[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Moseley S.P.J., Keuneman and Wijeyewardene JJ.**

THE KING *v.* WIJEYERATNAM.

15—M. C. Mallakam, 21,265.

Evidence—Charge of murder of a named person—Evidence of injuries on other persons murdered at same time—Relevance—Meaning of words "without any excuse" in clause 4 of Penal Code, s. 294—Duty of Judge to give direction—Proof of affidavit.

In a charge of murder the cross-examination of the witnesses for the prosecution indicated that the defence relied on the theory that the injuries sustained by the deceased person (S) and others were inflicted in a hand-to-hand conflict.

The crown led evidence to prove that fatal injuries were caused not only to (S) but also to two others, by gunshot wounds which could not have been inflicted at short range.

Held, that the evidence was relevant.

The King v. Mendias (42 N. L. R. 244) distinguished.

Where an affidavit which was alleged to have been sworn by the accused and which was put in evidence by the Crown was not proved according to law and where its submission gravely prejudiced the case for the accused,—

Held, that the conviction was bad.

Obiter, where the Judge puts to the jury clause 4 of section 294 of the Penal Code a precise direction is necessary as to the nature of the circumstances, which might come within the meaning of the words "without any excuse" in the clause, and which might reduce the offence from murder to culpable homicide not amounting to murder.

APPEAL from a conviction by a Judge and jury at the first Northern Circuit.

G. G. Ponnambalam (with him *S. N. Rajaratnam, S. Saravanamuttu* and *G. G. Hoover*), for the accused, appellant.—The evidence relating to the death of two persons other than the deceased, Sangarapillai, and to injuries to other persons was improperly admitted, and caused serious prejudice. Such evidence would have been admissible only if the defence was one of mistake or accident. No such defence was either raised or foreshadowed. See *The King v. Mendias*[1] ; *Phipson on Evidence (7th ed.) p. 68 ; R. v. Bernard*[2] ; *R. v. McGrath & McKevitt*[3] ; *R. v. Rodley*[4].

In the summing-up the attention of the jury was drawn to clause 4 of section 294 of the Penal Code. No direction, however, was given in regard to the meaning of the words "without any excuse". The onus was on the Crown to prove that there was no excuse. See *Ratanlal's Law of Crimes (14th ed., p. 720 et seq.)* and the cases referred to there.

The Crown produced in rebuttal an affidavit which was alleged to have been sworn by the appellant in connection with an application for bail to the Supreme Court. There was no definite proof, however, that the person who made the affidavit was the appellant. The document was

[1] *(1941) 42 N. L. R. 244.*
[2] *1 F. and F. 240.*
[3] *(1881) 14 Cox's C. C. 598.*
[4] *L. R. (1913) 3 K. B. 469 at 473.*

adversely commented upon by the presiding Judge and thus gravely prejudiced the case against the appellant. An affidavit cannot be used as evidence even against him by whom it is sworn without proof of the handwriting—*Barnes v. Parker* [1]. The ordinary rule regarding proof of a document would apply to proof of an affidavit also. It was held in *Rex v. Kadirgamen* [2], that even a deposition should be formally produced. The affidavit produced in this case cannot fall under section 80 of the Evidence Ordinance. It was not sworn before a person duly authorised under section 428 (*a*) of the Criminal Procedure Code. No general rules concerning affidavits have yet been passed under section 49 of the Courts Ordinance. Nor was the affidavit sworn before a District Judge or Magistrate. The document was, therefore, not a record of evidence given in a judicial proceeding. See also *A. I. R. 1939 Cal. 657* and *Sarkar on Evidence (6th ed.) p. 630.*

Nihal Gunesekera, C.C. (with him *S. Alles*), for the Crown.—The evidence regarding the death of, and the injuries on, other persons than the deceased Sangarapillai was led solely to rebut the defence that there was a hand-to-hand fight at close quarters between the two factions. It was, therefore, relevant and admissible—*John Makin et al. v. The Attorney-General for New South Wales* [3]; *W. H. Ball & E. L. Ball* [4]; *J. E. W. Chitson* [5]; *Gerald Kennaway* [6].

The Judge's failure to explain the meaning of the words "without any excuse" in section 294, clause 4, did not cause any prejudice. The verdict would not have been different even if the words had been explained. There was no substantial miscarriage of justice, and the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance would be applicable. The onus was on the accused to prove the excuse, if there was any—*Perkins v. Dewadasan* [7].

The question about the statement made in the affidavit was admissible not under section 80 but under section 145 of the Evidence Ordinance. The authenticity of the affidavit was never challenged by the appellant. The Court of Criminal Appeal will not give effect to a purely technical point, which might have been taken at the trial—*John Metz* [8]; *William Jackson* [9]; *Andrew Thomson* [10].

Cur. adv. vult.

