[COURT OF CRIMINAL APPEAL]

1969 *Present:* Alles, J. (President), Samerawickrame, J., and Weeramantry, J.

W. A. ALBERT SINGHO (*alias* Piyasena), Appellant, and THE QUEEN, Respondent

C. C. A. APPEAL No. 95 OF 1968, WITH APPLICATION No. 143

S. C. 100/68—M. C. Avissawella, 82550

Evidence Ordinance—Sections 154 and 155—Instance when a party may cross-examine his own witness—Criminal Procedure Code—Section 235 (b)—Words used in an unusual sense—Duty of the jury to determine their meaning—Accused's failure to give evidence—Whether trial Judge may comment upon it—Summing-up—Questions of fact—Duty of Judge not to give expression in strong language to his personal views.

Defending Counsel may bo permitted under sections 154 and 155 of the Evidence Ordinance to cross-examine a defence witness on his deposition in the Magistrate's Court when such deposition throws doubts on the truth of a prosecution witness.

Under section 245 (*b*) of the Criminal Procedure Code it is the duty of the jury to determine the meaning of words used in an unusual sense. Accordingly, where, in a prosecution for murder, the words of a statement made by the accused person to a prosecution witness are capable of the interpretation that either the accused or some other person inflicted the injuries on the deceased, the alternative construction of the words should be placed before the jury.

In a trial before the Supreme Court the Judge's comment on the failure of the accused to give evidence should be confined only to those cases in which there are special circumstances which the accused only can explain and which call for an explanation from him. A mere suggestion of the defence, when a Crown witness is cross-examined, that the accused was not the assailant but that he arrived on the scene in order to intervene in the quarrel between the deceased and a third party does not justify a comment by the Court that there was an obligation on the accused to enter the witness box and give an explanation as to how the participants in the quarrel received their injuries.

A Judge must not, in the course of his summing-up, use language the cumulative effect of which would remove from the consideration of the jury what are essentially questions of fact for their determination.

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

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *P. Sivaloganathan*, *Kosala Wijayatilake*, *S. C. B. Walgampaya* and (assigned) *B. Bodinagoda*, for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

February 10, 1969. ALLES, J.—

The appellant was convicted by the unanimous verdict of the jury of the murder of Maha Aratchige Gunasdasa and the attempted murder of his wife A. D. Leelawathie *alias* Kusumawathie. On the latter count, he was sentenced to 15 years rigorous imprisonment.

According to the case for the prosecution, the appellant and the deceased Gunadasa were labourers employed on Handagala Estate occupying adjoining line rooms. The deceased was married to Leelawathie *alias* Kusumawathie (hereinafter called Kusumawathie) 6 months prior to the incident. According to Kusumawathie, about a month prior to the tragedy, the appellant had come to the line room of the deceased and

attempted to take liberties with her in the absence of her husband. She informed her husband about this incident. This incident is suggested as being the motive for the attack on the deceased and his wife by the appellant. According to Kusumawathie, who was the only witness for the prosecution to the transaction, on the evening in question, she went to have a bath at the stream, leaving the accused and the deceased in the line room. When she was preparing to take her bath, she identified the voice of her husband crying out "Budu Amme". She ran in the the direction of the cries to the compound of the line rooms and saw her husband lying face downwards and the accused dealing two blows on him with an iron pipe. When she questioned the appellant, he dealt another blow on the deceased and thereafter attacked her with the same weapon. She also saw a tapping knife in the accused's waist. When she was struck, she fell down unconscious.

Another witness called Somapala says that when he was in the compound near the factory, he saw the appellant coming fast in the direction of the Superintendent's bungalow having a tapping knife in his hand. When he questioned the appellant why he was running the appellant told him "One is finished, there is doubt about the other". Somapala then went with the Superintendent to the place where the deceased and Kusumawathie lay fallen with injuries and they were thereafter despatched to the Hospital.

The defence suggested to Kusumawathie that she was having a lover called K. D. Somapala and that it was not the appellant who attacked the deceased but that it was this K. D. Somapala who was responsible for the injuries on the deceased and Kusumawathie and that the latter was giving false evidence to exonerate her lover and implicate the appellant. In support of this suggestion, the defence sought to place evidence before the jury that when Kusumawathie was taken away from the scene she said that she knew nothing. This evidence was sought to be led through the defence witness Chandradasa who had stated in the Magistrate's Court that when he arrived on the scene with the Superintendent of the Estate he heard Kusumawathie say that she did not know what happened when she was questioned by Leelawathie. Learned Counsel for the appellant submitted that had this evidence been placed before the jury they would have had serious doubts about the truth of Kusumawathie's evidence. This matter was not put to Chandradasa in view of the Judge's ruling to which reference is made below, but Counsel for the appellant at the trial, in the absence of the jury drew the attention of the trial Judge to sections 154 and 155 of the Evidence Act. The trial Judge then made the following observation :—

> "If there is any point in the submissions made, I confess I cannot see any substance in them. Speaking for myself, I reject the application."

