[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present :* **Basnayake, C.J. (President), Weerasooriya, S.P.J., and Abeyesundere, J.**

THE QUEEN *v.* E. R. MATHEW DE SOYSA

APPEAL NO. 53 OF 1963, WITH APPLICATION NO. 54

S. C. 184—M. C. Kanuwana, 4065

Trial before Supreme Court—Summing-up—Failure of Judge to refer to items of evidence favourable to accused—Misdirection.

Where, in a trial before the Supreme Court, the Judge gives prominence in his summing-up to the various matters which, if they stand by themselves, inferences adverse to the accused may be drawn, he should also remind the Jury of other connected items of evidence which are in favour of the accused. His omission to do so would convey to the Jury a misleading impression as to the strength of the case against the accused, and would amount to misdirection.

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

Colvin R. de Silva, with *A. C. M. Ameer*, *Varuna Basnayake* and *Hannan Ismail* (assigned), for the accused-appellant.

H. A. G. de Silva, Crown Counsel, for the Crown.

Cur. adv. vult.

August 23, 1963. WEERASOORIYA, S.P.J.—

The appellant was tried at the Assizes held at Negombo on a charge of having committed murder by causing the death of one Sidney Gunasekere. By a majority of 6–1 the Jury found him guilty of the offence and he was sentenced to death. He has filed this appeal and application against his conviction and sentence. At the conclusion of the argument before us we set aside the conviction of the appellant and the sentence passed on him, and directed that judgment of acquittal be entered in his favour. We now set out the reasons for our order.

The deceased was at the time of the murder residing on a land which abutted the Colombo-Negombo Road. The appellant and his family lived about a quarter mile away. He had a garage adjoining the deceased's residence where he carried on the business of motor car repairs. Car sales were regularly conducted there on Sundays, on such occasions the appellant being assisted by one Leopold Mendis. The land on which the garage stood also extended up to the main road, on the Colombo side of the deceased's land. Next to the garage, but separated off by a fence, was a row of rooms in the first of which (nearest the garage)

there was the shop of a florist and an undertaker, while in the second room the appellant ran a provision boutique which was looked after by two of his employees Rupasinghe and Nandasena.

Adjoining the deceased's residing land on the Negombo side is the house where the prosecution witness Catherine Mendis lived with her husband and a grown up son. The evidence of Catherine Mendis is that when she was asleep on the night of the 6th May, 1962, she was awakened at about 9.30 by the banging of doors and windows and some one calling out " Mahataya, Mahataya ". She then came on to the compound of her house and looked in the direction of the deceased's house and saw the appellant and Leopold Mendis going round it, banging the doors and windows. They were calling out " Mahataya, mahataya ". There appeared to be no one in the house, and the appellant and Leopold Mendis then went towards the appellant's garage. Catherine Mendis claimed to have identified them by the light of an electric lamp which was lit in the verandah of the deceased's house. There was also a big street lamp in front of her house the light from which fell as far as the garage. About a quarter or half an hour later the appellant and Leopold Mendis again went to the deceased's house. They switched off the electric light in the verandah. They again banged at the doors and windows and also at the trellis on the side towards the house of Catherine Mendis. Part of the trellis gave way and the appellant and Leopold Mendis entered the house through the damaged portion. After that Catherine Mendis heard articles being broken inside. They then opened the front door and came out of the house and returned towards the garage. A little while later the deceased came in his car and halted it on the road between the entrance to his land and the entrance to the garage premises. He got down from the car and walked up to his house, which was in darkness, and was seen to flash his torch inside it. Thereafter he came out and went in the direction of the car, when the appellant and Leopold Mendis set upon him, and assaulted him. The appellant is said to have struck the deceased with a weapon like P1 while Leoplod Mendis gave him a blow with a torch. Then they dragged him towards the garage where they subjected him to a second assault. Leopold Mendis appears to have struck the deceased at least one blow on that occasion too. The deceased fell, and the appellant alone continued to deal him some more blows with the weapon which he had. Each of the assailants then got into a car and went in the direction of the Kandana Police Station.

