

## [COURT OF CRIMINAL APPEAL]

1970 *Present* : G. P. A. Silva, S.P.J. (President), Sirimane, J., and  
Wijayatilake, J.

W. G. PUNCHIRALA, Appellant, *and* THE QUEEN, Respondent

C. C. A. 35 OF 1970, WITH APPLICATION 52

*S. C. 607/69—M. C. Trincomalee, 6949*

*Trial before Supreme Court—Accused's unsworn statement from the dock—Evidential value—Misdirection.*

Where, at a trial before the Supreme Court, the accused makes a statement from the dock, the Judge would be misdirecting the jury if he tells them that they should consider the statement of the accused but that "it is not of much value having regard to the fact that it is not on oath and not subject to cross-examination."

*Per Curiam*—"While it was necessary to point out to the Jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused, being that statement, it was the duty of the trial Judge to leave the considerations of that statement, entirely to the Jury untrammelled by an expression of opinion by him."

**A**PPEAL against a conviction at a trial before the Supreme Court.

*E. R. S. R. Coomaraswamy*, with *Siva Rajaratnam*, *H. Mendis*, *T. Joganathan*, *S. C. B. Walgampaya*, *N. Vilcassin* and (assigned) *M. Nassim*, for the accused-appellant.

*T. A. de S. Wijesundere*, Senior Crown Counsel, with *R. Abeysuriya*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

June 23, 1970. G. P. A. SILVA, S.P.J.—

At the conclusion of the argument in this case we substituted for the verdict of guilty of murder found by the Jury a verdict of guilty of culpable homicide not amounting to murder, and sentenced the accused to a term of ten years rigorous imprisonment. We state below our reasons for the decision.

The accused-appellant in this case was convicted by an unanimous verdict of the Jury of the murder of one Appuhamy. The evidence for the prosecution consisted of that of a medical officer who testified to an incised wound which penetrated the aorta, coupled with that of an eye witness who described an unprovoked attack on the deceased and another witness who met the accused shortly after the incident carrying a pointed knife with which he said he had stabbed a person from Golugedera, which was identified by another witness as the house of the deceased. The last mentioned witness obtained the knife from the accused and produced it at the Police Station and the accused too followed him a short while later.

In the submissions of counsel several criticisms were made of the summing up of the trial Judge. It is sufficient for our purpose if we deal only with those that influenced our decision to substitute a lesser verdict.

It was contended that the learned trial Judge's treatment of the accused's statement from the dock contained a number of misdirections. At a certain stage he stated to the Jury: "A person making a statement from the dock can say what he likes, because it cannot be tested in cross-examination unlike the prosecution witnesses who gave evidence in the

witness box and who were cross-examined like Mudiyanse. There is that infirmity in regard to the statement of the accused, but subject to that infirmity you have to consider that statement. It is not of much value having regard to the fact that it is not on oath and not subject to cross-examination." We think that the concluding sentence of this passage, taken in conjunction with the earlier observations conveyed an expression of opinion which would have induced the Jury to reject the statement from the dock without sufficient consideration on their part. While it was necessary to point out to the Jury the infirmities attaching to a statement from the dock, the only material in this case on behalf of the accused being that statement, it was the duty of the trial Judge to leave the considerations of that statement, entirely to the Jury untrammelled by an expression of opinion by him.

Secondly, following upon this direction the learned trial Judge went on to observe as follows :—"According to this statement the deceased man had partaken of arrack. That must have been just before his death, but it is in conflict with the medical evidence that the stomach was empty. He died almost instantaneously after the injuries. It is a question for you to accept his testimony or the testimony of Dr. Mrs. Jayatilleke who says that there was nothing in the stomach of the deceased." It was submitted by counsel that the accused had not said anywhere in the course of his statement from the dock that the deceased had consumed any arrack and that the consequent misdirection on this question of fact gravely prejudiced the accused in that the wrong direction would have unjustifiably persuaded the Jury to reject as false the statement of the accused. We feel that there is much force in this submission. The expression of opinion of the trial Judge that the unsworn statement of the accused was of little value immediately followed by this wrong direction which contained a criticism not warranted by the facts would have left very little room to the Jury to give the statement of the accused the consideration that it may have deserved.

The third criticism was that the learned trial Judge had not, in dealing with the possible mitigatory pleas of grave and sudden provocation and sudden fight, given any direction to the Jury as to the quantum of the burden that rested with the accused, nor had he touched on the possible influence of alcohol alleged to have been consumed by the accused on the gravity of any provocation he may have received, if his statement was believed. Had such directions been addressed to the Jury and the earlier misdirections been avoided, we think that the Jury may well have returned a verdict of culpable homicide not amounting to murder, having regard to the suddenness of the incident, the absence of premeditation and the possibility of the accused having been under the influence of alcohol at the time the offence was committed on the Sinhalese New Year day.

These considerations would justify the substitution of a verdict of guilty of culpable homicide not amounting to murder.

*Verdict altered.*