[IN THE COURT OF APPEAL OF SRI LANKA]

1972 *Present :* **Fernando, P., Samerawickrame, J., and Siva Supramaniam, J.**

T. G. DHARMADASA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 9 OF 1972—C. C. A. NOS. 146 AND 147 OF 1971

S. C. 243 of 1971—M. C. Polonnaruwa, 9037

Charge of murder against two accused—Summing-up—Failure of judge to direct jury as to the case against each accused separately when it was necessary to do so—Misdirection—Verdict of Jury—Power of Court of Appeal to alter it—Court of Appeal Act, No. 44 of 1971, s. 8 (2).

The appellant and another accused were convicted on a charge of murder. Although the case was one where the trial judge was required to advise the jury to consider the case against each accused separately, he omitted to give such direction. On the other hand he addressed the jury thus :—

" On the facts of this case, I cannot see how you can distinguish between the two accused in this case. You either convict both accused or acquit both ; if you believe the prosecution story, then you will convict the accused."

Held, that there was a misdirection on a very material point resulting in grave prejudice to the appellant. However, as a reasonable jury, if they had been adequately directed in regard to the whole case, could have found that the appellant had taken part in a joint attack of the deceased person without sharing an intention to kill him but in circumstances in which he must have known that death was a likely result, it was open to the Court of Appeal, acting under the powers vested in it by section 8 (2) of the Court of Appeal Act, to substitute for the verdict of murder against the appellant a verdict of guilty of culpable homicide not amounting to murder.

APPEAL from a judgment of the Court of Criminal Appeal.

E. R. S. R. Coomaraswamy, with *T. Joganathan*, *S. C. B. Walgampaya* and *E. R. S. R. Coomaraswamy* (Jnr.), for appellant.

V. S. A. Pullenayegum, Deputy Solicitor-General, with *C. Sandarasagara*, State Counsel, for respondent.

Cur. adv. vult.

July 24, 1972. FERNANDO, P.—

The appellant, Dharmadasa, as the second accused and another man, Ranasinghe, as the first accused were convicted at the Midland Assizes, upon the unanimous verdict of a jury on a charge of murder of a man named Mutu Banda. The record kept at the trial shows that the jury took only ten minutes to consider the verdict they returned. The trial judge pronounced sentence of death upon both men. They appealed to the Court of Criminal Appeal and that Court, after an argument lasting three days and a quarter of which about a day had been taken for the reply of counsel for the prosecution, dismissed their appeals without

reasons given. We have, therefore, had to consider the appellant's appeal made to us without having the advantage of the reasons which induced the Court of Criminal appeal to dismiss his appeal.

The evidence for the prosecution, which was by no means lengthy, consisted principally of one eye-witness, a woman named Punchi Hamine, the mother-in-law of Mutu Banda. She claimed to have seen the attack on her son-in-law which resulted in the latter's death. According to her, Mutu Banda was riding a bicycle along a path that led towards his house when the appellant and Ranasinghe, who were both known to her, jumped from the abutting shrub jungle on to the path and toppled the bicycle bringing down Mutu Banda as well. She was then about twenty yards behind her son-in-law. From where she was she saw both the appellant and Ranasinghe moving their hands (she demonstrated the movements to the jury) and she inferred they were "assaulting Mutu Banda or doing something. Each of them did once like that and ran off". Mutu Banda raised himself up from the ground, ran towards his house, but fell before he could go far. When she reached the spot where Mutu Banda had been set upon she saw blood at the spot, and there was a trail of blood from there right up to the place where the man lay fallen.

Punchi Hamine had been cross-examined to suggest that she had not seen any movement of the hands of the appellant to enable her to infer that he was himself stabbing Mutu Banda, and part of her deposition before the Magistrate's Court (D1) was proved to establish that at the inquiry she had attributed movement of the hands ("as if he was stabbing") only to Ranasinghe. For the appellant, it was claimed at the trial, at the Court of Criminal Appeal and before us that the variation of her evidence at the trial on this important aspect of the attack should have cast doubts on the credibility of her evidence in regard to the part attributed by her to the appellant. Complaint was made before us that the learned trial judge, when he came to instruct the jury on the effect of D1, only said, "the statement made outside this Court is put here for saying that the witness said a different thing at a different time. It is not every contradiction that goes to prove that she is speaking an untruth. The task of assessing a contradiction is important, it is for you. Is this a material contradiction for you to say 'we do not believe Punchi Hamine'?"

Punchi Hamine had not at any stage said she had actually herself seen a knife in the hand of either accused. The contradiction D1 was proved by the defence not to discredit the entirety of Punchi Hamine's evidence. Indeed, it may even have had the effect of strengthening her evidence in respect of the part she alleged that Ranasinghe had played; but it obviously tended to cast a doubt in respect of the part she alleged the appellant did play. After D1 was proved, a reasonable jury, properly and adequately directed on its effect, was likely to have entertained a doubt about the truth or, at least, the accuracy of her evidence that the appellant went through the motion of stabbing Mutu Banda. The direction

actually given was, in our opinion, not merely inadequate but could have had, and probably did have, the effect of clouding the real issue that arose from the proof of D1 which was not whether Punchi Hamine was a false witness when she claimed to have seen the attack but whether she was a sufficiently reliable witness in regard to the part she had seen the appellant play.