One must assume therefore that Counsel did make an application to cross-examine his witness and it would appear to us that the purpose of

the application was to throw doubts on the truth of Kusumawathie's evidence. We think the learned trial Judge was in error when he prematurely refused to consider the application of the defence to cross-examine Chandradasa on his deposition in the Magistrate's Court. This was a proper application that the defence was entitled to make under section 154 of the Evidence Act.

There were other matters of substance raised by learned Counsel for the appellant. Firstly, it was submitted that the trial Judge withdrew from the consideration of the jury not only whether the appellant intended to cause injuries and the injuries so intended were sufficient in the ordinary course of nature to cause death, but also deprived the appellant of the possibility of being convicted for a lesser offence on both counts of the indictment.

The deceased had four external injuries—a stab wound which went through the right cheek into the cavity, a lacerated wound quarter inch deep over the right cheek, a contusion over the bridge of the nose causing a fracture of the nasal bone. Of these injuries there was only one fatal injury corresponding to the injury to the head which caused a depressed fracture and laceration of the brain and which the Doctor described as a necessarily fatal injury. The stab wound was probably caused with a cutting instrument and the suggestion of the prosecution was that it was caused with the tapping knife which Kusumawathie noticed in the appellant's waist and which Somapala saw in the appellant's hand. On that basis, the appellant used two weapons on the deceased. Kusumawathie only saw the iron pipe being used and therefore the attack with the tapping knife must have been before Kusumawathie's arrival which the appellant thereafter concealed in the waist or was used by him after Kusumawathie was injured and fell down. It is not clear in what circumstances the two weapons were used. The trial Judge appears to have been considerably influenced by the evidence of Somapala who gave evidence of the words uttered by the appellant after the transaction was over. In view of the defence suggestion that K. D. Somapala was the assailant, and that the appellant intervened in the quarrel between the deceased and K. D. Somapala, the words uttered may have indicated that the appellant was giving effect to his own observations of the injuries caused to the deceased and Kusumawathie by another. It was therefore a misdirection to tell the jury that the "only inference to be drawn from the words which the appellant used was the set purpose of finishing the deceased and Kusumawathie". The alternative construction of the words was not placed before the jury. Under section 245 (*b*) of the Criminal Procedure Code, it is the duty of the jury to determine the meaning of words used in an unusual sense. A similar situation arose in *Queen v. Sethan*[1] 69 N. L. R. 117, where a possible interpretation favourable to the defence was not placed for the consideration of the jury and the conviction was set aside on the ground that the defence was not adequately put to the jury. Having regard

[1] *(1966) 69 N. L. R. 117.*

to the above observations and the fact that the deceased had only one fatal injury we think that the trial judge should not have withdrawn from the purview of the jury the possibility of a lesser verdict.

The words spoken to by Somapala appear to have coloured the trial Judge's view in regard to the charge of attempted murder as well. Kusumawathie had five injuries which could have been caused with an iron pipe but although most of the injuries were on the head, none of them had caused any internal injuries and the Doctor expressed the view that they were not sufficient in the ordinary course of nature to cause death. There is no evidence that they were grievous injuries or why she was hospitalised. It was therefore incumbent on the trial Judge to direct the jury to consider the possibility of a lesser verdict on the charge of attempted murder as well.

We might have chosen to reduce the offences to lesser offences had it not been for the fact that owing to other misdirections, we feel constrained to remit this case for a fresh trial.

Counsel for the appellant submitted that the observations of the trial Judge on the failure of the appellant to give evidence were not warranted in the circumstances of this case. We are inclined to agree. The defence suggested to Kusumawathie that the appellant was not the assailant and arrived on the scene to intervene in the quarrel between K. D. Somapala and the deceased. In this connection, the trial Judge directed the jury in the following terms :—

> "Therefore I am telling you, gentlemen of the jury, on a common sense angle, you will naturally ask yourselves the question, if these are matters which he put as suggestions to the Crown, why does he, the accused, not enter the witness box and offer his evidence? And because this is a matter of which he has had knowledge, he was an actual participant, the man who separated, but not at the correct time, after the foul deed was done that he had separated the parties, and I think I am right in saying that the fact that he has refrained from offering evidence to substantiate this suggestion is because he is convinced that the evidence of fact to support this suggestion which had he adduced before you would have operated against him."

