[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Nihill and Cannon JJ.**

THE KING *v.* LEWIS SINGHO.

35—M. C. Gampaha, 9,193.

Murder—Committed in a sudden fight without premeditation—Lesser offence —Immaterial which party offers the provocation or commits the first assault—Penal Code, s. 294, Exception 4.

Where in a charge of murder the evidence discloses that the accused may have committed the offence without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner, it is the duty of the Judge to direct the Jury to bring in the lesser verdict.

In such a case it is immaterial which party offers the provocation or commits the first assault.

[1] *27 Calcutta 210.*

APPEAL from a conviction by a Judge and Jury before the Fourth Western Circuit, 1941.

Dodwell Gunawardene for accused, applicant.

H. W. R. Weerasooriya C.C., for the Crown.

Cur. adv. vult.

December 15, 1941. HOWARD C.J.—

In this case three points are raised by Mr. Gunawardene on behalf of the appellant. He, first of all, complains that evidence with regard to the death of Brampy, the husband of the deceased, was improperly admitted. We think that there is no substance in this point, as the death of Brampy occurred in the same transaction as that of the deceased. In these circumstances, the prosecution was entitled to lead in evidence the fact that Brampy was killed in the circumstances related by the witnesses for the prosecution.

The second point made by Mr. Gunawardene is that the learned trial Judge has not given a full and adequate explanation of the defence relating to the exercise of the right of private defence. We think that the explanation given of this evidence by the learned trial Judge was adequate.

The third point raised by Mr. Gunawardene is, however, one which we think is substantial. He complains that the learned trial Judge has failed to direct the Jury that the offence might come within the fourth exception to section 294 of the Penal Code, or, in other words, that the offence might have been committed in the course of a sudden fight. It is true that no mention is made by the trial Judge in his summing-up of this possible defence. He dealt adequately with the question as to whether the appellant was exercising the right of private defence. He has also asked the Jury to consider whether the offence came within the first exception to section 294, namely, whether the appellant committed the offence when deprived of the power of self-control by grave and sudden provocation. It is obvious that the Jury by their verdict have rejected any suggestion that the appellant committed the offence when deprived of the power of self-control by grave and sudden provocation, or that he was exercising the rights of private defence. On the other hand, the evidence of the prosecution establishes that the appellant arrived on the scene and upbraided the deceased and her husband with regard to the disappearance of his child, and according to the story of the prosecution-witnesses, he stabbed each of them in succession after this upbraiding had taken place. So that it is obvious that there was a battle of words. Moreover, the accused and his wife were afterwards found suffering from injuries which might indicate that there had been a fight. In these circumstances, we think the trial Judge should have directed the Jury that it is possible that the appellant committed this offence without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. With regard to this defence, I might point out that it is immaterial in such

cases which party offers the provocation or commits the first assault. We think it possible that the offence may have been committed in the circumstances which would bring it within the phraseology of exception 4. We are, therefore, unable to distinguish it from the case of *The King v. Lanty* [1]. We think that the appellant was entitled to have the benefit of the lesser verdict. We set aside the conviction of murder and substitute a conviction for culpable homicide not amounting to murder. We impose a sentence of fifteen years' rigorous imprisonment.

Conviction varied.