The rest of the evidence only tended to differentiate between the parts played by Ranasinghe and the appellant.

Mutu Banda had two knife injuries on him, each taken by itself being sufficient to result in death. When the appellant and Ranasinghe, some five hours after this incident, made their appearance in the late afternoon at the Police Station which was about 15 miles from the scene of the crime, each of them handed over a knife to the Police. The evidence established that the injuries could have been caused with either of these two knives. Ranasinghe's knife, when examined by the Analyst, was found to have some light stains of blood, while the appellant's knife was free of either blood or stains.

There was evidence of bad feelings only between Ranasinghe and Mutu Banda. The two persons accused were not relatives although both eked out a living as carters. They had been seen together about four hours before the attack having tea in the village boutique.

Two persons, the witnesses Pasqual and Mabel Hamine, who came running up from their houses on hearing cries, questioned Mutu Banda as to what had happened. To Pasqual the injured man replied that Rane stabbed him, while to the other who was no other than his own wife he stated that Ranasinghe stabbed him.

Counsel argued that there was substantial difference between the strengths of the prosecution's cases as against Ranasinghe and the appellant. Shortly put, that (*a*) motive was established to have been present only in Ranasinghe, (*b*) Mutu Banda, in reply to questions by relatives soon after the injuries had been caused implicated only Ranasinghe, (*c*) no blood was present on the knife the appellant gave over at the Police station, while blood stains were discovered on Ranasinghe's knife given over at the same time, and (*d*) the only witness who had implicated the appellant as partaking in the attack had not, at the inquiry, stated that the latter had done anything after the bicycle had been toppled.

There was substance, in our opinion, in counsel's contention that here was a case where the trial judge was required to advise the jury to consider the case of each accused separately. This the trial judge omitted altogether to attempt. Counsel did not seek to suggest that the jury could not on the evidence have found that the appellant had taken part in a joint attack on Mutu Banda, but he was in our opinion justified in

submitting that it was not a necessary inference from the evidence of the prosecution that the appellant shared with Ranasinghe an intention to kill the deceased.

We have already referred to the effect that the contradiction between the deposition (D1) and the evidence of Punchi Hamine at the trial should have produced on any reasonable jury. In the state of the evidence, the substance of which we have indicated above, we thought there was a point in the criticism of counsel that the learned trial judge misdirected the jury when he addressed them thus :—

> " On the facts of this case, I cannot see how you can distinguish between the two accused in this case. You either convict both accused or acquit both ; if you believe the prosecution story, then you will convict the accused."

It was difficult for us to resist the conclusion that a direction such as this, following upon an omission to instruct the jury to consider separately the strengths of the respective cases against the accused, constituted a misdirection on a very material point resulting in grave prejudice to the appellant. The prejudice to him was that he received a sentence of death when he might have received one of imprisonment only. Assuming, as we have a right at this stage to do, that the prosecution story was believed, nevertheless an important question remained as to whether the appellant shared an intention in common with Ranasinghe to kill Mutu Banda. We think that an explanation for the circumstance that the jury took the unusually short time of ten minutes to deliberate upon their verdict in a murder case involving two persons is the probability that the learned judge's direction reproduced above made it appear to them that their task was quite simple. No reasonable jury was likely to have been willing to acquit Ranasinghe on the charge of murder. Such a jury could have inferred that an acquittal of the appellant on the charge of murder would have involved a similar acquittal of Ranasinghe as well, and that course they were understandably unwilling to take in this case. Indeed, the direction appeared to us to have been an over-simplification of the correct issue before the jury which we might formulate as follows :—

> " If the jury was satisfied that Ranasinghe stabbed the deceased in circumstances which made it an offence of murder on his part, were they satisfied beyond a reasonable doubt on the proved evidence that the appellant shared with Ranasinghe the murderous intention?"

The learned Deputy Solicitor-General suggested that the words of the trial judge we have reproduced earlier constitute no more than the latter's view on questions of fact in this case. The first sentence in that direction could possibly be argued successfully to be merely the trial judge's view on facts. Even so, we must respectfully point out, it was an erroneous view. Be that as it may, the rest of the direction could not have been understood by average jurymen as anything that was open to them in law to disregard.

Had there been an adequate direction in regard to the effect of the contradiction between Punchi Hamine's evidence at the inquiry and her evidence at the trial, and had the jury been instructed, as indeed on the facts of this case they should have been, to consider the cases against each accused separately, a reasonable jury could not, in our opinion have returned a verdict of guilty of murder against the appellant. We think, however, that the jury must have been satisfied that he participated with Ranasinghe in an attack upon the deceased in circumstances in which he must be held to have known that death was a likely result, and they could in that event have returned a verdict of guilty of the lesser offence of culpable homicide. We have, therefore, acting under the powers vested in us by Section 8 (2) of the Court of Appeal Act, substituted for the verdict of murder against the appellant a verdict of guilty of culpable homicide not amounting to murder and for the sentence of death a sentence of seven years' rigorous imprisonment.

Verdict altered.