[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Moseley S.P.J. and Cannon J.**

THE KING *v.* JOSEPH PERERA *et al.*

22—M. C. Chilaw, 12,292.

Evidence—Statement indicating a motive—Statement explaining conduct—Statement as to cause of facts in issue—Admissibility—Evidence Ordinance (Cap. 11), ss, 7, 8 (1) and (2)—Charge of murder—Failure to distinguish between intent to cause death and knowledge that it is likely to be caused—Misdirection.

The appellants, who were charged with murder, were employed on a farm owned by one P. The deceased and his wife M were also employed under P but had left his employment in consequence of certain improper advances made to M by P. Two days before the incident, E, who knew the appellants as workers on the farm, saw the latter in the company of P and overheard some remarks uttered by P. In consequence E made a statement to M, which he asked her to convey to the deceased by way of warning. P was not called.

[1] *24 N. L. R. 327.*

E, when he gave evidence, was not questioned what the words were which were uttered by P but M in cross-examination said that "E informed me that P told the two men that they would be given Rs. 5 if they were to bring my husband to the estate and further he warned me to caution my husband. It is not true that because of that my husband took the first opportunity to fight the first accused".

***Held*, that the evidence of E's warning to the deceased was relevant under section 8 (1) of the Evidence Ordinance as indicating a motive for the acts of the appellants.**

It was also admissible as, not being evidence of a statement the truth of which is in issue, it did not infringe any provision relating to hearsay.

***Held, further*, that the evidence of M regarding the passing of the information to the deceased was relevant under section 8 (2) of the Evidence Ordinance as a statement explaining the conduct of the deceased.**

***Held, also*, that the evidence of M in regard to the conduct towards her of P was relevant under section 7 of the Evidence Ordinance as being the occasion, cause, or immediate cause of facts in issue.**

Where in a charge of murder it was open to the jury to convict the accused of culpable homicide not amounting to murder the omission on the part of the trial Judge to direct the Jury whether in causing the death the accused had the intention of causing death or merely knowledge that he was likely to do so is a material misdirection.

APPEAL from a conviction by a Judge and jury before the 2nd Western Circuit.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekere, M. Balasunderam,* and *M. M. Kumarakulasingham*) for accused, appellants.

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

January 13, 1941. MOSELEY S.P.J.—

The appellants were convicted of murder at the Colombo Assizes on November 18, 1940, and were sentenced to death by Soertsz J. The case for the prosecution is that the deceased came by his death as the result of a blow on the head inflicted with a club by the first appellant, and that the second appellant was present at the time and that he and the first appellant were acting in the furtherance of a common intention. The first appellant admitted striking the deceased with a stick, but says that he struck at the latter's hand and that he did so in the exercise of the right of private defence. The Jury by their verdict rejected this defence. In order that the points raised in appeal may be properly appreciated a short statement of the facts as they emerged from the prosecution witnesses is necessary.

At the time of the incident the two appellants were employed on a farm owned by one Proctor. The deceased and his wife, Mango Nona, had at one time been employed on the estate but had left before the appellants' term of employment began. According to Mango Nona the proprietor made advances to her which were not acceptable. She and the deceased therefore left the estate and went to live on some Crown land near by and in sight of Proctor's farm. The latter, according to the woman, persisted in his overtures. Two days before the incident one Elaris,

who knew the appellants as workers on the farm, saw the latter in the company of Proctor and another and overheard some words uttered by Proctor. In consequence he made a statement to Mango Nona, which he asked her to convey to the deceased by way of warning. Elaris was not questioned as to what the words were which were uttered by Proctor but Mango Nona in cross-examination said: "Elaris had told me that Mr. Proctor had told two men on the estate that they would be given Rs. 5 if they were to bring my husband to the estate, and further he (Elaris) had warned me to caution my husband. I conveyed that information to my husband. It is not true that because of that my husband took the first opportunity to fight the first accused."

Two days later the witness Ramasamy fell in with the deceased whom he had known for six months at a fair and accompanied him on his way home. At a spot on the road near the entrance to Proctor's farm he saw the second appellant, club in hand, under a milla tree. The first appellant was a short distance away, and accosted the deceased, saying "Stop you fellow, you and I have a matter to discuss". The deceased seized the first appellant, saying "What are you going to do?" The second appellant then ran up with the club, whereupon the deceased turned and fled along a bund pursued by the appellants. After going some distance the first appellant snatched the club from the hands of the second, and after going a little further, struck the deceased on the head with the club. The deceased fell on the slope of the bund. The second appellant pulled him up the slope by the hair and saying that he must kill him, trampled on him with his heels. The deceased was then dragged by the hair by the appellants, preceeded by Proctor who seems to have appeared very quickly on the scene, to the latter's bungalow where the deceased collapsed. He died early on the following day.

The first point of law taken in appeal is that the evidence of Elaris of the warning which he conveyed to the deceased through the latter's wife consequent upon overhearing the words alleged to have been spoken by Proctor is inadmissible. The same objection is taken to the evidence of Mango Nona as to what Elaris told her, and what she, in consequence, told her husband, also to her evidence regarding the conduct of Proctor towards her.

