[COURT OF CRIMINAL APPEAL]

1971 *Present :* **Sirimane, A.C.J. (President), Samerawickrame, J., and Wijayatilake, J.**

W. M. SAMERAKOON BANDA, Appellant, *and* THE QUEEN, Respondent

C. C. A. No. 115 OF 1970, WITH APPLICATION No. 179

S. C. 94/70—M. C. Dambulla, 20221

Charge of murder—Evidence showing that accused struck deceased one blow only—Direction that should be given then by the Judge to the Jury—Whether accused had " the intention " or only " the knowledge "—Question for Jury to decide.

[1] *(1951) 52 N. L. R. at 550.*

In a prosecution for murder, the evidence showed that the accused-appellant had struck one blow on the neck of the deceased with a sword. The injury was only half an inch deep, but death resulted because the jugular vein was cut. Little force was needed to inflict that injury.

Held, that it was the duty of the Judge to have directed the Jury that if, having regard to the fact that only one blow was struck which caused an injury half an inch in depth, they took the view that the appellant had no murderous intention but had only the knowledge that death would be the likely result of his act, then he would be guilty of the lesser offence of culpable homicide not amounting to murder. Whether a person had " the intention " or only " the knowledge " is always a question of fact which must be left to the Jury to decide.

APPEAL against a conviction at a trial before the Supreme Court.

K. Shinya, with *Nihal Singaravelu* and *B. B. D. Fernando* (assigned), for the accused-appellant.

P. Colin Thome, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

January 13, 1971. SIRIMANE, A.C.J.—

The appellant had struck one blow on the neck of the deceased with a sword. The injury was only half an inch deep, but death has resulted as the jugular vein was cut. The evidence also showed that the deceased who was walking away from the appellant had suddenly turned round, on hearing a cry of warning from his wife, when the blow alighted on his neck. The learned trial Judge in dealing with the injury told the Jury—

" .....it must have been inflicted with considerable force for the jugular vein to be cut."

The Medical evidence does not support this direction. The sword which was a production in the case is a heavy sharp weapon, and learned Crown Counsel concedes that little force would have been needed to inflict an injury half an inch deep with that weapon.

Immediately after telling the Jury that considerable force must have been used, and that the injury was on the neck of the deceased, the learned Judge said—

" Having regard to these matters, have you any reasonable doubt that the person who caused an injury of that nature had the intention at least to inflict an injury which is sufficient in the ordinary course of nature to cause death. If that is your view, on an estimation of the evidence then the accused is prima facie guilty of the offence of murder."

There was evidence that the accused was smelling of liquor at the time, and the learned Judge said a little later—

> "*The only point in favour of the accused* in this case on which you might consider whether a lesser offence is possible is whether he was so drunk that at the time he caused the death of the deceased he did not know that what he was doing was wrong or contrary to law."

He gave no direction at all to the Jury that if having regard to the fact that only one blow was struck, which caused an injury half an inch in depth, they took the view that the appellant had no murderous intention but had only the knowledge that death would be the likely result of his act, then he would be guilty of the lesser offence of culpable homicide not amounting to murder.

Whether a person has "the intention" or only "the knowledge" is always a question of fact, which must be left to the Jury to decide. Only very exceptional circumstances would justify a non-direction on this point which would amount to a withdrawal of this issue from the Jury.

The non-direction in the circumstances of this case, in our view, amounts to a mis-direction. Had such a direction been given, we are of the view that the Jury may very well have found the appellant guilty of the lesser offence.

We therefore set aside the conviction for murder and substitute one of culpable homicide, and sentence the appellant to 7 years' rigorous imprisonment.

Conviction altered.