[COURT OF CRIMINAL APPEAL]

1965 *Present :* **H. N. G. Fernando, S.P.J., T. S. Fernando, J., and Abeyesundere, J.**

THE QUEEN *v.* M. ANTHONYPILLAI

APPLICATION NO. 49 OF 1965

S. C. 21/64—M. C. Jaffna, 26739

Trial for murder—Medical evidence—Right of Crown to call a medical witness not named in the indictment—Requirement that defence should be given adequate notice of the nature of the new evidence and a proper opportunity to meet it—Duty of Crown to lead evidence of all the medical treatment given to the deceased—Statement made by deceased—Evidential value thereof—Accident—Burden of proof.

The appellant was convicted of the murder of his wife. On the night of the incident the deceased stated that the appellant had poured some liquid smelling of kerosene oil into her mouth. The evidence showed that the deceased died of pneumonia about seventy hours after the alleged administration of the poison. According to the medical evidence it was not certain that the direct cause of the death was the administration of the poison. Application was therefore made by the Crown, in the course of the trial, to call a new medical witness not named in the indictment. Despite objection taken by the defence, the Court allowed the application. In the event, it was unsafe to suppose that the Jury would have returned their verdict of murder but for the new evidence stating that death was directly caused by the poison.

Held, that, before the new evidence was led, the defence should have been given adequate notice of the nature of the new evidence, as well as sufficient opportunity for preparation to cross-examine the witness who was to be called

Held further, (i) that it was the duty of the prosecution to have led some evidence concerning the condition and treatment of the patient throughout all the seventy hours which preceded her death.

(ii) that the trial Judge, when he directed the Jury that they could take into consideration the statement made by the deceased, should have cautioned the Jury as to the risk of acting upon the statement of a person who was not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate.

(iii) that even if the appellant caused the death of his wife by administering some liquid, it was the duty of the Judge to have explained to the Jury that the burden lay on the prosecution to exclude the possibility of an accidental death.

APPEAL against a conviction at a trial before the Supreme Court.

K. Charavanamuttu (Assigned), for the Accused-Appellant.

R. Abeysuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

July 19, 1965. H. N. G. FERNANDO, S.P.J.—

The appellant was convicted of the murder of his wife and sentenced to death. On the night of the incident, 1st September 1963, she made three statements, each to the effect that at about 11.30 p.m. the Appellant had poured some liquid smelling of kerosene oil into her mouth. It suffices to quote a part of one statement which she made to a Police officer :

" Today at about 11.30 p.m., my husband spoke to me and requested me to open my mouth to see whether the decayed teeth were removed and whether there were anymore to be removed. I opened my mouth. He then poured something from a bottle he had in his hand. It was a small bottle. The bottle was covered with his hand. Only the mouth was visible. I did not swallow. I put the contents out. I opened the gate and came out. I vomited again. "

After admission to hospital, the deceased woman was found by the Doctor who attended on her to be unconscious or semiconscious. This Doctor formed the opinion that she had taken some poison of the Folidol type containing parathion ; this was because of the symptoms he noticed, namely—

" She was frothing at the mouth and was Dyspynoes. She was finding it difficult to breathe. Her pupils were unequal and both contracted and the lungs showed crepitation. "

He accordingly treated her, mainly with a number of injections, on the basis of this diagnosis, and in his opinion the diagnosis was correct because the patient responded to the treatment within a few hours. After that stage, however, the woman appears to have suffered from Broncho-pneumonia and she died on 4th September about seventy hours after the alleged administration of the poison. In his evidence at the trial, this Doctor expressed his opinion that pneumonia was a probable consequence of the effect on the lungs of a poison of the parathion type. In fact he said that he had administered to his patient an antidote against pneumonia for this very reason. Considering that the deceased woman's death was not, according to this evidence, directly caused by the administration of the poison, it is at the least uncertain whether the Jury would have been willing to act on the opinion of the Doctor that pneumonia had probably resulted from the administration of the poison, and not from some other cause. The Doctor himself did not profess to have expert knowledge of the consequences of the administration of a poison of the type which he suspected in this case. The doctor was a young man aged about twenty-seven in September 1963 and he said that this was the first case he had dealt with, where there was suspected administration of Folidol.

This was only one difficulty which the prosecution encountered. Another was that an acting Judicial Medical Officer, who performed the post-mortem examination, had expressed in his report the following opinion : —

" In my opinion, death was due to Broncho-pneumonia involving both lungs and acute tracheitis, and possible toxaemia due to round worms.

Evidence of poisoning is awaited. The Analyst's report on Stomach contents, Liver and Spleen submitted herewith. "

On that opinion, upon which the Defence could no doubt have relied at the Trial, the Jury might not have been able to rule out the possibility that toxaemia due to worms had at least contributed to the death of the deceased woman, and to exclude the consequential doubt whether the death resulted from the administration of some liquid.

This difficulty was overcome by an application made in the course of the trial to call a new witness not named in the indictment. On objection being taken by the Defence the Court heard arguments and ultimately allowed the application in the following terms :—

" If I am satisfied that it will prejudice your defence, I shall not allow the application. But, I do not think so.

