

1944

Present: **Wijeyewardene J.**THE KING v. FERDINANDS *et al.*46—*M. C. Matara, 49,741.*

Evidence—Evidence given by an accused incriminating himself and another accused—Admissibility—Evidence Ordinance, s. 30.

Evidence given by an accused incriminating himself as well as a co-accused is admissible against the co-accused.

The fact that such evidence is given is in itself no ground for ordering separate trials.

THIS was a case heard before Wijeyewardene J. and a Jury in the third Western Circuit.

Nihal Gunasekera (with him *Vernon Wijetunge*), for the first accused.

G. E. Chitty (with him *H. Wanigatunge*), for the second accused.

H. Sri Nissanka, K.C. (with him *J. Fernandopulle* and *Ananda Pereira*), for the fourth accused.

U. A. Jayasundera (with him *S. E. J. Fernando* and *J. V. T. de Fonseka*), for the fifth and seventh accused.

The third, sixth and eight accused were undefended.

E. H. T. Gunasekera, C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

August 10, 1944. WIJEYEWARDENE J.—

The eight accused are charged with the offence of conspiracy to commit or abet the offence of giving false evidence in a judicial proceeding. The sixth accused is now in the witness box giving evidence "in his own behalf". In the course of his evidence he inculpated several of the other accused and then commenced to speak of what happened on March 21, 1942. At that stage the Crown Counsel intimated to me that it would be desirable to ask the Jury to retire, as, perhaps, I might have to consider certain questions of law in respect of the evidence which the sixth accused might proceed to give. I asked the Jury to retire and directed the sixth accused to go on with his evidence. That evidence was as follows:—

"When he, the first accused asked me that question I told him that I knew Abdeen. Then he asked me 'You know that Abdeen is my informant?' and I said, 'Yes, I know it'. Then he said 'When I went on leave the second accused took Abdeen to the barracks and assaulted him. Hinniappu is also one of my informants. He was taken to the barracks and he was thrashed and killed there'. Then he uttered a threat saying 'I will do a nice thing and he went away with the headman Burampy. At about 5 or 5.30 p.m. that day the alarm bell was rung and all the police officers fell in and assembled in the recreation room in their shorts and banians. The A. S. P. came in with Dingiya'".

Before giving my ruling as to the admissibility of that evidence I asked the defence Council whether they wished to be heard. The Council for the second accused, thereupon, contended that the evidence so given was inadmissible and then proceeded to submit that the entirety of the evidence given by the sixth accused would be highly prejudicial to all the other accused and moved—

- (1) that I should direct the sixth accused to stand his trial separately,
- (2) that the other accused be tried in this case,
- (3) that I should direct the Jury to ignore all the evidence given by the sixth accused.

After the luncheon interval the Counsel for the second accused made an alternative submission, namely, that I should confine the present case to the sixth accused and direct the other accused to be tried in other proceedings. The Counsel for the first, fourth, fifth and seventh accused adopted the argument of Mr. Chitty. The third, sixth and eighth accused did not make any submission.

I have considered the matter and I am unable to adopt either of the suggestions made by the defence. The evidence given by the sixth accused before the Jury retired was admissible. The evidence given by an accused person exculpating himself and inculpating his co-accused is admissible under our law. The evidence given by the sixth accused in this case may incriminate not only the other accused but also himself. He may be giving this evidence in the honest belief that he is entitled to an acquittal, if he acted on the advice of his superior officers. He may also be giving this evidence, as he thinks that in any event it may have a bearing on the sentence that may be passed on him. Whatever his reasons may be, there can be no doubt as to the admissibility of that evidence, as under our law a confession made by an accused in the witness box affecting himself and his co-accused is not shut out by section 30 of the Evidence Ordinance (see *Rex v. Ukku Banda*¹). The sixth accused who is giving evidence has the right to do so "with the like effect and consequences as any other witness".

As the evidence in question is admissible, I do not think it open to advance an argument on the ground that such evidence is prejudicial to the other accused. I am of opinion that this is a case in which I should not allow the application made by the defence.

The document P 9 which contains a material part of the evidence given by the sixth accused before the special Commissioner in February, 1943, was included in the list of documents filed with the indictment. At the very commencement of this trial the Counsel for the second accused inquired whether the Crown Counsel intended to refer to it in the course of his opening address, and the Crown Counsel gave an undertaking that he would not refer to it. In the murder case to which reference has been made in the course of these proceedings the sixth accused was one of the accused. There he appears to have made a statement from the dock similar to the statement in the document P 9.

Though my attention was not drawn to these matters before the Counsel for the second accused made the present application, they must have been well within the knowledge of the Counsel for the defence.

In fact, when I asked Mr. Jayasundere—who appears for the fifth and seventh accused whether he was leading evidence on behalf of his clients he said that he would not call evidence for the fifth accused but that he would decide whether he should call evidence on behalf of the seventh accused after the sixth accused has given evidence. Moreover, in the course of the trial the sixth accused made certain allegations in the absence of the Jury that some of the accused were trying to tamper with the witnesses for the Crown.

In these circumstances I find it difficult to understand why the present application is made for the first time at this stage.

Counsel for the second accused said that, if they realized that the sixth accused was going to give evidence against them, the other accused would have lead evidence to disprove the truth of what the sixth accused was now saying, before they closed their cases. I am prepared, as a matter of indulgence, to give the first, second, third, fourth and fifth accused an opportunity to lead such evidence.

The following evidence given by the sixth accused in the absence of the Jury will not be placed before the Jury:—

“ Then he said ‘ When I went on leave the second accused took Abdeen to the barracks and assaulted him. Hinni Appu is also one of my informants. He was taken to the barracks and he was thrashed and killed there ’. Then he uttered a threat saying ‘ I will do a nice thing ’ and he went away with the headman Brumpy.”

