

[COURT OF CRIMINAL APPEAL.]

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

THE KING v. GUNARATNA *et al.*

62-65—M. C. Kandy, 15,003.

Circumstantial evidence—An aspect of—Prosecution evidence pointing to guilt of accused—Onus on accused to give innocent explanation of such evidence.

In a case of circumstantial evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.

The Jury are entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt.

A PPEALS by four accused against certain convictions by a Judge and Jury.

N. Nadarajah, K.C. (with him *S. W. Jayasuriya*), for first accused, appellant.—Counsel analysed the facts and argued that the evidence against the appellant was entirely circumstantial. Even if the prosecution evidence is believed in its entirety, the guilt of the appellant cannot be presumed as the circumstances do not preclude an innocent user of the car, particularly as it was a hiring car. There was therefore no case to go before the Jury. See *R. v. Hodges*¹, *R. v. Taylor*², *Emperor v. Browning*³

The case against the appellant was one of suspicion only. Although the Judge's charge may be fair, where the verdict is unreasonable and it is not safe to convict this Court will quash the conviction. See *King v. Abeywickrama*⁴, *King v. Mustapha Lebbe*⁵, *King v. Pabilis et al*⁶, *King v. Tikiriya*⁷, *R. v. Bown*⁸, *R. v. Dibble*⁹, *King v. Appahamy*¹⁰, *King v. Velupillai*¹¹.

H. W. Jayawardene, for third accused, appellant.—Counsel analysed the evidence against the third accused and argued that the evidence against him was not sufficient to rebut the presumption of innocence. He contended that the Judge should have withdrawn the case from the Jury. He cited *R. v. Dibble and Williams*¹², *King v. Arnolis*¹³, also *Wills on Circumstantial Evidence*, (7th Ed.) pp. 323, 326 and 379-380.

Second and Fourth accused, appellants in person.

T. S. Fernando, C.C., for the Crown, pointed to the evidence against each of the appellants and argued that the second accused was in actual control of the car X 6159, that the first and third accused were in joint possession of that car along with the second accused, and that the 4th accused was in constructive possession thereof.

¹ 168 E. R. 1136.² (1928) 21 Cr. App. R. 20.³ 18 Cr. L. J. (India) at 483.⁴ (1943) 44 N. L. R. 254.⁵ (1943) 44 N. L. R. 505.⁶ (1944) 45 N. L. R. 541.⁷ (1944) 45 N. L. R. 474.⁸ (1940) 28 Cr. App. R. 141.⁹ (1908) 1 Cr. App. R. 155.¹⁰ (1945) 46 N. L. R. 128.¹¹ (1945) 46 N. L. R. 424.¹² (1908) 1 Cr. App. R. 155.¹³ (1943) 44 N. L. R. 370.

The action of the Judge in not withdrawing the case from the Jury is correct and the verdict is not unreasonable. The force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain—*Wills on Circumstantial Evidence* (7th Ed.) p. 109.

Counsel also cited *Regina v. Exall*¹, *R. v. Simpson*², *R. v. Crooks*³, and referred to the dictum of Lord Ellenborough in *R. v. Lord Cochrane*⁴ referred to in 41 N. L. R. at p. 344.

N. Nadarajah, K.C., in reply.—Joint possession was not the case for the Crown. If it was, there was serious misdirection in that no direction about possession was given to the Jury. It cannot be said that the first accused was in possession of the stolen articles—*Excise Inspector, Kandy, v. Punchi Mahatmaya*⁵; *Ponnachipillai v. De Silva*⁶; *Muttu Banda v. Weerasekere*⁷; *R. v. Crane*⁸.

Cur. adv. vult.

March 25, 1946. CANNON J.—

The four appellants were indicted on charges of breaking into the garage of Dr. S. P. Wickremasinghe, Lady McCallum road, Kandy, on the night of June 23, 1944, and stealing tyres and tools, and of breaking into the garage of Mr. J. W. Wickremasinghe, Peradeniya road, Kandy, on the same night and stealing five wheels, tyres and a wheel-brace.

