[COURT OF CRIMINAL APPEAL]

1944 *Present:* **Keuneman, de Kretser and Jayetileke JJ.**

THE KING *v.* PABLIS *et al.*

86—M. C. Panadure, 29,466.

Murder—Opinion of trial Judge—Charge for acquittal—Reasonable and substantial doubt as to guilt of accused—Conviction set aside.

Where, in an indictment for murder, the presiding Judge fully explained to the jury the points in favour of the accused and expressed in no uncertain terms that the evidence was insufficient to justify a conviction,

Held, that the opinion of the presiding Judge was not by itself sufficient to set aside the conviction.

Where after a careful examination of the evidence the Court of Criminal Appeal is of opinion that there is a reasonable and substantial amount of doubt as to the guilt of the accused, they are entitled to the benefit of that doubt.

THIS was an appeal from a conviction on a certificate by the trial Judge under section 4 (b) of the Court of Criminal Appeal Ordinance.

R. L. Pereira, K.C. (with him *Ian de Zoysa*), for the first accused, appellant.—The verdict of the jury in this case is unreasonable. The evidence relating to the identification of the accused is wholly unsatisfactory. The proceedings, further, show that the jury misunderstood the directions of the trial Judge.

N. Kumarasingham (with him *A. C. Nadarajah*), for the second, third and fourth accused, appellants.—There is reasonable and substantial amount of doubt as to the guilt of the appellants. They are, therefore, entitled to be acquitted—*R. v. Abeywickrema et al.*[1]; *R. v. Musthapa Lebbe*[2]; *R. v. Schrader*[3]; *R. v. Parker*[4]; *R. v. Scranton*[5].

Even if the first accused has been rightly convicted, the convictions of second to fourth accused cannot be supported. The mere fact that they were seen in the company of the first accused is not sufficient evidence of common intention—*R. v. Jan Singho et al.*[6]; *R. v. Dingiri Appuhamy et al.*[7]; *R. v. Jayanhamy et al.*[8].

E. H. T. Gunasekara, C.C., for the Crown.—It was open to the jury to accept and base their verdict on one or more of the three eye-witnesses even if they had doubts as to the credibility of the witness Menchohamy. Even if this Court is of opinion that the evidence raises a reasonable doubt it does not follow that the verdict of the jury should be set aside unless it is found to be a perverse one—*R. v. Andris Silva et al.*[9]; *R. v. Musthapa Lebbe* (*supra*)

Cur. adv. vult.

November 3, 1944. KEUNEMAN J.—

The four accused were indicted for the murder of Mallika Achige Brampy on January 27, 1944, at Weniwelkola. By a majority verdict of

[1] *(1944) 44 N. L. R. 254.*
[2] *(1943) 44 N. L. R. 505.*
[3] *(1911) 6 Cr. App. R. 253.*
[4] *(1911) 6 Cr. App. R. 285.*
[5] *15 Cr. App. R. 104 at 108.*
[6] *(1940) 41 N. L. R. 573.*
[7] *(1943) 25 C. L. W. 77.*
[8] *C. C. A. Minutes of Oct. 16, 1944*
[9] *(1940) 41 N. L. R. 433.*

five to two the jury found all four accused guilty of murder, but recommended the second, third and fourth accused for mercy on the ground that they did not actually fire the shot. The case for the prosecution was that the first accused fired the fatal shot, and that the second, third and fourth accused were associated with the first accused and shared the common intention to kill the deceased.

The appeal comes before us on a certificate by the trial judge under section 4 (*b*) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, that it is a fit case for appeal on the following grounds:—

' Facts, in particular

(1) the evidence of the three eye-witnesses as to identification by the light of a torch; and

(2) the meagreness of the evidence from which it might be inferred that the second, third and fourth accused were actuated with a common intention.''

No exception has or can be taken by the appellants to the charge by the trial Judge. In fact the trial Judge very fully explained the points in favour of the accused and expressed in no uncertain terms his own opinion that the evidence was not of such a kind as to justify a conviction. That, however, is not a sufficient ground for us to interfere in appeal, and we have, with the aid of counsel, carefully considered the facts for ourselves.

