[COURT OF CRIMINAL APPEAL.]

Present: **Soertsz S.P.J., de Kretser and Jayetilleke JJ.**

THE KING *v.* PODIMAHATMAYA

73—M. C. Ratnapura, 38,594.

Accident—Charge of murder—Evidence of exception of accident—Burden of proof—Statement of presiding Judge that accident reduces the offence—Misdirection—Penal Code, s. 73—Evidence Ordinance, s. 105.

The exception of "accident" on behalf of an accused person in terms of section 73 of the Penal Code does not arise for consideration unless the accused adduces some material in support of it either by way of evidence led by him or by way of matters elicited from the witnesses for the Crown or by way of some circumstance clearly pointing to accident or misfortune.

[1] *A. I. R. (1916) P. C. 22.* [2] *A. I. R. (1934) P. C. 81.*
[3] *(1936) 1 A. E. R. 356.*

APPEAL from a conviction by a Judge and Jury before the Western Circuit.

F. W. Obeysekera for appellant.

E. H. T. Gunasekara, C.C., for the Crown in the appeal.

Cur. adv. vult.

December 18, 1944. SOERTSZ J.—

Of the many grounds of appeal set forth in the notice filed by the appellant, only three appeared to us, on the facts of this case, to call for discussion, and on our intimating our view to Mr. Obeysekera, he confined his argument to them. They are grounds (1), (5), and (13).

(1) Error lay in expressly directing the jury that the burden of proof of accident, by preponderance of evidence was upon the defence in the case.

(5) The defence of accident or misadventure as emerged from both lay and expert evidence was not specifically put to the jury but passed over.

(13) The jury were misdirected on the law relating to exception, proof, and accident.

The first point submitted for our consideration, was that the Commissioner's charge when he said to them—

> " There are certain exceptions in the Penal Code which would reduce the offence of murder to culpable homicide not amounting to murder. The onus of proving the exceptions, both general and special exceptions, lies on the accused . . . . When death is caused by accident, it comes within an exception, and the burden of proving the accident is on the accused,"

was on the facts of this case incomplete, and that it must have left the jury with the impression that the exception of " accident ", if satisfactorily established, would only reduce the offence, not that it would excuse it, whereas, of course, in law " accident " if found by the jury would completely exonerate the accused.

Counsel pointed to the fact that the Commissioner, in the course of his charge, dealt with the question of accident at some length, and he submitted that the verdict of the jury might well mean that they found that the death of the deceased was due to an accident, and yet returned him guilty of culpable homicide not amounting to murder in view of the direction they had been given. There, undoubtedly, is great force in this argument *in abstracto*, but in relation to the facts of this case, it is of hardly any consequence for, in our view, on a careful consideration of all the evidence, there was no case of " accident " to go to the jury at all. Our law in regard to accident as a defence to a criminal charge is contained in section 73 of the Penal Code. It enacts that—

> " Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act, in a lawful manner, by lawful means, and with proper care and caution ".

Then, there is section 105 of the Evidence Ordinance which provides that—

> " When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code . . . . is upon him and the Court shall presume the absence of such circumstances ".

These provisions make it manifest that for the exception of accident to arise for consideration the person accused must, at least, adduce some material in support of it either by way of evidence led by him, or by way of matters elicited from the witnesses for the Crown, or by way of some circumstance clearly pointing to accident or misfortune. We find nothing of the kind here—not the last *scintilla* of evidence direct or circumstantial to support or even suggest it. And there, certainly, is no burden on the Crown to eliminate all fanciful theories of ingenious minds, as a part of its case. All the evidence there is, tends to negative accident.

When the appellant was charged in the Court below, his answer simply was " I am not guilty ". At the trial he did not elect to give evidence or to make a statement. The medical evidence to which there was some reference in the course of the argument does not make it clear or even highly probable that the injuries were sustained by misadventure. In regard to the argument based on the appellant's immediate reaction to the realization that death had occurred, the fact that he is said to have been in tears when he was found seated near the dead man, does not necessarily mean that he was deploring an accident. That lachrymosity might well have flowed from other causes.

On the other hand, the evidence led by the Crown was that the appellant and the deceased had quarrelled and exchanged blows, earlier that day; that in the early afternoon, when the two of them were on their way home—they were brothers and lived in the same house—the prisoner moving in a manner that indicated an angry mood, overtook the deceased, entered the house, came back armed with a gun, confronted the deceased with it, pushed the end of the barrel against his chest and said " I will strike you "; the two men, quarrelling in that way, went into the interior of the house and were lost to view; shortly afterwards a report of a gun was heard from within the house; witnesses who ran up to see what had happened, found the deceased lying dead and the prisoner seated near him, with the gun by his side; he appeared to be weeping.

On an interpretation of all this evidence most favourable to the prisoner, it is impossible to say that the death of the deceased occurred in the course of the appellant doing a lawful act, in a lawful manner, by lawful means, &c., and that is made by section 73 a condition *sine qua non*. The transaction that resulted in the death of the deceased in this case bears not the slightest resemblance to the hatchet transaction in the illustration appended to section 73.

If then, on the facts of this case, the defence of accident did not arise, and that is our view, the misdirection complained of, that is to say, the failure of the Commissioner to tell the jury that the general exception of accident served to exculpate, not merely to mitigate the offence, could have no material consequence and could not prejudice the appellant.

And so in regard to the objection taken to the Commissioner's direction on the nature and extent of the burden of proof, that too was immaterial, although we should wish to guard ourselves against being understood to say that we agree that, in that respect, there was misdirection. We have not thought it necessary to consider it.

The only other point that arises on the argument is whether the Crown has discharged the burden that rested on it to establish that the appellant was the assailant, that he did the act that caused the death of the deceased, that it entirely was a voluntary act or, at least, that the voluntary part of his acts was likely to have the effect it produced, and that it was accompanied by the requisite intention or knowledge. In regard to these matters it is true that there was no direct evidence to show that the appellant actually pulled the trigger that fired the gun, aiming the gun at the deceased, but on the indirect evidence to which reference has already been made and in the absence of any explanation, that was an inference the jury might reasonably draw. Similarly, in regard to the intention of the assailant, ordinarily, the only inference reasonably possible was that he intended to kill or, at least, to inflict injury sufficient, in the ordinary course of nature, to kill. But, there was, in this instance evidence to show that the appellant was in a state of intoxication at the time, and the jury were directed that, on the law as it stands today in view of the ruling given by a Divisional Bench of the Supreme Court in the case of *The King v. Rangasamy*[1], if they found that the degree of the appellant's intoxication was such as to incapacitate him from forming the intention necessary for the constitution of the offence of murder, they should return a verdict of culpable homicide not amounting to murder.

The conclusion to which we are thus led is that on all the evidence and all the matters before the jury, two verdicts were reasonably open to them. If they found that the appellant was capable of forming the requisite intention and did form it, the offence would be murder; but if he was not so capable, or did not, in fact, entertain that intention, the offence would be culpable homicide not amounting to murder. The verdict they returned is a reasonable verdict, that is to say there is evidence to support it.

We dismiss the appeal. The application fails.

Appeal dismissed.

[1] *25 N. L. R. 438.*