[COURT OF CRIMINAL APPEAL]

1966 *Present:* **H. N. G. Fernando, S.P.J. (President), T. S. Fernando, J., and Abeyesundere, J.**

THE QUEEN *v.* P. G. ARASA and another

C. C. A. 76 AND 77 OF 1966, WITH APPLICATIONS 125 AND 126

S. C. 111/65—M. C. Matale, 20491

Evidence—Trial before Supreme Court—Dock statement of accused—Duty of Judge to refer to it in his summing-up.

The 1st accused, who was charged with murder, made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross-examination of the prosecution witnesses and the accused's statement from the dock set up defences either of self-defence or of provocation or both.

Held, that it was the duty of the Judge to have directed the Jury that the dock statement was a matter before the Court which could be taken into consideration.

APPEALS against two convictions at a trial before the Supreme Court.

J. Muthiah (Assigned), for Accused-Appellants.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

November 28, 1966. H. N. G. FERNANDO, S.P.J.—

The two appellants were charged with the murder of one Kalinguwa and the second appellant was charged in addition with the attempted murder of one Kiri Honda.

According to the evidence the two appellants both lived near the house of the deceased but on different sides of that house. On the night in question the two appellants stood on the road opposite the deceased's house, and the first accused abused the deceased. The two men then went towards the first appellant's house and again returned soon afterwards along the road. On this occasion also the first accused abused the deceased man. The latter then went up to the road and asked the first appellant why he was being abused. At this stage, according to the prosecution witnesses, the first accused stabbed the deceased twice on his chest.

It will be seen that there was literally no evidence to justify a conclusion that the second appellant shared an intention to assault the deceased man. He participated neither in the abuse nor the assault. The only circumstance against him was his presence with the first appellant on both occasions. Indeed if the deceased man himself had not left his house and gone up to the first appellant on the second occasion there might have been no stabbing at all. This Court has held on numerous occasions that mere presence is not a sufficient circumstance to justify an inference of common intention. Such an inference would not have been reached in this case but for a reference by the learned trial Judge to the fact that the second appellant " did nothing to prevent the first accused from stabbing ". According to the evidence the stabbing took place so suddenly that it was in our opinion quite unreasonable to suggest to the Jury that the second appellant should have tried to interfere.

For these reasons we set aside the conviction of the second appellant on the charge of murder and acquitted him on that charge.

The Police found a club at the scene, lying by the side of the body of the deceased man. The club was found to bear blood stains. When the first appellant was arrested early the following morning Inspector Ameresinghe noticed an injury on his head. When the Inspector first mentioned this injury in his evidence, he said :—

> " he had a bleeding injury on the left side of his head. The blood was dried up and there were stains of blood on his sarong."

Thereafter in the course of his evidence he said on numerous occasions that the blood was dried up, and he said this emphatically when questioned by the Court three or four times on the point. Inspector Hettiarachi had also noticed the same injury and said in answer to Court :—

" A. It was dried blood.

Q. Then it is not a bleeding injury ?

A. Yes. "

Manifestly then the evidence concerning this injury was that there was dried blood noticed at the site of the injury early in the morning after the night of the incident. But unfortunately the learned Trial Judge despite his own questioning appears to have misunderstood the tenor of the evidence concerning the injury. On this point there was the following passage in the summing up :—

> " If Sergeant Amerasinghe saw a bleeding injury at 6 a.m., do you think it likely that the first accused would have received that injury at 10 o'clock on the previous night ? Do you not think that blood on that injury would have dried ? There would have been no bleeding injury after nearly eight hours. "

The learned Judge in this passage invited the Jury to take the view that the injury noticed by the Police Officers in the morning was a very

recent one and was probably sustained subsequent to the time of the incident. Having regard to the evidence on the point, this was a very serious misdirection on the facts.

The first appellant made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross-examination of the prosecution witnesses and this statement from the dock set up defences either of self defence or of provocation or both. In directing the Jury on the case for the defence the trial Judge said :—

> " But gentlemen, please remember, to prove that fact to your satisfaction, it is not sufficient by merely establishing that this stick was found close to the head of the deceased and that an injury was found on the head of the first accused. "

The direction here substantially was that the evidence available was insufficient to establish the fact that the first appellant had been struck with a club by the deceased and it virtually withdrew from the Jury the right to decide that fact. The Judge failed to direct the Jury that the dock statement was a matter before the Court which could be taken into consideration. But even without that matter, the two circumstances mentioned by the Judge would in our opinion well have justified a finding by the Jury that the first appellant must have been injured with a club in the course of his meeting with the deceased and before the stabbing incident.

In view of these misdirections the verdict of murder could not be allowed to stand. We therefore set aside that verdict and altered the conviction of the first appellant to one of culpable homicide not amounting to murder and imposed on him a period of seven years rigorous imprisonment.

Verdict against 1st accused altered.
2nd accused acquitted.