[COURT OF CRIMINAL APPEAL.]

1944 *Present:* **Moseley S.P.J., Hearne and Jayetileke J.**

THE KING *v.* PAULU PEIRIS.

45—M. C. Panadure, 26,400.

Sentence—Culpable homicide not amounting to murder—Right of private defence—Grave and sudden provocation or sudden fight—Propriety of sentence—Penal Code, s. 294, Exceptions 1 and 4.

Where a jury finds an accused guilty of culpable homicide on the ground that he has exceeded the right of private defence, a sentence of ten years may be regarded as having erred on the side of severity.

If, however, he is found guilty of culpable homicide because he had lost his self-control by reason of grave and sudden provocation or because he inflicted the fatal injury in a sudden fight, the sentence may be regarded as a proper one.

APPEAL from a conviction by a Judge and Jury before the Western Circuit, 1943.

S. P. C. Fernando and *S. S. Saravanamuttu* for appellant.

E. H. T. Gunasekera, C.C. for the Crown.

Cur. adv. vult.

January 31, 1944. HEARNE J.—

This is an appeal with the leave of this Court from the conviction of the appellant by the unanimous verdict of a Jury of the offence of culpable homicide not amounting to murder. He was sentenced to ten years' rigorous imprisonment.

At the trial the appellant admitted that he had stabbed the deceased with a knife and in answer to the Judge, the foreman stated that in the opinion of the jury he had done so with a murderous intention. Of this there can be no doubt. The knife penetrated the heart of the deceased who, in the words of the medical witness, " could have survived a very short time after the receipt of the injury which was necessarily fatal ".

Giving evidence the appellant said " On the day in question I returned home after work and I was at home. When I was in my house the deceased came close to my house and abused somebody in indecent words. I then went up to him and said, ' Simon, do not indulge in obscene language. You go home '. He then struck me with a club. That blow alighted on my left eyebrow and I fell down. After I fell down he began to strike me several times. I then raised an unconscious cry of murder. For my cries my son Lionel came up and raised me. Then the deceased struck my son also and he cried out ' Father, I am finished '. At this time I had a knife in my hands and for fear that we would be killed I stabbed the deceased. From that spot we were taken to the Police Station in a cart ".

Counsel for the appellant argued that the only reasonable verdict the jury could have returned upon that evidence and the evidence of the Inspector that the appellant and his son " with bleeding injuries " went to the Police Station after the incident was over was one of acquittal.

The jury, it was claimed, should have found that the appellant acted within the limits of the right of private defence which the law conferred upon him.

This argument is of course based upon the supposition that the jury accepted, or the contention that they should have accepted, the account given by the appellant of what is alleged to have transpired. But the jury, with good reason, may have taken the view that the evidence of the appellant did not represent the entire truth even as a bare probability.

The stabbing took place at 9.30 P.M. The deceased's son made a complaint at the Police Station at 9.50 P.M. The appellant arrived at the Police Station at about 11 P.M. and the statement he made was as follows. "I heard Simon (the deceased) abusing my brother Peter. I do not know why. Then I asked him not to quarrel. Then Simon assaulted me with a club. That blow alighted on my shoulder. Then he stabbed me with a long knife. Again he stabbed me on my shoulder. I do not know what sort of a knife it was. I then fell unconscious. I do not know who saw this ".

Having regard to the discrepancies between the appellant's evidence and the statement he made to the Police, the fact that the appellant's son was not called by the defence, the opportunity the appellant had of inflicting injuries on his son, and the finding near the body of the deceased of a knife which, although in his evidence the appellant says was not used, gave or was calculated to give verisimilitude to the statement he made to the police, the jury may well have doubted the truth of the appellant's evidence. If they concluded, as apparently they did, that the appellant had not established the existence of circumstances which entitled him to an acquittal, it is impossible for us to say that the view they took was unreasonable.

In regard to the sentence passed by the learned Judge we think that if the jury found the appellant guilty of culpable homicide on the ground that he had exceeded the right of private defence, the sentence passed *may* be regarded as having erred on the side of severity. If, however, he was found guilty of culpable homicide because he had lost his self-control by reason of grave and sudden provocation or because he inflicted the fatal injury in a sudden fight, we do not think that the sentence can be regarded as otherwise than a proper one. At the least it can be said that it is not one with which we could, with propriety, interfere.

It is, we think, a fair comment to make that the Judge indicated to the jury, without pressing his own view, that the appellant should be acquitted if it was found that the right of private defence arose at all. He also dealt with the mitigating circumstances which can be held to arise in law from grave and sudden provocation or a sudden fight. When the foreman stated that "the prisoner had the intention but there were mitigating circumstances ", it is clear to us that the verdict of the Jury was based upon exception (1) or (4) of section 294 of the Penal Code and not upon a finding that he had exceeded the right of private defence.

The appeal from conviction and sentence is dismissed.

Appeal dismissed.