[COURT OF CRIMINAL APPEAL]

1954 *Present:* **Pulle J. (President), Swan J. and Weerasooriya J.**

S. LUVIS, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 1 OF 1954, WITH APPLICATION 4

S. C. 19—M. C. Chilaw, 1,979

Charge of murder—Plea of sudden fight—Not specifically raised—Disclosure in evidence—Summing-up.

In a trial for murder, although it was an integral part of the accused person's defence that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the accused was the person who inflicted the fatal injury in the course of that fight.

Held, that, having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial Judge of the duty of placing before the Jury that aspect of the case.

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

Colvin R. de Silva, with *G. C. Niles* and *A. K. Premadasa*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 15, 1954. WEERASOORIYA J.—

The appellant in this case was convicted, on the unanimous verdict of the Jury, of the offence of murder.

The case for the prosecution was that as the deceased was proceeding from a boutique where he had gone to buy a cigarette, the appellant came up to him from the opposite direction and dealt him a blow with his hand on the face which caused the deceased to fall, and thereupon the accused pulled out a pointed weapon from his waist, stabbed the deceased once in the chest saying "I will go away only after killing you", and ran away carrying the weapon with him. According to the medical evidence the deceased must have died almost instantaneously on receiving this injury which had penetrated the chest cavity and cut the right ventricle of the heart. The prosecution was unable to adduce any evidence as to why the appellant should have delivered this sudden attack on the deceased. There was evidence that the deceased was not a man of good character and that he had at least on one occasion been convicted of an offence for which he received a jail sentence. There was also evidence that shortly before the stabbing the deceased had been drinking some arrack.

The appellant in giving evidence on his own behalf related a version as to how the deceased could have received the fatal injury which was substantially different from the circumstances as deposed to by the witnesses called by the prosecution. His version was that when he was casually passing the scene of the stabbing he noticed two groups of people who were abusing each other and " getting ready for a fight ", to use his own words ; that in one of these groups was the deceased, that he went up to the deceased and told him to go away and not to quarrel, but the deceased resented his intervention ; and he described the subsequent stages of the incident as follows :—

> " The deceased scolded me dragging the name of my mother. I also returned the abuse in the same terms. He then struck me with his hand and I also struck him in return. Then Sardiris, Sardiel and Martin got hold of the deceased. Then there was a free fight on the road. I then went home . . . . "

The appellant denied that he had a knife or used one on the deceased. The suggestion implied in his evidence was that the deceased came by his death in the course of the fight which took place as he left the scene. In re-examination he stated :—

> " . . . . At the time I left they were surrounding and fighting in a group. One was fallen. That person appeared to be Hendy (the deceased). At the time I left I thought that was Hendy who was fallen. It was after that that I left the scene.
>
> *Q :* Was it due to any blow dealt by you that Hendy fell down ?
>
> *A :* Due to my blow. I cannot say which blow but I dealt blow for blow. He dealt me a blow and I dealt him a blow. I cannot say whether he fell for that blow because the blows began to rain and he fell . . . . "

It appeared to us that from the admissions made by the appellant in the above quoted portions of his evidence, and notwithstanding his denial that he caused the fatal injury on the deceased or that he was even armed with a knife, it was open to the Jury to hold it as established beyond reasonable doubt that the appellant was the person who caused the deceased's death ; and also that more probably than not, and despite the version presented by the prosecution eye witnesses of an almost cold blooded murder, the circumstances in which the appellant came to inflict the fatal injury were those of a sudden fight between him and the deceased in which others too were involved. This was a conclusion which the Jury could all the more readily have reached in view of certain other aspects of the case which were matters of common ground, namely, the absence of a motive and the failure of those same witnesses to give prompt information to the Police after the deceased was killed.

Learned Crown Counsel submitted that the only process by which the Jury could have reached the conclusion envisaged in the preceding paragraph was on an elimination of certain material portions of the evidence, not only of the prosecution but also of the defence, as unworthy of credit, and a piecing together of such other portions of that same

evidence as appeared to them to represent the truth ; and he further submitted that a conclusion so reached would have been vitiated by the consideration that if the Jury were of the view that the prosecution evidence on such material points as the circumstances in which the deceased came to be stabbed was not true, it would have been their clear duty to reject the entirety of the case against the appellant instead of proceeding somewhat laboriously to form a composite picture of the evidence which represented neither the prosecution nor the defence version.

But while, generally speaking, it is undoubtedly within the competence of a Jury to reject the whole of the evidence of witnesses who are shown not to have spoken the truth on material points, we do not think that in the present case the rejection of the evidence of the alleged eye witnesses called by the prosecution as to the circumstances in which the deceased was stabbed necessarily entitled the appellant to an acquittal since there was before the Jury the evidence of the appellant himself, the admissions in which, taken in conjunction with the other features in the case to which attention has already been drawn, and the evidence of the prosecution witnesses that the fatal injury was inflicted by the appellant, could well have formed the basis of a verdict that even if the death of the deceased had been caused by the appellant with such an intention as would otherwise have constituted the offence of murder, the appellant's offence was nevertheless that of culpable homicide not amounting to murder in that the killing of the deceased was in the course of a sudden fight between himself and the appellant. It is on the premise that the Jury could reasonably have returned such a verdict in this case that learned Counsel for the appellant made the submission that the conviction on the charge of murder cannot be allowed to stand inasmuch as the trial Judge did not deal with that verdict in his charge. In this connection he drew attention to the fact that the directions of the learned Judge in regard to the returning of a verdict that the appellant was guilty of the lesser offence of culpable homicide not amounting to murder were confined to a possible finding by the Jury that the infliction of the fatal injury was not accompanied by a murderous intention.

In the present case, although it was an integral part of the appellant's defence at the trial that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the appellant was the person who inflicted the fatal injury in the course of that fight, but having regard to the evidence we were satisfied that the fact that such a defence was not specifically raised did not relieve the learned trial Judge of the duty of placing before the Jury that aspect of the case, and following a series of decisions of this Court (of which, to mention two, are the cases of *Rex v. Vidanalage Lanty* [1] and *Rex v. Murugesu* [2]) we set aside the conviction on the charge of murder and substituted therefor the verdict that the appellant was guilty of the offence of culpable homicide not amounting to murder and imposed a sentence of ten years rigorous imprisonment. We now set out the reasons for our order.

Conviction altered.

[1] *(1941) 42 N. L. R. 317.*

[2] *(1951) 53 N. L. R. 469.*