[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Moseley S.P.J., Keuneman J. and de Kretser JJ.**

THE KING *v.* VIDANALAGE LANTY.

4—M. C. Kalmunai, 25,096

Misdirection of law—Evidence to support lesser verdict—Failure to give proper direction—Statement made under section 122 of the Criminal Procedure Code signed by witnesses—No prejudice to accused—Court of Criminal Appeal Ordinance, s. 6 (2).

There was evidence in this case upon which it was open to the jury to say that it came within exception 4 to section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf.

In the course of his charge the presiding Judge referred to this evidence as part of the defence story but not as evidence upon which a lesser verdict might possibly be based.

Held, that it was the duty of the presiding Judge to have so directed the jury and that in the circumstances the appellant was entitled to have the benefit of the lesser verdict.

Held, further, that where statements of witnesses recorded under section 122 (1) of the Criminal Procedure Code have been signed by them contrary to the express provision found in the section, the use at the trial of such a statement is not a ground for quashing the conviction where no prejudice has been caused to the appellant thereby.

THIS was an application for leave to appeal against a conviction for murder before a Judge and jury at the Batticaloa Assizes.

C. Suntharalingam (with him *S. W. Jayasooriya* and *J. A. P. Cherubim*), for accused, appellant.

Nihal Gunasekera, C.C., for the Crown.

May 8, 1941. MOSELEY S.P.J.—

This was an application for leave to appeal against conviction. The appellant was convicted at the Batticaloa Assizes, on March 20, 1941, before Nihill J. of murder, and was sentenced to death. At the hearing Counsel for the appellant was allowed to raise certain questions of law. We may say at at once that, in spite of several unsatisfactory features in connection with the evidence of the principal witnesses for the prosecution, we are unable to say that the verdict of the jury is unreasonable, or that it cannot be supported having regard to the evidence before it.

In regard to the facts it is common ground that, at the time when the deceased received the stab injury which caused his death, there were present the deceased, appellant and the principal Crown witness Kanagan. The defence version brings another person, William Silva, to the spot as an eye-witness of at least the beginning of the transaction. Kanagan's story is that the appellant made an unprovoked attack with a knife on the deceased. The appellant says that the injury to the deceased was caused by Kanagan in an abortive attempt to stab appellant.

Shortly after the incident appellant, who was not then suspect, and William Silva were examined by a police officer as provided by section 122 (1) of the Criminal Procedure Code (Cap. 16) and their statements were reduced into writing and signed by them. These written statements were subsequently used at the trial for the purpose of proving that each had made a different statement at a different time. It is contended on behalf of the appellant that the fact that the statements were signed by the persons making them renders them inadmissible. It is true that section 122 (1) contain an express provision that a statement made in such circumstances shall not be signed and we were referred to a decision upon the corresponding section of the Indian Code in support of Counsel's contention. In *Bhuneshari v. Empress* [1] Srivastava J. expressed the opinion that it was impossible to say what the statements of the witnesses might have been if their signatures had not been obtained and he was unable to agree that the fact had not occasiond a failure of justice. This was a judgment of a single Judge, a fact which was remarked in *Muhamad Panab and another v. Emperor* [2] in which the Court held that, while the signature by the maker of such a statement was an irregularity, "it would not by itself be ground sufficient for quashing a conviction". With this view we respectfully agree. We do not think the appellant has been in any way prejudiced by this breach of the provision of the section which, it is to be feared, is not an unusual one.

Counsel then argued that the use of the statements of the appellant and William Silva was illegal. In the course of the trial the learned Judge made an order allowing Crown Counsel to use the statement made to the Police Inspector by the accused "for the purpose of showing that

[1] *A. I. R. (1931) Oudh 172*

[2] *A. I. R. (1934) Sind 82*

he has made different statements at different times, that is, statements different from the evidence he is now giving in the witness box". Such procedure appears to us to come within the clear wording of section 122 (3) and is therefore unobjectionable. The same observation applies to the statement of William Silva.

Another ground of appeal is that there had been a mistake in the case by the prisoner or his adviser. This appears to be without substance, as does the objection that William Silva was discredited by the incorrect observations of the presiding Judge. In our view the criticism expressed by the learned Judge was well founded.

The remaining ground of appeal is that the jury were not directed properly on the matter of a fight before the deceased was stabbed. That is to say, that it was not brought to the notice of the jury that there was some evidence upon which, if they believed it, it was open to them to find that the appellant was guilty of culpable homicide not amounting to murder, as provided by exception 4 to section 294 of the Penal Code. The learned Judge did in fact put it to the jury that, if they were convinced beyond reasonable doubt by the evidence for the prosecution, it was clearly their duty to find the appellant guilty of murder, but that, if they believed the defence, they would not hesitate to acquit him. No question of culpable homicide not amounting to murder, he said, arose on his defence. It is a fact that no such defence was put forward by him or on his behalf. In *William Hopper*[1] the defence, as in this case, was that of accident. In that case, however, Counsel for the defence indicated that, if that defence failed, he should hope for a verdict of manslaughter only. But the Court expressed its view that, even if Counsel had not contended for a verdict of manslaughter, the Judge was not relieved of the necessity of giving the jury the opportunity of finding that verdict. In *The King v. Bellana Vitanage Eddin*[2] Howard C.J. in referring to a defence that had not been raised nor relied upon at the trial, said that that fact was not in itself sufficient to relieve the Judge of the duty of putting this alternative to the jury "if there was any basis for such a finding in the evidence on the record". A similar view was expressed in *The King v. Albert Appuhamy*[3].

Is there then in the present case any basis for a finding that the injury which the jury have found to have been inflicted by the appellant on the deceased, was inflicted without premeditation in a sudden fight within the meaning of exception 4 to section 294 of the Penal Code? There is the evidence of the appellant to the effect that he was seized by the deceased and that he held the deceased by the waist, and that, when he asked the deceased for an explanation, the latter replied "Wait and I'll tell you the reason" and called upon Kanagan to stab. This is to some extent corroborated by William Silva. There is, as well, the evidence of Martin to the effect that the appellant ran into his house saying: "Sinhalese people are coming to assault me", and that the appellant said he was afraid to go back to the road. Some of these matters were referred to by the learned Judge, but only in setting out the defence story and not as evidence upon which a lesser verdict might possibly be based.

[1] *11 Cr. App. R. 136.* [2] *41 N. L. R. 345.* [3] *41 N. L. R. 305.*

In our view the defence of accident should not, in the words of Reading L.C.J. in *William Hopper* (*supra*), be taken "to the exclusion of any other possible view of the facts and circumstances. The Court, with the assistance of the jury, must arrive, not at the view presented, but at a true view of the facts".

We do not go so far as to say that a verdict of culpable homicide not amounting to murder should have been found. The question was not put to the jury, and we think that the appellant must have the benefit of the lesser verdict.

In the exercise of our powers under section 6 (2) of the Court of Criminal Appeal Ordinance, we set aside the verdict and sentence and substitute therefor a verdict of culpable homicide not amounting to murder and a sentence of ten years' rigorous imprisonment.

Conviction for murder set aside.

Conviction for culpable homicide not amounting to murder entered.