[COURT OF CRIMINAL APPEAL]

1949 *Present:* **Jayetileke A.C.J. (President), Canekeratne and Gunasekara JJ.**

THE KING *v.* JAYEWARDENE

APPEAL 30 OF 1949 WITH APPLICATION 80

S. C. 1—M. C. Kandy, 31,177

Evidence Ordinance—Bad character of accused—Evidence of —Admissible to prove motive or state of mind—Sections 8 and 14.

Under section 8 of the Evidence Ordinance evidence can be led by the prosecution to prove a motive for any fact in issue or relevant fact, and under section 14 evidence of a previous conviction can be given if it will throw light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter.

APPEAL, with application for leave to appeal, against a conviction in a trial by a Judge and Jury.

G. E. Chitty, with *N. M. de Silva* and *Vernon Wijetunge*, for the appellant.

R. R. Crossette-Thambiah, Acting Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, for the Crown.

Cur. adv. vult.

July 15, 1949. JAYETILEKE A.C.J.—

The appellant was tried on an indictment charging him with having committed murder by causing the death of one S. M. Samarasinghe, an offence punishable under section 296 of the Penal Code.

The deceased was a youth of the age of about 16 years at the time of his death which occurred on January 21, 1948. On that day when he returned from school he found a parcel which had been sent to him by post awaiting him. He took it to his room and when he opened it a bomb which was inside it exploded and caused him very serious injuries which resulted in his death.

The evidence shows that two parcels addressed to the deceased and to his sister Mrs. Seneviratne were posted on January 20, 1948, at the Havelock Town Post Office, and two other parcels addressed to Miss Dissanayake, a cousin of the deceased, and to Podi Nilame, a brother of the deceased, at the General Post Office. The senders of the parcels have not been traced. A fifth parcel was handed over to the Police by Ukku Banda the manager of a boutique at Undugoda. Ukku Banda said that two well-dressed men came to the boutique and left the parcel there. All the parcels contained locally manufactured bombs. Mr. Chanmugam, the Government Analyst, who dismantled one of the bombs,

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said that the main component of it was a stick of dynamite about 2½ inches in length and about 1¾ inches in diameter which was tightly fitted into a thick cardboard tube the two ends of which were secured by two wooden stoppers. There were two holes bored in each stopper into which two detonators were fixed one at each end. Inside the detonator there was some gunpowder and into this gunpowder a lighting element similar to those found in the bulbs of electric torches was found. The tube or cylinder was encased in a larger cardboard cylinder the open ends of which were secured by wooden stoppers on either side. In a little space between the two cylinders two small dry cells of the strength of about 1½ to 2 volts were found at one end. The switching device was on the outer cardboard tube. Two copper strips were tied to the cylinder about two inches apart, one lead from the battery and one from one end of the filament being connected to each copper strip. A thick copper wire about eight inches long was passed under the copper strips and was prevented from making electrical connection between the two strips insulating a short portion of the wire which was arranged to be under one of the copper strips. To each end of the wire were attached a tag labelled " Pull ". Pulling of the wire in either direction shifted the insulation from under one copper strip and caused the filament to spark. That ignited the detonator and the gunpowder which finally exploded the dynamite. The bomb was harmless as long as the wire to which the tag labelled " Pull " was attached was not pulled. He said further that as a result of inquiries he learnt that dynamite of this particular thickness and detonators of this particular type were not available to civilians and that civilian dynamite would not have fitted the inner cylinder.

The deceased lived with his father in a village called Kabbagamuwa in the District of Kegalla up to about the year 1944 when his father sent him to Dharmarajah College and made him a boarder in the dispensary of one Gampaha Vederala in King's Street, Kandy. In the year 1945 he left that boarding-house and came to the house of the appellant in Trincomalee Street. The appellant was a tailor by occupation. He was not married. There is no evidence as to his age but the learned Judge in his summing-up has referred to him as an adult. He used the front portion of his house as his tailoring establishment and he lived in the back portion. The deceased lived in the appellant's house up to the beginning of 1947 when he left owing to some displeasure with the appellant and resided in the boutique of one Alwis Appuhamy at Buwaliadde for about a month. In April 1946 when the deceased went home for the holidays the appellant wrote to him a letter P25. It reads :—

> " Do you mean to board in another place this term ? Do you not consider about the College boarding ? If you do not like it I will find another place for you. I would not hesitate to buy or to rent another place for you . . . . How can I without your friendship in the future ? Otherwise . . . . I have nothing to console myself."

