

1945

Present: **Wijeyewardene J.**

MARTIN FERNANDO, Appellant, and THE INSPECTOR OF
POLICE, MINUWANGODA, Respondent.

133—*M. C. Negombo, 43,121.*

Appeal Court—Decision on question of fact—Finding of Magistrate—Duty of Court of Appeal.

An Appellate Court is not absolved from the duty of testing the evidence in a case both extrinsically as well as intrinsically, although the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight.

Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt.

The King v. Fernando (32 N. L. R. 251) followed.

A PPEAL from a conviction by the Magistrate of Negombo.

Cyril E. S. Perera (with him E. P. Wijetunge), for the accused, appellant.

H. A. Wijemanne, C.C., for the Crown, respondent.

Cur. adv. vult.

March 22, 1945. WIJEYWARDENE J.—

The accused was convicted on a charge of theft of a bull belonging to one Migel on September 24, 1944, and sentenced to three months rigorous imprisonment.

Migel stated that at about 1 A.M. he heard a noise and came out armed with a club and a katty. He saw three men leading the bull. He flung the club, and the three men ran away leaving the bull. Two men escaped, but he and his son succeeded in seizing the third man who happened to be the accused. Shortly afterwards, Pemiyanu came for his cries and accompanied him on his way to the Police Station. They were unable to go to the Police Station as stones were pelted by some people and, therefore, they took shelter in the house of one Aron Fernando. The Police were informed only in the morning.

Neither Migel's son nor Aron Fernando was called as a witness. Pemiyanu was called as a witness but he could not, of course, give evidence with regard to the theft itself.

The defence was that the accused was an employee of one S. P. Charles Appu, who is described by Pemiyanu as a "respectable young man", whose parents own some property. The accused says that Charles was in love with Jane, a daughter of Migel, and he accompanied Charles to the house of Migel that day as Charles wished to go and meet Jane. They both went near the house of Migel and Charles was having a conversation with Jane secretly when Migel awoke and came out. Charles ran away but the accused was caught. Charles also gave evidence

supporting substantially what the accused said. I may add that Migel himself was cross-examined about Jane and Charles and his evidence was—

“ Charles is a bachelor. My daughter is a student at Anula College. I do not know that Charles is in love with my daughter, Jane Nona ”.

It is most unlikely that Charles would have given the evidence he did if it was not true, as by giving that evidence he would in no way help himself or Jane but would, on the other hand, incur the displeasure of Migel.

I do not see any reason for disbelieving the evidence of accused or Charles. Nor am I impressed by the reasons given by the Magistrate for rejecting the defence. He says that Charles admitted that he had gone to Migel's house on previous occasions and that Migel was aware of those visits, and that, therefore, it is difficult to understand why Migel should have raised any objection to the visit of Charles that day. The attitude of Migel would depend on the time at which and the circumstances in which Charles paid his visit. There is nothing in the evidence to show that Charles's earlier visits were also timed at 1 A.M. or that he got Jane secretly on those occasions to meet him outside. Migel would probably have no objection to the visits of Charles, a “ respectable young man ”, provided he came there with the knowledge of Migel and at a reasonable hour. But certainly he would object to a visit of Charles at 1 A.M. and also to a quiet conversation between Charles and his daughter at that hour in the compound. The second reason given by the Magistrate is that it is difficult to understand “ why Charles and the accused should have taken to their heels when Migel challenged them ”. It appears to me that Charles and the accused acted as most people of their class would act in similar circumstances. The Magistrate states further that if the defence version is true the accused would have told Migel the truth as soon as he was arrested. It is not at all strange that the accused did not act in that way. He was an employee of Charles and he was not going to reveal to Migel the secret love affairs of Charles and Jane.

Though the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight, an Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically (*vide The King v. Fernando*¹, and *Nga Kyaw Hla v. The King*²).

A close examination of the evidence raises a strong doubt in my mind as to the guilt of the accused and the accused should be given the benefit of that doubt.

I allow the appeal and acquit the accused.

Appeal allowed.

¹ (1930) 32 N. L. R. 251.

² *All India Reporter* (1935) Rangoon 45.