It does not appear to us that there is an obligation on the intervenient in a quarrel between two persons to give an explanation how the participants in the quarrel received his or her injuries. The direction of the trial Judge almost suggests that it was incumbent on the appellant to prove how the deceased and Kusumawathie came by their injuries. Although the trial Judge has a discretion to comment on the failure of the accused to give evidence (*The King v. Duraisamy*[1] 43 N.L.R. 241 and *The King v. Geekiyanage John Silva*[2] 46 N.L.R. 73) such comment should only be confined to those cases in which there are special circumstances which the accused only can explain and which therefore call for

[1] *(1942) 43 N. L. R. 241.*

[2] *(1945) 46 N. L. R. 73.*

an explanation from him. We are unable to say that in this case there was any special circumstance which required the appellant to give evidence.

There was also the complaint of the defence that in this case there was a virtual withdrawal from the purview of the jury of their decision on questions of fact, particularly in regard to the credibility to be attached to the evidence of the main witness Kusumawathie and in a lesser degree to that of Somapala, and the nature of the criticism of the defence witness Chandradasa.

At a very early stage of the summing up, the trial Judge had taken a strong view of Kusumawathie's evidence and felt that the cross-examination was calculated to besmirch her character. Said he at pp. 52 to 54:—

> "Learned counsel for the defence has sought to attack her evidence to impeach her credibility and also at the same time to assail her moral character to despoil her reputation. You will have to consider, gentlemen, whether the suggestions made in that regard by learned counsel are of any substance whatsoever. It was suggested by learned counsel for the defence that this young woman Kusumawathie had a paramour in a man called Somapala, just a suggestion, and that that Somapala thereafter had at some time committed suicide, just a suggestion. There is not an iota of fact to support it. And as it was, as a parting shot, if I may use that expression, learned counsel asked the last question in the cross-examination of her evidence. 'After your husband's death you have got married?' And you know the way that she replied, and she said, 'Definitely, No.' Those are questions, gentlemen, put with a view to despoil her character. I am sorry the questions were put. When questions like this are put, suggestions against the character of a woman, a young woman who has now lost her husband, one would expect these suggestions to be followed up by some kind of fact produced before you. After all a woman whether she may be in Colombo society or in a village, in a line-room of an estate, she is entitled to the protection of her reputation. I do not know how you feel in regard to that aspect of the matter, but as responsible men do you not think that suggestions of this kind have been put for the mere sake of putting them and to my mind it is most unfair by this poor woman."

Again in dealing with a question put to her by Counsel for the defence, he said—

> "In regard to this matter too (that the deceased married Kusumawathie and came to live with her in the line room six months prior to the tragedy) you will remember, gentlemen, it has just struck me, learned counsel for the defence put a rather startling question. The question is this: (to the woman Kusumawathie) 'You came here and had a nice time with Gunadasa and thereafter married him?' I really could not understand the meaning of this question. It almost bordered

on obscenity, but such was the type of questions put to this woman in an endeavour to besmirch her character. You will realise therefore, gentlemen, to what depths the accused has gone, to what lengths he has gone to try and blackmail this woman ."

In dealing with the evidence of the defence witness Chandradasa, he said—

" Learned counsel did not call the accused, but called a man called Chandradasa. I cannot understand why he called him. He said he heard the cries of Leelawathie. At that time there was no Leelawathie. At a later stage when that car was brought to fetch these people to hospital there was a Leelawathie. He was asked about this elusive and phantom figure, Somapala, and he said he did not know. I was rather surprised when counsel for the defence chose to call this witness. One can attribute it to inexperience, but I think that even a law student would know that this kind of evidence would lead nowhere.....In the particular facts of this case he has sought to make suggestions to the principal witnesses for the prosecution, that woman, Kusumawathie, and what has the defence suggested —that on this day Somapala, this phantom, Somapala, this imaginary lover, paramour of Kusumawathie, and Gunadasa were engaged in a fight in which Kusumawathie also joined, and this accused to save his neighbour, Gunadasa, from an attack by this unknown Somapala, who was there to attack him with this tapping knife and pipe, intervened and managed to disarm Somapala of the iron pipe and the tapping knife. Of course there is no evidence that in the process of disarming the man this accused had injuries. There is no evidence whatsoever. He acted as a good Samaritan and unfortunately by some ill luck, by some twist of fate he is in the dock. That is the suggestion made by the defence."

