[COURT OF CRIMINAL APPEAL.]

1948 *Present:* **Wijeyewardene, Cannon and Rose JJ.**

THE KING *v.* DE ALWIS.

*43—M. C. Colombo, 35,484.*

*Court of Criminal Appeal—Charge of attempted murder—Plea of self-defence—Misdirection as regards burden of proof on accused—Certificate by trial Judge—Force of—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 4 (b).*

The Jury, by a majority verdict of five to two, found the first accused (appellant) guilty of an attempt to commit culpable homicide not amounting to murder.

The verdict was based on the view that the appellant had acted in excess of the right of private defence by striking the injured man more than one blow.

On the important question whether the appellant struck one blow only, as alleged by him, or more than one blow, the trial Judge said: "If he (the appellant) struck more than one blow it would be an excessive use of the right of private defence. That is a matter for you. So really, gentlemen, the question then boils down to this—Has the first accused by a preponderance of probability satisfied you that he struck only one blow?"

*Held*, that it was not unlikely that the Jury were misdirected as regards the burden of proof on the appellant and that, in view of the evidence in the case, the verdict was unreasonable.

The fact that the trial Judge disapproved of the verdict of the Jury or has issued a certificate under section 4 (*b*) of the Court of Criminal Appeal Ordinance is not of itself a sufficient ground for interfering with the verdict of the Jury.

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

*H.. V. Perera, K.C.* (with him *C. S. Barr Kumarakulasinghe* and *V. Wijetunge*), for the first accused, appellant.

*M. F. S. Pulle, C.C.*, for the Crown.

*Cur. adv. vult.*

September 25, 1945. WIJEYEWARDENE J.—

The appeal comes before us upon the certificate of the trial Judge under section 4 (*b*) of the Court of Criminal Appeal Ordinance, No. 23 of 1938.

Four accused were indicted for the attempted murder of one David Rupesinghe on March 3, 1944, by striking him with a car pump P1 and clubs. By a majority verdict of five to two the Jury found the first accused—the present appellant—guilty of an attempt to commit culpable homicide not amounting to murder. They returned a unanimous verdict in favour of the other accused.

The grounds set out in the certificate issued by the trial Judge are:—

" (*a*) The Jury having disbelieved the three prosecution witnesses ..... David, ..... James, ..... and ..... Marukku ..... acquitted the second, third and fourth accused.

(*b*) They, nevertheless, on the evidence of the same three witnesses convicted the first accused, appellant, whose testimony was corroborated by independent, direct and circumstantial evidence."

The Jury have returned their verdict in this case against the appellant, though the learned trial Judge made it sufficiently clear to them that they would be quite justified in bringing a verdict of acquittal in favour of all the accused. The fact that the trial Judge disapproved of the verdict of the Jury or has issued a certificate under section 4 (*b*) is not of itself a sufficient ground for upsetting the verdict of the Jury (see *Elizabeth Prefect's Case* [1]). The duty is, therefore, cast on us to examine the evidence and ascertain whether the conviction should be set aside " on the ground that it is unreasonable or cannot be supported having regard to the evidence ".

David, the injured man, said that he entered the Hendela Tavern that day at about 10 A.M. at the invitation of the appellant who was inside the tavern. The appellant questioned him why he gave some information to the Police and got them to raid a certain gambling club. David denied having given such information, though, in fact, he had induced a friend of his to give that information about a month before this incident. The appellant did not accept David's denial and David asked him to satisfy himself by questioning the Police. David left the appellant then and was moving towards the door of the tavern when the appellant struck him from behind with P1. David fell and the appellant hit him again on his side and "broke" a rib. The other three accused

[1] *(1917) 12 C. A. R. 273.*

came to the place shortly afterwards and beat him with clubs. In his dying declaration, however, David made no reference to the second accused.

The other material witnesses called for the prosecution were James. Marukku and Albert. James said that he was present when David was called by the appellant to the tavern. He saw David being attacked by the appellant and later by the second, third and fourth accused and Eusebius who died during the pendency of the proceedings. On his way to the Police Station he met Albert, a brother of David, and told him that Alo Sinno's (appellant's)"gang" had assaulted David. Thereupon Albert went to the Police Station in place of James and made his complaint giving the names of the appellant, Eusebius and second and fourth accused as the assailants. He did not make any reference to the third accused. No satisfactory evidence has been given as to how he happened to give the names of the second and fourth accused to the Police. Marukku did not mention the second accused as an assailant in the Magistrate's Court. Moreover, he made his statement to the Police on March 6, and the Crown has failed to give a convincing reason for the failure to get his statement recorded by the Police earlier.

The appellant who gave evidence stated that he went to the tavern that morning with Eusebius to get a hundred-rupee note changed by Devasiri, the Manager of the tavern. As he was holding out the note, David who was inside the tavern drinking toddy came up to him with a knife and tried to snatch the note. He struck David once with P1 which he was carrying. They both struggled and fell down. As he was falling, he received blows on the back and shoulders. He dropped P1 which was picked up by Eusebius who, then, gave one or two blows with it to David. In the course of the struggle the one hundred-rupee note got torn, one part remaining in his hands and the other part in David's hands. He went immediately afterwards towards the Police Station, when he met the Inspector of Police on the road. He made his statement to the Inspector promptly and produced the torn piece of the note. The Inspector came to the scene, and found there the other piece of the note and a knife identified by the appellant as the knife of David. The appellant said that he did not see the other accused at the tavern that morning. His evidence is corroborated in material particulars by Devasiri, a Cochin man.

The evidence led in the case leaves no doubt that David and James are men of bad character and are feared by most people in the village.

On a careful examination of the evidence we are of opinion that the Jury reached a correct decision in acquitting the other accused and in indicating by their verdict against the appellant that the appellant assaulted David in circumstances which gave him the right of private defence. In finding the appellant guilty of attempt to commit culpable homicide not amounting to murder, the Jury has, no doubt, taken the view that the appellant has acted in excess of the right of private defence. Is that an unreasonable view or a view that cannot be supported by the evidence?

As stated earlier, David's evidence was that he fell for the first blow given by the appellant, and that he was lying fallen when the appellant

" hit " him on his side and " broke " a rib. On the other hand, the appellant said that he struck David only once. In view of the opinion of the Jury with regard to the credibility of David, the Jury should have had no difficulty in holding that the Crown has not proved that more than one blow was given by the appellant.

The charge of the learned Judge if we may say so with respect, was not only full but on the whole very favourable to the accused. But as it happens at times in the course of a long charge, the trial Judge made a statement towards the end of his charge which may have created a wrong impression on the minds of the Jury as to the party on whom the burden rested to prove the number of blows given to David. He said—

> " If he (the appellant) struck more than one blow it would be an excessive use of the right of private defence. That is a matter for you. So really, gentlemen, the question then boils down to this. Has the first accused by a preponderance of probability satisfied you that he struck only one blow ? "

It is not unlikely that the Jury was misdirected by that statement and thought that the burden rested on the appellant to prove that he did not give more than one blow to David.

If the Jury held that only one blow was proved to have been given by the appellant, they could not have held that he acted in excess of the right of private defence in view of the evidence in the case and the clear direction given by the learned Judge.

We are of opinion that the verdict of the Jury against the appellant is unreasonable and not supported by the evidence and we, therefore, set aside his conviction and acquit him.

*Conviction set aside.*