[COURT OF CRIMINAL APPEAL]

1970 *Present:* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Thamotheram, J.**

H. S. PERERA (*alias* Mandawala), Appellant,
and THE QUEEN, Respondent

C. C. A. No. 70/70, with APPLICATION No. 117

S. C. 792/69—M. C. Kalmunai, 39382

(i) *Evidence Ordinance—Statement of a person who is dead— Admissibility —Scope of Section 32 (1)— "Circumstances which resulted in death"—Whether they can include reference to a past incident as evidence of motive.*

(ii) *Summing-up—Judge's expression of his own opinion on guilty intention of accused—Verdict of guilt returned by Jury—Failure of Jury to devote some reasonable time to consider their verdict—Inference that they yielded to the Judge's dictation.*

(i) The accused-appellant was convicted of murder. The fatal assault on the deceased man took place on 9th August 1969. In the statement which he made to the Magistrate the deceased had mentioned an earlier incident "on 26th or 27th July" when he had a quarrel with the accused and had hit him a blow with a bottle. At the trial the Judge directed the Jury that this statement afforded evidence of motive.

Held, that the deceased's statement was not admissible under section 32 (1) of the Evidence Ordinance because it was not a statement as to the circumstances of the transaction which led to the death of the deceased.

(ii) In his summing-up the Judge strongly expressed his opinion that, considering the intention with which the accused acted, the case was indeed one of murder. At the same time he gave a formal direction that the Jury were entitled to disregard his own emphatic opinion on matters of fact. The Jury returned their verdict of "Guilty" after a consideration lasting less than ten minutes.

Held, that the failure of the Jury to devote some reasonable time to the consideration of their verdict could fairly indicate that the verdict was reached at the Judge's dictation, and not upon the Jury's own deliberations.

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

E. R. S. R. Coomaraswamy, with *K. Jeganathan, T. Joganathan, S. C. B. Walgampaya, P. H. Kurukulasuriya* and *Miss A. P. Abeyratne* (assigned), for the accused-appellant.

N. Tittawella, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

1*—A 00580—2,808 (8/73)

November 24, 1970. H. N. G. FERNANDO, C.J.—

After hearing the arguments of Counsel in this case we set aside the verdict of murder and the sentence of death passed against the appellant and substituted therefor a verdict of culpable homicide not amounting to murder and a sentence of 10 years, rigorous imprisonment. We now state our reasons.

The prosecution called only one alleged eye-witness of the assault on the deceased which resulted in the latter's death. According to this witness, one Charles, he had been together with the deceased and two other persons on the night of the incident at the house of one Marshal, assisting in the preparation of food for a function to be subsequently held at that house, and these four persons had been engaged in this task until about 1 a.m. Thereafter five or six persons including the deceased and the witness Charles were returning to their homes, first along a footpath and then along a narrow road. They were walking in single file, and in this line Charles was the third person and the deceased was following behind him. Just after the party got on to the road, a person came from the opposite direction flashing a torch. As that person walked past Charles, the latter identified him as this accused. Charles then saw the accused in the act of stabbing the deceased, although he did not see a knife in the accused's hands. The accused then turned back in the direction from which he had come, so that Charles was again able to recognise the accused. The deceased was removed to hospital and surgery was performed but he died about two days later.

One submission made in appeal on behalf of the accused was that the failure of the prosecution to call any of the other persons who had been present with the deceased fairly raises the inference that those persons did not identify this accused as the person who stabbed the deceased man. Indeed the defence called one of those persons as its witness, and he admitted that he did not recognise the assailant as being this accused. That witness however had been walking about 10 or 15 feet behind the deceased and had immediately run away when he saw the act of stabbing. The witness Charles on the other hand had the advantage that the assailant twice went past him, and that he thus had a sufficient opportunity to identify the assailant. Moreover, the defence was unable to suggest any reason why the witness Charles would have testified with such certainty against this accused, if there had been any doubt in his mind as to the correctness of his identification. There were in addition statements which had been made by the deceased to a Doctor and to a Magistrate in both of which he clearly stated that he had been stabbed by this accused.

We were not able therefore to agree that the Jury should not have acted with confidence on the evidence of Charles.

