[COURT OF CRIMINAL APPEAL]

1953 *Present:* **Rose C. J. (President), H. A. de Silva J. and K. D. de Silva J.**

E. CHANDRADASA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 60, WITH APPLICATION 104, OF 1953

S. C. 9—M. C. Kalutara, 16,544

Charge of murder—Plea of self defence—Summing-up—Circumstances when Judge should give adequate direction on sudden fight and provocation—Penal Code, s. 294, Exceptions 1 and 4.

In a trial for murder, questions of sudden fight or grave and sudden provocation should be left to the jury and adequately explained by the trial Judge where the facts, or the necessary inference to be drawn from them, would make it possible for the jury reasonably to form such a verdict. The mere fact that the accused himself, or his counsel, has contended for a complete acquittal on the ground of self-defence does not excuse the jury from considering, or the trial Judge from directing them upon, the question as to whether the true facts would not necessitate a verdict of culpable homicide not amounting to murder.

[1] *(1952) 54 N. L. R. 469.*

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

A. B. Perera, with *J. C. Thurairatnam* and *D. A. Jayasuriya*, for the accused appellant.

G. P. A. Silva, Crown Counsel, with *N. T. D. Kanekeratne*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 16, 1953. ROSE C.J.—

The appellant was convicted by an unanimous verdict of the jury of the murder of one Egodahettiaratchige Albert Silva. The main point taken by learned counsel for the appellant is that there was no, or insufficient, direction to the jury on the question of grave and sudden provocation or sudden fight, so that in effect the jury were denied the opportunity of returning a verdict of culpable homicide not amounting to murder on the basis that either one or the other of those exceptions had been established.

The case for the prosecution was that excitement prevailed in the village owing to a recent Village Committee Election and that on the day in question the accused and a man called Dionis approached the deceased ; that Dionis struck a blow on the deceased with his hand ; and that the accused delivered one stab blow on the deceased which alighted on the left side of the chest and penetrated the heart. The injury was necessarily fatal. The appellant, who agrees that there was election excitement in the village but who attributes the ill-feeling between the deceased and himself to an episode regarding impersonation which he alleges he detected and in which the deceased was implicated, gave evidence on his own behalf and took up the position that he was set upon by the deceased and two other men and that in the course of the struggle he grappled with the deceased for the possession of the deceased's knife and that in the course of that struggle he inadvertently pressed the knife into the body of the deceased man.

The learned trial Judge appears himself to have formed the view, which logically speaking is of course quite tenable, that the appropriate verdicts for the jury should be either guilty of murder or not guilty of any offence, on the ground that if the defence version was accepted in full it would seem to be quite clear that the appellant was acting in self defence and had not exceeded his right.

The only reference that the learned trial Judge made to the question of grave and sudden provocation was at page 27 of his charge where he said : " Learned Counsel asked you to consider whether the accused acted under grave and sudden provocation. If you hold that the circumstances narrated by the accused were the circumstances in which the accused came to stab the deceased then there is grave and sudden provocation. Why consider that matter ? If the accused acted in the exercise of the right of private defence and if he did not exceed that right, then he is entitled to an acquittal. "

In effect, therefore, the learned Judge is directing the jury that they should disregard the possibility of their adopting a middle course on the ground that the exception of grave and sudden provocation had been established and that they were limited to the choice of two verdicts only, namely, guilty of murder or not guilty of any offence. Moreover, there is no reference at all at any stage of the charge to the question as to whether or not the accused should be convicted of culpable homicide not amounting to murder on the ground that the injuries on the deceased were caused in the course of a sudden fight.

Counsel for the appellant contended that, as in so many other murder cases of this type, it is open to the jury to come to the conclusion that the true version of what occurred may lie somewhere between the prosecution version and the defence version and that in the event of their forming such a view a verdict of culpable homicide not amounting to murder would be appropriate.

There is a long line of authorities to the effect that questions of sudden fight or grave and sudden provocation should be left to the jury and adequately explained by the learned trial Judge in any case where the facts, or the necessary inference to be drawn from them, would make it possible for the jury reasonably to form such a verdict.

The mere fact that an appellant himself, or learned counsel on his behalf, may contend for a complete acquittal on the ground of self defence does not excuse the jury from considering, or a learned trial Judge from directing them upon, the question as to whether the true facts would not necessitate a verdict of culpable homicide not amounting to murder.

A passage from a judgment [1] of Moseley S.P.J. is relevant :

" The learned Judge did in fact put it to the jury that if they were convinced beyond reasonable doubt by the evidence of the prosecution it was clearly their duty to find the appellant guilty of murder, but that if they believed the defence they should not hesitate to acquit him. No question of culpable homicide not amounting to murder, he said, arose on his defence. It is a fact that no such defence was put forward by him or on his behalf. In *William Hopper* [2] the defence, as in this case, was that of accident. In that case, however, counsel for the defence indicated that, if that defence failed, he should hope for a verdict of manslaughter only. But the court expressed its view that even if counsel had not contended for a verdict of manslaughter, the Judge was not relieved of the necessity of giving the jury the opportunity of finding that verdict. Moreover, in *The King v. Bellana Vitanage Edin* [3], Howard C.J. in referring to a defence that had not been raised nor relied upon at the trial said that that fact was not in itself sufficient to relieve the judge of the duty of putting this alternative to the jury if there was any reasonable basis for such a finding in the evidence on the record. "

[1] *The King v. Vidanalage Lanty (1941) 42 N. L. R. at page 319.*
[2] *11 Cr. App. R. 136.*
[3] *(1940) 41 N. L. R. 345.*

It is perhaps hardly necessary to refer to other cases in which similar expressions of opinion have been made, but learned counsel for the appellant did refer us to a number of authorities [1] to the same effect.

I consider that had the jury been invited to consider the applicability of either or both the exceptions of sudden fight or grave and sudden provocation they might well have found, as it was open to them to find, that the accused was not guilty of the offence of murder. As they were not so invited I am of the opinion that the appellant must have the benefit of the lesser verdict.

It is perhaps significant that when the foreman of the jury was asked by the Clerk of the Court: " *Q.* Do you find the prisoner guilty of the charge of murder with which he is indicted ? " he replied " Yes ; but five gentlemen of the Jury wish to bring in a rider that mercy should be considered for the prisoner on account of the age of the prisoner. "

We were informed from the Bar that the appellant was 27 years old at the time of the commission of the offence. His youth, therefore, could hardly have been a compelling reason for the jury's rider.

It was for these reasons that we set aside the conviction and sentence and substituted a conviction for culpable homicide not amounting to murder and imposed a sentence of 10 years rigorous imprisonment.

Conviction altered.