

1937

*Present : Abrahams C.J.*THE KING *v.* ELIATAMBY *et al.*

3-4—D. C. (Crim.) Jaffna, 4,017.

*Criminal Procedure—Conflict of evidence—Duty of Judge to examine the defence—Burden of proof—Reasonable doubt created by the defence.*

In a criminal case it is the duty of the Judge to scrutinise the defence unless it is overwhelmingly obvious that the witnesses are so contradictory of each other as not to be worthy of credit or that they contribute nothing relevant to the case for the defence.

The burden of proof being on the prosecution, the defence has to prove nothing beyond what is necessary to instil a reasonable doubt in the mind of the Court.

**A** PPEAL from a conviction by the District Judge of Jaffna.

R. L. Pereira, K.C. (with him Kumarakulasingham), for accused, appellants.

M. F. S. Pulle, C.C., for the Crown.

*Cur. adv. vult.*

August 23, 1937. ABRAHAMS C.J.—

The two appellants were tried with a third man Vinasithamby Sellathurai on the following charges :—(1) Causing grievous hurt to one Mailvaganam by means of a sword, (2) voluntarily causing hurt to one Ledchumy by means of a sword, (3) voluntarily causing hurt to one Vinasithamby by means of a sword, (4) voluntarily causing hurt to one Arupillai by means of a knife, and (5) voluntarily causing hurt to one Mailvaganam. The first appellant was found guilty on counts (1), (2) and (3), and the second appellant guilty on count (4). The third man Vinasithamby Sellathurai was acquitted.

In view of the fact that all the three accused were said to have acted in concert, the first appellant using a sword, the second appellant a knife, and the accused Sellathurai using a club, it is a little difficult to see why the two appellants were not convicted of all the offences, and why, in view of the fact that the learned District Judge seems to have believed that the accused Sellathurai accompanied his co-accused and carried a club, he acquitted him.

The story for the prosecution was this. The three accused were alleged to have entered the compound of the house in which the woman Ledchumy and her son, Arupillai, were living. The appellant Eliathamby was armed with a sword, the appellant Aiyathurai with a knife, and Sellathurai with a club. They cut the gate open and called out to Arupillai, and when the woman came out and asked what they wanted Eliathamby cut her with the sword on her left hand. Arupillai came out and struck Eliathamby on the head with a piece of firewood. Aiyathurai then cut Arupillai from behind with a knife, and Sellathurai struck Arupillai with a club. A man called Mailvaganam came up just at the moment when Arupillai was being stabbed and remonstrated with the parties quarrelling, whereupon Eliathamby told him not to interfere and cut him with a sword. In his evidence he is recorded as saying, "I raised my right

hand to ward off the blow and the blow alighted on the left palm"—a rather singular operation. One Vinasithamby also heard the disturbance and arrived on the scene while, in his own words, Arupillai and Eliathamby were pushing each other and fighting. He also tried to separate them and Eliathamby cut him with the sword on his left arm, and Sellathurai struck him with a club on his right thumb. Then Ledchumy was said to have been struck with the sword on the right shoulder blade. Corroboration of the injured persons evidence was offered by Vaithilingam the son-in-law of Ledchumy, Chelliah her brother, Manicamthiagarajah a bystander, Kathirgamen a barber, who was close by and said he saw the disturbance without being able to see precisely what happened, and one Kanapathipillai, who also saw the disturbance. The only persons not related to Ledchumy are Kathirgamen the barber and Manicamthiagarajah. It was alleged that the motive for this attack was due to the refusal of Arupillai to intervene in some law suit in which Aiyathurai was concerned. Aiyathurai and Sellathurai are brothers and Eliathamby is a relation of theirs.

A complaint was made on behalf of the injured parties very shortly after the occurrence to the Police Vidane, who investigated at once. The following day the injured persons were examined by the Judicial Medical Officer. It is interesting and extremely important to note what their injuries were. Ledchumy had a skin deep incised wound between two of her fingers on the left hand and no other injuries. Mailvaganam had an incised wound 3 in. long and  $\frac{1}{3}$  in. deep across his left palm, he had a linear abrasion on the right shoulder blade, a contusion on right angle of lower jaw, a contused abrasion on right shoulder and an abrasion on the left forearm. As he was treated in hospital for 22 days as a result of the cut, this injury, though not of a very serious nature, is in law grievous hurt. Arupillai had three incised wounds: one skin deep on the front of the chest, the 2nd  $\frac{1}{2}$  in. deep on the back of the chest, left side, and the 3rd skin deep just over the second injury. He also had an abrasion on the back of the left forearm. Vinasithamby had an incised wound skin deep across the back of the thumb, a superficial incised wound on the back of the left hand, a skin deep incised wound across the front of the left arm, a contusion on the right thumb. The Medical Officer stated that the incised wounds on Arupillai were caused by a clasp knife, the incised injuries on the other people by a sword, and the rest were injuries caused by a club. With all respect to this evidence, I am unable to see how in view of the fact that no sword was produced it could be ascertained that the incised wounds were not all caused by a knife. The evidence however, is very brief, and it seems quite likely in view of the separate allegations against the several accused that the medical witness intended to indicate no more than that the injuries were consistent with the use of a particular weapon which he mentioned. The matter is not unimportant in view of the fact that Eliathamby admits having used a knife and denies that he had a sword.