Nevertheless we note from the proceedings in the Magistrate's Court that two other persons who had been with the deceased man at the time of the assault had testified to their identification of this accused as the assailant. That being so, we do not understand the omission by the prosecution to call one or both of them to give evidence in support of the witness Charles. That omission could have left in the minds of the Jury the incorrect impression that Charles alone claimed to have recognized this accused.

Counsel for the accused further submitted that the Jury might well have returned a lesser verdict than one of murder, but for certain irregularities in the conduct of the trial and in the directions of the earned trial Judge as to the matters established by the evidence.

The fatal assault on the deceased man took place on 9th August 1969. In the statement which he made to the Magistrate the deceased had mentioned an earlier incident " on 26th or 27th July " when he had a quarrel with the accused and had hit him a blow with a bottle. Since the entire statement was read to the Jury at the trial, the Jury became aware that the deceased had thus mentioned a possible motive entertained against him by the accused ; and the trial Judge directed the Jury that this statement did afford evidence of motive.

Learned Senior Crown Counsel who appeared for the Crown in appeal conceded that the statement of the deceased man concerning this previous incident had been wrongly admitted in evidence at the trial. We had occasion recently in *The Queen v. Stanley Dias* (C. C. A. Minutes of 24.11.70) to refer to a similar improper admission of a deceased's statement, not permitted by s. 32 of the Evidence Ordinance because it was not a statement as to the circumstances of the transaction which led to the death of the deceased.

There was also the evidence of the witness Marshal (at whose house the cooking preparations had been made) to the effect that the accused had also visited his house for a short time on the night before the assault. According to Marshal, the deceased had been busy in the kitchen, but the people working in the kitchen had occasionally moved from the kitchen to some *place outside* where apparently food had been cut and chopped. When the accused came to the house he was seated on the verandah but the people working in the kitchen could not have been seen from the verandah. No question was put to Marshal as to whether

people who went from the kitchen to the " place outside " could have been seen by the accused. Nor was any question put to the principal witness Charles as to whether he himself had seen the accused on the verandah or whether the deceased had left the kitchen at any time. Despite the fact that the prosecution made no serious attempt to establish as a fact that the accused had seen the deceased in Marshal's house at any time, the learned trial Judge directed the Jury that they could draw " the natural, reasonable and inevitable inference that the accused did see the deceased that night in the house of Marshal ", and the further inference that the accused had planned beforehand to stab the deceased when the latter left Marshal's house.

In the state of the evidence, it was in our opinion merely a possibility and not by any means a probability, that the accused did see the deceased at Marshal's house, so that it would have been unreasonable for the Jury to reach an inference beyond reasonable doubt that the accused had lain in wait for the deceased after seeing him in Marshal's house. There was thus a mis-direction of fact and law as to this part of the evidence and the inference which could properly have been drawn from it.

In dealing with the question of intention, the learned trial Judge referred to the injuries on the deceased in somewhat harrowing language, and he attributed to the medical witnesses the opinion that " no earthly power could have brought this man to life " although the witnesses did not express an opinion in such terms. Although the learned Judge was quite entitled to express his own opinion as to the intention with which the accused acted, his opinion that this was indeed a case of murder was so strongly expressed that we doubt whether the Jury did in fact trouble to consider any alternative verdict to one of murder. This doubt is borne out by the fact that the Jury returned their verdict after a consideration lasting less than ten minutes.

We would refer in this connection to the Criminal Justice Act of 1967, which, in amendment of the former English Law, permits a Court to accept a verdict of the Jury which is not unanimous. Subsection (3) of section 13 of that Act provides as follows :—

> " A Court shall not accept a majority verdict unless it appears to the Court that the Jury have had not less than two hours for deliberation or such longer period as the Court thinks reasonable having regard to the nature and complexity of the case."

This provision emphasizes, not only the degree of care which a Jury is required to exercise in the consideration of a verdict, but also the principle that the verdict must truly be that of the Jury itself. Despite

the formal direction by a trial Judge that the Jury is entitled to disregard his own emphatic opinions on matters of fact, a failure of the Jury, as in this case, to devote some reasonable time to the consideration of its verdict, can fairly indicate that the verdict was reached at the Judge's dictation, and not upon the Jury's own deliberations.

On the ground just stated, and in view of the reception of improper evidence as to motive and of the misdirections concerning the inference that the accused had seen the deceased in Marshal's house, we considered it unsafe to sustain the verdict of murder and the sentence of death.

Verdict altered.