[COURT OF CRIMINAL APPEAL]

1967 *Present* : **H. N. G. Fernando, C.J. (President), Abeyesundere, J., and Alles, J.**

THE QUEEN *v.* S. A. JOGREST PERERA

APPEAL No. 31 OF 1967, WITH APPLICATION No. 41

S. C. 141—M. C. Polonnaruwa, 15137

Trial before Supreme Court—Summing-up—Misdirection—Duty of Judge to refer to points in favour of defence.

In a trial before the Supreme Court it would be a misdirection to instruct the Jury that they must convict the accused if, in fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

It is the duty of the Judge to present fairly to the Jury evidence which tended to favour the case for the defence.

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

E. R. S. R. Coomaraswamy, with *A. S. Mohamed*, *Gemunu Seneviratne* and *F. C. Perera* (Assigned), for the accused-appellant.

J. G. T. Weeraratne, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 1, 1967. H. N. G. FERNANDO, C.J.—

It was common ground in this case that the Appellant caused the death of one Jayakody by striking him on the head with an axe. The Appellant's defence to the charge of murder, that he acted in the exercise of the right of private defence, was obviously rejected by the Jury when they returned a verdict of murder.

Two prosecution witnesses deposed to the incident. One of them stated that on his return after a morning's work on a bicycle he stopped near a boutique with the idea of reading the morning newspaper and sat for sometime on the luggage-carrier of the bicycle. He saw that Jayakody was seated on a bench in the verandah of the boutique reading a newspaper. He also saw the Appellant come out of the boutique with an axe in his hand, and the Appellant assaulted Jayakody once with the axe. The Appellant thereafter went inside the boutique and made his exit from the rear of the boutique. The second witness stated that he was reading a newspaper under a tree near the boutique when he heard the sound of a thud. He then looked towards the boutique and saw Jayakody fall to the ground with his head bleeding; he also saw the Appellant going inside the boutique with an axe in his hand.

The Appellant admitted this assault on Jayakody. But he gave in evidence a version of events preceding the assault. He himself had come to the boutique and had a cup of tea; he thereafter sat down on a chair in front of Jayakody, who having read a newspaper, folded it and placed it on the bench. He then spoke to Jayakody in a low tone about certain things which Jayakody had previously done to him, and finally asked whether Jayakody intended to send him back to his village. Jayakody then replied " I do not propose to send you to your village; I will send you to the moon ". Jayakody then pulled out a knife. The Appellant then, in fear for his life, rushed into the boutique and seized an axe. At this stage Jayakody was near the door-way of the boutique with knife in hand, and the Appellant struck him with the axe.

In cross-examination of the two prosecution witnesses, assigned Counsel suggested to them that there had been before the assault a loud and angry exchange of words between the Appellant and Jayakody. This the witness denied. It is unfortunate that Counsel had apparently misunderstood his instructions, for the Appellant's evidence was that

the conversation had been in a low tone. That being so, there was no real conflict between the prosecution and defence versions as to this matter ; in the case of the second witness in particular, who was reading a newspaper before he heard a thud, his evidence in no way conflicts with the Appellant's version of the events which preceded the assault with an axe.

The two prosecution witnesses denied that they saw a knife in the hands of Jayakody. But the defence called one Weerasekera who had been a prosecution witness at the non-summary inquiry. This witness stated that when Jayakody's body was lifted from the floor of the verandah, he saw a knife which had been lying under the body. The learned Commissioner was apparently aware that Weerasekera had given similar evidence about the knife in his deposition. Nevertheless he commended to the Jury a prosecution suggestion that Weerasekera gave false evidence " to help " the Appellant. Now this suggestion was not put to Weerasekera by Crown Counsel, nor was there any evidence whatsoever of any friendship between the witness and the Appellant. Hence the idea that Weerasekera was trying to help the Appellant was a mere conjecture, and it was unjust and unfair to invite the Jury to act upon it.

The Appellant gave uncontradicted evidence that Jayakody had previously acted in a most aggressive manner towards the Appellant. The Appellant had made several complaints to the police against Jayakody :—that Jayakody had brought a gun, threatened to kill him, and up-rooted fence sticks in his garden ; that Jayakody had taken away his bull and branded it ; that Jayakody had cut the barbed wire on his fence. The learned Commissioner referred to these matters but only as a preface to the following observations :—

> " Eventually he (Appellant) realises that he could not get the police to act in these matters and, the suggestion for the prosecution is, that on this day after the incident of a couple of days earlier when he met this man for the first time he decided to punish him in this fashion, that is the suggestion for the Crown ; that is the motive that the Crown says that impelled the man to act in this fashion. "

This evidence of Jayakody's previous aggression and acrimony towards the Appellant supported the defence version that on this morning also Jayakody had been threatening and aggressive. The summing-up does not contain even a bare statement of the mode in which this evidence might assist the defence. Instead, the evidence was presented to the Jury only as being hostile to the defence case, and it was unfair thus to present it.

An important point in the Appellant's evidence was that on the spur of the moment he seized an axe which he found inside the boutique.

This fact, if true, negatived the Commissioner's theory that the Appellant had " decided to punish Jayakody ", but its proper significance was not mentioned in the summing-up. Here again the Commissioner failed to sum up adequately evidence on which the defence relied. In appeal, the Crown has conceded that the axe had in fact been in the boutique.

The evidence established that the Appellant went of his own accord to the Police Station after the incident, and his statement was recorded quite soon thereafter. He had in the statement alleged that Jayakody had made the same remark " I will send you to the moon ". Thereafter (according to the statement) Jayakody had tried to take something from his waist and the Appellant thought that Jayakody was trying to stab him, and out of fear the Appellant then went into the boutique and brought the axe with which he hit Jayakody. The learned Commissioner quite properly told the Jury that this statement had not referred to Jayakody having a knife in his hand and thus contradicted the Appellant's evidence on the point. But the Jury were not directed that the statement generally corroborated the Appellant's evidence, and that it contained the substance of the version that the Appellant acted in self-defence. Nor were they directed that Weerasekera's evidence concerning a knife could suffice to explain that the Appellant's omission to mention the knife in his statement had been inadvertent.

The Jury were, on the whole case, directed that " if what the accused says is the truth, the version the three witnesses speak to . . . . is not true ". The prosecution witnesses did not claim to have seen or heard everything ; their evidence did not render improbable the defence version of a conversation in low tones before the assault. It was only the first witness who actually saw the assault by the Appellant, and this witness did not claim to have been continuously watching the verandah in which Jayakody had been seated ; the truth of his evidence was not contested by the defence, which only relied on an incident a few moments earlier which may not have been noticed by the witness. In these circumstances, it was a misdirection to instruct the Jury that they must convict if the prosecution evidence was true. In fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

In view of this misdirection, and the omission of the learned Commissioner to present fairly to the Jury evidence which tended to favour the case for the defence, we set aside the verdict and sentence and acquit the Appellant. We did not consider this a fit case to exercise our discretion to order a new trial.

Accused acquitted.