After they had gone Catherine Mendis went back to her house. Her husband and her son were asleep. She got into bed and was cogitating on what she had seen, when the deceased's son Malcolm, a young man of about 28 years, knocked at the door of her house. On her opening the door he told her " Father has been murdered, come let us go and see ". He also told her that when returning home he heard of the assault. Catherine Mendis says that as she was frightened to leave her house, she asked Malcolm to go to the Police Station. She did not tell Malcolm that she had seen the assault. Before Malcolm could go to the Police Station the Police arrived at the scene as a result of certain information

given by the appellant at the Kandana Police Station. Catherine Mendis was questioned by the Police only on the morning of the 7th May. She admits that in her statement she said that she did not see the assault. Under cross-examination as to why she said so she first explained that it was due to fear because on the afternoon of the 6th May she was threatened with death by the younger brother of her daughter's husband, who is also related as a cousin to the appellant. When it was pointed out to her that even if such a threat was uttered it was over a land dispute in which the appellant was in no way involved, she came out with the further explanation that on the morning of the 7th May one Peduru Alwis, an uncle of the appellant, had threatened her not to give evidence. She was unable to say whether Peduru Alwis knew at the time that she had seen the assault on the deceased.

Leopold Mendis was produced by the Police as a suspect before the Magistrate on the 8th May, 1962, and remanded, but one week later on the application of the Police he was released from custody. On the same day the Police filed a report under Section 148 (1) (*b*) of the Criminal Procedure Code charging the appellant and Rupasinghe with the murder of the deceased. Rupasinghe was discharged in the course of the non-summary inquiry. The name of Catherine Mendis was, for obvious reasons, not listed as a witness in the Police report. In her absence, it is not clear on what evidence the Police relied when they charged Rupasinghe as well as the appellant with the murder of the deceased. On the 19th May, 1962, she went to the Police Station and volunteered a statement and she subsequently gave evidence at the non-summary inquiry. She was the only prosecution witness called at the trial who claimed to have seen the assault on the deceased.

Malcolm Gunasekere, who was also called as a witness for the prosecution at the trial, stated that on the night of the murder he and the deceased were the sole occupants of the deceased's house, that in the evening they went to see his aunt who lived close by and that the deceased returned home ahead of him. Malcolm left his aunt's house some time later and was walking home when he got information at the Welisara hospital gate about the assault on his father. He then proceeded along the road until he came up to where his father lay fallen. He knocked at the undertaker's shop but as there was no response he went in the other direction and knocked at the door of Catherine Mendis' house. When she opened the door he told her that his father had been murdered and she asked him to go to the Police Station. When he was about to go to the Police Station a Police jeep arrived with the Police.

One of the matters which the prosecution hoped to establish by calling Malcolm was the motive for the accused to have killed the deceased. But Malcolm did not give the evidence expected of him. On the contrary, he was definite that the appellant and the deceased were throughout on the best of terms. In cross-examination it was put to him that the deceased had been previously assaulted by others who were not well disposed towards him. He admitted that the deceased had been assaulted once, but said that the incident took place a long time ago.

It was, however, elicited by the defence from Dr. Udawatte, who performed the post mortem examination on the body of the deceased, that a few days before the 6th May, 1962, the deceased was admitted to the hospital with a history of having been assaulted. There is no evidence as to who assaulted the deceased on that occasion. Apparently the fatal assault on the 6th May, 1962, took place within a day or two after the deceased was discharged from hospital.

Among the injuries which the deceased sustained as a result of the assault on the 6th May, 1962, were several of a non-grievous nature. Two of them consisted of a series of parallel contusions which Dr. Udawatte thought could well have been caused by blows with P1, which is described as an iron steering rod one end of which was grooved. The fatal injuries were a contusion of the scalp, two inches in diameter on the back of the head, with a fracture of the occipital bone and haemorrhage over the membranes covering the brain, and a large contusion on the left side of the chest underlying which there were fractures of the 6th, 7th, 8th and 9th ribs, haemorrhage round the area of the heart, contusion of the lower lobe of the left lung, contusion of the wall of the stomach and diaphragm and laceration of the spleen and the left kidney.