November 3, 1941. MOSELEY J.—

The appellant, together with six others, was charged at the Jaffna Assizes on an indictment alleging that being members of an unlawful assembly, the common object of which was to commit murder, they did in prosecution of the said common object commit murder by causing the death of one Ambalam Sangarapillai; alternatively, that they committed murder by causing the death of the said Ambalam Sangarapillai. The appellant, at the trial, was convicted on the second count, his co-accused being acquitted on both counts. He now applies for leave to appeal against the conviction upon grounds which involve questions of fact, and

[1] *(1866) 15 L. T. 218.*
[2] *(1940) 41 N. L. R. 534.*
[3] *(1894) A. C. 57 at 65.*
[4] *5 Cr. App. R. 238 at 247.*
[5] *2 Cr. App. R. 325.*
[6] *12 Cr. App. R. 147.*
[7] *(1938) 39 N. L. R. 337.*
[8] *11 Cr. App. R. 164.*
[9] *14 Cr. App. R. 41.*
[10] *9 Cr. App. R. 252.*

appeals on a number of questions of law. Assuming that the evidence placed before the jury was properly before them, we cannot say that the verdict was unreasonable or that it cannot be supported having regard to that evidence. It is, therefore, only necessary for us to consider the arguments advanced by Counsel for the appellant on the points of law. The charges were based on an incident that occurred on the beach at Myliddy on the morning of March 23, 1940, when there was a clash between what became known during the trial as the Eastern and Western Parties. In the course of the clash three persons were killed and a number of others injured. Of these, the three who were killed and a majority of those injured belonged to the Western Party. The appellant and his co-accused were members of the Eastern Party.

It appears unnecessary to set out the facts in any degree of detail. It may be sufficient at this juncture to say that the case for the prosecution was that the Eastern Party were the aggressors, the Western Party merely victims. The defence put forward by the appellant was that he was acting in the exercise of the right of private defence. He said that he heard cries from the beach and saw some people from Kaddukadawai being pursued by a crowd from the West; that he ran to his house, got his gun and four cartridges and joined the Kaddukadawai people, who by that time appear to have turned their faces to their pursuers; that he heard shots fired, fired two shots into the air and that he then fired at a certain man, Markandu, with the intention of preventing further firing from the West. He admitted in cross-examination that he knew that what he was doing was likely to result in the death of someone. The jury indicated by their verdict that they rejected his story that he was acting in the exercise of the right of private defence. A number of grounds were submitted to us alleging the improper admission of evidence and several instances of misdirection and non-direction. Many of these appear to us to be without substance.

There are, however, three grounds of appeal which have invited our careful consideration. They are as follows:—

(1) That the facts of the death of two persons other than the deceased, Sangarapillai, and of injuries to other persons were improperly put in evidence.

(2) That in inviting the attention of the jury to clause 4 of section 294 of the Penal Code, the trial Judge omitted to give a proper direction in regard to the meaning of the words: "Without any excuse".

(3) That an affidavit marked X 2 which is alleged to have been sworn by the appellant and which was put in evidence by the Crown was not proved according to law and that its submission gravely prejudiced the case against the appellant.

In regard to Point 1, it appears that medical evidence was led detailing the nature of the injuries which caused the death of one Velupillai. The fact of the death of one Sinappu, and to some extent the nature of his injuries was also before the jury. Further, the nature and extent of the injuries incurred by ten of the Western Party were described in detail by the medical witness. It is contended on behalf of the appellant that for the purposes of the prosecution it was necessary to prove only the nature of the injuries sustained by the deceased, Sangarapillai, in respect of

whose death alone the appellant and his co-accused were charged in this case. It is conceded that the injuries inflicted on the deceased and others of his party were caused in the course of the same transaction. We were referred to a decision of this Court in the case of *The King v. Mendias*[1]. In that case evidence had been given by the prosecution witnesses to the effect that persons other than the deceased received injuries from blows struck by the accused on the same occasion and medical evidence had been led as to the nature of those injuries. This evidence had been admitted upon the footing that it might throw some light on the question of the intention of the accused. It was held by this Court that the fact that persons other than the deceased received injuries at the hands of the accused was admissible in evidence as being so closely and inextricably mixed up with the guilty act itself as to form part of the same transaction, and therefore admissible under section 6 of the Evidence Ordinance. But it was held that the nature and extent of the injuries inflicted on other persons did not go to prove the malicious intention of the accused towards the deceased. In the present case the Crown did not rely upon such evidence as being indicative of the intention of the appellant and his co-accused. The evidence was not led in order to rebut a plea of accident or mistake. It had, however, been indicated by the cross-examination of prosecution witnesses that the defence was to some extent going to rely upon the theory that the injuries sustained by the deceased and others were caused in the course of a hand-to-hand conflict. This theory could be exploded if it were shown from the nature and pattern of the gunshot wounds that they could not have been inflicted at close range. For that reason it seems to us that this evidence was relevant at the time at which it was placed before the jury although at a later stage, in the light of the defence put forward by the appellant, it became irrelevant in so far as he was concerned.

