

[COURT OF CRIMINAL APPEAL]

1948

*Present: Howard C. J., Dias and Nagalingam JJ.*THE KING *v.* MUNIANDI

APPEAL No. 2 OF 1948 WITH APPLICATION No. 4.

S. C. 31—M. C. Badulla-Haldumulla, 4,178.

Court of Criminal Appeal—Charge of murder—Direct evidence of only one witness—Evidence full of infirmities—Suggestion that he was accomplice—Not put to jury—Substantial doubt as to guilt—Accused entitled to acquittal.

The accused was charged with murder by pouring arsenic into toddy which he afterwards gave the deceased to drink. The case for the Crown rested almost entirely on the evidence of one P who testified that he was present and watched the accused pouring arsenic into the bottle that contained the toddy. The defence was that it was P who administered the poison. The evidence of P was found to be full of infirmities. The trial Judge asked the Jury to consider whether P was an accomplice but his charge did not contain any detailed examination of his evidence with particular reference to the infirmities in it. Apart from the evidence of P the evidence against the accused was of a purely circumstantial nature which amounted merely to suspicion.

Held, that the Jury had not given the accused the benefit of a grave doubt and that his conviction could not stand.

APPEAL, with application for leave to appeal, from a conviction in a trial before a Judge and Jury.

S. S. Kulatilleke, for the applicant, appellant.

Boyd Jayasuriya, *Crown Counsel*, for the Crown.

Cur. adv. vult.

February 9, 1948. HOWARD C. J.—

The accused in this case appeals from his conviction on a charge of murder. It was alleged by the Crown that the accused caused the death of the deceased by pouring a caustic solution of arsenic in a concentrated

¹ (1866) *I Q. B.* 379.

form into toddy which the accused afterwards gave to the deceased to drink. The case for the Crown rested almost entirely on the evidence of one Pitchamuttu who testified to the fact that he was present and watched the accused pouring the arsenic mixture from the bottle P1 into the bottles P5, P6 and P7 that contained toddy. Both the accused and the deceased were employed by Mr. Andrews, a Mechanical Engineer, living at Diyatalawa. At the trial Mr. Andrews being dead the deposition made by him before the Magistrate was put in evidence. He stated that the accused had been employed by him as house cooly from July 5, 1946. At that time a man called Bernard Peter was employed as cook. Bernard Peter was discharged by Andrews on July 26, 1946, as he was suspected as the result of complaints by the accused of having stolen 6 bottles of beer and the deceased was installed as cook in his place. The deceased had previously helped Andrews as an acting cook. Andrews also stated that in a cupboard of the sideboard he kept a preparation of arsenic for preserving skins of animals. On August 1, 1946, he forced open the door of the servants' room as the key had been taken by Bernard Peter. This was done in the presence of the deceased and the accused. In the servants' room he found the bottle P1 standing in a corner with about one-eighth of the contents missing. Andrews states in evidence that he told the accused and the deceased that the bottle contained poison and they should not meddle with it. Both the accused and the deceased lived outside Andrews' bungalow and left it at night when the day's work was over. On August 3, 1946, the deceased came to Andrews with Pitchamuttu and asked him whether he would employ him in the garden. Pitchamuttu was then employed as a garden labourer. According to Andrews the deceased and accused appeared to get on with each other. Nor had the latter asked for the post of cook. Pitchamuttu in his evidence states that on August 3, 1946, he was taken at 7 A.M. by the deceased to work in Andrews' garden. At 12 noon when he had finished work the deceased gave him two logs of firewood to take to his house and asked him to bring back two empty bottles. He delivered the firewood to Pottu, the deceased's wife, and the latter gave him two bottles (P5 and P6) which she washed in his presence. The deceased on being handed these bottles gave Pitchamuttu Rs. 5 and asked him to go to Bandarawela and bring two bottles of toddy. Near the Co-operative Store Pitchamuttu says that he met the accused. They went at the latter's request to his house and then took the empty bottles and both walked to Bandarawela. Pitchamuttu says he told the accused that he was bringing toddy for the deceased. They went to a toddy tavern and after drinking $1\frac{1}{2}$ bottles purchased two bottles which was put into P5 and P6. The accused, according to Pitchamuttu, also purchased two bottles one of which was P7. They then returned together and reached Andrews' bungalow about 8 P.M. Pitchamuttu says he handed the bottles P5 and P6 to the deceased. The latter who was working in the kitchen placed P5 and P6 on a table inside a small room adjoining the kitchen. The accused kept his bottles inside the kitchen and proceeded to work in the bungalow. The deceased said that two bottles of toddy were not enough for him and asked the accused to lend him one of his. The accused then gave him P7 which the deceased kept with P5 and P6. The deceased then went

