1945 *Present:* **Howard C.J., Keuneman and Jayetileke JJ.**

THE KING *v.* JINASEKERE *et al.*

43—M. C. Gampaha, 23,673.

Evidence—Misdirection of fact—Statement of one accused exonerating another—Evidence in rebuttal—Death caused in course of sudden fight without premeditation—Penal Code s. 294 exception 4—Misdirection of law.

Where the presiding Judge's comment on the evidence of a headman to the effect that he was in a position to say that the accused did not carry a pointed knife, with which the deceased was alleged to have been stabbed, did not put accurately to the jury the effect of the headman's evidence.

Held, that there was a misdirection of fact.

Where the 2nd accused gave evidence to the effect that he and not the 1st accused stabbed the deceased,

Held, that the jury should have been directed that the testimony the 2nd accused, as stated above, by means of a statement made to be considered by the jury in determining the guilt or innocence of each of the accused.

Where an Inspector of Police was called to rebut the evidence of the 2nd accused, as stated above, by means of a statement made to him by the 2nd accused, any further information from that statement beyond that called in rebuttal should not be admitted.

Where the circumstances showed that the deceased received fatal injuries in the course of a sudden fight without premeditation in the heat of passion upon a sudden quarrel,

Held, that the Judge should have asked the jury to say whether the case came within exception 4 of section 294 of the Penal Code.

APPEAL against a conviction by a Judge and jury before the Western Circuit.

H. V. Perera, K.C. (with him *E. A. G. de Silva* and *Mackenzie Pereira*), for 1st appellant.

Mackenzie Pereira for 2nd and 3rd appellants.

D. Jansze, C.C., for the Crown.

Cur. adv. vult.

June 11, 1945. HOWARD C.J.—

The three accused in this case were jointly indicted on a charge of murder. The first accused was found guilty of murder and the second and third accused of intentionally causing grievous hurt. All three accused appealed against their convictions. The convictions of the second and third accused have already been set aside and they have been discharged. The only points of substance taken by Mr. Perera on behalf of the 1st accused are as follows:—

(1) That the trial Judge told the jury that the headman's statement about not seeing a knife with the first accused is not worthy of much consideration, whereas the headman's evidence was that he was in a position to say that the first accused did not have the knife with which he was alleged to have stabbed the deceased.

(2) That certain portions of the second accused's statement to the Police were wrongly admitted in evidence.

(3) That the learned Judge should have told the jury that the evidence of the second accused could have been taken into consideration when they were determining the guilt of the first accused.

(4) That on the evidence it was open to the jury to give the first accused the benefit of exception 4 to section 294 of the Penal Code. The failure of the trial Judge to so direct the jury vitiates the verdict.

With regard to (1) the headman, W. D. Elaris, was called by the Crown. In cross-examination he stated as follows:—

"The 1st accused was in my company for half an hour. I did not find this pointed knife (P 1) in his possession. I did not see it at any time in his hand or in his waist. I did not see the handle of a pointed knife which had been stuck between his sarong and shirt. I am in a position to say that this knife (P 1) was not with him."

In reply to questions put by the Court the headman stated as follows:—

"I found P 1 near the 3rd accused's house in the garden. On information I picked up the knife. At that time the 1st accused was wearing a sarong and a shirt. As we were walking side by side talking it was difficult for me to see what he had. When I came to the scene where Jane Nona was lying fallen I saw these wounds and when I searched the 1st accused he had a clasp knife with him."

The Crown case was based on the theory that the first accused stabbed the deceased with the pointed knife (P 1). The headman says he arrived

at the scene four minutes after the 1st accused, who was with him, had turned back and run towards the cries. The headman saw no blood on the 1st accused and the clasp knife (P 3) was in his waist. The question as to whether the 1st accused was carrying the knife P 1 was in the circumstances of the case a most important one. We think that the learned Judge misdirected the jury in brushing aside the evidence of the headman on this point. It was open to the jury to take the view that the headman might possibly not have noticed the possession by the first accused of P 1. On the other hand the headman stated that he and the first accused were in each other's company for half an hour. Moreover the headman stated that he was in a position to say that P 1 was not with him. The jury might therefore take the view that, if the first accused had P 1, the headman must have seen it. The Judge's comment on the headman's evidence on the point does not accurately put to the jury the effect of the headman's evidence and in our opinion amounts to misdirection.

With regard to (2) it would appear that when the case for the defence was closed, Crown Counsel called Inspector Wijesinghe who stated that, on being taken into custody, the second accused made a statement in the course of which he said " We fell in a bunch and therefore I do not know who stabbed Jane Nona ". Although the record does not say so, the Inspector was no doubt called to rebut that part of the evidence of the second accused in which he said he stabbed the deceased. Inspector Wijesinghe was not cross-examined. But in reply to a question put by the Court he read out a further statement made by the second accused in which the latter was supposed to have said:—

> " Karamanis, Gunasekere, Sediris and Jane Nona chased after me to our land. Karamanis assaulted me with a club, I fell down. I did not assault Karamanis. She came up to the spot. (She is Laiso Hamy.) When I was assaulted we fell in a bunch. Gunasekere was not at the spot. I do not know who stabbed Jane Nona. I do not know who assaulted Karamanis. I am not angry with Jane Nona or Karamanis. I do not know who murdered Jane Nona."

This further statement should not have been produced in evidence inasmuch as it was not called in rebuttal of anything the second accused had said in evidence. Moreover, the learned Judge used this statement in his summing up to reinforce the contention that the second accused was not speaking the truth and therefore a witness on whose evidence the jury could place no reliance.

With regard to (3) the second accused went into the witness box and gave evidence to the effect that he and not the first accused stabbed the deceased. This evidence if accepted by the jury would have exonerated the first accused. In commenting on the evidence of the second accused the learned Judge stated as follows:—

> " Then gentlemen, in considering the case for the second accused you must consider his case entirely. You must keep the first and third accused aside in anything which might implicate either of them."

This passage is somewhat obscure. It might mean that the evidence of the second accused could not be taken into consideration in considering

the guilt of the first and third accused. In this case it was too favourable so far as the first and third accused were concerned. Or by the use of the word " entirely " it might mean that his evidence could not either be used as testimony in favour of the first and third accused. We think that the jury should have been told that the testimony of the second accused formed part of the evidence in the case and could be considered by the jury in determining the guilt or innocence of each of the accused.

With regard to (4) the case for the first accused, based on the injuries found on the second and third accused which were to a certain extent unexplained, was that the deceased received her fatal injuries in the course of a sudden fight and therefore the circumstances were such as to bring the case within exception 4 of section 294 of the Penal Code. Moreover, if the evidence of the second accused is accepted there was evidence to support the argument that the injuries found on the deceased were received in the course of a sudden fight without premeditation in the heat of passion upon a sudden quarrel. In these circumstances we think that the jury should have been asked by the learned Judge to say whether the case came within this exception.

We have been very much impressed by the argument of Mr. Jansze, on behalf of the Crown, that there can be no doubt about the guilt of the first accused inasmuch as he was implicated immediately after the arrival of the headman on the scene by Karamanis and Gunasekere. In spite, however, of the manifest force of this contention we do not think we can allow the conviction to stand. We therefore set it aside and direct that the first accused be tried before another jury.

Conviction set aside.
Retrial ordered.