[COURT OF CRIMINAL APPEAL]

1951 *Present :* **Nagalingam S.P.J. (President), Gratiaen J. and Gunasekara J.**

MURUGESU, Appellant, *and* THE KING, Respondent.

Appeal 64 of 1951, with Application 93. S. C. 4—M. C. Kayts, 1,515

Charge of murder—Plea of self defence—Summing-up—Duty of Judge to give adequate directions on "provocation" and "sudden fight"—Penal Code, s. 294, Exceptions 1 and 4.

In a prosecution for murder, the accused pleaded that he had acted in self-defence, and the jury were adequately directed by the presiding Judge on that issue.

Held, however, that, as the mitigatory pleas of "grave and sudden provocation" and of "sudden fight" would also have arisen for the jury's consideration in a possible view which they might have taken of the evidence, the presiding Judge should have given the jury adequate direction on that aspect of the case as well.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham with *T. Ganeshalingam* and *S. Sharvananda* (assigned) for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 15, 1951. GRATIAEN J.—

This is an appeal from a conviction for the murder of a man named Aiyan Kandiah *alias* Singarayar.

The appellant and Kandiah were the owners of rival toddy booths, and it is not in dispute that some days before the 6th June, 1951, they had quarrelled over a seemingly trivial dispute concerning the price of toddy. The case for the prosecution is that about mid-day on 6th June, 1951, the accused attacked Kandiah with a " toddy-pole " when the latter was passing his booth. Kandiah was removed to the Jaffna Hospital at 1.15 p.m., and he died there about an hour later. Dr. Vanniasekaram who conducted the post-mortem examination on his body has testified to the deceased having sustained a single injury on his head. The skull was fractured and the injury was necessarily fatal.

The appellant gave evidence on his own behalf at the trial. He did not deny that it was he who had dealt the blow in consequence of which Kandiah came by his death. His version of what took place is, however, entirely different from that relied on by the Crown. He states that when he was about to enter his toddy booth he was waylaid by Kandiah and a man called Nagamany each of whom assaulted him with a club. He claims that in these circumstances he acted justifiably in self-defence, and that he was entitled to an acquittal of the charge against him.

The appellant ran away from the scene after attacking Kandiah, and the evidence establishes that shortly afterwards he went to the Village Headman who gave him a letter reporting the incident to the Inspector of Police. In the meantime the Inspector had arrived at the spot. When the appellant returned to the scene and discovered that the Inspector had already arrived there he attempted to run away. He was however promptly arrested. A short while afterwards he too was examined by the doctor who speaks to 6 separate contusions on the appellant's shoulder blades and left forearm. These injuries were non-grievous, but in the opinion of the doctor they must have been caused by two separate weapons which were in all probability clubs.

The defence relied strongly on the evidence of these injuries as supporting the appellant's version of the incident. The crown, on the other hand, suggested that the injuries had been inflicted by a friendly hand during the comparatively short interval between the appellant's hurried escape after attacking Kandiah and the time of his ultimate arrest.

Having regard to the manner in which the case was conducted at the trial, a great deal of the learned Judge's summing-up was confined to matters relating to the appellant's special defence that he had acted in the exercise of the right of self-defence. In our opinion the jury received adequate directions on the law applicable to this defence and on the issues of fact arising for consideration on this part of the case.

Learned Counsel for the appellant complains, however, that the jury were not adequately directed on certain other defences which, upon the evidence, also called for the consideration of the jury—namely, the issues of " grave and sudden provocation " and of " sudden fight ".

We are of the opinion, and we understood learned Crown Counsel to agree, that the issues of " grave and sudden provocation " and alternatively of " sudden fight " were matters which would necessarily arise for the consideration of the jury if they believed that Kandiah, either alone or with someone else, had in fact assaulted the appellant, even if they rejected the rest of the appellant's version wherein he claimed to have struck Kandiah in *self-defence*. It was possible, for instance, to take the view that it was Kandiah who first attacked the appellant, whereupon the appellant retaliated—not in self defence but under the influence of the provocation received—by hitting Kandiah with a " tapping pole ". In that possible view of the facts, the question arose whether, in the opinion of the jury, the accused's offence was reduced to one of culpable homicide not amounting to murder within the meaning of Exception 1 of section 294 of the Penal Code. Alternatively, in another possible view of the facts, the application of Exception 4 arose for consideration.

Upon an examination of the summing-up as a whole, we think it unlikely that when the jury finally retired to consider their verdict, they sufficiently appreciated that, if the plea of self-defence was rejected by them, the issues of " provocation " and " sudden fight " still remained for their consideration. Even if this matter was appreciated by the jury, we do not think that they had received adequate directions as to the law relating to " provocation " and " sudden fight ". The only reference to the law on these issues appears in a single sentence at a comparatively early stage of the summing-up, where the learned Judge said:—

> " Gentlemen of the Jury, even if this man was not defending himself but if there was provocation by the deceased and the other man or there was a sudden fight, then his offence would not be murder but culpable homicide not amounting to murder. "

We do not regard this sentence as containing a sufficient direction as to the law or the circumstances in which the issues of " provocation " and " sudden fight " would properly arise for consideration. It is important to note that at the conclusion of the summing-up which was in other respects entirely adequate (and, indeed, favourable to the defence) the learned Judge summarised for the benefit of the jury the various issues on which the verdict must ultimately depend:—

> " Gentlemen of the Jury ", he said, " if you believe that the deceased and Nagamany lay in wait and assaulted the accused, then you will ask yourselves the further question whether in these circumstances you can reasonably say that he has exceeded his right of private defence. I have answered that question. In my opinion he was within his right. If he was not attacked, then you will ask yourselves was it his hand that caused the fatal injury ? When he dealt that blow, did he have a murderous intention ? If you have no doubt that it was his hand that caused the fatal injury then proceed to ask yourselves whether you can hold that he had a murderous intention. If you come to the conclusion that he had a murderous intention then his offence would be murder ; but if you think that he had no murderous intention, then proceed to consider if he had the knowledge that his act was likely to cause death or bodily injury sufficient in the ordinary course

of nature to cause death. If he had the knowledge then his offence would be culpable homicide not amounting to murder. If, however, even that knowledge has not been established by the evidence, he would be guilty of voluntarily causing grievous hurt. "

Having regard to the specific issues which were so prominently placed before the jury at this stage of the trial, it is in our opinion impossible to state with certainty that, when considering their verdict, they had also reminded themselves of the very brief and inadequate direction that they should also consider the issue of " provocation " or of " sudden fight ".

Although the jury's verdict clearly involves a rejection of the plea of self-defence, it does not necessarily follow that they had rejected that part of the appellant's version which asserted that it was Kandiah who first attacked him. In the result, we cannot say that the jury might not reasonably, if properly directed, have returned a verdict that the appellant was guilty only of culpable homicide not amounting to murder on the ground of " provocation ", or, alternatively, of " sudden fight ". We accordingly quash the conviction for murder and substitute in its place a conviction for culpable homicide not amounting to murder. For this offence we sentence the appellant to undergo a sentence of eight years' rigorous imprisonment.

Conviction altered.