This letter shows that the appellant had a deep affection for the deceased but that the deceased had more or less made up his mind to leave the appellant's house. Early in 1947 at the deceased's request Kodikara,

who was a friend of the family, found accommodation for him in the house of Alwis Appuhamy at Buwaliadde. The evidence of Kodikara and Alwis Appuhamy shows that after the deceased left his house the appellant tried hard to get him back and when he failed he threatened on several occasions to do him harm. The evidence of Simon and Jayasinghe also shows that the appellant uttered similar threats. Kodikara said that, three days after the deceased left, the appellant went to his workshop and told him,

> "This boy was living with me. I fed him, clothed him and did everything for him. He has left my place having removed a ring of mine. He is a very bad boy. Please get him out of the place where he is boarded at present and send him back to me".

He conveyed to the deceased what the appellant said but the deceased did not agree to go back. Two days after that visit the appellant went again to his workshop and asked him how the matter stood and he told the appellant that the deceased would not go back. The appellant asked him to consider whether the deceased would be sent back or not and went away. A day or two later the appellant paid a third visit to him. On that occasion he told the appellant that he did not wish to be disturbed and asked him to go away. Thereupon the appellant drew a kris knife from his waist and said,

> "If I cannot destroy him (deceased) with anything I will destroy him with this."

Alwis Appuhamy said that, about six days after the deceased came to his house, the appellant came to see him and told him that the deceased got angry with him and left and requested him not to keep the deceased in his house. About four or five days later the appellant came again and repeated his request. Ten days later the appellant came again and said,

> "I have already told you on two occasions not to keep that boy in your place. If you continue to keep him you will also get into trouble. I will kill that boy if he does not come back to me."

He got alarmed at this threat and asked Kodikara to take the deceased away. Shortly afterwards the deceased's elder brother Podi Nilame arranged with Jayesinghe, the Assistant Manager of the Tarzan office, Kadugannawa, for the deceased to stay in the Tarzan office. On March 3, 1947, the deceased left Alwis Appuhamy's house.

Jayesinghe said that, a few days after the deceased came to reside in his office, the appellant came there and asked him to send the deceased back to his house. He asked the appellant why he wanted the deceased and the appellant replied,

> "My business is going down. It is a good omen to have the boy in my house. He has a pleasant face and is good-looking. It is pleasant to have him in the shop."

On March 24, 1947, the appellant met the deceased on the road and assaulted him. Podi Nilame went to the appellant's shop and asked

him why he assaulted the deceased and the appellant told him "I hit him because he refused to come when I called him". The Police filed a plaint against the appellant in the Magistrate's Court on March 29, 1947, charging him with disorderly behaviour on the road. The appellant went four times to Podi Nilame's house in Kegalla to get the case withdrawn and when Podi Nilame refused to withdraw the case he said "Then you people will fall into trouble". The case was heard on August 14, 1947, and the appellant was convicted and fined Rs. 5.

The evidence of Karunaratne shows that before the trial was taken up the appellant offered him Rs. 500 to break a hand or leg of the deceased, and that of the deceased's father shows that the appellant went up to the deceased after the conviction and told him "See what I will do to you."

The evidence of Simon shows that after the conviction the affection the appellant had for the deceased had turned into hate. Simon said that about three months before the day of the tragedy the appellant threatened approximately about a hundred times to destroy the deceased. The appellant said that he knew how to make bombs, that he had tested a bomb, and that he would send a bomb to the deceased and kill him. He would also send bombs to several people. He said further that when the threat was repeated he told Piyadasa the appellant's cook :

> "This man is persisting in this. He may put his intention into effect. Therefore tell the deceased not to open a parcel if he receives one."

Piyadasa was not called as a witness. He is more or less of the same age as the deceased and it seems to be probable that he conveyed the information to the deceased.

The evidence of Podi Nilame shows that the deceased warned him not to open any suspicious parcel that was sent to him, and that he, in turn, passed on the warning to his sisters. The fact that Podi Nilame did not open the parcel he received seems to support his evidence on this point.