The evidence for the prosecution was that the deceased was an old man of about 70 years of age. On the night in question he had his meal about 8.30 P.M. and sat on the cot in his verandah. He asked his wife, the witness Menchohamy, to fetch him a chew of betel, and his wife came out to the verandah carrying the betel and a bottle lamp. There was another bottle lamp lighted on the cot beside the deceased. The witness Davith, the son of the deceased, was seated on another cot at the other end of the same verandah, with an electric torch which he had picked up in his hand. The witness Thomas was inside the front room in a line with the door. Suddenly a shot rang out, and it is fairly certain that it was fired from immediately in front of the house, at a distance of about 37 feet from where the deceased was seated. As the shot was fired Davith rushed on to the road flashing the torch he had, and Menchohamy and Thomas who had himself been hit by some of the pellets also rushed out to the road. By the light of the torch all three witnesses saw the first accused moving backwards lowering the gun, while the third accused threw a long pole (later discovered to be a spear) at Davith. This spear fell on the road. As the third accused hurled the spear he said—'' I will eat you, you fellow!'' The first and the third accused were close to each other. The witnesses also saw the second and the fourth accused about 17 feet away from the other two accused; second accused had a club but nothing was noticed in the hands of the fourth accused. All the accused then ran away.

I may add that the witnesses spoke to an alleged motive but this was so '' flimsy.'' that the trial Judge rightly directed the jury to '' put away from their minds the question of motive''.

It is quite clear that the principal question to be decided was that of identification, and the most important matter was whether Davith had a torch and flashed it at the moment of firing or so soon after as to permit the three witnesses to identify the four accused. It was not pretended that there was sufficient light to identify the accused without the aid of the torch. The trial Judge concentrated attention on that point.

Davith himself stated and Thomas agreed that Davith had this torch for about three years and had renewed the batteries from time to time. But the evidence relating to the torch raises many points of doubt. First of all, it is admitted by the witnesses for the prosecution that certain neighbours came hurrying to the scene, and that one of them, Peiris, actually accompanied Davith to the house of the headman. Davith said he took the torch on his way to the headman's. But none of these neighbours, not even Peiris, has been called or even put on the back of the indictment as a witness. Undoubtedly Davith did go to the headman and make a statement about 9 P.M. The statement is as follows as recorded by the headman:—

> "On the 27th January 1944, about 9 P.M. complaint was made to me by Mallika Achige Davith Singho of Weniwelkola that his father Mallika Achige Brampy Appu was shot. He was on the bed. He fell on that bed. Do not know whether he died. Pannilage Pabilis of Godigomuwa, *do*. Andy, *do*. William, Guruge Carolis *alias* Podda ran away after the shooting. The complainant mentioned the witnesses Amhettige Thomas Singho, Kurrupege Mechehamy. Explained to the complainant and asked him to set his signature.
>
> Sgd. Davith Alwis.
> Sgd. Charles Perera, V. H. 600."

The point in favour of Davith's evidence is that he mentioned the names of the four accused. But it is important to remember that he did not say which of the accused shot or had the gun. He did not mention the episode of the throwing of the pole or spear. He did not mention the torch. Now Davith in his evidence at the trial maintained that he not only showed the torch to the headman but told the headman that he had identified the accused by the light of the torch. This was flatly denied by the headman, and he is almost certainly speaking the truth for if the torch had been produced before him he would have taken it into his possession. Further the headman has stated that when he returned to the house of the deceased man he searched the neighbourhood with the aid of a chulu light and that no torch was produced to him even then. The headman also said he did not remember seeing anything in Davith's hand when he came to his house. The Police arrived about 1.30 A.M. the next morning. About half an hour before they arrived Thomas handed the spear to him "saying that it was picked up from the road." Nothing was said as to the spear having been thrown at anyone. It was only after the arrival of the Police that any mention was made of the torch. In consequence of a statement then made by Davith Inspector Van Sanden took charge of the torch. The torch was then tested and it threw a powerful light.

There has been considerable criticism of the story of the torch. Davith appears "to have been over anxious to bring the torch to the notice" of the jury. Further it has been argued that it was unnatural for Davith to rush out to the road with the torch instead of going to the assistance of his father. It is not possible to generalize as to how a man would react to the unexpected firing of a gun. But there is a more fundamental point, and that is the fact that the headman denied the story of Davith that he had shown the torch to the headman at the latter's house. I think the jury ought to have accepted the evidence of the headman who was in no way discredited by counsel for the prosecution who called him. That and the failure to mention or produce the torch till after 1.30 A.M. were matters which should have raised a considerable doubt as to the truth of the story of Davith and also of the other two witnesses that a torch was used on that occasion.

As regards the spear also the story is difficult to follow. According to Thomas, he "was holding the spear squatting on the ground and crying." and the headman saw him in that position. The headman however did not corroborate that, and it is more than strange that Thomas should have merely handed the spear over with no other comment than that he had found it on the road. Davith's failure to mention the throwing of the spear to the headman is also remarkable in view of the fact that Thomas said he informed Davith about his picking up the spear before Davith went off to the headman.