Although the trial Judge did direct in general terms that all questions of fact were for the jury and that they were not bound by any expression of opinion of the facts by him, learned Counsel for the appellant submitted that the Judge's expression of the facts was couched in such strong language that the jury were deprived from arriving at an independent view of the facts. There is some justification for this criticism. Counsel however went further and submitted that the Judge's observations on the facts was not a fair representation of the evidence led in the case.

On Kusumawathie's own evidence, she came to the scene after the deceased was attacked and she was therefore unable to state what transpired before she heard her husband's cry of distress. The existence of a K. D. Somapala was not such a fantastic one. Kusumawathie only stated that she was not aware that a person called Somapala committed suicide after the incident but admitted that she knew a Somapala who worked as a domestic servant under the Superintendent of the Estate. The witness Somapala was confronted with a statement made by him in the Magistrate's Court (which was proved as D2) that he knew a Somapala who committed suicide. It was therefore not quite correct to

describe Somapala as an elusive, phantom figure, an imaginary lover, the paramour of Kusumawathie. Again when the Judge observed that "to say that the last question put to Kusumawathie in cross-examination as being 'After your husband's death you have got married' it is a mis-statement of fact. The question that was put was "Did you get married?" and the answer was a denial. We see no objection to Kusumawathie, a young woman of 23 being asked whether she got married after her husband's death. Many a village lass whose husband dies prematurely seeks the protection of another partner to maintain and support her. We see nothing objectionable in the question being likely to despoil her character. Again in reference to the expression "nice time" which the Judge thought bordered on obscenity, Kusumawathie in answer to the question admitted that the deceased brought her to the line room to have a nice time with him and ultimately did not want to leave him and married him. It was perhaps a marriage decided upon by the deceased and Kusumawathie after trial and experience.

The picture that was therefore sought to be portrayed by the trial Judge of Kusumawathie being a virtuous and much maligned woman, who was unfortunate to lose her husband and whose character was sought to be besmirched unfairly by the defence is not borne out by the evidence. Even if this was the case, it was essential in the interests of his client for Counsel to cross-examine her on relevant material in view of the suggestion of the defence. Since we propose to order a re-trial in this case we do not wish to elaborate on the possible circumstances in which the deceased and Kusumawathie received their injuries.

In regard to the evidence of the witness Somapala, the trial Judge directed the jury in the following terms :—

> "It was, I think, quite apparent that this boy, I do not know whether it is proper for me to say, that innocence is stamped on his face. If you think I am wrong it is for you to have me corrected, but that is my impression. May be I am expressing myself in rather strong terms, but in whatever terms I express my views you are entirely at liberty to disregard them if my views do not coincide with yours, but I cannot resist making this observatoin in view of the aspersions which were sought to be cast on this woman Kusumawathie."

The demeanour of a witness is a matter that should be left for the consideration of the jury and it is undesirable that a trial Judge should give expression in strong language to his personal views on the question of demeanour. For the trial Judge to say, in spite of some qualification, that "innocence is stamped" on the face of the witness, is practically to invite the jury to accept his views on questions of fact.

We think that the expressions of the Judge in regard to the credibility to be attached to Kusumawathie's evidence, the strong views of the Judge unsupported by evidence that the defence sought unfairly to besmirch her character, the commendation of Somapala's evidence as being consistent only with a murderous intention and the absence of a

direction that it might be equivocal and equally consistent with the defence suggested that the appellant was not the assailant, had the cumulative effect of removing from the consideration of the jury what were essentially questions of fact for their determination. In the words of Lord Reading in *Leo George O'Donnell*[1] 12 Cr. App. R. 219 at 221 it seems to us that the Judge in this case used "in the course of his summing up such language as leads them (the jury) to think that he is directing them, that they must find the facts in the way which he indicates."

In view, therefore, of these substantial misdirections both on the law and the facts, this conviction cannot be allowed to stand.

We were invited by Counsel for the appellant not to remit this case for a re-trial, but we think that if we accede to this submission, we would be usurping the functions of the jury, who are entitled on a proper direction on Kusumawathie's evidence to accept the position that the appellant was responsible for the injuries inflicted on the deceased and herself. Under the proviso to section 5 of the Court of Criminal Appeal Ordinance, we are of opinion that there was evidence before the jury upon which the appellant might reasonably have been convicted. We therefore order a new trial on the same charges.

Case sent back for new trial.