Catherine Mendis stated in her evidence that although she saw the appellant strike the deceased as many as ten or twelve blows with a weapon like P1, she was unable to specify on which part of his body any blow alighted. She also said that Leopold Mendis gave the deceased two blows with the torch which he had, that the blows were dealt from in front of the deceased and one of them alighted on the face. In the opinion of Dr. Udawatte the contusion and fracture on the back of the deceased's head could have been caused by a blow with a torch. Even if the blow dealt by Leopold Mendis which alighted on the deceased's face could not have caused the injury on the back of his head, there was one other blow dealt by him which could have accounted for that injury. Dr. Udawatte was not questioned whether such an injury could have been caused by an assailant standing in front of the deceased. In the absence of an opinion to the contrary from the doctor, there would appear to be no reason for excluding the possibility that a blow dealt by Leopold Mendis had caused that injury. As for the larger contusion on the left side of the deceased's chest and the underlying internal injuries, Dr. Udawatte said that they could have been caused with P1, but he seemed to think it more probable that they were caused by repeated blows with a fist or by the deceased having been trampled on while he lay fallen. If any weight is to be attached to this opinion, it would appear that the appellant was not the person who caused these injuries, for Catherine Mendis did not say that the assault on the deceased by the appellant was carried out by any means other than a weapon like P1. In determining the responsibility of the appellant for the fatal injuries on the deceased, the Jury had before them the evidence of Catherine Mendis as to the part played by Leopold Mendis in the assault, which evidence they were under a duty to consider, notwithstanding that the Police had elected not to proceed against Leopold. At the trial the prosecution sought to hold the appellant responsible for the fatal injuries

on the deceased on the footing that they were inflicted by the appellant and not by Leopold Mendis. This being the case which the appellant was called upon to meet, it must be assumed that the verdict of the Jury finding the appellant guilty of murder was returned on that footing, i.e., they found as a fact established beyond reasonable doubt that the appellant by his own hand inflicted the fatal injuries on the deceased. It is difficult to understand how the Jury could have arrived at such a finding, unsupported as it is by the evidence of Catherine Mendis and also the opinion expressed by Dr. Udawatte as stated earlier.

The verdict of the Jury was challenged by counsel for the appellant at the hearing of the appeal, not only on the ground that it was unreasonable, but also on grounds of misdirection by the trial Judge. We do not think it necessary to deal with all the grounds of misdirection in regard to which submissions were addressed to us. There can be no doubt that the case for the prosecution contained many infirmities on a consideration of which the Jury could well have returned a verdict of not guilty in favour of the appellant. They were, the generally unsatisfactory evidence of Catherine Mendis, her delay in coming forward as a witness after having in the first instance denied any knowledge of the assault on the deceased, the absence of a motive for the appellant to have assaulted the deceased and the fact that a few days prior to the 6th May, 1962, the deceased had been the victim of an assault by some unknown person or persons.

In discussing the question of motive the trial Judge rightly told the Jury that the Crown had failed to prove the motive which it set out to prove. But in this connection he referred to the evidence of Malcolm Gunasekere that the deceased carried on the business of selling second hand cars, and to the appellant's evidence that he too carried on a similar business at his garage on Sundays and that on the evening of 6th May, 1962, which was a Sunday, there had been such a sale. In regard to this evidence the Judge stated as follows :—

> " Now, Gentlemen, the Crown has not established any motive, but the Crown suggests could it be that outwardly the accused and the deceased were friendly, but they are rival car dealers. On the evening of this day till 6.30 there was a car sale, the car sale conducted by the accused in which he was assisted by Leopold Mendis. *Did something go wrong in this car sale which made the accused suspect that the deceased had something to do with that ?* That only remains a suggestion and there is no proof . . . . . "

This suggestion is based on the following propositions—(*a*) that there was rivalry between the deceased and the appellant over car sales ; (*b*) that the car sale held by the appellant on the evening of the 6th May, 1962, was not a success ; and (*c*) that the deceased was in some way responsible for its failure. There is not an iota of evidence in support of any of these propositions, nor were they even put to the appellant in cross-examination when he gave evidence on his own behalf. In the circumstances,

if Crown Counsel suggested such a motive for the consideration of the Jury, as the above quoted passage from the summing-up indicates, it represented nothing more than a figment of his imagination, and the only direction which the Judge should have given to the Jury regarding the suggestion was not to pay any attention whatever to it. In our opinion, the omission to do so amounted to a misdirection.

