[COURT OF CRIMINAL APPEAL]

1970 *Present :* Siva Supramaniam, J. (President), Samerawickrame, J., and Tennekoon, J.

PERIYAMBALAM *et al.*, Appellants, *and* THE QUEEN, Respondent

C. C. A. 111–115/69, WITH APPLICATIONS 155–159

S. C. 172/68—M. C. Kandy, 58275

Trial before Supreme Court—Deposition of a witness before Magistrate—Its invalidity as substantive evidence—Summing-up—Aspects of the evidence discrediting the case for the prosecution—Duty of Judge to direct Jury's attention to them—Allocutus—Its evidential value—Criminal Procedure Code, s. 305.

Where, at a trial before the Supreme Court, the evidence given by a witness is inconsistent with his deposition before the Magistrate, it would be a non-direction amounting to a misdirection in law if the trial Judge fails to direct the Jury that they should not treat as substantive or corroborative evidence the deposition made by the witness before the Magistrate.

It is the duty of the trial Judge, in the course of his summing-up, to draw the attention of the Jury specifically to important aspects of the evidence which tend to discredit the case presented by the prosecution.

An admission made by an accused person in answer to the allocutus under section 305 of the Criminal Procedure Code is part of the evidence in the case, and the Court of Criminal Appeal cannot ignore the effect of such admission.

APPEALS against five convictions at a trial before the Supreme Court.

Colvin R. de Silva, with *I. S. de Silva*, *C. Sandrasagara* and (assigned) *C. Ganesh*, for the accused-appellants.

Ian Wikramanayake, Crown Counsel, with *Sunil de Silva*, Crown Counsel, for the Crown.

Cur. adv. vult.

March 2, 1970. SIVA SUPRAMANIAM, J.—

The appellants were convicted of the offence of murder by an unanimous verdict of the jury and were sentenced to death.

The facts, as disclosed in the evidence, were briefly as follows :— The deceased as well as the appellants were labourers on Loolkandura Group, Deltota. Originally all the labourers on the said estate were members of the Ceylon Workers' Congress but sometime prior to the incident in question the appellants and some others had broken away and joined a rival labour union. There had been some disagreement in regard to the management of a temple as well and it was arranged that both parties should manage it during alternate periods. On 1st April 1968 a meeting of the temple Committee of the C.W.C. group to which the deceased

belonged was fixed for 6.30 p.m. The deceased was the deputy Thalaivar on the estate of the C.W.C. group and was on his way to the meeting of the Committee when he came by his death at the hands of his assailants.

In regard to the identity of the assailants, the prosecution relied principally on the evidence of two witnesses—Sivapackiam, a girl then about 17 or 18 years of age, and Subramaniam, another labourer. Sivapackiam and her parents as well as Subramaniam were members of the C.W.C. group. According to Sivapackiam, when she was on her way to a water spout at about 6 or 6.30 p.m. she saw the 1st appellant standing on a rock on a side of the estate road. When she was at the water spout she heard the sound of someone whistling with his mouth from the direction where the 1st appellant was. Immediately thereafter she saw the deceased man coming along the road. The 1st appellant then went in the direction of the line room occupied by the 4th and 5th appellants. Then the 2nd, 3rd, 4th and 5th appellants came on the scene. The 3rd, 4th and 5th appellants held the deceased and the 3rd appellant assaulted him. Then the 2nd appellant assaulted him with an iron rod on the top of the head. At the same time the 1st appellant assaulted him with an axe from behind and that blow too alighted on the crown of the head. At that stage she ran away from the scene. It was proved, however, that when she gave evidence before the magistrate at the scene the next day she had stated : " All I saw is the 1st, 3rd and 4th accused holding Muttiah and the 2nd accused Perumal hit him on the head with an iron rod ". She made no mention of the 1st appellant having assaulted with an axe or of the 3rd appellant having assaulted with a club. The learned trial judge indicated very clearly to the jury his own view that this witness's testimony in regard to the assault on the deceased was unworthy of credit.