In the first place it was argued that the words uttered by Proctor in the hearing of Elaris are hearsay and not admissible since Proctor was not called as a witness. This is a point which might have some substance if it were sought to put in evidence a statement of fact made by Proctor, the truth of whch was in question, as, for example, a statement made after the commission of an dffence which implicated a certain person. The English authority cited by counsel for the appellants, *The King v. Christie*[1], was in respect of such a case. It seems to us therefore to have no bearing on the point. The same observation applies to the case of *Khijiruddin Sonar v. Emperor*[2], where evidence given of a statement, made by a person not called as a witness, which implicated the accused in the commission of an offence committed a year previously, was held to be inadmissible. The prosecution in the present case was endeavouring to strengthen the case of unprovoked murder against the appellants

[1] *(1914) A. C. 545.*

[2] *I. L. R. 53 Calcutta 372.*

by giving evidence of motive. It did not appear that the appellants had a private grievance against the deceased or that they even knew him before the date of the incident. The prosecution, however, had in its possession evidence of an inducement which had been offered to the appellants to take some hostile action against the deceased. If an error was made in the examination-inchief of Elaris, it was not in pursuing the matter further and eliciting from the witness the exact words which were uttered. The failure to do this might have prejudice the appellants in the minds of the Jury who might well have thought that the words upon which Elaris based his warning demanded more drastic action against the deceased than they actually did. The possibility, however, of such prejudice was removed by the statement in cross-examination of Mango Nona, to which reference has been made. The evidence, then, of the words which Elaris told Mango Nona that he heard Proctor utter, goes a long way towards attributing to the appellants a motive which otherwise seemed to be lacking. This has been described by Counsel for the appellants as a "speculative" motive, but it seems to us that the evidence provides a real motive for the otherwise inexplicable conduct of the first appellant in accosting the deceased. It may be that the intention of the appellants, at the moment of accosting, was to do no more than Proctor had asked them to do and that the subsequent events were brought about by the deceased's failure to acquiesce.

This evidence, then, seems to us, in so far as it indicates a motive for the acts of the appellants, to be relevant under section 8 (1) of the Evidence Ordinance. It is also, as we have indicated, admissible, since, not being evidence of a statement the truth of which is in issue, it does not infringe any provisions relating to hearsay.

Was it then permissible to bring out in evidence the fact that Elaris had deemed it prudent to convey, through Mango Nona, a warning to the deceased, and that Mango Nona had in fact conveyed such a warning? That Elaris repeated what he had heard to Mango Nona and that the latter passed the information on to her husband seems to us to carry the case for the prosecution no further. The evidence of their respective statement could only be relevant as explanatory of the conduct of the deceased, who appears to have adopted a somewhat belligerent attitude when accosted by the first appellant. That attitude, in itself, might be of no importance. But the defence was that the first appellant was acting in the exercise of the right of private defence. Mango Nona had said that she had conveyed the information given her by Elaris to her husband and went on to say: "It is not true that because of that my husband took the first opportunity to fight the first accused". The conduct of the deceased in respect of what we have called his belligerent attitude was then in issue, and is explicable by the receipt, through his wife, of Elaris' information. The evidence then as to the passing on of the information is relevant under section 8 (2) (explanation 2) of the Evidence Ordinance.

The remaining objection, so far as the admissibility of evidence is concerned, is to the evidence of Mango Nona in regard to the conduct towards her of the proprietor of the estate. Counsel for the appellants contended that there was no nexus between Proctor and the appellants

in the light of which there could be attributed to the appellants a motive conceivably possessed by Proctor. As, however, has already been observed, the appellants had no grievance against the deceased. The assault on the deceased took place at the boundary of Proctor's estate, the latter was almost immediately on the scene, and the appellants, led by Proctor, conveyed the deceased to their employer's bungalow. The latter appears to have approved of the appellants' conduct, and his own previous conduct towards the wife of the deceased seems to be relevant under section 7 of the Evidence Ordinance as being the occasion or cause, immediate or otherwise, of facts in issue. It seems to us therefore that the objection as to the admissibility of this evidence is without substance.

The point was then taken that there was no evidence that the first appellant committed the act imputed to him in furtherance of an intention common to both appellants, or to put it more plainly and appropriately, that there is no evidence that the second appellant shared the first appellant's intention, whatever that may have been. Counsel for the appellants cited the case of *Queen-Empress v. Duma Baidya and others*[1]; in which three persons assaulted the deceased and gave him a beating, in the course of which one gave him a blow on the head which resulted in his death. It was held that, in the absence of proof that the accused had the common intention to inflict such injury as would cause death, they could not be convicted of murder.