The evidence was that a Vauxhall 14 h. p. hiring car, X6159, belonging to the fourth accused, was seen on the morning of June 23, going towards Kandy from the direction of Colombo with five or six unidentified persons. In the early afternoon it passed Dr. Wickremasinghe's garage in Lady McCallum road three times and again at about 10 p.m. It was also seen at Katugastota, and at about 5.30 p.m. it stopped outside an hotel at Gampola. On each of these occasions several people were in the car, and on one of the earlier times when it passed Dr. Wickremasinghe's garage, the first accused was identified as one of the occupants, and when it stopped at the Gampola hotel, the first, second and third accused were identified as three of five occupants. At about midnight it was seen stationary about 60 yards from Dr. Wickremasinghe's garage. It then had three occupants, one of whom explained to Dr. Wickremasinghe's gardener that they had run out of petrol and that another of their party had gone to fetch some. The gardener could not identify any of the party. The next morning Dr. and Mr. Wickremasinghe's cars were found on the highway some distance from their garages and minus their wheels, tyres and tools.

The car X-6159 was not seen again until two days later when at 9.30 p.m. it was seen standing empty outside a cinema theatre at Ratnapura. A couple of hours later the first three appellants got into it, and as it was about to be driven off by the 2nd accused, the Police detained the car and its occupants. When searched, both the first and second accused had on them a number of car switch keys, and in the car was found

¹ 176 E. R. 353.

² (1909) 2 Cr. App. R. 128.

³ (1910) 4 Cr. App. R. 60.

⁴ Gurney's Rep. 479.

⁵ (1945) 46 N. L. R. 88.

⁶ (1945) 46 N. L. R. 358.

⁷ (1945) 46 N. L. R. 546.

⁸ (1912) 7 Cr. App. R. 113.

Mr. J. R. Wickremasinghe's wheel-brace among no less than five wheel-braces in the tool box under the bonnet, and on one of the wheels was one of the tyres which had been stolen from Mr. J. R. Wickremasinghe's garage during the night of June 23. The number on this tyre had in the short interim been defaced and another substituted for it. Later when the car was taken to Kandy, a more thorough search revealed the presence of a fully loaded revolver hidden behind the arm-rest of the back seat and a jemmy concealed in the cushion back of the front seat and to which access was obtained through a tear in the upholstery. This jemmy fitted, with the perfection of a glove, one of the marks on Dr. Wickremasinghe's garage door where the padlock staple had been levered out.

No evidence was called by the defence and the appellants were convicted of the offences charged. It was submitted in this appeal that the evidence did not warrant their conviction because, *inter alia*, it being a hiring car, they might have been innocent passengers who had hired the car or been given a lift; that the revolver and jemmy being hidden and the wheel-braces being in the tool-box under the bonnet and the stolen tyre on one of the running wheels, the appellants would not necessarily have any knowledge of their history or presence on the car; and that as regards the switch keys they might have been yale lock keys. It was emphasised that the conviction depended entirely on circumstantial evidence, and contended that evidence of these facts, even assuming them to be true, did not rebut the presumption of innocence. It was not seriously contested that the car X 6159 was the car that was used in the crimes, but it was argued that the evidence was not sufficient to implicate the appellants as occupants of the car at the time of the crimes.

It becomes necessary to consider the bearing of this evidence as it relates to the appellants individually and jointly.

It is to be noted that the car can, without speculation, be said to have been equipped on the night of June 25, for some felonious purpose and, in particular, one connected with motor cars, having on it, as it did, no less than five wheel-braces for the removal of motor-car wheels, in addition to the loaded revolver and the jemmy. It may, I think, be properly described as a bandit car.

It is also to be noted that the homes of all the appellants are in Colombo, from which Ratnapura lies 56 miles away in one direction and Kandy over 70 miles away in another direction. One of the witnesses also expressed the opinion that the first three appellants were of the artisan class, although the first accused was said to be the "proprietor of a social club" in Colombo. To be exact, the first accused lives at Wellawatta, the second accused at Rajagiriya, and the third and fourth accused at Slave Island.

The fourth accused is the owner of the car, which, in addition to being equipped for banditry, had on it one of the tyres that had been stolen less than 48 hours before. It is true that he was never identified as one of the occupants of the car on the 23rd, but as owner of the car some explanation was to be expected from him, if he was innocent. His association with the second accused can be inferred also from the fact that the second accused was not only driving the fourth accused's bandit car on June 23 and 25, but was also on the 24th driving another car at

Wellawatta, the possession of which the fourth accused was at the time retaining pending payment for repairs done by him to it. At this time the second accused was accompanied by the first accused.

