[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present :* **Fernando, P., Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

L. S. PREMATILLEKE, Applicant, *and* THE STATE, Respondent

Application No. 66 of 1972

C. C. A. 59/72—S.C. 117/2 M. C. Matara 51785

Trial by Jury (Special Provisions) Law, No. 12 of 1972—Its applicability after May 22, 1972—Proviso to section 5 (1) of Court of Criminal Appeal Ordinance—Manner of its application.

The Trial by Jury (Special Provisions) Law, No. 12 of 1972, is deemed to have come into effect on May 22, 1972. It is therefore applicable to a case in which the trial of an accused person who had elected to be tried by an English-speaking jury was subsequently conducted in Sinhala after May 22, 1972.

Quaere, whether the manner of application of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance " must be active and robust and not passive and apologetic ".

APPLICATION for leave to appeal from a judgment of the Court of Criminal Appeal reported in *(1972) 75 N. L. R. 506.*

G. E. Chitty (Sr.), with *G. L. M. de Silva,* for the accused-applicant.

Kenneth Seneviratne, Senior State Counsel, for the respondent.

Cur. adv. vult.

March 19, 1973. FERNANDO, P.—

This is an application for leave to appeal from a judgment of the Court of Criminal Appeal dismissing an application for leave to appeal on the facts as well as an appeal from a conviction on a charge of murder.

Learned Counsel for the applicant has addressed us at length in an effort to induce us to grant leave. The first point relied on by him was that in respect of the question of identity of the deceased man there had been in the trial Court a misreception of medical evidence and misdirection amounting to a withdrawal from the jury of its right to decide on the question of identity. A similar argument had been unsuccessfully addressed to the Court of Criminal Appeal. We do not agree that there has been a withdrawal from the jury as alleged in the argument. The

1* K 21708 —2,805 (5/73)

jurors were informed of their right to decide all questions of fact and that they were not bound by any views of the Judge on such questions. Moreover, there was other more compelling evidence of identity before the jury to which no allusion had been made by the trial Judge.

The most important witness in the case was a man named Sirisena who claimed to be an eye-witness of the attack made by the applicant. The trial Judge gave a clear and explicit direction to the jury that " the foundation of the case rested on his (Sirisena's) evidence. The prosecution case has been built on his evidence. When that building collapses you will have to throw away the entire case. " With the return by the jury of a verdict of guilt there is a necessary inference that the jurors accepted this eye-witness's evidence given before them.

Counsel contended that the trial Judge should have instructed the jury to treat the evidence of Sirisena as if he had been an accomplice. The Court of Criminal Appeal has rightly held that there was no necessity for such an instruction in the circumstances of this case as there was no evidence which could have led to a reasonable suggestion of Sirisena having been an accomplice. The failure to direct the jury in a manner suggested by Counsel does not constitute in our opinion a non-direction on a necessary point. Criticism was directed before us as well as before the Court of Criminal Appeal that the direction to the jury to consider whether the evidence relating to drunkenness of the applicant could affect their decision as to the nature of the verdict they were to return was insufficient and misleading. The Court of Criminal Appeal has observed that it does not consider the direction given inadequate. That Court has also set out the evidence that told against the applicant on this point, and we see no sufficient ground on which to grant leave to appeal.

The other point raised by the applicant's Counsel before us related to the proceedings being had in the trial Court in Sinhala whereas the applicant had elected to be tried by an English-speaking jury. We think no useful purpose will now be served in considering this point in view of the enactment of Trial by Jury (Special Provisions) Law, No. 12 of 1972, which is deemed to have come into effect on May 22, 1972, i.e., before the date of the trial in question.

While we refuse the application for leave for the reasons shortly stated above, we find it necessary to observe here that this refusal to grant leave should not be understood as involving an acquiescence in certain dicta to be found in the judgment of the Court of Criminal Appeal relating to the manner of

application of the proviso to Section 5 (1) of the Court of Criminal Appeal Ordinance. We refer in particular to the following statement in the judgment :—

> " Such application must be active and robust and not passive and apologetic."

Consideration of the dicta referred to above must await a suitable opportunity in the future.

Application refused.