into the bungalow to attend to the dining table. The accused was inside the small room where the toddy was. According to Pitchamuttu after the deceased left the accused brought the white bottle P1 containing a liquid with the colour of coconut oil and poured part of the contents into each of P5, P6 and P7 and shook the bottles to mix the liquor. Pitchamuttu says the accused brought P1 from the direction of the kitchen. Having done this the accused went inside the bungalow to attend to his duties taking P1 with him. It was then about 9 P.M. After he had finished his work the deceased came to the kitchen with the accused. The latter took a bottle of toddy (P7), filtered the whole of it into a saucer (P2) and gave the deceased a cup of toddy (P4). The deceased drank one cupful of toddy from P7. The accused did not drink any. Accused then washed P7. What remained in P2 was thrown away by the accused. The deceased, accused and Pitchamuttu left the bungalow together. Subsequently they parted company, the deceased going to his house by himself taking P5 and P6 with him. His wife Pottu says that the deceased returned about 9 P.M. He poured a little toddy from P6 and drank it. He immediately started vomiting. He then handed a glass of toddy to his son Velu. Velu said it had a peculiar smell and should not be drunk. Velu then went to fetch a doctor. The deceased was crying out that he had a burning sensation in his stomach. Dr. Misso came and treated him. His condition got worse and at 5 A.M. on August 4 he died. Pottu kept P5 and P6 and handed them to the Police. The evidence of Pottu is corroborated by that of Velu, the son of the deceased. The latter also states that on the morning of the 4th he went with his brother Vadivel to tell Andrews about his father's death and that Vadivel found bottle P1 against a wire post near the Kitchen. Velu says he handed P1 to Andrews. Andrews in his statement says P1 had been emptied of $\frac{1}{3}$ of its contents. The evidence of Dr. Misso was to the effect that he found symptoms of arsenic poisoning. Dr. Nayagam, the District Medical Officer, Haputale, held a post-mortem examination on August 4, 1946. He took specimens from the deceased's body which were sent to the Government Analyst. Dr. Nayagam diagnosed the death of the deceased as due to arsenic poisoning. Mr. Chanmugam, the Government Analyst, analysed the specimens (P8, P9, P10 and P11) of the body of the deceased and found arsenic in all of them. P1, P5, P6 and P7 were also sent to him. He found in P1 a caustic solution of arsenic in a concentrated form. He also found a caustic solution of arsenic in P5 and P6. No arsenic was found in P7.

Counsel for the appellant contends that the verdict of the Jury is unreasonable and cannot be supported by the evidence. The case against the accused contained some most unusual features. There was in the first place no apparent motive. Moreover if the story of Pitchamuttu is to be believed the accused poured the arsenic solution into the toddy in his presence. This clothes the story with a mantle of improbability which makes it all the more necessary to examine and dissect Pitchamuttu's evidence with the greatest care. According to the latter's evidence the deceased had consumed the arsenic solution from the bottle P7 at Andrews' bungalow. He apparently suffered no ill effects from this dose. There was no vomiting. On the other hand some time

later when he drank at his own house some of the mixture from P6, he immediately felt ill effects, and started to vomit and died eventually at 5 A.M. According to the Government Analyst arsenic may take anything from 6 hours to 24 hours to take effect on the human system after consumption. The evidence of Pitchamuttu with regard to the effect on the accused after he had drunk from P7 at the bungalow does not seem to fit in with the evidence of Pottu and Velu as to the effect on the deceased when he drank at his house. In this connection the evidence of Velu as to what the deceased told him is most relevant. In cross-examination he stated first of all the deceased told him he had drunk some toddy in the bungalow. Asked whether he said to the Police "S. Muniandi and Pitchamuttu had asked my father to take the toddy at the bungalow of Mr. Andrews, but my father had refused to take the toddy and brought the toddy home" he said "In the bungalow my father was asked by Pitchamuttu and Muniandi to drink all the three bottles of toddy, but my father refused and consumed only a little and when he did so, these two people asked deceased to drink the rest of the toddy in the bungalow, but my father refused and brought the rest of the toddy home." The evidence of Pitchamuttu as to the drinking by the deceased of the toddy from P7 at the bungalow seems to conflict with what the deceased told Velu. Moreover what the deceased told Velu suggests in no uncertain manner that Pitchamuttu was an accomplice. There are other matters connected with the testimony of Pitchamuttu which throw grave doubt on his veracity. At the Magisterial inquiry he says he did not question accused as to what he put in the toddy. At the trial he says he did. In the lower Court he says that the deceased strained and drank the whole contents of P7. At the trial he says accused strained and the deceased drank one cupful. Again before the Magistrate he says he did not question the accused as to what he was pouring into the toddy. At the trial he says he did question him. From this examination of Pitchamuttu's evidence it is obvious that it contained many infirmities. The charge of the learned Judge does not contain any detailed examination of Pitchamuttu's evidence with particular reference to these infirmities. The defence was that Pitchamuttu was the person who administered the poison and it was further suggested that he might have done so at the instance of Bernard Peter who had been superseded as cook by the deceased. The learned Judge has asked the Jury to consider whether Pitchamuttu was an accomplice, but the Jury were not asked to examine this matter from the point of view of the various infirmities in his evidence and the suggestion that he might be acting as a tool of Bernard Peter. In the circumstances we feel that the testimony of Pitchamuttu presents so many unsatisfactory features that no Jury could place any reliance on it. There remains for consideration the question as to what remains of the case against the accused when bereft of the testimony of Pitchamuttu. In this connection it must of course be borne in mind that the only persons who knew of the existence of the arsenic in P1 were apart from Andrews and the deceased, Bernard Peter and the accused. Bernard Peter says that he went on a pilgrimage to Kataragama on August 3. Therefore by a process of elimination one could reach the conclusion that it could only have been the accused. On the other hand this reasoning does not exclude

the possibility that Pitchamuttu might conceivably have been informed by Bernard Peter of the existence of the poison and administered it at the latter's instance. We have reached the conclusion, therefore, that without the evidence of Pitchamuttu the evidence against the accused rests merely on suspicion. Being of a purely circumstantial nature it does not point unequivocally to the guilt of the accused. Even if this circumstantial evidence is reinforced by the evidence of Pitchamuttu the case against the accused was very doubtful and there was a reasonable and substantial doubt as to his guilt particularly when it is taken into consideration that certain aspects of Pitchamuttu's evidence were not squarely placed before the Jury. In those circumstances following *R. v. Schragger*¹ we think the conviction cannot stand. Or to put the case in the way it was stated in *R. v. Parker*² we think the Jury has not given the appellant the benefit of a grave doubt and it is safer that the conviction should not be allowed to stand, *R. v. Bradley*³.

For the reasons given the appeal is allowed and the conviction set aside.

Conviction set aside.
