[COURT OF CRIMINAL APPEAL]

1969 *Present*: **H. N. G. Fernando, C.J. (President), Sirimane, J., and Weeramantry, J.**

D. SOMASIRI, Appellant, *and* THE QUEEN, Respondent

C. C. A. 37 OF 1969, WITH APPLICATION 49

S. C. 77/68—M. C. Hambantota, 58198

Evidence—Charge of murder—Motive for the crime—Inadmissibility of hearsay evidence—Evidence Ordinance, s. 60 (1).

The accused was charged with murder. He and the deceased had been good friends for a long period. In order to prove that the accused had a motive for the alleged offence the prosecution led the evidence of two witnesses who stated that the deceased had, a few days before the alleged murder, informed his father that he had told the accused not to come to his house because his sisters were there.

Held, that the fact that the deceased did warn the accused to keep away from his house could be proved only by the evidence of a *witness* who heard the warning being given to the accused (s. 60 (1) of the Evidence Ordinance), or by the evidence of some conduct or admission of the accused.

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

Colvin R. de Silva, with *P. O. Wimalanaga*, *I. S. de Silva*, *T. B. Dilimuni* and (assigned) *M. Nassim*, for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

June 23, 1969. H. N. G. FERNANDO, C.J.—

This appeal is against the conviction of the appellant of the murder of one Pemasiri. According to the evidence of Ariaratne, he and the deceased man, and also the deceased's father, mother and two sisters had been asleep in a house consisting of four rooms. Ariaratne slept only a few feet away from the deceased, but because of a corner in the wall the place where the deceased slept was not visible to him. He was woken up by a cry of the deceased "Buddu Amme", whereupon he went with his torch to the deceased's bed-side: he then saw a man running away whom he identified as this accused, and he also saw the deceased's parents in the act of lifting up the deceased. He saw that the deceased had been injured, and the deceased expired a few minutes

later. Ariaratne then went for assistance, and a message was sent to the Police. But he admitted at the trial that he did not mention to anyone at all (not even to the deceased's parents) the fact that he had seen this accused. For this omission, he gave the somewhat unsatisfactory explanation that he waited until the Police came to state the name of the accused. The deceased's parents apparently had not seen the alleged assailant, and the evidence of the deceased's mother did not assist the prosecution to establish the guilt of the accused.

The prosecution led evidence to prove that this accused had a motive for this alleged offence. It was clear that the accused and the deceased had been good friends for a long period, and that the accused, who occupied a neighbouring "wadiya", used to come frequently to the deceased's house. But it was suggested that after the deceased's two sisters had recently come to stay with him, the deceased did not like the accused to continue visiting his house. According to the evidence of Ariaratne and the deceased's mother, the deceased had a few days before this incident informed his father that he had told the accused not to come to his house because his sisters were there.

The purpose of this evidence was obviously to establish the truth of the statement alleged to have been made by the deceased to his father. If the deceased did actually warn the accused to keep away from his house, there was reason for the accused to entertain ill-feeling towards the deceased. The question which arises therefore is whether the fact that the deceased did warn the accused was proved by lawful evidence. This fact could be proved only by the evidence of a *witness* who heard the warning being given to the accused (s. 60 (1) (*b*) of the Evidence Ordinance), or by evidence of some conduct or admission of the accused. But here neither of the witnesses heard the fact which the prosecution desired to prove. Their evidence, while being relevant to prove that the deceased made a certain statement to his father, was only hearsay evidence of the alleged fact of the warning given to the accused.

Learned Senior Crown Counsel contended that proof of the deceased's statement to his father could entitle the Jury to infer as a matter of fact that what the deceased said to his father was true. He sought to justify this contention on the decision in *The King v. Sathasivam* [1]. The accused in that case was charged with the murder of his wife. Sometimes prior to her death the wife had made a complaint to the Police stating her fear that the accused might use violence on her, and the prosecution proposed to lead evidence of this complaint and of the fact that the accused had been informed of the complaint. The prosecution claimed that such evidence would lead to the inference that the accused felt strong resentment against his wife for having made the complaint and would thus establish a motive for the crime. Gratiaen J. refused to admit this evidence, ruling that he would admit it only if there was available some independent testimony that the complaint had in fact induced such resentment in the accused's mind.

[1] *(1953) 55 N. L. R. 255.*

This ruling contradicts Crown Counsel's present contention. Gratiaen J. made it clear, both that the statement of the deceased wife to the police was inadmissible to prove the truth of its contents, and that even proof of the accused's knowledge that such a statement had been made by his wife could not justify an inference that he felt resentment on that account.

Applying this ruling, the statement said to have been made by the deceased to his father was not admissible as proof that the deceased had given a warning to the accused; and even the fact that the deceased made such a statement is of less significance than the corresponding fact in *Sathasivam's case*, because here there was no evidence whatsoever to show that the accused had become aware of the statement made by the deceased to his father.

The verdict of the Jury establishes their confidence in Ariaratne as an honest witness, but since the prosecution depended entirely upon his evidence in order to prove the identity of the person who had stabbed the deceased, the Jury could not reasonably convict this accused unless they were confident also of the accuracy of Ariaratne's identification of this accused. That confidence they might well have gained because there was evidence before them of the deceased's statement concerning the warning said to have been given to the accused. That evidence (as we have just shown) was wrongly admitted, and it is not possible for us to say that the Jury would have accepted Ariaratne's identification if the content of the deceased's alleged statement had not been brought to their notice.

We set aside the verdict and sentence, and order that the accused be tried afresh on the same charge.

Case sent back for a fresh trial.