[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present :* **Fernando, P., Sirimane, J., Samerawickrame, J., and Siva Supramaniam, J.**

N. M. PUNCHI MAHATTAYA, Appellant, *and* THE STATE, Respondent

APPEAL NO. 11 OF 1973—C. C. A. No. 132/72

S. C. 97/72—M. C. Rakwana, 52176

Trial before Supreme Court—Conviction of accused based solely on circumstantial evidence—Misdirection on most vital point—Other evidence of an equivocal nature—Liability of the conviction to be set aside—Police Information Book—Statements therein that formed no part of the evidence upon which the verdict was returned—Incapacity of the Court of Criminal Appeal to examine them—Criminal Procedure Code, s. 122 (3).

The accused-appellant was convicted, at a trial before the Supreme Court, on a charge of murder. His appeal to the Court of Criminal Appeal was dismissed. The case for the prosecution depended solely on circumstantial evidence. Misdirection, however, was present and established on the most vital point. Moreover, the other evidence was at best but of an equivocal nature and raised, on the whole, only a probability of the guilt of the appellant.

Held, that, in the circumstances, the conviction must be quashed.

Held further (SIRIMANE, J., dissenting), that the Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statements of witnesses recorded by the Police in the course of their investigation (i.e. statements in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122 (3) of the Criminal Procedure Code which enables such statements to be sent for to aid a court is applicable only to courts of inquiry or trial.

APPEAL from a judgment of the Court of Criminal Appeal.

G. E. Chitty, with *Paul Perera* and *G. L. M. de Silva*, for the accused-appellant.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *F. Mustapha*, State Counsel, and *P. Ramanathan*, State Counsel, for the respondent.

Cur. adv. vult.

December 21, 1973. FERNANDO, P.—

This appeal came on for hearing after leave granted by us to the appellant to appeal against a judgment of the Court of Criminal Appeal refusing his application for leave to appeal on the facts and dismissing his appeal against his conviction on a charge of murder of a young woman named Gunaratna Menike and the sentence of death pronounced on him.

The case against the appellant at his trial rested solely on circumstantial evidence. What was described both by prosecuting counsel at the trial as well as the learned Commissioner of Assise who presided thereat as " the main plank " of the prosecution case was the evidence of a witness Punchimahattaya, an uncle of the deceased.

Punchimahattaya made no claim to have been an eye-witness of the stabbing that had ended the life of the deceased. He lived about 50 yards away from her house, and, at about 10 a.m. on the day of the murder, was engaged on his compound in making a rope when he heard a cry " සුදා පිහියෙන් ඇන්නෝ " (Suda pihiyen anno) from the direction of the house where the deceased lived with her parents. He ran in that direction, and by the time he reached the compound of that house heard a feeble voice cry " සුදා පිහි (Suda pihi). He peeped through an open kitchen

window and saw the deceased lying on her face on the kitchen floor in a pool of blood. He then went up to her addressing her as " දුවේ දුවේ " but there was no response. There was no evidence that she uttered any cry thereafter. She appeared to him to be dead. On his way to the deceased's house after he had heard the first cry he saw no one going away from that direction or at any relevant time thereafter. He saw no one else in the house. It was proved that her parents had gone to the village fair and that her brother was at school.

The medical testimony disclosed that the deceased had five stab wounds on her, three on her back and two on the front part of her body, and that she could have lived at best a maximum of ten minutes after she had begun to be attacked.

There was a house that was a little closer to the deceased's than Punchimahattaya's, but a witness called from that house had heard no cries at all. It was established therefore that the cries spoken to by Punchimahattaya were probably the last cries of the victim, and possibly the only cries.

The appellant whose name is also Punchimahatmaya, is a cousin of the husband of a witness Wimalawathie, the elder sister of the deceased. He lived about a mile and a half away from the deceased's home. It was not disputed that he used to be called Suda in the village. He had been in the habit of visiting his cousin and had formed the habit of visiting also the home of the deceased which was only a quarter of a mile away from that of Wimalawathie. He used to make these visits irrespective of whether the deceased's parents were present in or absent from the house. The post-mortem findings disclosed that the deceased, though unmarried, had been used to sexual intercourse, and the case was presented to the jury without dispute that the deceased and the appellant had been sexually intimate.