Gouridas Namasudra v. Emperor[2], was a case in which several persons struck several blows, only one of which was fatal, and it was not found which one of the accused was responsible for that blow. It was held that those who did not strike the fatal blow could not be said to contemplate the likelihood of such a blow being struck by the others in prosecution of a common object, and the conviction of murder was altered to one of grievous hurt. We have considered these cases since they were brought to our notice by counsel for the appellants, but it seems to us that they shed no useful light on the present case. Indeed, it seems to us that all such cases must be judged on their own merits. We have already drawn attention to the part played by the second appellant in this incident, and in our view there was ample evidence from which the Jury could infer that the second appellant, although his part was less spectacular than that played by the first appellant, had some intention, in common with the latter, inimical to the deceased. It might be that the first appellant, in furtherance of that intention, exceeded the act intended, but the common intention to perform the act originally intended remains.

The next point to be taken is that the learned trial Judge did not direct the jury, except in the light of the exceptions of section 294 of the Penal Code, as to their competence to return a verdict of culpable homicide not amounting to murder, that is to say, the Jury were not told that, if they absorbed the first appellant of the intention to cause death, or to cause a bodily injury sufficient in the ordinary course of nature to cause death, but imputed to him the knowledge that he was likely by his act to cause death, they could convict of culpable homicide not amounting

[1] *19 Madras 483.* [2] *I. L. R. 36 Calcutta 659.*

to murder. Counsel for the appellants described such a verdict as a middle course between murder and grievous hurt. As far as punishment for the offence is concerned, that may be an apt description where the case falls within the first part of section 297 of the Penal Code, but the description does not truthfully apply to cases falling within the second part of the section since the punishment is no greater than that provided for cases of grievous hurt under section 317 of the Code. To lay men, however, such as constitute a jury, there can be little doubt that the offence of culpable homicide not amounting to murder appears a more heinous offence than that of grievous hurt even where in the commission of the latter offence a dangerous weapon is used.

It must be conceded that in the present case the learned trial Judge was silent in regard to the proper verdict if no more than knowledge of the likelihood of death could be imputed to the first appellant. It is contended by Counsel for the appellants that, in the absence of such a direction, the Jury, if they thought the case more serious than one of grievous hurt, would feel compelled to return a verdict of murder. In the case of *Queen v. Shumshere Beg*[1] the trial Judge had in effect decided that the accused intended to cause the death of the deceased and simply left it to the Jury that if they should convict of culpable homicide not amounting to murder they should say under which one of the exceptions the case fell. It was held that it was the duty of the Judge to point out accurately the difference between murder and culpable homicide not amounting to murder. In *Natasar Ghose v. Emperor*[2] the omission on the part of the trial Judge to direct the Jury on the question whether in causing death the accused had the intention of causing death or merely knowledge that he was likely to do so was held to be a material misdirection.

Counsel for the Crown relied upon the case of *Rex v. Bellana Vitanage Eddin*[3], in which it was held that, in a case where the Jury could have arrived at no verdict other than one of murder, it was not the duty of the Judge to put before the Jury an alternative issue in regard to culpable homicide not amounting to murder, and that to do so would merely confuse their minds. Those observations do not seem to us to apply to the present case. In the light of the medical evidence and the nature of the weapon used, we think that it was open to the Jury to find that the first appellant had no more than the knowledge that he was likely by his act to cause death and that the Jury should have been directed that it was within their province to find accordingly. The verdict of murder against the first appellant is therefore set aside and, in the exercise of our powers under section 6 (2) of the Court of Criminal Appeal Ordinance, we substitute a verdict of culpable homicide not amounting to murder.

Since the verdict of murder against the second appellant is on the footing of common intention, it follows that the verdict must, in his case also, be set aside. Of what offence then can he be found guilty? If he shared with the first appellant the intention to cause harm to the deceased and knew that what they were doing was likely to cause his death, he could have been convicted of culpable homicide not amounting to

[1] *9 Sutherland's W. R. 51 Criminal Rulings.*
[2] *I. L. R. 35, Calcutta 531.*
[3] *17 C. L. W. 128.*

murder. But it seems to us that this is putting the case rather hardly against him. In chasing the deceased with a club it can safely be assumed that he intended to use it. He was deprived of the opportunity by having his weapon snatched from him. While discounting the sincerity of his expressed intention to kill the deceased while the latter was on the ground, it seems to us safe to impute to him, in the light of his action in trampling upon the deceased, an intention to cause grievous hurt, although he did not actually do so. Nevertheless, under the provisions of section 32 of the Penal Code, sharing the first appellant's intention to the extent we impute to him, he can properly be convicted of causing grievous hurt punishable under section 317 of the Code. We accordingly substitute that verdict.

None of the remaining points of law appear to us to be of any substance. The applications for leave to appeal on questions of fact, the grounds of which comprise allegations of non-direction and misdirection, are equally without substance and are dismissed.

The convictions for murder and the sentences of death are in the case of each appellant set aside, as was announced by the Court at the conclusion of the hearing of this appeal.

In the case of the first appellant a verdict of culpable homicide not amounting to murder is substituted and a sentence of ten years' rigorous imprisonment is imposed. We find the second appellant guilty of causing grievous hurt under section 317 of the Penal Code and sentence him to eight years' rigorous imprisonment.

Convictions varied.