# ANIL JAYANTHA
# v.
# THE ATTORNEY-GENERAL

COURT OF APPEAL
FERNANDO, J., AND
EDIRISURIYA, J.
CA NO. 34/2000
HC BALAPITIYA NO. 84306
JULY 09, 2002

*Penal Code, section 296 – Capital charge – Duty of prosecutor to draw attention to items of evidence which cast serious doubts – Intervention of court – Criminal Procedure Code, section 122 (3).*

**Held :**

Though a prosecutor is not bound to expose every infirmity and weakness in his case yet when a person is brought up on a capital charge and there is some item of evidence which casts serious doubts on his guilt, it is the duty of the prosecutor to draw the attention of the trial Judge to such evidence.

**APPEAL** from the judgment of the High Court of Balapitiya.

**Cases referred to :**

1. *Fernando v. The Queen* – 76 NLR 265 at 266.
2. *Muthubanda v. The Queen* – 73 NLR 8.
3. *K. v. Cooray* – 28 NLR 83.

*Ranjit Abeysuriya*, PC with *Sharmane Gunaratne* and *Lanka de Silva* for accused-appellant.

*Palitha Fernando*, Deputy Solicitor-General for Attorney-General.

*Cur. adv. vult.*

September 09, 2002

**EDIRISURIYA, J.**

In this case initially four accused were indicted for having on or about 1995. 11. 07 caused the death of one Indunil Silva an offence punishable under section 296 of the Penal Code. Since 1st and 4th accused were dead the indictment was amended and trial against the 2nd and 3rd accused was taken up before the High Court Judge of Balapitiya without a Jury.

Widow of the decased Wickrama Nishanthi de Silva gave evidence to the following effect: On 1995. 11. 07 her husband came home and left the house in the morning saying that he was going to Colombo. She too walked with him carrying the little child in her arms. They walked along the railway track. She stopped near the crossroad.

Just at that time she saw 1st accused Sarath Prema de Silva *alias* Sisira come running on the tarred road, from the direction of Galle. Sisira attacked the deceased either with a sword or a *manna*. One blow struck the deceased's left leg. The deceased fell down. She was about 40 feet away from where he lay fallen.

She was shocked by this incident and hid herself in the jungle. She did not have the strength to shout. Thereafter, the accused Liyanage Anil Jayantha came and struck the deceased on the head with an axe. At the same time Jayawardane and Anulawathie also came. The 4th accused Jayawardane had a knife in his hand.

Professor Niriellage Chandrasiri who performed the post-mortem examination on the deceased said that there were 17 external injuries on the body of the deceased. He said all the injuries taken together could cause death in the ordinary course of nature. He said that death was due to shock caused by bleeding from the injuries. He also said that he could not conclude that these injuries were caused with an axe.

Jayawardane did not do anything. Sisira's mother Anulawathie shouted "මරන්න". Anulawathie attempted to prevent the witness from going to the police. The witness said that she made a complaint to the police.

The learned High Court Judge has acquitted the 3rd accused Anulawathie on the basis that there was no participatory presence on her part. The 1st and 4th accused were dead at the time of the trial.

The learned counsel for the 2nd accused-appellant submitted that this witness in her statement to the police just after the incident has not mentioned the name of the second accused as one of the persons who attacked her deceased husband or that he had a weapon in his hand. He further submitted that the defence counsel at the trial has failed to bring this material omission to the attention of court. However, the learned counsel for the appellant submitted that the learned counsel who appeared for the accused at the trial has stated in his address that this witness has not mentioned the fact that the second accused attacked the deceased or that he had a weapon in his hand.

The learned counsel for the accused-appellant referred us to a judgment of Sirimane, J. in *Fernando v. The Queen.*[1] His Lordship has stated other two judges agreeing that: "Though a prosecutor is not bound to expose every infirmity and weakness in his case yet when a person" is brought up on a capital charge, and there is some item of evidence which casts serious doubts on his guilt we think it is the duty of the crown to draw the attention of the trial judge to such evidence. Had this been done as was pointed out by this court in *Muthubanda v. The Queen*[2] the trial judge would undoubtedly have prominently placed this matter before the Jury and drawn their attention to the serious discrepancy between the evidence in court and the statements to the police.

