

## [COURT OF CRIMINAL APPEAL]

1944 Present: Moseley S.P.J., Wijeyewardene and Jayetileke JJ.

## THE KING v. N. TIKIRIYA.

15—M. C. Kandy, 12,347.

*Murder—Conviction by majority of five to two—Verdict against the weight of evidence—Court of Criminal Appeal.*

The accused was convicted of murder by a majority verdict of five to two. The deceased was a nephew of the accused. They were cultivators, who occupied adjoining gardens. On the day in question, the deceased who appears to have been weeding among the tea-bushes in his garden received gun-shot injuries, which resulted in his death two days later. Three days after the incident, the accused made a statement to the Magistrate under the provisions of section 134 of the Criminal Procedure Code. In this statement he said that on the morning in question he had fired a shot at some crows without effect. Two hours later the crows returned and he fired again. It was only then that he saw his nephew who attracted his attention by asking, who fired the shot.

There was no evidence from which it could be inferred that the accused fired at the deceased with a murderous intention.

*Held*, that the verdict could not be supported having regard to the evidence in the case.

**T**HIS was an application for leave to appeal against a conviction by a Judge and Jury before the Second Midland Circuit, 1944.

*S. Subramaniam*, for applicant.

*E. H. T. Gunasekera*, C.C., for the Crown.

*Cur. adv. vult.*

September 20, 1944. MOSELEY S.P.J.—

The applicant was convicted of murder by a majority verdict of five to two. The deceased was a man of about 50 and was the nephew of the accused who is said to be about 75. They occupied adjoining gardens where each carried on mixed cultivation. At about 11 A.M. on November 26, 1943, the deceased who appears to have been weeding among the tea bushes in his garden received gun-shot injuries which resulted in his death two days later. According to his widow, she heard the shot and saw accused running towards his house with the gun. The accused admits having fired the fatal shot. Three days after the incident he made a statement to the Magistrate under the provisions of section 134 of the Criminal Procedure Code. In this statement he said that on the morning in question he had already fired a shot at some crows without effect. Two hours later the crows returned, so he reloaded the gun,

a somewhat primitive trap-gun, and fired again. It was only then that he saw his nephew who apparently attracted his attention by asking who had fired the shot.

The only point which the Jury had to decide was whether or not the accused at the time of firing the shot, knew that the deceased was in the line of fire. The widow of the latter alleged that there was enmity between the accused and the deceased and that there had been enmity between them for 20 years. Her disclosure of this circumstance to the headman was somewhat belated, and the headman disclaimed all knowledge of such enmity. Moreover the widow admitted that the deceased had witnessed the execution of a deed by one Jotidasa in favour of the accused, a fact which seems to indicate that they were on friendly terms. It cannot be said that the existence of a motive was proved.

There is evidence that from the firing point to the spot at which the deceased was shot there was a clear view, but the fact that the deceased was engaged in weeding suggests his close proximity to the tea bushes which grew there. The age of the accused, a certain weakness of vision indicated by the fact that he wore glasses, and the range which is said to have been 90 feet, seem to us to render it highly probable that the accused did not in fact see the deceased. Moreover, if the deceased was engaged in weeding, a stooping position might well result in the concealment of his body from view.

It is not in favour of the accused that he ran away after firing the shot. But, according to his own account, he was dazed when he realised what he had done and his first impulse might well have been to run. The fact that he had already shot at the crows that morning is borne out by the evidence of the widow who said that she had heard such a shot.

There is one other feature in this case that seems to us to negative a murderous intention on the part of the accused. He had in his house a muzzle-loading gun which would seem a more appropriate weapon to be used if one intended to take the life of a human being, while for killing or securing crows the trap-gun might be eminently suitable.

A careful examination of the evidence has led us to the conclusion that there are no facts from which it can be inferred that the accused fired at the deceased with a murderous intention. The verdict cannot be supported having regard to the evidence.

The appeal is allowed. Conviction and sentence are quashed.

*Conviction quashed.*