[COURT OF CRIMINAL APPEAL.]

1945 *Present:* **Soertsz S.P.J., Keuneman and Wijeyewardene JJ.**

3—M. C. Colombo, 32,915.

THE KING *v.* N. A. FERNANDO *et al.*

Evidence—Value of evidence of adverse witness—Duty of jury—Meaning of word "premeditation"—Penal Code, s. 294, Exception 4.

The fact that a witness is treated as adverse and is cross-examined as to credit does not warrant a direction to the jury that they are bound in law to place no reliance on his evidence.

It is for the jury to examine the whole of the evidence of such witness so far as it affects both parties favourably or unfavourably for what in their opinion, it is worth.

Where the trial Judge explained to the jury the meaning of "premeditation" in exception 4 of section 294 of the Penal Code as if it were synonymous with "intention".

Held, that there was a misdirection in law.

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

H. V. Perera, K.C. (with him *Nihal Gunesekere* and *S. W. Jayasuriya*) for the appellant.

E. H. T. Gunasekara, C.C., for the Crown.

Cur. adv. vult.

May 17, 1945. SOERTSZ S.P.J.—

The appellant and another were put on their trial on a charge of murder. The jury returned a unanimous verdict acquitting the other accused and finding the appellant guilty of the offence charged. The main points Counsel for the appellant submitted for our consideration were:—

(*a*) That the jury were wrongly directed in that the evidence of the witness Wijepala called by the Crown and treated by it, with the permission of the Court, as an adverse or hostile witness was submitted by the Judge for the consideration of the jury. Counsel's contention was that Wijepala's evidence should have been excluded altogether and that, if that had been done, there was no other evidence to go to the jury in support of the charge.

(*b*) Alternatively, that in view of the fact that Wijepala began his evidence at the trial by recanting a substantial part of the evidence given by him in the Court below, to the effect that the assailant of the deceased was the appellant, and reverting to that statement only when he was treated as an adverse witness and confronted with his deposition in the Court below, there was non-direction when the trial Judge failed to caution the jury to examine his evidence critically, and to invite their attention to the contradictory and otherwise unsatisfactory nature of his evidence at the trial.

(*c*) That the Judge, as it would appear from his charge, having formed the view that corroboration of Wijepala's evidence was necessary, misdirected the jury by telling them that such corroboration was forthcoming from the fact that Wijepala was clearly shown to have been present on the scene.

(*d*) That the trial Judge misdirected the jury in regard to the operation of exception 4 under section 294 of the Penal Code by the terms of his explanation of the words " without premeditation " and by telling them that if they were not satisfied that the appellant was acting without premeditation in the meaning of the words as given by him to them, they need not address themselves any further to a consideration of that exception.

(*e*) Counsel also submitted that the charge taken as a whole must have served to confuse rather than assist the jury, and he asked for a retrial.

To deal with the last objection first, we find that although parts of the charge were somewhat obscure and misleading, it is quite impossible for us to hold that, in consequence, there was such a miscarriage of justice as Counsel contends there was.

In regard to (*a*) we are in respectful agreement with the view taken by a full Bench of the Calcutta High Court in *Profulla Kumar Saker v. King Emperor* [1] that the fact that a witness is dealt with as adverse and is cross-examined to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence. It is for the jury to examine the whole of the evidence of such a witness so far as it affects both parties favourably or unfavourably for what, in their opinion, it is worth. We, therefore, rule that the evidence of Wijepala was rightly admitted for consideration by the jury.

As for contention (*b*), although we are of opinion that some part of Counsel's criticism of the Charge was justified, we find that, on the whole, the jury had before them in consequence of the examination-in-chief and cross-examination of that witness all the assistance necessary to enable them correctly to appraise the value of that evidence, for the trial Judge, although he indicated his own view of that evidence, quite clearly directed the jury that they were not bound by his view but could form their own upon the evidence.

In regard to (*c*) we agree that the Judge's observation that the fact that Wijepala was clearly shown to have been present afforded corroboration of his evidence, was quite erroneous, but that error was dispelled by the intervention of Crown Counsel and, in our opinion, no prejudice could have been caused to the appellant by that error of the Judge. The learned Judge appears to have entertained the impression that, in all cases, a rule of practice requires a jury to be warned not to convict a man on the uncorroborated testimony of a single witness. There is, of course, no such rule. The Judge was evidently thinking of the evidence of accomplices. But, in this instance, although the jury could have acted on Wijepala's evidence, even if it was uncorroborated, and although the learned Judge invited their attention to the fact of his presence at the

[1] *A. I. R. 1931 Calcutta 401.*

scene as constituting corroboration, we do not think any prejudice was caused by that fact. Examining the case for ourselves, we find that there was some circumstantial corroboration of Wijepala's evidence in regard to the deceased man's assailant, afforded by the blood stains found on the shirt of the appellant. The location of those stains supports Wijepala's description of the attack. The appellant's explanation, in Court, of those stains on the shirt was contradicted by the statement he had made to the police.

In regard to (*d*) we are in agreement in with Counsel for the appellant. The trial Judge explained " premeditation " as if it was synonymous with " intention ". There was, then, misdirection in that respect. The jury, in view of that misdirection, and also in view of the observation made by the Judge that if they were not satisfied that the condition " without premeditation " was present on the evidence, they need not consider that exception any further, probably refrained from such further consideration.

On a careful examination of the evidence we think that, properly directed, the jury could reasonably have found that the appellant's case came within that exception. There is evidence forthcoming from the prosecution that a quarrel arose suddenly, that upon it the deceased struck the first blow and a fight so arose, and that the appellant dealt only one blow with his knife.

For these reasons, at the conclusion of the hearing of the appeal, we set aside the conviction for murder and found the appellant guilty of culpable homicide not amounting to murder and sentenced him to twelve years rigorous imprisonment.

Conviction altered.