[COURT OF CRIMINAL APPEAL]

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

THE QUEEN *v.* M. A. SOMAPALA

C.C.A. 46 OF 1966, WITH APPLICATION 71

S. C. 254/65—M. C. Horana, 39595

Evidence—Concession by prosecuting Counsel as to the truthfulness of a witness— Right of the defence to the benefit of that concession—Evidence of good character of the accused—Duty of Judge to refer to it in the summing-up.

The credibility of the accused-appellant, who gave evidence, was impeached by the evidence of two Crown witnesses but was supported by the evidence of another Crown witness W. Although the prosecuting Counsel conceded that the evidence of W was truthful, the trial Judge directed the Jury to reject W's evidence.

Held, that the defence was entitled to the benefit of the prosecuting Counsel's admission on the evidence led by the Crown. The trial Judge should not have deprived the defence of that advantage.

Held further, that when an accused person gives evidence of his good character it is the duty of the Judge to give direction to the Jury concerning it.

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

G. E. Chitty, Q.C., with *H. L. Karawita, A. M. Coomaraswamy, M. Underwood*, and *G. C. Wanigasekera* (Assigned), for the Accused-Appellant.

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

Cur. adv. vult.

October 29, 1966. SANSONI, C.J.—

The appellant was charged with the attempted murder of Gamage Baba Nona on 2nd April 1965 by firing at her with a revolver. He was found guilty of causing grievous hurt, by a majority verdict of 5 to 2, and sentenced to 3 years' rigorous imprisonment.

A prosecution witness Somapala said that at about 12.45 p.m. that day he was walking with a dumb man called Jandi, when the appellant came towards them riding a bicycle. The appellant, while seated on the bicycle with one foot on the ground, questioned him about a complaint of assault made by him against the appellant on the previous day. He

then pulled out a revolver with his left hand from his trousers pocket. Somapala said that as he ducked, he heard the report of a shot. He then saw that Jandi had been shot in the chest. At that time Jandi's sister Baba Nona came running up, and the appellant shot her.

Baba Nona in her evidence said that she ran up from her house on hearing Somapala cry out that Jandi had been shot. The appellant then shot her. She saw Jandi lying fallen on the spot, and Somapala running away. Somapala is Baba Nona's nephew.

The prosecution also called a witness, Wimalawathie, who said that the appellant came to her house at about 1.30 or 2 p.m. that day and gave her a revolver to keep. She took it to the house of a neighbour called Babynona. Babynona was not at home, and she left it in that house. Wimalawathie said that when she returned the appellant was still in her house. The Police arrived later and took him away. Under cross-examination she said that the appellant appeared to be afraid and in pain when he came to her house ; he told her that he had been chased, and that he had snatched the revolver from one Kalu Mahathmaya *alias* Dias, and brought it to her to keep. She also said that when the Police came to her house and inquired where the appellant was, the latter came out of his own accord and entered the Police jeep.

The appellant gave evidence on his own behalf. He said that Somapala, Jandi, Kalumahathmaya *alias* Dias and others stopped him when he was cycling home on the afternoon in question. Jandi hit him. Dias took something from his pocket, and the appellant then held his hand. They struggled and fell. Two shots went off during this struggle. The revolver produced came into his hand and he ran to Wimalawathie's house and told her that he took it from Kalumahathmaya *alias* Dias and asked her to keep it. When the Police Jeep arrived later he was in that house and he went up to it. He put his character in issue. He also said that he had no grievance against either Somapala or Baba Nona. He had mud stains on his shirt due to his struggle with Dias, and he had an injury on his hand which was caused by Jandi hitting him with a stick in the course of his struggle.

It was for the Jury to decide which of these two versions they would accept after the learned Commissioner had summed up the evidence and directed them on the law. The first complaint made by Mr. Chitty against the summing-up is that the learned Commissioner was not entitled to ask the Jury to reject Wimalawathie's evidence after Crown Counsel had asked them " to accept what she says as a witness of truth ".

The passage in question reads as follows :—

" Counsel for the defence, counsel for the prosecution, make submissions to you because you are the sole judges of fact, for you to consider. You can consider them and if they appeal to you you adopt them. If you do not, you reject them. They are not entitled to give any opinion in regard to the witnesses, in regard to whether he is an acceptable witness or otherwise. That is a matter for you, Gentlemen.

Now, in the course of this case, counsel for the defence commented that in the course of his address, counsel for the Crown said in regard to Wimalawathie " accept what she says as a witness of truth ", and that that means Counsel's opinion is that she is a witness of truth That is not a matter for Counsel, Gentlemen. It is for you. You and you alone having seen and heard the witness, can come to the conclusion whether Wimalawathie is a witness of truth, or whether every other witness here is or is not a witness of truth. As I told you, Counsel's opinion of a witness must bear no weight with you with regard to credibility. That is a question for you, Gentlemen, entirely for you.