The only one of the accused who gave any evidence was Eliathamby. He said that about five or six days before this episode he and Arupillai were attending a festival in the temple. There were dancing girls there and Arupillai cracked jokes about them, which, for some reason or other:

Eliathamby resented, and he struck him. On the day of the alleged assault he, Eliathamby, happened to be passing along the road where Arupillai was living and was accompanied by Aiyathurai. He met Vaithilingam outside Arupillai's house, and Vaithilingam used provocative language. He said that Vinasithamby held him while Mailvaganam assaulted him with some iron instrument called an alavangoe and struck him on the left shoulder. Then other people assaulted him, and one man called N. Chelliah had a hatchet. Aiyathurai in his defence said that he took out a clasp knife and brandished it. Aiyathurai also used a stick and assaulted his assailants. Mailvaganam endeavoured to snatch his knife but he did not let go. He then received a blow on the head from Mailvaganam with an alavangoe. He fell down and knew nothing more. He completely denied having entered the compound or having a sword with him, and attributes the injury on Ledchumy's hand to her interference in the fight. When the Police Vidane came he was still near the spot and made a statement, and that is borne out by the Police Vidane. He says that the accused Sellathurai was actually on the spot and that he did not accompany him there. His evidence is supported to some extent by two witnesses, one S. Thambiah and the other V. Guranathi who said that they happened to be going along the road and saw Eliathamby and Aiyathurai going ahead. Both said that they saw Vaithilingam outside the gate of Ledchumy's house. They both saw Vaithilingam speak to Eliathamby and then saw Vinasithamby seizing Eliathamby and Mailvaganam striking him with an iron rod. Then Arupillai struck at him with a clasp knife. They both saw Eliathamby waving a clasp knife, and Thambiah says that he saw Mailvaganam snatching the knife. Then the accused Sellathurai came up to assist Eliathamby and he was also assaulted. Thambiah stated that all the parties were related to him, but Guranathi was not asked whether he was related to any of them and he did not volunteer any information about them.

All the three accused were admitted to the hospital the same day at 9 P.M. It is important to note their injuries. Eliathamby had an incised wound, scalp deep, on the left side of the front of the head, a contused wound, scalp deep, on the left side of the back of the head, a contused abrasion on the left arm, a contusion on the left side of the head, just behind the ear, a contusion on the left forearm and a contusion on the right buttock. The medical witness was of the opinion that the first one was caused by a sharp cutting instrument which might have been a hatchet. The rest could have been caused either by a club or an iron rod. Aiyathurai had a contused abrasion on the left parietal eminence of the head and one on the left side of the head just behind the ear. They were caused by two blows which might have been from a stone. Sellathurai had a contused abrasion on the left lateral aspect of the chest, a similar abrasion on the back of the right shoulder and a contusion on the front of the left shoulder, all caused by a blunt instrument. The first and second could have been caused by a hatchet, and the third by an iron or club. The contusions on Sellathurai and Aiyathurai could have been caused by stones.

The learned District Judge said that the first question is whether the fight took place in the circumstances alleged by the prosecution or in the

circumstances alleged by the defendants. He says that the story of the genesis of the quarrel, as told by the prosecution, is very much more likely than that told by the defence. Then he says, "On the evidence and the probabilities of the case, I am inclined to think that it was the accused party who were the aggressors and who went and created a disturbance in the complainant's house", and he says finally, "The chief question is whether the accused were the aggressors or whether they were waylaid by the complainant's party and assaulted by them. As I said before, on the evidence and probabilities of the case, I think there can be no doubt that it was the accused who went to the complainant's house and created a disturbance". It appears to me that the learned District Judge overlooked the burden which lay upon the Crown to prove its case beyond all reasonable doubt, and was rather inclined to consider a balance of probabilities between two conflicting stories. The prosecution gave one version, the defence gave another, but it was for the District Judge not to decide which was the more probable story but whether in spite of any defects that might appear in the case for the prosecution or any counter-evidence on the part of the defence, he was fully convinced that the evidence for the prosecution was substantially true. It may be that the motive alleged by the prosecution is a more probable one than that alleged by the defence, but motives only become important when evidence is satisfactory, not when it is unsatisfactory. Then can the evidence for the prosecution be said to be satisfactory? In the first place there are a number of injuries on Vinasithamby, Mailvaganam, and Arupillai which have been completely unaccounted for by the prosecution. These multiple injuries appear to me to be far more consistent with a faction quarrel and fight in which blows were exchanged on both sides, rather than the sudden attack alleged by the injured parties themselves and their witnesses. The only one of the injured people who received one injury only was Ledchumy. If Mailvaganam for instance was rendered *hors de combat* with that cut on his palm how is it that he also suffered several contusions and abrasions? It is also a point that Ledchumy alleges that she was struck on the shoulder with a sword, (she herself says it was a cut, but the witness Manicamthiagarajah says that it was with the flat of the blade) and that she had a mark which she showed to the doctor, but the doctor did not say that there was any injury other than that on the hand. We have then the multiple injuries that the three accused persons were shown to have sustained, and in particular the incised wound on the head of Eliathamby consistent with having been caused by the blade of a hatchet. If the three accused surprised the various injured parties, as they were alleged to have done, it seems a singular thing that they were so roughly handled. There was a suggestion in the course of the case that some stones were thrown at them by some people, and that might account for some of the contusions but it would not account for the cut on the head that Eliathamby received.