Point 2, although in the light of our decision to quash the conviction it is purely academic, seems to us, nevertheless, deserving of some consideration. Clause 4 of section 294 of the Penal Code is one which it is rarely necessary to consider in criminal trials in this country. The section, by this clause, creates the offence of murder if the person committing the act by which death is caused knows that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. The following illustration of the commission of murder in these circumstances is given :—

> "A, without any excuse, fires a loaded gun into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual."

This clause is generally considered to have a limited application. It is unnecessary for that aspect to be considered here. In the light of the illustration the clause would seems to be peculiarly applicable to the circumstances of the present case, were it not for the statement of the appellant that he deliberately aimed at a particular person. Nevertheless,

[1] *42 N. L. R. 244.*

it seems to us that the learned Judge was right in drawing the attention of the jury to this provision of our law which defines one set of circumstances in which the offence of murder may be committed, in case the jury should, as they did, reject the story of the appellant. The clause and the illustration were put to the jury verbatim. There was not, however, any direction as to the nature of the circumstances which might come within the meaning of "any excuse" and consequently reduce the offence from murder to culpable homicide not amounting to murder. There was no doubt a very complete direction given to the jury in regard to the appellant's plea that he was acting in the exercise of the right of private defence. This plea, if accepted in its entirety, would have entitled the appellant to acquittal even on the footing that he intended to cause the death of Sangarapillai. Since, however, the attention of the jury was definitely directed to the possibility of convicting the accused, even if he had no such murderous intention as is set out in the first three clauses of section 294, it seems to us that the effect of clause 4 should have been more precisely explained to them. Mere knowledge on the part of the person committing the act which causes death that it is so imminently dangerous that it must in all probability cause death does not in itself constitute the offence of murder. That would be culpable homicide not amounting to murder. As Plowden J. in *Barkatulla (1887)* (*P. R. No. 32 of 1887, p. 64*) observes :—

> "An act done with such knowledge alone is not prima facie an act of murder . . . . It becomes an act of murder only if it can be positively affirmed that there was no excuse . . . . it must be a wholly inexcusable act of extreme recklessness."

In the course of the same judgment the learned Judge continues :—

> "It is a matter of fact and not of law whether a particular act of homicide committed with the knowledge described in clause 4 of section 300, *i.e.*, section 294 of the Ceylon Penal Code, is committed without any excuse. As the 4th clause is framed, it need never be determined as a matter of law what circumstances, other than or falling short of the five exceptions, constitute an excuse, it being in each case a question of fact whether from the concomitant circumstances which are proved, the just inference is that the act was done 'without any excuse'. As this 4th clause is expressed, like the three preceding clauses, to be subject to the five exceptions which are legal excuses for murder (as contra-distinguished from culpable homicide) it is evident that the words 'without any excuse' in clause 4 do not mean merely 'in the absence of the circumstances described in the exceptions'. A jury or a Court as a Judge of fact is left at liberty to affirm upon proof of circumstances other than or falling short of an exception, not that these circumstances form an excuse for murder, but that in view of them the jury or Court is unable to affirm that the particular act of homicide was committed without any excuse, and is therefore unable to pronounce the act to be culpable homicide amounting to murder, as defined in clause 4 of section 300."

The authority above cited is not available. The observations attributed to Plowden J. are as set out in *Ratanlal's Law of Crimes* (*14th ed., p. 720 et seq.*). It may be that in this case the jury were attracted by

the similarity of the circumstances to those set out in the illustration to clause 4. It is equally possible that in the absence of a special direction upon the point they may have confused the excuse to which the clause refers with the exceptions which are legal excuses for murder and found that there was no evidence to support any of those exceptions whereas they should have had an opportunity of considering whether there was an entire absence of such excuse as would make the offence merely that of culpable homicide not amounting to murder. As we have already observed, this point is *obiter* in so far as the decision of this appeal is concerned. Nevertheless, we have thought it proper to express our opinion upon the manner in which clause 4 should be put to a jury.

We now come to the point which prompted our decision to set aside the conviction. As has already been observed, the appellant who gave evidence on affirmation admitted that he fired two shots at a certain member of the Western Party. He realized, he said, that what he was doing was likely to result in the death of someone. But he excused his conduct on the ground that he was acting in the exercise of the right of private defence. He was cross-examined by Counsel for the sixth accused and in the course of cross-examination it transpired that he had applied to the Supreme Court for bail and in support of his application had sworn an affidavit; that the person before whom he swore the affidavit was Mr. Nalliah, a Justice of the Peace. A copy of the affidavit was put to him and, in particular, paragraph 5 which is as follows :—

> "That I have been falsely implicated in this case by some of my father's enemies and also on mere suspicion because I possess a licensed gun."