The other evidence tendered by the prosecution was of four witnesses who had seen the appellant at various times that day and of Wimalawathie referred to above. Of these four witnesses, two spoke to having seen the appellant go along the road from which access was to be had to the deceased's house, while another said she saw the appellant seated on a stile close to a junction of two roads at a time when the deceased was engaged in washing clothes at a well, but out of sight of the deceased. All three witnesses had seen the appellant not later than 45 minutes to an hour before the stabbing. The fourth witness had seen the appellant at a time estimated as between 12.30 p.m. and 3 p.m. that afternoon walking past a chena situated about two and a half miles away from the house of the deceased. He was seen carrying a knife in his hand at the time.

The remaining witness Wimalawathie was called probably with the object of proving a motive for the murder. Wimalawathie, whose husband we have already stated is a cousin of the appellant, lived about a quarter of a mile away from the deceased's home, and was in the habit of addressing the appellant as Sudu Malli. She testified that the appellant, who was sometimes allowed to stay the night in her house, was found one night in her own room. She remonstrated with him over his conduct, complained next morning to her husband and told the appellant not to come to her house again. Later she related the incident to her mother and to the deceased. There was a suggestion that the appellant as a consequence of this incident stopped his visits to both houses, but no attempt had been made to follow up this suggestion with evidence. We must add that when the father of the deceased was in the witness box no question had been put to him on this point. Therefore, whatever may have been the feelings between Wimalawathie and the appellant, no evidence led at the trial tended to show that the deceased and the appellant had fallen out over the incident related by Wimalawathie.

Apart from the evidence of Punchimahattaya, the other evidence for the prosecution was insufficient to permit the case against the appellant being left to the jury. Punchimahattaya himself could have told the jury only of what he had heard. He could not constitute himself the judge of the meaning of what he had so heard, and it is only fair by him to say that he did make no such pretension, and was indeed not invited to do so. It is, of course, probable that he thought Suda was being accused by the deceased. The first of the cries (Suda pihiyen anno) could have meant that the deceased was accusing the appellant. The defence, however, contended that it may have been meant as a cry to Suda for help against a knife attack. The circumstances in which Punchimahattaya heard the cries did not render it practicable to ascertain either the nature of their intonation or whether there had been a pause between the first word "සුදා" and the second word " පිහියෙන් ". The absence at the trial of any attempt at such ascertainment is therefore understandable. The meaning was a matter for the jury, and the trial judge probably did not *intend* to take that matter out of the jury's control. The manner in which he placed the respective interpretations before the jury was, however, unfortunate, and Mr. Chitty's criticism that in the event he misdirected the jury is, in our opinion, legitimate. On two occasions in the course of his charge the trial judge conveyed to the jury that if they accepted Punchimahattaya's evidence the prosecution has discharged the burden that lay on it to satisfy them that the assailant was Suda. He appears inadvertently to have overlooked

that, even if on Punchimahattaya's evidence the words of the cry were established, their meaning or the inference therefrom remained to be determined by the jury.

On the first of the occasions referred to in the above paragraph, the trial judge addressed the jury thus :—

> " Do you or do you not think, from the position in which the injuries were inflicted, the deceased would not have seen who the assailant was, and the assailant, if you believe the evidence, *she has said was Suda.*"

On the other and later occasion, the misdirection was clearer;

> " If you find beyond reasonable doubt that the deceased did utter these words .... what does that mean ? That Suda stabbed ? The prosecution has tendered evidence before you to say that that is this Suda. Defence counsel says hers is the last cry of a person who is thinking of her lover, because Suda is a term of endearment. These are matters for you ...... It is an inference. It is your view that matters .... if you then believe that, and are prepared to conclude so, having regard to all the infirmities in Punchimahattaya's evidence, *then the prosecution has established that it was Suda who stabbed.*"

The judge was telling the jury here that an acceptance of Punchimahattaya's evidence as being true entailed the inference that the burden on the prosecution to establish beyond reasonable doubt that Suda stabbed the deceased has been discharged.

In a case where the evidence was by no means strong and so much depended on inference by the jury, the trial judge might well have been advised to assist the jury to decide between an inference that the cry was one of accusation of Suda or an inference that it was a cry to Suda for help. Even if he had left the matter to the jury in the way he did, without pausing to assist them with questions which they could formulate and answer before drawing the inference, which was indeed the course he followed, the criticism might have had to be limited to one merely of inadequate direction of the jury. Where, however, he has left the inference to the jury coupled with a positive misdirection, the criticism that has been made is, in our opinion, well-founded and is entitled to weight, particularly where the evidence other than that of Punchimahattaya created only suspicion against the appellant. The course actually followed by the learned judge had the unfortunate effect of thwarting his intention to leave the inference of accusation versus cry of distress to the jury. In the result he inadvertently withdrew that question of inference from them.