You say had you known of this earlier, you may have led expert evidence helpful to the defence but you had that opportunity since 5.4.65, when you were notified by the Crown. You had with you the findings of fact by the Medical witnesses in the depositions made to the Magistrate. You could have, if you chose to, sought expert opinion based on the data given by the medical men.

You had the opportunity, you had the time, and you had the material which is more than precis. ' In the interests of Justice ' does not mean the interests of the accused alone.

I grant the application, the name of the witness to be added to the indictment ".

In consequence of this order Dr. Chandra Amarasekera Deputy Judicial Medical Officer, Colombo, gave evidence on the second date of trial. The importance of his evidence is made apparent in the charge to the Jury. In inviting the Jury to disregard the possibility that toxaemia due to round worms may have been a contributory cause of death the Trial Judge referred to the opinion of Dr. Amarasekera " that death could not have been due to toxaemia caused by round worms, he was very emphatic on that ". Much stress was also laid on Dr. Amarasekera's opinion that the deceased woman must have contracted pneumonia because of the administration of some poison containing parathion. Indeed it would be unsafe to suppose that the Jury would have returned their verdict of murder but for Dr. Amarasekera's evidence.

The prosecution was no doubt entitled to call Dr. Amarasekera as a witness, even though there had been an omission to lead in the Magistrate's Court evidence of the nature given by Dr. Amarasekera. But a series of cases in England has established that where it is necessary to lead such new evidence the Defence must be given adequate notice of the nature of the new evidence, as well as sufficient opportunity for preparation to cross-examine the witness who is to be called. In the present case the Defence had neither such notice nor such opportunity.

The terms of the Judge's order quoted above make it clear that even if Defence counsel had asked for an adjournment of the trial such an application would have been refused. The Defence had been made aware about a month before the trial of the Crown's intention to call Dr. Amarasekera. But at that stage no copy or precis of Dr. Amarasekera's evidence has been furnished to the Defence. Having regard to the able manner in which Assigned Counsel represented his client at the trial, he could well have made valuable use of a reasonable opportunity for preparation to meet Dr. Amarasekera's evidence. The fact that such an opportunity was denied to the defence was gravely prejudicial.

Before turning to other aspects of the case it is convenient to refer to a matter which appears to have entirely escaped the attention of the trial Judge. The deceased woman was admitted to Hospital at 2 a.m. on 2nd September. Dr. Joseph who attended to her immediately and who treated the case as one of suspected poisoning was with the patient until 4 a.m. Thereafter, he had nothing to do with the patient. Quite naturally, he gave no evidence whatever as to the history of the case during the sixty-five hours which preceded the death which took place at 9.45 p.m. on the 4th September. No Doctor or Nurse who attended to the patient during this period was called at the trial, and although the bed-head ticket was produced there is no reference in the evidence or in the summing up of any matters pertaining to the period after 4 a.m. on the 2nd September. It is impossible at this stage to say that the Jury would have reached their verdict of murder if there had been before them some evidence concerning the treatment and condition of the patient during the sixty-five hours which preceded her death.

The symptoms which Dr. Joseph said he had noticed have been mentioned in an earlier part of this judgment. But during his cross-examination he admitted that in the Magistrate's Court he may not have mentioned all the signs and symptoms described by him at the trial. It does not appear from the record that he stated the symptoms after reference to any notes made contemporaneously. In these circumstances there was at least the possibility that the symptoms had not in fact been clearly recognised by Dr. Joseph at the time he examined the patient. This possibility was not adverted to in the charge to the Jury.

Apart from the medical evidence, the second important factor was the statement made to the Police by the deceased woman. With regard to this statement the learned Judge gave the following directions :—

> " This statement is evidence. The law permits you to take into consideration this piece of evidence. Usually a witness's evidence is tested by cross-examination and in this case the deponent is dead. In spite of the fact that there is no cross-examination because she is dead, still the law permits you to examine that evidence. It is in the nature of a dying declaration. Examine that evidence and if you are satisfied beyond reasonable doubt, accept what has been stated there. Do not forget that there was no other witness to the incident

and the deponent herself is not before you, the law regards her statement as evidence in regard to the cause of death, and the circumstances which led to her death."

In our opinion this direction only instructed the Jury that they could act upon the deceased's statement. But there was no caution as to the risk of acting upon the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate. Connected with this omission there was the failure to direct the Jury that, even if the Appellant caused the death of his wife by administering some liquid, the burden lay on the prosecution to exclude the possibility of an accidental administration. *Thuraisamy v. The Queen*[1]. The Jury could thus have had the impression that the possibility of an accidental administration could be excluded merely by reason of the failure of the accused to give evidence. A direction that the Crown must prove the guilt of the accused beyond reasonable doubt did not in these circumstances suffice to explain the particular burden which rested on the prosecution in this case.

In our opinion the denial to the Defence of a proper opportunity to meet the evidence of Dr. Amarasekera, and the omission from the charge to the Jury of requisite directions concerning the statements made by the deceased woman and the possibility of accident, have led to a miscarriage of justice. We are not disposed in all the circumstances to order a new trial. We set aside the conviction of the Appellant and the sentence passed on him and we direct a verdict of acquittal to be entered.

Accused acquitted.