[COURT OF CRIMINAL APPEAL.]

1943 *Present :* **Moseley A.C.J., Hearne and de Kretser JJ.**

THE KING *v.* JOHANIS *et el.*

1—M. C. Kalutara, 14,942.

Murder—Plea of sudden fight upon a sudden quarrel—Circumstances bringing the case within the exception proved—Jury in doubt as to view they should take—Exception 4 to Penal Code, s. 294.

Where, in a charge of murder, exception 4 to section 294 of the Penal Code is pleaded on behalf of an accused and circumstances are in evidence which bring the case within the exception and which the Jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight upon a sudden quarrel and that the accused did not take undue advantage of it.

In such a case the principle laid down in *The King v. James Chandrasekere* (*44 N. L. R.* 97) does not apply.

It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within the exception, that the existence of such circumstances cannot be held proved.

THIS was an application for leave to appeal on the facts from a conviction by a Judge and Jury.

M. M. Kumarakulasingham, for appellants.

H. W. Weerasooriya, C.C., for respondent.

February 1, 1943. HEARNE J.—

The first accused was found guilty of the murder of P. V. Agiris *alias* Kalenis and the second accused of the abetment of "the offence aforesaid, which said offence was committed in consequence of such abetment".

In supporting the application of the first accused for leave to appeal Counsel argued that the verdict of murder was unreasonable for the reason that, although the accused did not give evidence, there was ample material in the prosecution case on which the Jury could have found that the homicide was committed in "a sudden fight". In the course of his argument it was pointed out that the presiding Judge had not directed the Jury on the law relating to exception 4 of section 294 of the Penal Code or invited them to consider whether a defence based upon the exception arose out of the evidence. We felt that this omission was so closely related to the application before us that it was desirable to consider it and, although a point of law was thus raised in an application to appeal on the facts, a proceeding of which this Court in principle has disapproved, we gave leave for it to be argued.

The deceased alone was in a position to speak to all the circumstances which preceded the infliction upon him of fatal injuries, the nature of which left no doubt of his assailant's murderous intentions. Three statements alleged to have been made by him and his deposition to the Magistrate were put in evidence and Counsel directed our attention to

variations in what he said at different times. A fair summary of the prosecution case against the first accused, based upon the dying statements and the deposition of the deceased, as well as the evidence of the witness, Emalin Nona, would be as follows. Emalin Nona, the wife of the deceased, told him she had been abused by the first accused. This was in their house where the first accused also lived. The deceased questioned the first accused, his brother, who said that "he was entitled to abuse her if he so wished" or words to that effect. It is in doubt as to whether the deceased had spoken to his brother in the latter's room or had done so from the room in which he had been engaged in conversation with his wife. On coming out of one or the other of these two rooms the deceased heard a noise, which suggested to him that a gun was being loaded. The first accused "opened the door of his room" (this suggests he had been in his room by himself behind a closed door) and "put the gun out". There is no suggestion that the gun was pointed at the deceased or that any attempt was made by the first accused to shoot the deceased. The deceased "held the muzzle, the gun went off, and seizing the first accused by one hand he wrenched and threw the gun away" with the other. A struggle took place, in the course of which the deceased held the first accused by his neck. The latter asked Piyasena, the second accused, to bring a knife, which he did. With this knife the first accused stabbed the deceased.

It was conceded by Crown Counsel that the deceased met his death in the course of a sudden fight and that premeditation on the part of the first accused was excluded by the evidence. These two facts being in his favour the question arises of whether the sudden fight was "upon a sudden quarrel". In the argument of Crown Counsel the sudden fight was occasioned by the act of the deceased in dispossessing the first accused of the loaded gun which he had in his hands, that he was entitled to act as he did assuming, as is very probable, he thought his life was in danger and that this in itself could not be regarded as "a sudden quarrel". But even, Crown Counsel went on, if the aggressive attitude adopted by the deceased when he questioned the first accused led the latter to load the gun and point it beyond the door, and even if the quarrel may be regarded as having started then and continued till the "gun incident" occurred, so that it may be said the sudden fight was "upon a sudden quarrel", the Jury, if directed in accordance with the judgment of this Court in *The King v. Chandrasekere* (*supra*) could not have held that a defence based upon exception 4 of section 294 of the Penal Code had been proved.

The submission that was made was that, as it was possible for the Jury to take two views of the evidence only one of which, according to the argument, could have led them to return a verdict of culpable homicide, the accused had left in doubt "the circumstances which would bring the case within one of the exceptions" and in consequence had not discharged the onus which section 105, read with section 3 of the Evidence Ordinance, placed on him.

That, I think, is a misunderstanding of what was decided in *The King v. Chandrasekere* (*supra*). This case lays down that if the existence of circumstances which would bring "the case within one of the exceptions"

is involved in doubt, the existence of those circumstances cannot be said to have been proved. It does not lay down that if two possible views may be taken of a set of proved circumstances, the Jury is precluded from adopting *either* or those two views. In fact, as it appears to me, just as inevitably as one cannot have one side of a sheet of paper without the other, there cannot be one view of a matter and not the contrary view as well. If, for instance, an accused rests his defence upon exception 1 of section 294 of the Penal Code, the Jury may decide that he has proved, within the meaning of proof in section 3 of the Evidence Ordinance, the circumstances alleged by him and yet may hold or not hold that he lost his self-control in consequence of the provocation to which he was subjected. Similarly, when circumstances are in evidence which the Jury regard as having been proved, thay may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused "did not take undue advantage, &c.". It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved. Even if two views are *possible* they may have no doubt as to which of these views they prefer to take on the basis of *probability*.

In our opinion, had the Jury been invited to consider the applicability of exception 4 to the evidence of the case, they may have found, as it was open to them to find, that the accused was not guilty of the offence of murder. As they were not so invited, we think that the first accused must have the benefit of the lesser verdict. *The King v. Vidanelage Lanty* [1].

In regard to the second accused, it appears that if the first accused had been found guilty of culpable homicide the Jury, following the learned Judges's directions on the law, would probably have found him guilty of an abetment of that offence.

We set aside the verdicts and sentences, and substitute in respect of the first accused a verdict of culpable homicide and in respect of the second accused a verdict of abetment of that offence. The first accused is sentenced to ten years' rigorous imprisonment and the second to five years' rigorous imprisonment.

Set aside.