[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present:* Basnayake, C.J. (President), Gunasekara, J., and Pulle, J.

D. D. WEERASINGHE, Appellant, *and* THE QUEEN, Respondent

Appeal No. 51 of 1956

S. C. 16—M. C. Badulla, 3,983

Court of Criminal Appeal—Sentence—Grounds for reduction.

The Court of Criminal Appeal will reduce a sentence when it is excessive, if the sentence does not give effect to the jury's verdict or if the accused has not been given the benefit of any doubt as to the view of the facts upon which the jury have based their verdict.

APPEAL against a sentence.

Colvin R. de Silva, with *S. B. Lekamge* and *M. L. de Silva*, for the accused-appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 10, 1956. GUNASEKARA, J.—

This is an appeal against a sentence.

The appellant was tried at an assize held at Bandarawela on an indictment charging him with the attempted murder, at Buttala, of one Mahasoof whom he had stabbed with a knife. The jury, by a unanimous verdict, found him guilty of attempted culpable homicide not amounting

to murder, punishable under section 301 of the Penal Code, and he was sentenced to rigorous imprisonment for 7 years, which is the maximum term of imprisonment for the offence.

The appellant had inflicted six wounds on Mahasoof which were described by a medical witness as follows :

" (1) an incised wound ¾ " deep and scalp deep over the right side of the vertex about 4 " above the right ear.

(2) an incised wound ¾ " in length ¾ " wide 1 " deep over the back of right side of the chest about 2 " below the neck and 3½ " lateral to the mid-line of the chest.

(3) an incised wound 1¼" in length, ½ " wide, 1 " in depth over the back of right shoulder.

(4) an incised wound 3 " in length, 1¼ " wide over the back of right side of chest just below the arm pit placed more or less vertically penetrating into the chest cavity.

(5) an incised wound 1¼ " long, ½ " wide, 1½ " deep over the upper part of right buttock about 4 " from the mid-line of the body.

(6) an incised wound 1 " long, ¼ " wide and skin deep over the back of left side of chest 2½ " from mid-line at about the level of the 4th rib ".

The doctor who gave this evidence also stated that the wound which penetrated the chest cavity was one that was sufficient in the ordinary course of nature to cause death. The appellant's case was that these wounds had been inflicted by him in the exercise of a right of private defence. According to him, he had been set upon by Mahasoof and several other men and in the course of a struggle with his assailants he had struck at them with a knife that he held in his left hand.

The trial judge addressed the appellant in the following terms when he passed sentence :

" I have taken into account the number of the injuries you inflicted, it does not matter with which hand, on Mahasoof. The story of your left hand is merely a red herring across the trail. A good number of injuries have been inflicted and one of the injuries at any rate was a grievous one and without medical attention the man would have died. I am of the opinion that you should be prevented as long as possible from returning to Buttala where neither the air nor the environment, if I may say so, is so healthful as that of this place. The sentence is seven (7) years R. I. "

It is contended in support of the appeal that the jury's verdict implies acceptance of the appellant's version coupled with a finding that he had exceeded the power given to him by law, and that in this view of his conduct the sentence is grossly excessive.

We are unable to agree with the contention that the verdict implies that the jury were satisfied that the appellant acted in the exercise of a right of private defence. In accordance with the directions that had been given to them in the learned judge's summing up a juror could have based the verdict on any one of four grounds : that it was not proved that the acts which caused the injuries were done by the appellant with the

intention of causing death (or with an equivalent intention) but it was proved that they were done with the knowledge that he was likely by those acts to cause death ; or that they were done with such an intention but in circumstances that brought the case within one of the exceptions relating respectively to exceeding the right of private defence, provocation and sudden fight. While the verdict may well have been based on any one of those grounds by all the jurors, it is not impossible that it was based by some jurors on one ground and by others on others. Nor is it impossible that there was such a divison of opinion that there was no majority in favour of any one of the four grounds.

The remarks made by the presiding judge suggest that his own view was that there was no truth in the version that the injuries were inflicted in circumstances that brought the case within any of the exceptions. It appears, therefore, that he has assessed the punishment that he imposed on the appellant upon the footing that the offence was one committed without any intention to cause death or an equivalent intention. In such a case the maximum term of imprisonment that he could have imposed for the completed offence, if the appellant had actually caused the death of the injured man, was only ten years. Viewed in the light of this consideration in the circumstances of the case the sentence of seven years' rigorous imprisonment for the attempt appears to the court to be palpably excessive.

Our attention has been drawn by the learned counsel for the appellant to the case of *R. v. Fernando* [1], where it was held that the sentence must give effect to the jury's verdict, and by the learned crown counsel to the case of *R. v. Ponnasamy* [2], where it was held that the accused should be given the benefit of any doubt as to the view of the facts upon which the jury have based their verdict. In the latter case this court reduced the term of a sentence of imprisonment for attempted culpable homicide not amounting to murder from seven years to five years on the ground that although the trial judge was of the view that the accused had the intention to cause death it was possible that the jury held that he had no such intention but merely had the knowledge that what he was doing was likely to result in death. In the present case it is contended for the appellant that the view most favourable to him is that his offence is reduced from attempted murder to the lesser offence by reason of circumstances that bring the case within the exception relating to exceeding the right of private defence. In a case falling within that exception the maximum term of imprisonment for the completed offence of culpable homicide not amounting to murder would be twenty years, as in a case of culpable homicide falling within any of the other special exceptions to the definition of murder ; but it is difficult, if not impossible, to conceive circumstances in which an offence of culpable homicide falling within this exception should be punished with the maximum term of imprisonment. Viewed in the light of the principle laid down in *R. v. Ponnasamy* [2], too, the sentence passed in the present calls for reduction.

We reduce the sentence to one of rigorous imprisonment for four years.

Sentence reduced.

[1] *(1916) 47 N. L. R. 261.*

[2] *(1942) 43 N. L. R. 359.*