Facts in the above case are as follows: The prosecution alleged that around midnight, the appellant had entered the house of the deceased through the roof and struck both the deceased and his wife Maria with a blunt weapon probably an iron rod.

The deceased succumbed to his injuries a couple of days later. He and his wife were both over 70 years of age. There were no other inmates of that house. Therefore, the prosecution case depended mainly on the identification of the accused by Maria. She stated in her evidence that on hearing a noise she got up, lit a lamp and saw the appellant striking a blow on her husband followed by a blow on her. She knew the accused. He had been their tenant for about six months, and had left a few days before this incident after some unpleasantness having it is alleged uttered a veiled threat. The prosecution relied on this fact as evidence of motive. His Lordship has stated that "If indeed he had been seen by Maria, she should have no difficulty in identifying a person whom she knew so well".

The defence strongly challenged this evidence and placed before the Jury the deposition of the doctor who had examined Maria and her husband at about 10.00 am next morning. Both of them had told him that they were assaulted "by burglars". Since it appeared that the discrepancy was a very serious one Their Lordships who heard the appeal thought it necessary in the interests justice to ascertain what exactly the witness Maria and her husband had told the police officer who questioned them, undoubtedly with the primary object of ascertaining the identity of the assailant. The extracts from the Police Information Book furnished to court showed that their statements were recorded at 5.15 pm on the following evening. Both of them had categorically stated that they did not know who their assailant was. In the above case Their Lordships were of the view that had the statements of Maria and the deceased been placed before the Jury it was impossible to say that they would have returned a verdict adverse to the accused.

Also I think it is pertinent to consider the case of *Muthubanda v. The Queen* (*supra*). In this case the accused who was charged with murder was convicted by a five to two verdict of the Jury of culpable homicide not amounting to murder. A material question that arose for consideration was whether the deceased had a gun with him at the time he was attacked by the accused. If the deceased had a gun, it was not unlikely that the accused struck the deceased with a sword fatally in the exercise of the right of private defence. The two eyewitnesses for the prosecution stated in their evidence in chief that the deceased had sent away the gun shortly before the time of attack.

In cross-examination also they denied that the gun was with the deceased at the attack. But, in their statements to the police soon after the incident they had made no mention of the fact that the deceased sent away the gun at any stage. This serious discrepancy between their evidence in court and their statements to the police was not brought to the notice of the trial judge by the Crown Counsel.

His Lordship Alles, J. held with other two judges agreeing that this was a case which required the intervention of the court in terms of section 122 (3) of the Criminal Procedure Code.

Again in the Divisional Bench Case, *King v. Cooray*.[3] His Lordship Garvin, ACJ. dealing with the proper approach to the cross-examination of witnesses from the statements recorded in the course of a police investigation observed thus: "It may indicate lines of inquiry which should be explored in the interests of justice, or may disclose to a judge that a witness is giving in evidence a story materially different from the story told by him to the investigation after the offence".

I think, therefore, in the instant case the learned trial judge should have given his mind to the submission made by the counsel for the accused that though the eye-witness testified in court that Anil attacked

the deceased with a weapon she had not told the Police that he had any weapon in his possession or that he attacked the deceased with it. It would appear that this line of defence was not taken up at the trial except at the stage where the defence counsel delivered his address.

Ajith Wijesooriya, a retired Inspector of Police, said the deceased told him that the first and the second accused attacked with a sword. (සිසිරයි, සුද්දයි කඩුවෙන් පහර දුන්නා). 120

This dying declaration does not support the evidence of Nishanthie who has said the second accused attacked the deceased with an axe. Also her statement to the police states that he was at the scene but does not say that he had a weapon or that he attacked the deceased. Professor Niriellage Chandrasiri's testimony is that the injuries could not have been caused with an axe.

Therefore, when one takes Nishanthi's evidence the conclusion one can come to is that the 2nd accused was merely present at the scene. Had the trial judge considered this discrepancy in Nishanthi's evidence it would have become clear that it was unsafe 130 to convict the second accused-appellant on the evidence given against him by Nishanthi.

In the attendant circumstances I quash the conviction for murder. Accordingly, I set aside the sentence of death imposed on the 2nd accused-appellant and acquit him.

**FERNANDO, J.** – I agree.

*Appeal allowed.*