The evidence of Promadasa shows that about two weeks prior to the date of the tragedy the appellant came to his shop and asked him whether he could give him ten sticks of dynamite and twenty detonators of the military type. The appellant told him that he wanted them for a friend of his who had a contract at Hingurakgoda.

The evidence of David Perera and Majeed shows that on January 20, 1948, they met the appellant at a petrol shed in Kandy and spoke to him. David Perera asked the appellant (sarcastically) whether he had not gone to see his friend, meaning thereby the deceased, and the appellant replied "I could not go recently but I have sent him a present".

The learned Judge in his summing-up indicated to the jury that he did not believe the evidence of these two witnesses and he also told them that if they did not believe them they could reject their evidence and act on the other evidence. We are unable to say what view the jury took of their evidence but in view of the observations of the learned Judge referred to above we have no alternative but to disregard their evidence.

The main question for our consideration is whether the rest of the evidence made out a *prima facie* case against the appellant. The learned Judge directed the jury in regard to the principles on which they should act when they were examining a case on circumstantial evidence. He pointed out to them that in order to base a conviction on circumstantial evidence they should be satisfied that the circumstances unmistakably implicate the appellant and exclude the possibility that someone else committed the offence. Their verdict implies that they accepted the evidence of Ukku Banda that two men came to the boutique on January 21, 1948, and left there the bomb which he subsequently handed over to the Police. Ukku Banda's evidence was supported by that of William Singho, the driver of the omnibus in which the two men travelled. Ukku Banda did not know the deceased at all and he had no reason to bear ill-will towards him.

According to the evidence of Podi Nilame, whose memory appears to be better than that of his father, Punchi Banda, the proprietor of the boutique, had no grievance against the deceased and he too had no reason to bear ill-will towards him. However that may be, it appears to us to be improbable that Ukku Banda or Punchi Banda posted the bomb to the deceased because we think that, if either of them did so, he would not have allowed a similar bomb to remain in the boutique from January 21, 1948, up to January 23, 1948. We are of opinion that the person who sent the bomb to the boutique did so with the object of diverting suspicion from himself to Ukku Banda or Punchi Banda. The deceased's father's house which the accused knew well is about half a mile from Punchi Banda's boutique and the evidence shows that the appellant went to Kabbagama four or five times between April and August 1947, once to see the deceased's father, the other times to see Podi Nilame, in order to induce them to withdraw the case against him. About that time there seems to have been some dispute between the deceased's grandfather and Punchi Banda about the rent of the boutique and it is possible that the appellant heard about it.

We have examined with great care and anxiety all the evidence that was before the jury when they retired to consider their verdict. We have tested that evidence in the light of probability and the more we look at it in that way the more we are satisfied that there was a case for the appellant to meet. The appellant tried his utmost to get the deceased back to his house from the time the deceased left up to the date of the assault. He then tried his utmost to get the case against him withdrawn. After the conviction he was bitterly incensed against the deceased. At first he threatened to do him harm and later to destroy him with a bomb. He also threatened to destroy several others with bombs. He said that he knew how to make bombs and that he had tested a bomb. About a fortnight before the bombs were posted he tried to buy dynamite and detonators of the military type. On January 20 four bombs were posted to the deceased, his brother Podi Nilame, his sister Mrs. Seneviratne, and his cousin Miss Dissanayake, but a bomb does not seem to have been sent to the deceased's sister Dingiri Amma. He had the intention of getting married to Dingiri Amma at one time. He had a motive to destroy Podi Nilame and Mrs. Seneviratne who were members of the deceased's family. The motive to destroy Miss Dissanayake is not known.

The parcel sent to the deceased was addressed to Kadugannawa and that sent to Mrs. Seneviratne to Yatagoda School, Nelundeniya. The name and address of the sender of these two parcels was given as A. M. Seneviratne, Government Training School, Colombo. The parcel sent to Podi Nilame was addressed to Undugoda and that sent to Miss Dissanayake to Dalpathdeniya, Ambanpitiya. The name and address of the sender of these two parcels was given as W. B. Wickremasinghe, School, Galapitamada. The appellant knew the place where the deceased and Podi Nilame lived. He knew that Mrs. Seneviratne was a teacher and was married to a teacher who was undergoing a course of training. He knew Miss Dissanayake and the place where she lived. He attended a "pinkama" at Nelundeniya in connection with the death of an uncle of hers and he may have met there W. B. Wickremesinghe another uncle of hers.

