[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Nagalingam S.P.J. (President), Gratiaen J. and Swan J.**

H. A. FERNANDO, Appellant, *and* THE KING, Respondent

APPEAL No. 59 WITH APPLICATION No. 86 OF 1951

S. C. 12—M. C. Gampaha, 57,683

Evidence—Statement regarding character of accused—Elicited inadvertently—Requirement of fresh trial.

In the course of the trial of the accused on a charge of rape, one of the prosecution witnesses said in cross-examination that the accused was a " murderer ". This evidence was elicited accidentally and not in answer to a question put deliberately with a view to placing before the Jury the antecedents of the accused. Application for a new trial was made by Crown Counsel but was refused by the trial Judge.

Held, that there should be a fresh trial, although no application for it had been made in the trial Court by accused's Counsel.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. W. W. Gunawardena, for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 26, 1951. NAGALINGAM S.P.J.—

The prisoner in this case was convicted of the offence of rape and was sentenced to undergo a term of seven years' rigorous imprisonment. He appealed against his conviction and sentence, and at the conclusion of the argument we made order setting aside the conviction and directing a fresh trial. We then indicated that we would give our reasons later which we now proceed to do.

The point taken on appeal is that the prisoner has been seriously prejudiced in his defence as he has not had a fair trial by reason of animadversions having been cast upon his character by one of the witnesses for the prosecution. The evidence as to the character of the appellant was not admitted as a result of a question put deliberately with a view to placing before the Jury the antecedents of the prisoner, but on the other hand it was by a pure mischance revealed to the Jury.

The mother of the young woman who was the victim of the offence stated in evidence that she saw the prisoner running away from her house towards his sister's house and that he had been in his sister's house for about an hour. Counsel for the defence without the least anticipation of the turn the answer might take to his question asked the witness, " Why did you not go and question him (the prisoner) ? ". The answer was, " He was a murderer, I was afraid. How can I approach

a murderer ?". Almost immediately this answer was given, the Jury would appear to have been asked to retire, and in the absence of the Jury learned Crown Counsel called attention to this answer, obviously with a view to indicating that the answer was a reflection upon the character of the prisoner and presumably thereby suggesting that it may be proper and more satisfactory that the Jury should be discharged and the prisoner directed to stand his trial before a fresh Jury. We have advisedly used the term " presumably thereby suggesting " for the reason that the typescript does not disclose that there was a formal application made to the learned trial Judge asking him to consider whether the Jury should not be discharged and the trial commenced before a new Jury. Learned Crown Counsel contented himself with a bare invitation to Court to recognize the existence of circumstances from which a possible view for a retrial may be taken. Counsel for the defence himself did not take objection to the impropriety of the answer of the witness nor did he associate himself with the submission made by Counsel for the Crown. He would, however, appear to have been a passive spectator in regard to the problem presented by Crown Counsel to the learned presiding Judge, possibly under the impression that where Counsel for the Crown himself had made the application, no words from him could have the effect of reinforcing or adding weightage to what had fallen from the lips of Crown Counsel in regard to such a matter.

In the manner, one might almost say the half-hearted manner, in which the problem was presented to the learned trial Judge, it is not a matter for surprise that the learned trial Judge thought that the trial might very well proceed before the same Jury, as in his opinion the word " murderer " used by the witness had reference to the evidence given by her that she had heard cries of murder emanating from the direction of her house before she got up to it, and the learned Judge therefore indicated that there was no need to transfer the case to another Jury.

