[COURT OF CRIMINAL APPEAL]

1948 *Present :* **Wijeyewardene A.C.J. (President), Canekeratne and Nagalingam JJ.**

THE KING *v.* DINGO *et el.*

Applications Nos. 248–249. S. C. 13—M. C. Matara 3,366

Court of Criminal Appeal—Evidence of child of tender years—Omission to take oath—Deliberate—Admissibility—Oaths Ordinance—Chapter 14—Section 9.

Section 9 of the Oaths Ordinance applies not only in cases where the omission to administer the oath occurs *per incuriam* but also where the Court deliberately refrains from administering the oath.

The King v. Ramasamy (1941) 42 N. L. R. 529 doubted.

Mohamed Sugal Esa Mamasan Rer Alalah 1946 A.C. 57 referred to.

APPLICATIONS for leave to appeal against two convictions in a trial before a Judge and Jury.

H. A. Chandrasena, for the applicants.

R. A. Kannangara, Crown Counsel, for the Crown.

Cur. adv. vult.

October 22, 1948. WIJEYEWARDENE A.C.J.—

The second accused is the son of the first accused and the deceased. The two accused were found guilty of the murder of the deceased on August 16, 1947.

About six years before his death, the deceased left his village Pallewella and got employed on a rubber land at Rotumba about twelve miles away. He also cultivated in *ande* a paddy field at Rotumba. The first accused and the children continued to live at Pallewella, but the first accused visited the deceased at Rotumbe occasionally for a few days and the deceased himself used to visit his family at Pallewella. The first accused admitted that she was greatly annoyed, as the deceased was keeping a mistress. The deceased, however, went to Pallewella and invited the first accused to go to Rotumbe and help him to reap the harvest. Accordingly, the first accused went there on August 9, with her young son Deonis, a boy of four or five years. The second accused got married one or two years before the death of the deceased and lived with his wife in the house at Pallewella. In July, 1947, there appears to have been some unpleasantness between the deceased and the second accused's wife and the second accused sought the assistance of the Village Headman to "obtain by peaceful means" some brass utensils, tumblers, &c.,

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belonging to his wife, and in the possession of the deceased. Shortly afterwards, the second accused and his wife appear to have gone and lived somewhere else in the vicinity. The deceased had been issued a permit P5 under the Land Development Ordinance in respect of a lot at Pallewella and the deceased had nominated the second accused as his successor. The deceased took no steps to cancel that nomination in spite of the incident in July. The Crown witness Deonis, and the first accused both gave evidence stating that the second accused came to Rotumba a few days before August 16th and worked in the deceased's field. In fact, the first accused said the second accused came at the invitation of the deceased. The Crown witness, Udenis—brother of the deceased—stated that the second accused went to Rotumba on August 15. The evidence of Udenis does not show that he was in a position to say from his own knowledge when the second accused went to Rotumba.

The deceased was murdered in the early hours of August 16 when he was sleeping in the hut. The other occupants of the hut at the time were the first accused, second accused and Deonis. The deceased had four injuries. Two of them were very serious injuries—one being necessarily fatal. They caused a fracture of the jaw and a comminuted fracture of the cheek bone one inch from the right eye. These injuries had been admittedly caused by an axe. Close to each of these injuries was found an incised wound about $\frac{3}{4}$" long and skin deep. The Doctor undertook to say that these injuries could not have been caused by a glancing blow of the axe and that they must have been caused by a " sharp cutting weapon like a knife ". Unfortunately, this expression of opinion does not appear to have been sufficiently tested by cross-examination.

The only eye witness for the Crown was the little boy Deonis. He appears to have been in the arms of the deceased's mother when he gave evidence from the witness box. He has been living with the deceased's mother and brother ever since the murder. The learned trial Judge was satisfied that he was a competent witness in spite of his tender years. Assuming that the trial Judge had deliberately omitted to administer an oath or affirmation to Deonis, the appellant's Counsel contended that Deonis' evidence was inadmissible, on the authority of *Ramasamy's* case (1941) 42 New Law Reports 529. That assumption was found to be erroneous as the Judge had, in fact, affirmed the boy. It must, of course, be presumed that in spite of the boy being about five years old the trial Judge was satisfied that he understood the sanctity of an affirmation and the necessity of speaking the truth. However, as reference has been made to *Ramasamy's* case (*supra*) I wish to state that the decision in that case would have to be reconsidered in view of the Privy Council decision in *Mohamed Sugal Esa Mamasan Rer Alalah* (1946 Appeal Cases 57) that section 13 of the Indian Oaths Act, 1873, which is in identically the same terms as section 9 of our Oaths Ordinance applied not only in cases where the omission to administer the oath occurs *per incuriam* but also where the Court deliberately refrains from administering the oath.

