[COURT OF CRIMINAL APPEAL.]

1942 *Present* : **Soertsz, Keuneman, and Jayetileke JJ.**

THE KING *v.* MUDIYANSE.

10—M. C. Kurunegala, 6,053.

Plea of Self-defence—Charge to the Jury—Burden of proof—Evidence Ordinance s. 105—Questions put by Jury to Judge—Confused state of mind—Re-trial.

Where in charging the Jury in regard to the plea of private defence the Judge stated as follows :—

"In that connection I must say that by law the burden is placed on an accused person to prove to you that he was exercising that right. Now that burden is not so heavy as is imposed on the Crown to prove its case beyond all reasonable doubt. All that the accused had to do is to show by a preponderance or balance of evidence that the circumstances are such as to bring him within this provision of law."

Held, that there was no misdirection of law.

Where it appears to the Court of Criminal Appeal from questions put to the Judge by the Jury, before returning their verdict, that the Jury were in an extremely confused state of mind, although the Judge had charged them fully and properly, the Court may order a re-trial.

APPEAL from a conviction by a Judge and Jury before the 2nd Midland Circuit 1942.

J. E. M. Obeyesekere (with him *V. F. Guneratne*), for accused-appellant, who is also the applicant in the application.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

October 26, 1942. SOERTSZ J.—

This is an appeal from a sentence of death passed on the appellant by the Presiding Judge, when the Jury empanelled to try the case returned a verdict of six to one, finding the appellant guilty of the offence of murder with which he was charged.

The case for the Crown was that the appellant had taken the deceased man at a disadvantage, and stabbed him while he was reeling to a fall under two blows dealt him by the appellant's brother.

The Medical Officer, who performed the autopsy, found an injury that, if it was not necessarily fatal, was undoubtedly, sufficient to cause death in the ordinary course of nature.

The case for the defence was that the appellant stabbed the deceased man when he was about to attack the appellant's brother with a knife and that, in the circumstances of the case, it was justifiable homicide. On this plea, there also arose the question whether the appellant's offence was not that of culpable homicide not amounting to murder if, in the view of the Jury, he had exceeded the right the law gave him.

Counsel for the appellant appears also to have submitted to the Jury for their consideration, as alternative defences, the questions whether the appellant's offence was not that of culpable homicide not amounting

to murder either on the ground that, at the time he caused the death of the deceased, he had been deprived of his power of self-control by grave and sudden provocation ; or on the ground that the death of the deceased occurred in circumstances that brought the case within the plea of a sudden fight.

The learned Judge charged the Jury as fully and as clearly as was possible. He explained to them the meaning of the word "murder" and repeatedly drew their attention to the fact, that, for the constitution of that offence, it was necessary that there should be, on the part of the assailant, an intention either to cause death or to cause bodily injury sufficient, in the ordinary course of nature, to cause death. He then told them that if they could not find such an intention, or were in reasonable doubt as to the existence of such an intention, they should not find him guilty of murder, but should go on to consider whether they could find that he had the knowledge that his act was likely to cause death. If they so found, the offence would be that of culpable homicide not amounting to murder. If they did not find even this requisite knowledge, or had a reasonable doubt in regard to it, they would then go on to consider whether he intended to cause the grievous injury that had resulted.

The learned Judge next dealt with the defence that the appellant was exercising the right of private defence and explained the law on that point again fully and clearly. He summed up the evidence on this question and called their attention to such contradictions and discrepancies as existed in the evidence. Finally, he dealt with the alternative defences of provocation and sudden fight, and he asked the Jury to consider their verdict.

Counsel for the appellant confined himself to two of the several grounds on which this appeal was taken. He contended, firstly, that there was misdirection in that the learned Judge in charging the Jury in regard to the plea of private defence said to them :—

> "In that connection I must say that by law the burden is placed on an accused person to prove to you that he was exercising that right" (namely, the right of private defence).

That is the only part of the charge dealing with this question that has been quoted in the notice of appeal, but that is an incorrect and misleading statement of what the Judge said on this point, for he added immediately :—

> "Now, that burden is not so heavy as is imposed on the Crown to prove its case beyond all reasonable doubt. All that the accused has to do is to show by a preponderance or balance of evidence that the circumstances are such as to bring him within this provision of law."

In our view this direction, if it erred at all, erred in favour of the prisoner. The direction as quoted in the grounds of appeal was in itself a correct direction. It states, substantially, what section 105 of the Evidence Act lays down.

Secondly, Counsel contended that the proceedings show that the Jury were thoroughly confused in their minds and that, for that reason, their verdict should not be allowed to stand.

The summary I have given of the charge shows that the Jury were given all the assistance a Judge could possibly give them. But they, or at least, some of them, as will presently appear, seem to have stood in need of much more than assistance. After a deliberation of forty-five minutes' duration, they came before the Judge and asked for further direction. It is necessary to quote the full note of the proceedings that took place there :—

"Foreman : I have been requested to ask Your Lordship to give us a little further instruction on the law relating to murder, and this is the question particularly asked : If a man uses a lethal weapon on another, but without the intention of causing death, but unfortunately kills his victim, is he still guilty of murder?

Court : Not unless he has the intention of causing death or such bodily injury as in the ordinary course of nature is sufficient to cause death. Does that clear the point ? He must intend to cause death or such bodily injury as is sufficient in the ordinary course of nature to cause death. Is that the only point ?

Foreman : Yes, that is the only point.

Court : I may say in that connection, Mr. Foreman, that a person by law is presumed to intend the ordinary consequences or normal consequences of his acts. An ordinary, normal person is presumed to intend the ordinary consequences of his acts. What I mean to say is, if somebody in this Court got up and pointed a gun at you from this distance and fired it, he is presumed to intend the death of the person he fired at.

Foreman : Even though he can say afterwards that he did not intend?

Court : Yes. Is that all ?

Foreman : Yes. That is all.

Here, again, it is perfectly clear that the learned Judge directed the Jury correctly that they could not find the prisoner guilty of murder "unless he had the intention of causing death or such bodily injury as in the ordinary course of nature is sufficient to cause death." But our difficulty is that we cannot be certain as to the purpose of the question the Foreman asked. Was he seeking to ascertain whether intention to cause death, &c., was essential ; or whether the prisoner would be guilty of murder, even if he had no such intention, because he used a lethal weapon ; or whether when the Foreman used the phrase "but *unfortunately* kills his victim", he was asking for guidance in regard to what the position would be in law, if the prisoner used a lethal weapon not with *intention* in the sense of *malice aforethought*, but in an attempt to exercise the right of private defence. It seems impossible to say what exactly the Foreman intended to ask. The word *unfortunately* is extremely puzzling in the context. The question becomes even more difficult when we find that the Foreman was asking this question at the request of one or more fellow Jurors. Had he himself quite understood the difficulty of the Juror or Jurors for whom he put the question ? Then there is the final question put by the Foreman after the learned Judge had adduced an instance to illustrate the rule that "a person by law is presumed to

intend the ordinary consequences or normal consequences of his acts". That question was "Even though he can afterwards say that he did not intend ?"

It is impossible to say what the real difficulty was that existed in the minds of the Juror or Jurors at whose instance the Foreman put that question, and we are unable to free ourselves from a strong impression that, although the Jury had been fully and properly charged, they, or some of them, appear to have been in an extremely confused state of mind.

We have, therefore, come to the conclusion that it is desirable that we should quash the conviction and order a re-trial.

Conviction quashed.