As regards the second accused he was identified as the driver of the bandit car when it was at Gampola on June 23 and at Ratnapura on the 25th, and in his pockets were found six car switch keys and one padlock key. So he is the driver of the bandit car at Kandy on the evening of the crime and at Ratnapura on the 25th when it was equipped as stated and had on it some of Mr. J. R. Wickremasinghe's property together with the jemmy which fitted the mark on Dr. Wickremasinghe's garage door. The implications of this evidence as regards the guilt of the second accused are, in my opinion, clear—in the absence of an explanation.

Taking the case of the first accused, he was identified in the bandit car with a number of others on one of the earlier times it passed Dr. Wickremasinghe's garage on the afternoon of the 23rd, and also when it stopped at the Gampola hotel, where he and the other four occupants of the car, of whom the second and third accused were also identified, had a meal together. He was also in the bandit car when it was stopped by the Police at Ratnapura on the 25th equipped as stated and having on it the stolen property mentioned. The removal of a victim's car by mobile thieves operating from another car—which was the technique employed in this case—would require the services of two persons able to drive; and it was in evidence that the 1st accused had this ability in common with the second accused, for he had in his possession a driving licence. Moreover, he had on him no less than four car switch keys, which would seem to be more useful to a person intending to steal motor car equipment than to a proprietor of a social club. And if the first accused was an innocent passenger of this sinister car at Kandy on the 23rd, it was an unfortunate coincidence that when he was arrested in the car at Ratnapura, he and the second accused had between them a total of ten car switch keys. His association with the second accused is also shown by the fact that he was with him in another car possessed by the fourth accused at Wellawatta on the 24th. I am unable to agree with the contention that these facts called for no explanation from the first accused.

The evidence against the third accused is less in quantity than that against the others; but he was identified with the second and first accused at the Gampola hotel, where he inquired for meals on their behalf and joined them at the meal; he was in the bandit car then and also when it was equipped as stated at Ratnapura on the 25th. It is true that no car switch key was found on him, but not only was he in the Kandy district on the day of the crimes with the first and second accused in car X6159, but two days later he was 100 miles away from Kandy with the first and second accused in the same car, with the added circumstances that the first and second accused were then found to be in possession of ten car switch keys and the car was discovered to be equipped as described and to have on it some of Mr. J. R. Wickremasinghe's property which had been stolen at Kandy a few hours after he had been seen in the car at Kandy. These facts clearly indicate an occasion for the third

accused, if he wished his presence at Kandy and Ratnapura in these circumstances not to be construed against him, to give evidence in explanation of it.

The facts given in evidence are characterised by Mr. Nadarajah and Mr. Jayawardene as circumstances only of suspicion. I agree that the significance of each fact, taken separately, may be so termed, but the question for consideration is whether, taken cumulatively, they are sufficient to rebut the presumption of innocence. This aspect of circumstantial evidence must have been in the mind of Pollock, C.B., when he remarked many years ago in *Regina v. Exall* (176 English Reports, *Nisi Prius*, at p. 853) :—

It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

In my opinion, these circumstantial facts connect the prisoners not only with the bandit car but also with one another, and it is not merely that connection which implicates them but the *circumstances* in which they were thus associated. These circumstances indicate that the first, second and third accused were not innocent passengers in the car ; while the presumption of guilt arising from possession of stolen property has not been rebutted by the fourth accused. The summing-up of the trial Judge has not been impeached, and no one could fairly say that the Jury's verdict was perverse.

The majority of the Court are therefore of opinion that the circumstantial evidence was such as to establish against the first and third accused a *prima facie* case of guilt, which, without explanation, entitled the Jury to find a verdict against them on the principle that the Jury are entitled to draw inferences unfavourable to a defendant where he is not called to establish an innocent explanation of evidence given by the prosecution which, without such explanation, tells for his guilt. As regards the second and fourth accused the Court is unanimous in its decision not to disturb the verdicts against them. All the appeals are therefore dismissed and the convictions affirmed.

Appeals dismissed.