Deonis who was examined in the Magistrate's Court only some months after the incident stated at the trial :—

> " I saw my mother (first accused) and my elder brother (second accused) attacking my father that night with the axe and the knife. I saw that by the lamp light (i.e., light from a clay lamp with coconut oil and a wick). When my father was attacked he was lying down. Mother used the axe. Brother used the knife ".

The first accused gave evidence to the effect that she used an axe and caused the injuries under grave and sudden provocation, as she saw the deceased sleeping with his mistress on the verandah. She stated that the second accused did not join in the assault.

The Counsel for the appellant pointed out that the evidence of the first accused was supported by Deonis who said that the mistress was in the house at the time that his father was killed. Unfortunately, no reference was made to this evidence in the charge. But, on the ground of this omission we are unable to interfere with the verdict of the Jury against the first accused.

On the evidence in the case the convictions of the second accused could be sustained only on the ground that the murder was committed in pursuance of a common murderous intention shared by the first and the second accused. The facts alleged to prove the common intention and referred to in the charge to the Jury are—

(*a*) *Motive.*—The first accused was annoyed with the deceased, as he kept a mistress and the second accused was not only displeased with the deceased over the incident of July but stood to benefit by the death of the deceased, as he would then become the permit-holder under P5.

(*b*) The second accused joined his mother at the hut at Rotumba on August 15, and the deceased was killed that very night.

(*c*) The second accused made a false statement P8 to the Village Headman the morning after the murder.

(*d*) The second accused hid the axe with which the first accused hacked the deceased.

(*e*) The second accused inflicted certain injuries on the deceased at the same time as the first accused.

I shall deal with each of the matters in order :—

(*a*) It is, no doubt, correct that in a criminal case it is futile to inquire into the question of the adequacy of a motive when a motive is proved. iBut when the Crown relies on this alleged motive to prove community of intention and makes one person liable for the injuries inflicted by another the question of motive deserves some consideration. The fact that two persons have motives for killing a third party do not necessarily prove a common intention. They may each have an intention to kill the third party but they need not necessarily have a common intention. Moreover, with regard to the alleged motive of the second accused there

is no evidence that the second accused was impatient to succeed his father as permit-holder on P5. No doubt, in a sense the second accused stood to gain by the death of his father. But in that sense every child may be said to have a motive for killing his father as he may then expect to succeed to a share of the father's estate by intestate succession if, of course, it is not proved that he was responsible for the death.

As for the incident in July we find that the deceased does not appear to have been annoyed very much by it. He does not seem to have taken any steps to cancel the nomination of the second accused as his successor.

(*b*) In referring to this point the learned trial Judge has failed to draw the attention of the Jury to—

(i) the evidence of Deonis and the first accused that the second accused came to Rotumba a few days before the murder ;

(ii) the fact that Udenis' evidence on the point has to be carefully examined ;

(iii) the evidence of the first accused that the second accused came at the invitation of the deceased.

(*c*) No doubt, the second accused made a statement to the Headman suggesting that the deceased had been killed by some unknown man in the night. That statement was, of course, untrue. But I fail to see why any inference of common intention should be drawn from this fact when the most natural explanation is that the second accused was trying to protect his mother who, he thought, had been badly treated by his father.

(*d*) The second accused hid the axe as he wanted to protect his mother and at her request.

(*e*) Even accepting the evidence of Deonis that he saw the second accused using a knife it is impossible to infer from the infliction of those injuries either a murderous intention or a common murderous intention. Is such an intention established by the fact that the second accused inflicted two injuries skin deep ? Moreover there is an error in the charge of the learned trial Judge on this point. Deonis' evidence was that having gone to sleep he got up at midnight and saw by the light of the coconut lamp that the second accused was using a knife. The first accused admitted that there was such a lamp in the house but she added, " I blew out the light when I went to sleep ". There was nothing in the statement P8 of the second accused to contradict that statement. In that statement the second accused said :

> " About midnight my mother put me up and told me that she heard a noise outside. Opening the door and lighting the lamp I and my mother came out ".

In the course of his charge to the Jury the learned trial Judge said :

> " Then what about the lamp ? Deonis says there was a lamp. P8, the statement of the second accused, says there was a lamp. First accused says, ' No, there was no lamp ' ".

The question whether there was a light at the time of the murder is very important. If there was no light then Deonis could not have seen the second accused using his knife to inflict those two trivial injuries quite close to the serious injuries inflicted by the first accused.

If the attention of the Jury had been directed to all these matters, we do not think the Jury would have found the second accused guilty of murder.

We would therefore acquit the second accused.

Second accused acquitted.