He had in his possession a piece of copper wire when the Police searched his house. That piece of wire was very much like the wire used on the bombs but a little thinner.

He was in a position to make his explanations on these matters if he was prepared to have them put to the test and yet he offered no explanations. We are therefore of opinion that the verdict of the jury was justifiable.

The next question is whether certain answers given to certain questions put by the learned Judge led the jury to believe that the appellant was a person of bad character. Jayasekera, a student attending Dharmaraja College, said that he had been to the appellant's house and he did not see any women there but he saw two or three schoolboys. These boys did not go to the appellant's shop to get themselves measured for clothes. He, however, added in answer to Counsel that these boys went to see the deceased who was living there. After the re-examination of Simon was over the foreman of the jury asked him the following questions and received the following replies :—

Q. Did you see school boys and young boys visit him ?
A. I have.
Q. Many ?
A. Yes.
Q. On many occasions ?
A. Yes.

We are unable to say why the foreman put these questions. If his object was to find out whether the appellant's attachment to the deceased was an improper one we are satisfied that no prejudice could have been caused to the appellant in view of the direction given by the learned Judge that no suggestion was made by the prosecution of an improper attachment between the appellant and the deceased and that evidence of such an attachment was inadmissible. It was argued that the words "what inferences you may draw is a matter for you" in the summing-up of the learned Judge may have led the jury to think that they could draw the inference that the appellant's attachment to the deceased was an improper one. In the context in which these words appear we do not think that a reasonable jury could have thought so. It seems to

us that the learned Judge used those words with reference to what he said in the preceding paragraph. It must be noted that in the course of the trial he ruled that the prosecution could not lead evidence to prove an improper attachment between the appellant and the deceased. That ruling seems to us to be unduly favourable to the appellant. We think that evidence that the attachment of the appellant to the deceased was an improper one was admissible under sections 8 and 14 of the Evidence Ordinance. Under section 8 evidence can be led to prove a motive for any fact in issue or relevant fact, and under section 14 evidence of a previous conviction can be given if it will throw light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter. (Ameer Ali on Evidence, 9th Edition, p. 216.) It was under these sections that the learned Judge allowed the prosecution to prove that the appellant was convicted for disorderly behaviour on the road.

The only other question is whether P38 was properly admitted in evidence. There is no evidence that it is in the handwriting of the appellant or that it bears his signature. Simon said that the handwriting looks like that of the appellant. We are of opinion that it should not have been admitted in evidence. It was produced to prove that the appellant was greatly attached to the deceased. On that point there was a large volume of evidence and its production could not have caused any prejudice to the appellant.

For the reasons given above we would dismiss the appeal and the application.

Appeal and Application dismissed.

1949 *Present :* **Wijeyewardene C.J.**

KUMARESU *et al.*, Appellants, *and* THE DIVISIONAL REVENUE OFFICER, VAVUNIYA, Respondent

S. C. 1,390–1,392—M. C. Vavuniya, 21 374

Criminal procedure—Procedure when investigation of offence cannot be completed in twenty-four hours—Unlawful detention for a period exceeding fifteen days in all—Escape from custody—Power to pursue and re-arrest—Penal Code, s. 220A—Criminal Procedure Code, ss. 35 and 126A (2).

An accused who has been irregularly ordered under section 126A (2) of the Criminal Procedure Code to be detained for a term exceeding fifteen days in the whole may yet be guilty of escaping from lawful custody if, at the time he escapes, the period of fifteen days contemplated by the section has not expired.

The right given by section 42 of the Criminal Procedure Code to pursue and re-take a person escaping from lawful custody should be exercised immediately. An arrest made after an interval of time after an immediate but unsuccessful pursuit would therefore be unlawful.

Section 35 of the Criminal Procedure Code contemplates an arrest at the time of the commission of a cognizable offence or immediately afterwards and not some time afterwards.