Malcolm Gunasekere stated in his evidence that a short while after he arrived at the spot where the deceased lay fallen, which was between 11 p.m. and 12 p.m., the appellant too came there, that he asked the appellant why he had killed the deceased, that the appellant replied " I do not know " and abruptly left the place. Seeing that according to Malcolm there was " no earthly reason " for the appellant to have assaulted the deceased, it is not clear why such a question should have been put to him. At the trial much seems to have been made by the prosecution of the appellant's reply as amounting to an admission of guilt. The learned trial Judge asked the Jury to consider whether the reply given by the appellant and his general behaviour at the scene were not items of circumstantial evidence which established that the appellant was the person who inflicted the injuries on the deceased. In particular he asked the Jury to consider whether the appellant, if innocent, would not have offered to take the deceased to hospital, and he even commented adversely on the appellant having left the scene at that stage. But in regard to the alleged admission of guilt by the appellant, apart from the inherent improbability of the evidence of Malcolm on this point, the Judge omitted to draw the attention of the Jury to the cross-examination of Malcolm by appellant's counsel which clearly showed that it was quite unsafe to act on Malcolm's evidence as to the precise question to which the appellant is said to have replied " I do not know ". In regard to any adverse inference that the Jury were asked to draw from the conduct of the appellant in not having offered to take the deceased to hospital, the evidence of Malcolm is that when he arrived at the scene and saw the deceased lying there he realised that the deceased was already dead. The appellant who came there subsequently would also have known that the deceased was beyond any succour. The appellant denied that he met Malcolm there. But even if Malcolm's evidence is accepted in preference to that of the appellant, no useful purpose would have been served in offering to take the deceased to hospital at that stage, and if the appellant, having arrived there and learnt what had happened, left the place abruptly, it would appear that he did so in order to go to the Kandana Police Station and give information regarding the matter, which he did at 12.10 a.m. The appellant was cross-examined at length as to why he went to the Police Station only at such a late hour. The explanation given by the appellant may not be entirely truthful and was also the subject of adverse comment by the learned trial Judge, but in considering whether there was any undue delay on the appellant's part from which an inference against him could be drawn, it is relevant to note that up to then Malcolm Gunasekere himself had not gone to the Police Station and given information of what he knew although, according to him, he had been at the scene for a longer time than the appellant.

We think that when the learned Judge gave prominence in his summing-up to the various matters from which, had they stood by themselves, inferences adverse to the appellant might have been drawn, he should also have reminded the Jury of the other connected items of evidence which were in favour of the appellant. His omission to do so would have conveyed to the Jury a misleading impression as to the stength of the case against the appellant, and, in our opinion, amounted to misdirection. See, in this connection, the observations of the Court of Criminal Appeal in England in *Nina Vassileva*[1].

Learned counsel for the appellant also complained of the manner in which evidence relating to certain injuries found on the appellant when he was examined by a doctor (not Dr. Udawatte) on the 7th May, 1962, was dealt with in the summing-up. These injuries consisted of two small contusions on the right ring finger, a fairly extensive abrasion on the outer side of the left thigh and a small abrasion on each knee. Apart from these injuries the appellant had a swelling on his upper lip which the doctor had failed to note. The evidence regarding the appellant's injuries was elicited from the doctor by Crown Counsel as tending to show that the appellant was involved in an incident with the deceased as described by Catherine Mendis. There was, however, nothing in her evidence which accounted for the injuries on the appellant. The doctor was questioned whether these injuries could have been accidentally self-inflicted by the appellant when he was assaulting the deceased in the course of a struggle with him, and the doctor discounted such a theory. According to the appellant he got the injuries by falling off his bicycle on the night of the 6th May, 1962, when he was coming from home to his garage to sleep there, as he sometimes used to do. The doctor expressed the opinion that the injuries could very likely have been caused in that way. Regarding this opinion, which was favourable to the appellant, the Judge told the Jury that it had been expressed by the doctor without reference to the swelling on the lip, and he added :

> " It is for you to consider whether that is an injury which is likely to have resulted if the accused fell from his bicycle, and whether if there is an injury to his lip there would also not be some sort of abrasion and injuries to other parts of his face *or knees*."

There seems to be no reason, however, to think that had the doctor noticed the swelling on the appellant's lip, his opinion as to the probable cause of the injuries would have been any different. A swelling on the lip caused by contact with some part of the bicycle when the appellant fell off it, does not appear to be inherently unlikely. As for the observation of the Judge regarding the absence of abrasions on the knees, it was not in accordance with the evidence, for the appellant did have an abrasion on each knee. In our opinion there was misdirection in the manner in which the Judge dealt with the injuries on the appellant.

[1] *6 Criminal Appeal Reports 228.*

Having regard to the infirmities in the case for the prosecution to which we have drawn attention, it seemed unlikely to us that the Jury would have convicted the appellant if they had been properly directed. We made order, therefore, quashing the conviction.

Accused acquitted.