Exception was however taken by the counsel for the appellants to the following passage in the learned judge's charge with reference to the question of the assault :—

> " You may be able to look at it this way, that she spoke the truth up to a point, that what she said to the magistrate is all that she saw and that subsequently she has in some way been influenced to add to the story perhaps on knowing that there were other injuries on Muttiah, perhaps because of talks on the estate. You may be able to say that although this part of her evidence is untrue, nevertheless we do believe beyond any doubt one part of it, namely, that while three or four persons were holding Muttiah, preventing him from moving, then at that stage, as she has said to the magistrate, the second accused hit Muttiah on the head with an iron bar or something of that kind. "

The complaint of appellant's counsel was that the learned trial judge failed to give a clear direction to the jury at any stage of his charge that the evidence given by a witness before the magistrate should not be

acted upon as substantive evidence at the trial and in the absence of such a direction, the latter part of the aforesaid passage would have given the impression to the jury that they could act on such evidence.

According to Subramaniam, when he was returning from his vegetable enclosure that evening, he saw the five appellants getting out of the line room of the 4th appellant. When he passed them he saw them having weapons in their hands. He did not however specify what the weapons were. He had earlier seen the deceased on the road. After he reached his line room he heard a cry " They are cutting and killing Muttiah Thalaivar " and he ran back and saw the five appellants assaulting the deceased who was lying fallen on the ground. He did not see the weapons at the time of the assault. He also stated that he could not speak to any particular act done by any of the appellants.

It was proved, however, that this witness gave a different version to the magistrate when he testified at the scene. His evidence there was as follows :—

> " At about the same time I saw the deceased coming from the opposite direction followed by the 1st accused Perambalam. I did not see any weapons in the hands of the first accused or with the others. At once I heard the cries of the last witness Sivapackiam. She was shouting saying " Annaie alarum adikarangalai ". I then turned and rushed back and I saw the first accused cutting the deceased with an axe. I saw the 2nd accused assaulting with the crowbar and the other three accused assaulted the deceased with clubs ."

With reference to the evidence of this witness, the learned trial judge stated :—

> " With regard to him also the Defence has relied on his original version. To the magistrate he said that he did not see weapons when he saw these five men, but that he saw some weapons being used when the assault took place. Ask yourselves whether that is a serious contradiction, or whether after 18 months it is purely a mistake and that when he says today that he saw weapons on the first occasion he was really assuming that because he saw them assaulting they must have had weapons earlier. "

Learned counsel for the appellant complained that in respect of the testimony of this witness too, in the absence of a specific direction that the evidence given before the magistrate should not be acted upon as substantive evidence the jury may have relied upon the passage quoted above as substantive evidence which corroborated the evidence of Sivapackiam that the 1st appellant cut the deceased with an axe and the 2nd appellant assaulted him on the head with an iron rod.

The failure of the learned trial judge to direct the jury that they should not treat as substantive evidence the deposition of any witness before the magistrate was, in our opinion, a non-direction which amounted to a misdirection in law. In consequence of this non-direction the jury may

well have decided to accept and to act on the evidence of Sivapackiam on the footing that her evidence found corroboration in the evidence given by Subramaniam before the magistrate shortly after the incident. If they did so, they would not have given due weight to the learned judge's strong criticism of Sivapackiam's evidence. The acceptance of Sivapackiam's evidence would also have probably resulted in the jury treating as immaterial the differences in the versions of the incident in Subramaniam's testimony before the magistrate and at the trial.

Learned counsel for the appellant also urged that the attention of the jury should have been pointedly drawn to the following matters, which, he submitted, would have cast grave doubts on the truth of the case presented by the prosecution.