Now, Gentlemen, I mentioned that matter because it struck me that it might be useful to mention it, as I came to it at that particular point, but I might also tell you this, Gentlemen, here and now that the credibility of witnesses is a question of fact and that is a matter entirely for you."

It seems to us that after Crown Counsel in his address to the Jury asked them to accept Wimalawathie as a truthful witness — and that is what the words used mean — the appellant was entitled to the benefit of that concession. Crown Counsel, who must be presumed to know the strength of his case and the relevant facts, was entitled to choose to accept Wimalawathie's version on a disputed question of fact. The defence was entitled to the benefit of that admission on the evidence led by the Crown. There was no need for the learned Commissioner to deprive the defence of that advantage.

It will be seen, from the short summary of the respective versions already given in this judgment, that according to Wimalawathie the appellant voluntarily surrendered to the Police when they arrived at Wimalawathie's house. She also said that the appellant already had mud stains on his shirt when he arrived there. The prosecution, however, called two other witnesses, Police Sergeant Munasinghe and Police Constable Wijekoon, who gave an entirely different version as to what happened when they arrived at Wimalawathie's house. Munasinghe said that when he inquired for the appellant, Wimalawathie said that he had not come there. At that time, Munasinghe said, he saw the appellant running out from the rear of the house chased by Wijekoon. Wijekoon and the accused struggled, and Munasinghe then ran up and struck the accused and took him into custody. Munasinghe denied that the appellant came voluntarily to the jeep. Wijekoon gave evidence similar to that of Munasinghe, and he explained the mud stains on the appellant's shirt by saying that they struggled together on the ground. The importance of Wimalawathie's evidence also lies in her statement that, apart from the appellant voluntarily surrendering to the Police, the appellant complained to her that he had been chased and that he had snatched the revolver from Kalumahathmaya *alias* Dias. The

appellant's credibility was impeached by the evidence of Munasinghe and Wijekoon, but supported by the evidence of Wimalawathie. Hence the importance of the concession made by Crown Counsel on this point.

Another complaint made against the summing-up was the absence of any direction to the Jury as to how they were to treat the evidence of good character which the appellant gave regarding himself. It has been held that the possession of a good character by an accused is primarily a matter which goes to credibility—see *R. v. Bellis*[1]. It is also something which should be taken into account in his favour, on the basis that a person of good character is less likely to commit a crime than a man of bad character—see (1966) Criminal Law Review, p. 163. There was no direction to the Jury on this question at all, and there is a passage in the summing-up which Mr. Chitty said was prejudicial to the appellant and could have misled the Jury. The particular passage is :—

> " Gentlemen, in this case it has been stressed before you that this accused is a schoolmaster and that he stands to lose more by a conviction than perhaps a person who is not so high in social status.
>
> Well, Gentlemen, if such a person gives evidence, it may be that he is worried by that fact also, but you Gentlemen of the Jury, who are impartial judges will not be swayed by a thing like that. You as judges are not going to be swayed by the fact that he is a schoolmaster and that the other person is a cultivator. You see, Gentlemen, the very thought that he knows you are all impartial might worry him, it might worry him as to the consequences and how you react to the way he gives evidence. It is because of reasons like this that you are asked to make some allowance for an accused when he gives evidence, only on the question of demeanour, not on anything else. He has no licence, because he is an accused, to tell lies or anything like that ; only on the question of demeanour you make some allowance."

It is difficult to understand what the learned Commissioner meant to convey by the words " the very thought that he knows you are all impartial might worry him, it might worry him as to the consequences and how you react to the way he gives evidence," and again, " he has no licence, because he is an accused, to tell lies or anything like that ; only on the question of demeanour you make some allowance". It might have been understood by the Jury to mean that the appellant was a type of person who did not wish to be tried by impartial Judges, and such an opinion of him would certainly not be creditable. There was also no need to emphasize the fact that an accused person has no licence to tell lies. If such an observation was considered proper, it would have been fairer to add that no witness has any such licence. The passage quoted might have left the Jury wondering whether the Judge did not view the appellant as an unsatisfactory witness and a man who did not wish to be tried by an impartial tribunal who was also given to telling lies when in the witness box.

[1] *(1966) 1 A. E. R. 552.*

These observations, coupled with the absence of any reference to the evidence of good character, which was unchallenged by the prosecution, may well have placed the appellant at a disadvantage when the Jury came to consider the weight to be attached to his evidence. We think that these flaws in the summing up affected its fairness to such an extent as to vitiate it completely.

We quash the conviction. We do not think that this is a case in which there should be a retrial.

Conviction quashed.