the information given to him by Mohamadu implicating the second and third accused.

The Crown did not call Sheriff as a witness at the trial, though he was called as a witness for the prosecution at the non-summary inquiry. Sheriff who was called as a witness by the second accused said that he was close to Azeez at the second accused's gate when Mohamadu said, "This man stabbed me". He did not say that Mohamadu made a statement relating to second and third accused on the way to the Police Station. It was not even suggested by the Crown Counsel in cross examination that he had made a statement either at the Police Station or in the Magistrate's Court to the effect that Mohamadu mentioned to him the names of the second and third accused at any time that day.

The defence of the second accused was that Mohamadu came to his house that day unexpectedly and then created a disturbance questioning him about a petition. The second accused ran out and told Azeez and Sheriff "my son-in-law has come there and is creating a disturbance Please come". Azeez and Sheriff went to his compound and he followed them when he saw Mohamadu injured and the first accused standing close by, with a knife in his hand. He denied that he sent Samath to Mohamadu inviting Mohamadu to come that day.

The Counsel appearing for the second accused raised a number of points in the course of his argument but I think it sufficient to consider only two of those points.

The first point arises in respect of the evidence which Mohamadu was permitted to give, namely, that Samath brought a message from the second accused inviting him to the second accused's house. The Crown did not call Samath. The only evidence on behalf of the defence of the three accused on this point is the denial of the second accused that he sent a message by Samath. The evidence, therefore, of Mohamadu that Samath brought a message from the second accused was hearsay. In the course of his charge to the Jury the learned trial Judge said—

“That brings you ultimately to this most important question, that is to say, the question whether on all that you have heard and seen in this case you think this is a case in which the injured man came there unexpectedly to create a disturbance, or whether this is a case, as the injured man himself says, he came there by appointment.”

Clearly, the question mentioned therein is whether Mohamadu's arrival at the house of the second accused was expected or unexpected by the second accused. If the second accused had, in fact, sent a message by Samath there could be no doubt that Mohamadu's visit was arranged and expected by the second accused. That is a vitally important question as that would prove that the second accused deliberately planned to get Mohamadu to his house that afternoon. That would be an incriminating item of evidence against the second accused on the charge of abetment since the case of the Crown was, as pointed out in the charge, that the second accused abetted the first accused by “engaging in a conspiracy” and “intentionally aiding” the first accused. Through an oversight the Jury was invited to decide that question by a consideration of all the evidence heard by them and that would include the hearsay evidence referred to.

I shall now proceed to consider the second point. It will be seen from the summary of the evidence given above that the statement of Mohamadu that he mentioned to Azeez the names of the second and third accused, as he was lying injured at the second accused's gate, is contradicted by Azeez who said that the statement was made sometime after when Mohamadu was being taken to the Police Station. The second accused relied on the omission of Azeez to make any reference to the second accused in the statements to the Police to show that at no time Mohamadu had mentioned the name of the second accused to Azeez. The second accused relied also on the evidence given by Sheriff. It was in these circumstances that the Proctor for the second accused drew the attention of the trial Judge at the close of his charge to the Jury to the fact that he had omitted to refer to the evidence of Azeez and Sheriff and the statements made by Azeez to the Police as disproving the evidence of Mohamadu that he mentioned the name of the second accused to Azeez or Sheriff. The learned trial Judge, thereupon, said—

“On no occasion, in no statement, did Azeez say the parts played by the second and third accused were these, but then you will bear in mind, gentlemen, that in an emergency such as this people are

generally concerned—I mean unless people are very careful to cross their t's and dot their i's—with the main incident, who stabbed, and that is the way in which the Crown says this happened. But the fact remains, as was elicited I think in the evidence, that the injured man made a dying deposition that night in which the second and third accused were implicated, and that is why the Police arrested the second accused and were in search of the third accused."

Now the dying deposition was not in evidence in the case. The only relevant reference to the dying deposition is in the evidence of the Inspector of Police who said—

"It is only as a result of the dying deposition of Mohamadu that I obtained a warrant against the third accused."

It would thus be seen that the reference in the charge to the Jury to the dying deposition is incorrect so far as it relates to the second accused.

This is a case with peculiar features as stated by the learned trial Judge and we think it likely that the Jury may have been influenced against the second accused by the reference to the hearsay evidence of Samath and the statement with regard to the dying deposition and may thus have found an explanation of the "peculiar features" and reached a decision against the second accused.

We would, therefore, quash the conviction of the second accused and direct his re-trial.

Convictions of first and third accused affirmed.

Conviction of second accused set aside and re-trial ordered.