This discussion, it must also be borne in mind, took place away from the hearing of the Jury, so that the Jurors did not even have the benefit of the learned Judge's view with regard to what he considered was the proper significance and appropriate effect to be attached to that evidence, and indubitably the Jury, when they retired to the Jury room at that stage, were left with the epithet " murderer " that had been applied to the accused person yet ringing in their ears, for that impression was never sought to be removed thereafter by anything said or done during the rest of the proceedings. In these circumstances, it is extremely difficult to say to what extent the Jury may have been influenced in the view they reached in regard to the case taken as a whole or, to put it somewhat differently, it would be impossible to say whether they would not have resolved against the prisoner any doubts they might have had in their minds in regard to the ease by reason of the reference to him as " murderer". It cannot be gainsaid that to describe an accused person as a murderer is to give him the worst possible character that one can imagine. One would not pause to consider whether a man described as a murderer had in fact been found guilty

or not of the offence of murder or even of a lesser charge, for it seems to us that where a person is referred to as a murderer the picture that is at once conveyed is that of a person who has killed a fellow being and, necessarily therefore, a person who would not hesitate to commit any other crime. With such a picture before the Jury of the character of the accused person, it cannot, to put it at the lowest, be asserted with any degree of certainty that the prisoner may not have suffered prejudice in his trial, for the tendency of the human mind always is to fasten guilt more easily on a person of bad character than on one of a good character.

In view of the decisions in the cases of *The King v. Kotalawala* [1] and *The King v. Piloris Fernando* [2] learned Crown Counsel rightly thought it unprofitable to contend that the proper course in these circumstances would not have been to have discharged the Jury at the stage at which this unfortunate piece of evidence was placed before them and to have ordered a fresh trial, but he did urge that Counsel for the prisoner not having made an application himself for a retrial, we should, following the dictum in the case of *Wattam* [3], not quash the conviction. He also relied upon the case of *John Cutter* [4] where, although it was shewn that a previous conviction of the prisoner had inadvertently come to the knowledge of some at least of the Jurors, the Court of Criminal Appeal refused to interfere on the ground that the prisoner's Counsel had not availed himself of the right of claiming a retrial during the proceedings that culminated in the conviction of the prisoner. In that case, it must be noticed, the facts were rather peculiar and exceptional. Not till after the Jury had delivered their verdict did it transpire that evidence of bad character of the accused person had come to the knowledge of some of the Jurors by reason of a previous conviction of his having been entered on a copy of the indictment which had been handed to them. The prisoner's Counsel at that stage was offered two alternatives, either to take the matter up in appeal or to have a retrial before a fresh Jury. He chose, after taking time for receiving instructions, the former course, and in those circumstances the Court of Criminal Appeal held that the prisoner had forfeited his right to complain of the irregularity. It should be borne in mind in this connection that under the law prevailing in England the Court of Criminal Appeal there has not the right to order a retrial, so that if the Court did interfere on the ground of irregularity of reception of evidence, the prisoner would then in effect have secured an acquittal, for a retrial could not have been ordered. That is a factor which, no doubt, would strongly weigh with the English Court of Criminal Appeal in holding that the right to complain is lost where application for a retrial is not made in the course of trial. But under our law we have the power to order a retrial, and it cannot be said we need give the same amount of weight to such a circumstance here. Besides, it is not without interest to note that in the case of *William Stirland* [5] the Lord Chancellor, Viscount Simon, thought that even under the English Law the proposition was not so strict as set out in *Wattam's case* [6].

[1] *(1941) 42 N. L. R. 265.*
[2] *(1946) 47 N. L. R. 97.*
[3] *(1941) 28 C. A. R. 80.*
[4] *(1944) 30 C. A. R. 107.*
[5] *(1944) 30 C. A. R. 40.*
[6] *(1941) 28 C. A. R. 80.*

" The object of British Law, whether civil or criminal " said the Lord Chancellor, " is to secure, if it is possible, that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by Counsel at the trial is not necessarily conclusive. We do not think that the failure on the part of the prisoner's Counsel to take the objection at the hearing of the case, and more so in a serious case, should stand in the way of our interfering with the conviction ".

As we have already remarked, the imputation of such a heinous crime as that of murder to an accused person is such a serious reflection on his character that we cannot but hold that the trial in those circumstances must be regarded as having been prejudicial and unfair to the prisoner. We have, for these reasons, set aside the conviction and ordered a fresh trial.

Fresh trial ordered.