It is also a singular thing that if Eliathamby had a sword and used it without any resistance at all, that he should have inflicted such comparatively trivial injuries, and it does not seem to me that the injuries he did inflict were inconsistent with the use of a knife during a rough and tumble in which a certain number of people were engaged and that

the injury to Mailvaganam might well have been inflicted by his snatching the knife as the witness for the defence alleged he did.

I have further to observe certain inaccuracies in the judgment which tend to favour the prosecution. It is admitted that the witnesses, Manicamthiagarajah and Kanapathipillai, figured rather late in the case and were actually examined in the Police Court as a result of the petition presented to the Government Agent that their evidence had not been taken. The learned District Judge says that as regards the former that he was present at the time the Police Vidane went to the scene but that he did not volunteer to give evidence through fear that he himself would have been made an accused. There is nothing in the evidence of this witness that justifies this statement of the learned District Judge.

As regards Kanapathipillai, he is said in the judgment to have told the Police Vidane what he had seen. But it appears in his evidence on page 21 of the record that although he was present at the time the Police Vidane recorded the statements of the injured persons and witnesses he did not make a statement himself. The Police Vidane himself said that nobody told him that Manicamthiagarajah was also one of the witnesses and that Kanapathipillai was at the spot but that nobody mentioned his name that day. On the following day, however, he was told that both these people witnessed it and he questioned Kanapathipillai who said that he came later, and that Arupillai was there with injuries, and that he went away out of fear! The learned District Judge says that there is no reason why Kanapathipillai should give false evidence against the accused. That is no doubt true, but in view of the circumstances under which Kanapathipillai gave his evidence and also the fact that the Police Vidane implies that Kanapathipillai came to the spot after the disturbance was over, it would appear that the learned District Judge has not sufficiently considered the reliability of the witness and appears to have overlooked the fact that he was contradicted by the Police Vidane.

Next as regards the defence, I must confess to a great deal of surprise at finding that it has not been examined in the light of what the two witnesses, Thambiah and Gurunathi, have stated. It was the duty of the District Judge to consider that evidence. Either he has ignored it completely or he has rejected it without properly considering it. It is elementary that the evidence for the defence must be scrutinized as well as the evidence for the Crown. Failure to do so is an injustice to the accused unless it is overwhelmingly obvious from the record that the witnesses are so contradictory of each other so as not to be worthy of credit or that they contribute nothing of any relevancy to the case for the defence. I do not see how such a criticism could be passed upon this evidence. The learned District Judge is at pains to say that he does not see why Kanapathipillai should give false evidence against the accused but he does not give any reason why Thambiah, who was related to all these parties, and Gurunathi who does not appear to have been an interested witness, should not be worthy at least of some consideration.

It has been represented by Counsel for the Crown that no exception can be taken to the evidence of the barber Kathirgamen, who says that he saw Eliathamby in the compound of Ledchumy's house with a sword in his hand and Sellathurai in the same place with a club. That, of

course, is a matter of some importance, but the learned District Judge however has not sufficiently considered the whole of the evidence in the case for me to say that he was bound to accept the evidence of the barber.

It is an unfortunate incident in the administration of justice in the country that whenever there is a faction disturbance or whenever it seems likely in any case of hurt that blows have been exchanged between two persons or two groups, each side claims to have been attacked and not to have retaliated except to the extent perhaps of legitimate self-defence, and each side generally magnifies the acts of the opposite party and minimises its own acts. But when it appears that there is a mixture of truth and falsehood on both sides, it has to be remembered that the burden of proof is on the prosecution and that the defence has to prove nothing beyond what is necessary to instil a reasonable doubt in the mind of the Court. That in this case there was a disturbance is obvious, and that several people on both sides were engaged is also obvious; that blows were given and exchanged with sharp instruments and blunt instruments and a sword is also very likely. Taking into consideration the unexplained injuries on both sides, the unjustified credit that the District Judge has given to Kanapathipillai and the complete omission to deal with the defence witnesses, I am of the opinion that it would not on the record be safe to say that this case has been made out according to the charges. What actually happened seems to be more a matter of conjecture than proof. I therefore quash the convictions of both appellants and acquit them.

*Convictions quashed.*

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