No doubt there is evidence that the witnesses were excited and full of grief, but the considerable interval of time before either the torch or the spear were brought to the notice of the authorities was a matter of prime importance to the defence.

Other matters relevant to the decision of the case which may raise doubts as to the truthfulness of the witnesses may be briefly enumerated:—

(1) It is argued that it is not natural for Davith to be holding on to the torch at the psychological moment, and for him to flash the torch in the direction from which the shot came.
(2) As the trial Judge put it, Davith's evidence is corroborated by Thomas and Menchohamy "in a startling fashion. Their evidence on material points is almost word for word."
(3) Thomas at any rate purported to have seen so distinctly that he recognized the gun as being a single-barrelled gun.
(4) It is argued that it is unlikely that the accused would have remained standing for a little time in the open when the torch was flashed. There is evidence that there was a fence and shrubs between them and the road, and it was possible for them to take cover.

There are no doubt possible answers to some of the points made for the defence, but in the mass these points are very substantial and should have been fully considered by the jury. The jury in fact were absent for 50 minutes, and were then sent for by the Judge who inquired whether he could help them further. The foreman of the jury then replied—"Yes, my Lord, with reference to the evidence of the old woman (Menchohamy), the jurors are in doubt whether the woman could have seen at that distance." The trial judge apparently thought this meant that the

whole jury were in doubt on that point, and informed them that if they had a doubt on that point—as to whether Menchohamy was speaking the truth,—the whole case for the prosecution was tainted and the accused were entitled to the benefit of the doubt. The jury then retired and in ten minutes returned a divided verdict of guilty. I think however that it was possible that what the foreman meant was that there was a division of opinion among the jurors as to whether Menchohamy could see so far. But even so it is singular that the jury should have taken up a point which did not figure in the evidence and was not even mentioned by the trial judge in his summing up. It leaves one with the uneasy feeling that the jury were concentrating on points not raised in the evidence but discovered by themselves, and this may have diverted their attention from the vital matters in the evidence which had been put to them. It is also possible that the jury misunderstood the Judge's remark that the three witnesses gave their evidence " remarkably well ". This was really made as a criticism and followed the comment that the corroboration was " almost word for word ". It is possible that the jury took this too literally.

As regards common intention on the part of the second, third and fourth accused, there is strong reason to question the finding of the jury. We have already dealt with the allegation that the third accused threw the spear. As regards the second and the fourth accused nothing was proved against them except that they were present about 17 feet away from the first accused, and that they ran away when the first and the third accused did so. This in our opinion is insufficient to prove common intention on the part of the second and the fourth accused, for undoubtedly the area in which they were was used as a hunting ground at night by people in the neighbourhood.

In circumstances such as we have here we think there is authority which entitles us to interfere with the verdict. In *Rex v. Schrager*[1] where the question was also one of identification, the Lord Chief Justice mentioned the facts and said—

> " On the evidence of the prosecution the case against him was very doubtful, and it did seem to the court that there was a reasonable and substantial amount of doubt as to the guilt of the appellant. The conviction therefore could not stand, but it must not be supposed that the fact that the judge disapproved of the verdict of the jury would alone be sufficient to upset a conviction ".

This case was followed in *Rex v. Parker*[2]. That was also a case where identification played a main part. It was a charge of rape, and the girl who was very respectable had been badly outraged. She later identified her alleged assailant in the street, and in her evidence adhered to her identification very strongly. However she said that the assailant was wearing blue overalls at the time of the offence and at the trial it was not suggested that appellant wore or possessed any such overalls. The Lord Chief Justice described the case as one of very great difficulty and added—

> " Her identification depended throughout on the blue overalls, and it is hardly possible she could have been mistaken in thinking that

[1] *6 C. A. R. 253.*

[2] *6 C. A. R. 265.*

her assailant was so dressed. Appellant gave his right name and address when she spoke to him in the street and challenged prosecution. There is therefore a sufficient doubt as to the accuracy of the verdict for us to give appellant the benefit of it. This was evidently the view formed by Pickford J. at the trial ''.

See also *Rex v. Scranton*[1] and *Rex. v. Bradley*[2]; *Rex v. Abeywickreme*[3] and *Rex v. Mustapha Lebbe*[4].

After a careful examination of the evidence in the present case we are of opinion that there was a reasonable and substantial amount of doubt as to the guilt of the appellants and that the appellants were entitled to the benefit of that doubt.

We accordingly set aside the convictions of all the four accused and acquit them.

Conviction set aside.