[COURT OF CRIMINAL APPEAL]

1971 *Present :* **H. N. G. Fernando, C.J. (President), Silva, S.P.J., and Weeramantry, J.**

P. D. SEEMON APPUHAMY, Appellant *and* THE QUEEN, Respondent

C. C. A No. 110/70 WITH APPLICATION No. 171/70

*S. C. 184/70—M. C. Dambulla, 19971*

*Trial before Supreme Court—Summing-up—Misdirection.*

The accused-appellant was convicted on a charge of attempted murder. The case was purely of word against word of the virtual complainant and the accused himself. According to the accused, he used a knife in self-defence. The Doctor who examined the complainant was not called at the trial, but his deposition was read. He had expressed an opinion in cross-examination that the injuries on the complainant could have been caused by the accused in an attempt to defend himself.

*Held*, that the omission of the Judge to make reference, in his summing-up, to the passages from the deposition of the Doctor favourable to the accused was a misdirection on an important matter.

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

*C. Ganesh* (assigned), for the accused-appellant.

*Noel Tittawella*, Senior Crown Counsel, for the Attorney-General.

February 13, 1971. H. N. G. FERNANDO, C.J.—

In this case, in which the accused has been convicted on a charge of attempted murder, the only persons who gave evidence as to the incident were the virtual complainant and the accused himself. The version of the complainant was that in the course of an argument he was suddenly set upon and stabbed by the accused. The accused on the contrary said that there was an attack by the complainant and that he fell on the ground with the complainant lying over him. According to the accused, he used a knife to defend himself in the course of this struggle, and the injuries on the complainant were caused in that way.

The Doctor who examined the complainant was not called at the trial, but his deposition was read. In the course of cross-examination he stated as follows :

> " If the accused was on the ground and the complainant was over him and the accused had used a knife indiscriminately, it is possible that these injuries could have been caused. All the injuries are on the left side. He could have used a knife in his right hand and caused these injuries to defend himself."

Thereafter in re-examination his evidence became even more favourable to the accused :

> " Injury 1 could have been caused if the complainant was on the accused and the accused had stabbed him and pulled the knife upwards. Injury 1 may or may not be a result of a direct stab. "

The learned Trial Judge directed the jury as to the defence of the accused that he acted in self defence ; but unfortunately no reference whatsoever was made in the summing-up to the passages from the deposition of the Doctor which have been quoted above. Considering that the learned Trial Judge himself appears to have overlooked this important part of the Doctor's deposition, it would be quite unsafe to think that the jury did remember and take account of that part of the evidence.

This was a case purely of word against word, and the version of the defence did receive much support from the opinions which the Doctor had expressed. In view of the fact that there was no reference in the summing-up to those opinions, there was a misdirection on an important matter. In the result, the conviction has to be set aside.

In regard to the matter of ordering a re-trial, we take note of the fact that the accused is a person who does not have the use of his left arm, and there is also evidence that he himself did sustain an injury on his leg in the course of this incident. We do not think it therefore necessary that he should be put in peril a second time.

The conviction is quashed, and we direct that a verdict of acquittal be entered.

*Accused acquitted.*