[COURT OF CRIMINAL APPEAL]

1952 *Present* : **Nagalingam A.C.J. (President), Gunasekara J. and Pulle J.**

DINGIRI BANDA, Appellant, *and* THE QUEEN, Respondent

APPLICATION 24 OF 1952

S. C. 18—M. C. Kurunegala, 2,019

Criminal procedure—Charge of murder—Plea of lesser offence put to Jury in first instance—Rejection of plea—Regularity of procedure.

During a trial for murder, before the close of the case for the prosecution, the Judge left it to the Jury to accept or not, on their own responsibility, a plea of culpable homicide not amounting to murder that was tendered by the accused. The Jury after consideration decided that " the case must proceed ", and the accused was ultimately convicted of murder.

Held, that the procedure that was adopted caused no prejudice to the defence

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

Austin Jayasuriya, for the accused appellant.

R. A. Kannangara, Crown Counsel, for the Crown.

Cur. adv. vult.

April 24, 1952. GUNASEKARA J.—

The appellant, a young man of twenty, was convicted of the murder of one Punchi Banda, his uncle, by stabbing him on the afternoon of the 17th July last. The date of the conviction was the 29th February, and the only ground upon which the appeal was pressed is a supplementary ground of appeal that was submitted by Mr. Jayasuriya on the 7th April. It has been formulated by him as follows :—

> " After the three eye-witnesses for the prosecution had given evidence but before the case of the Crown had been closed the Counsel for the accused submitted a plea of culpable homicide not amounting to murder be accepted and suggested that matter be put to the jury at that stage. Neither the presiding judge nor the Crown Counsel was prepared to accept such a plea but His Lordship put the matter to the jury. The jury however after deliberation decided to go on with the case. It is submitted such procedure was irregular and gravely prejudiced the defence of the accused ".

The deceased man died of a penetrating stab wound on the front of the chest that injured the left lung and he had also received two incised wounds on the left cheek and left arm respectively. The appellant, who gave evidence at the trial, admitted that these wounds were inflicted by him. The scene of the stabbing was a place of amusement run by the deceased, which consisted of a boutique equipped with a couple of billiard or bagatelle tables. It is common ground that when the appellant arrived there a game was being played at one of the tables, which was on the verandah of the boutique, and that the deceased was present among a group of spectators. According to the appellant, some of them were drinking arrack that was being supplied by the deceased and he asked one of them jokingly whether he too could get a drink, and thereupon the deceased abused him and struck him with a bottle and he stabbed the deceased in self-defence. According to the case for the prosecution, the appellant entered the verandah and stood for a short while among those who were watching the game and suddenly stabbed the deceased a couple of times and ran away. This was the version given by three eye-witnesses whose presence on the verandah at the time of the stabbing is admitted by the appellant. Under cross-examination by Mr. Sri Nissanka Q.C. who defended the appellant at the trial, it was admitted by two of these witnesses that the deceased had a criminal record, and one of them also agreed that the appellant on the other hand

was a well-behaved man. All of them, however, denied a further suggestion that before the appellant stabbed the deceased the latter had scolded him for betting on the game and had struck him on the head with a bottle.

After the medical witness who held the post-mortem and the three eye-witnesses had given evidence and before the close of the case for the prosecution Mr. Sri Nissanka made the submission referred to in the supplementary ground of appeal, stating that the appellant was willing to plead guilty to culpable homicide not amounting to murder on the footing that he had acted under grave and sudden provocation. The Crown Counsel indicated that he did not agree to the proposed plea being accepted, but the learned Judge acceded to Mr. Sri Nissanka's request and invited the Jury to consider whether they were prepared to accept the plea or whether they wished to hear the rest of the case. He told them that the Crown Counsel was not prepared to accept the plea and he himself was not prepared to commend it to them, but that it was open to them to accept it if they thought it was probable that " this was not a premeditated murder but something that happened while the accused had lost his power of self-control by reason of some grave and sudden provocation that transpired at the bagatelle table ". He also told them that the case was entirely in their hands at that stage and the responsibility for the verdict would be theirs, while it would have been his if he had accepted the plea at an earlier stage. He went on to say :

> " At this stage if you think it would be a sheer waste of time to wait till the accused comes into the witness box and says that the stabbing occurred in the way suggested in the cross-examination of the witnesses, then you can say so now. And remember where an accused person wants to bring himself within an exception to criminal liability it is sufficient if he proves the facts on which he relies to be probably true. If you think it is utterly improbable that this man who bore a good character up to the time of this incident would have attacked the deceased in this way for no reason, if you think it is probable that there was a grave and sudden provocation offered to the accused by the deceased who did not bear an unblemished character, you may on your own responsibility accept the plea ".

The Jury after consideration declared that they were " unanimously of the opinion that the case should proceed ". The Crown Counsel then adduced the evidence of a witness who identified the deceased's body at the post-mortem and of the officer who conducted the police investigation, and closed the case for the prosecution. The police officer deposed, among other things, to a statement alleged to have been made to him by the deceased shortly after the stabbing, according to which the appellant suddenly went up to him when he was watching the game and stabbed him without any provocation. The case for the defence consisted of the evidence of the appellant.

It was contended in appeal that the Jury's refusal to accept the plea that was tendered on the appellant's behalf involved a premature acceptance of the prosecution evidence and a disbelief of the appellant's

version before he gave evidence. In our opinion there is no substance in this contention. The plea could have been accepted only upon the basis that the appellant did an act which would amount to murder unless it was done in circumstances of extenuation, the burden of proving which lay upon him. Until the appellant gave his own account of the incident there was no evidence at all of the existence of any such circumstances. Consequently the Jury's view that "the case must proceed" implied only that they were not prepared to assume without evidence that the homicide was committed whilst the appellant was deprived of the power of self-control by grave and sudden provocation. The refusal to make that assumption was a perfectly proper decision and could not cause any prejudice to the defence. On the other hand the procedure adopted by the learned Judge gave the appellant an opportunity, to which he was not entitled, of obtaining the benefit of an exception without any evidence of the existence of circumstances bringing the case within the exception.

The appeal is dismissed.

Appeal dismissed.