The learned Deputy Solicitor-General, in the course of a customary helpful argument, attempted to justify the dismissal of the appellant's appeal by the Court of Criminal Appeal not for any of the reasons set out at length in the judgment of that Court, but on the basis of the reasoning which we reproduce below in summary form.

He reminded us of the dictum of Lord Morris in the judgment of the House of Lords (on an appeal from the Court of Criminal Appeal of Northern Ireland) in the case of *McGreevy v. Director of Public Prosecutions*[1] (1973) 1 W.L.R. at 281 that "it is not to be assumed that members of a jury will abandon their reasoning powers and, having decided to accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence." Thereafter, correctly formulating that the jury had to decide whether the cry was one of accusation or of distress merely, he argued that in considering the possibility that this was a cry of distress, the jury would have considered that that possibility depended on two facts, (1) that there had been no estrangement between the appellant and the deceased and (2) that she believed the appellant was near about. He submitted that the jury had in the circumstances of this case rejected the possibility of the cry being one of distress. As we pointed out to him in the middle of his argument, while we agree that we must not underestimate a jury, there was here no evidence of any estrangement but only a suggestion of such a thing based on the evidence of the estrangement between the appellant and the elder sister of the deceased.

In a case dependent solely on circumstantial evidence, it is not the function of the Court of Criminal Appeal (or of this Court for that matter) to consider an interference with the verdict reached by a jury unless misdirection, mistake of law or misreception of evidence has been established. But in the instant case, as we have pointed about above, misdirection was present and was established on the most vital point in the case. That coupled with the fact that the other evidence relied on by the prosecution was at best but of an equivocal nature rendered the quashing of the conviction, in our opinion, inevitable. We have not lost sight of the fact that the effect of the prosecution's evidence as a whole was to raise a probability of the guilt of the appellant. But probability, even high probability, does fall short of the recognised standard of proof of a serious criminal charge which has long been a feature of the administration of criminal justice in this Country.

[1] *(1973) 1 W. L. R. at 281.*

There is one observation which we feel compelled to make before we dispose of this appeal. Our attention was drawn in the course of the argument to a passage in the judgment of the Court of Criminal Appeal which shows that it has perused statements of witnesses recorded by the Police in the course of their investigation (*i.e.* statements in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise. On our expressing surprise that the Information Book should have been perused in this manner, we were informed by counsel for the appellant as well as by counsel for the State that calling for the police statements and their examination by the Court in the course of hearing an appeal has not been uncommon there in very recent years. It is hardly necessary to emphasize that this new practice derives no support from any law of which we are ourselves aware, and learned counsel did not themselves suggest the existence of any such law. The Criminal Procedure Code (Section 122 (3)) which enables such statements to be sent for to aid a court limits the exercise to courts of inquiry or trial. The Court of Criminal Appeal is neither a Court of inquiry nor one of trial. At the stage the Court of Criminal Appeal (or for that matter the Supreme Court in appeal) hears an appeal both inquiry and trial have been concluded. There would therefore appear to be no justification for either of the last mentioned two Courts to call for and examine statements that formed no part of the evidence upon which the verdict was returned. The practice referred to of which we have hitherto been unaware is without authority and contrary to law, and may tend " to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future." We have no doubt that, with appreciation of that position, the practice will now disappear.

The appeal is allowed, the conviction of and the sentence pronounced on the appellant are quashed and he is acquitted.

SIRIMANE, J.—

I agree with the conclusion reached by this Court that the conviction should be quashed.

I regret I cannot share the views expressed by my Lord the President, and my brothers Samerawickreme and Siva Supramaniam regarding the use of the Information Book by the C.C.A.

Every Judge of the Supreme Court knows that together with the brief i.e. the type-written record of the proceedings in the Magistrate's Court, the "I. B. extracts " are sent up to him. In fact, they are called for by the Registrar of the Supreme Court

from time immemorial. I have not been able to locate provision of law under which this is done.

It would be a gross misdirection to use anything in these extracts which have not been properly proved in directing a Jury, but the Judge with his experience can use them to guide and assist him.

Surely three Judges sitting in Appeal are sufficiently mature not to let anything in the extracts colour their judgment. They know that some of these statements may be "doctored" and quite unreliable. They will use them only with the greatest caution as I myself have often done when sitting in the C.C.A.

Accused acquitted.