According to the medical evidence, the deceased had only two externa injuries, namely, a longitudinal incised wound on the vertex of the scalp and a vertical incised wound on the left side of the neck. The doctor stated that both injuries could have been inflicted with a heavy sharp cutting weapon like the axe head P6. The deceased did not have a single injury consistent with an assault with a crowbar or an iron rod or with a club. The medical evidence, therefore, negatived the testimony of Sivapackiam that she saw the 3rd appellant assaulting the deceased with a club and the 2nd appellant with an iron rod. It also negatived the testimony of Subramaniam that he saw all five appellants assaulting the deceased man with weapons which he could not identify. There was, however, no reference to this aspect of the medical evidence in the learned trial judge's summing up.

According to Subramaniam, when he went to the spot after the deceased man had been killed and the appellants had run away therefrom, he did not see any weapons at the scene near the body of the deceased. But, according to Sub-Inspector of Police, Muhajareen, when he arrived at the scene at 10.15 p.m. he found at the spot 2 pieces of clubs, an iron rod with one end bent, a piece of wooden bedding and a pruning knife. There was no blood stain on any of them. It is a reasonable inference that these "weapons" five in number, had been introduced at the scene by some interested party, before the arrival of the Police. If, therefore, there was some party engaged in fabricating evidence by introducing "weapons" at the scene, the strong possibility of such party fabricating oral testimony too cannot be overlooked. This aspect of the case was also not dealt with by the learned trial judge in his charge.

While there is no duty cast on a trial judge to refer to every detail in the evidence in the course of his summing-up, it is essential that the attention of the jury should be specifically drawn to important aspects of the evidence which tend to discredit the case presented by the prosecution. In the instant case, a specific reference to the matters referred to above may well have resulted in the jury entertaining grave doubts as to the truth of the testimony of both Sivapackiam and Subramaniam. Having regard to the foregoing matters we are of opinion that upon the material

available the verdict of the jury was unreasonable and the convictions of all the appellants on a charge of murder on the basis of their having acted in concert in furtherance of a common murderous intention cannot stand.

The case of the 1st appellant, however, stands on a different footing from that of the rest. The evidence of Sivapackiam was that the whole incident commenced with a whistling sound being heard from the direction where the 1st appellant was. There was no one else present near him at that time and it is a reasonable inference, therefore, that it was he who whistled. That part of the evidence of Sivapackiam was not contradicted by any evidence previously given by her before the magistrate and it is apparent from the verdict of the jury that they accepted it. After whistling, the 1st appellant went in the direction of the line room occupied by the 4th appellant. According to Sivapackiam, he reappeared on the scene with an axe and assaulted the deceased with an axe. According to the medical evidence, both the injuries which were found on the deceased could have been inflicted with an axe like P6. Sivapackiam's evidence that the 1st appellant assaulted the deceased with an axe was, of course, contradicted by her own evidence before the magistrate. But the 1st appellant, in answer to the allocutus at the conclusion of the trial stated as follows: "I state that I committed culpable homicide not amounting to murder". Whatever may be the history of the origin of the allocutus at criminal trials, we are satisfied in this case that the statement of the 1st appellant was an unequivocal and unqualified admission to the Court that the injuries on the deceased which resulted in his death were inflicted by him. It was submitted by learned counsel for the appellants that the statement made by the 1st appellant is not part of the evidence in the case and this Court will not therefore be justified in acting upon it. We are unable to agree.

In the case of *Martin Appu v. The King*[1] (52 N.L.R. 119) it was held that the Court of Criminal Appeal may take into consideration statements made by the appellant in his notice of appeal although such statements refer to matters outside the evidence given at the trial. In considering the 1st appellant's appeal, therefore, this Court cannot ignore the effect of the aforesaid admission. Having regard to all the circumstances, however, we are of opinion that the conviction of murder of the 1st appellant should be set aside and a conviction of culpable homicide not amounting to murder be substituted for it and we accordingly do so.

For the reasons already set out we allow the appeal and quash the convictions of the 2nd, 3rd, 4th and 5th appellants and acquit them. We sentence the 1st appellant to 15 years' rigorous imprisonment.

Verdict altered in regard to 1st appellant.
Appeals of 2nd, 3rd, 4th and 5th appellants allowed.

[1] *(1950) 52 N. L. R. 119.*