The appellant agreed that in the affidavit sworn by him he stated that the enemies of his father were implicating him, but to that statement he added the word 'alone'. He agreed, however, that he had used the words 'on mere suspicion because I possess a licensed gun' but explained that he said so because he alone was implicated. Later in the trial the Clerk of Assize was called and he produced from its proper custody the appellant's petition for bail together with what purported to be the affidavit in support. The affidavit was signed by one Iyasamy Wijeyeratnam in English and appeared to have been affirmed before Mr. Nalliah, J.P. Paragraph 5 of the affidavit is in the same terms as paragraph 5 of the copy to which reference has been made. The affidavit was admitted in evidence. The learned trial Judge in commenting upon the appellant's defence naturally referred to the affidavit and commented upon the fact that nowhere in the affidavit did the appellant suggest as a reason for bail that he had fired in the defence of the Kaddukadawai people. The appellant's explanation was also put to the jury and they were invited to ask themselves if they felt they would be satisfied with that explanation. It was suggested that the affidavit gave a very strong impression that the appellant's grounds for his application were that he had been falsely implicated in the matter and that he was in no way connected with it. The jury were told that they might think it a matter

for surprise that the appellant did not base his application for bail upon the circumstances which he now puts forward in his defence and they were reminded that it was not until the trial that such a defence was raised.

The point for decision is whether or not the affidavit was properly in evidence. Counsel for the appellant assumed that the prosecution relied upon section 80 of the Evidence Ordinance (Cap. 11) which permits certain presumptions to be drawn when a document is produced purporting to be a record or memorandum of the evidence given by a witness in a judicial proceeding. Crown Counsel, however, did not rely upon section 80, but upon section 145 of the Evidence Ordinance, which provides for proof of a previous statement made by a witness in writing or reduced to writing. As has been observed, the appellant admitted making an affidavit before Mr. Nalliah, but he did not admit that the copy which was put to him agreed in all respects with the contents of the affidavit he admits having made. It would have been an easy matter to prove that the affidavit produced from the record of this Court was the one made, if indeed it was, by the appellant. He might have been called to admit, or deny as the case may be, the signature to the affidavit, or Mr. Nalliah might have been called to prove that it was the appellant who in fact had made the affidvit. Neither of these things was done. It seems, therefore, to us that there was no proof that the person who made the affidavit produced was the appellant. In the absence of such proof the affidavit could not be admitted in evidence against him. If authority for this proposition is required, it may be found in *Barnes v. Parker*[1], where Martin B. refused to admit an affidavit sworn by a party without proof of his handwriting. The same difficulty arises if it is sought to bring the affidavit within the scope of section 80 of the Evidence Ordinance. In that case, however, at least one further difficulty arises. In order to bring the document within the scope of the section a preliminary requirement is that it shall purport to be the record of the evidence of a witness in a judicial proceeding. The judicial proceeding contenplated in the present case could only be the application made to the Supreme Court for bail. Section 428 of the Criminal Procedure Code is as follows :—

> "Subject to general rules any affidavit may be used in a criminal court if it is sworn—
>
> (*a*) in this Island before any person generally or specially authorized by the Supreme Court to administer oaths in the Supreme Court or any District Judge or Magistrate ; "

It does not appear that any "general rules" have been made touching this matter. An affidavit, therefore, which it is sought to use in such a matter as an application for bail, must be sworn or affirmed before a person authorised in terms of paragraph (*a*). Mr. Nalliah does not fall within that category. It is noteworthy that section 49 of the Criminal Procedure Code which deals with proof of service of summons was amended in 1919 in order to enable an affidavit of service to be sworn before any person appointed by the Governor on his behalf. The amendment, no doubt, was prompted by the desirability, for the sake of convenience, of enlarging the class of persons before whom such

[1] *15 L. T. (N. S.) p. 218.*

oaths might be made. One may deduce therefrom a clear intention on the part of the Legislature to preserve generally the limits imposed by section 428. It does not seem to us that the affidavit was properly before the Court to which the application for bail was made. It therefore cannot be regarded as the record of evidence in a judicial proceeding. The position is then, that the affidavit was improperly admitted before the jury. Had it been excluded, it would not have been open for the trial Judge to invite the jury to examine the appeallant's defence in the light of paragraph 5 of the objectionable affidavit. The assumption that he, at the time of applying for bail, had indicated a defence different from that put forward at the trial may well have had a considerable effect on the minds of the jury, prejudicial to the appellant. For this reason we have thought fit to quash the conviction and sentence and order a judgment of acquittal to be entered.

Conviction quashed.