

1945

[COURT OF CRIMINAL APPEAL.]

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

THE KING v. VELUPILLAI.

5—*M. C. Anuradhapura, 11,205.*

*Court of Criminal Appeal—Discrepancies in evidence of prosecution witnesses—
Failure of Jury to consider—Verdict insupportable on the evidence—
Duty of Court of Criminal Appeal to interfere.*

Where the Jury have failed to give due consideration to the discrepancies in the evidence of the witnesses for the Crown and to test the probability of the evidence given by the defence in the light of these discrepancies, the Court of Criminal Appeal will set aside their verdict if it cannot be supported having regard to the evidence.

APPPLICATION for leave to appeal against a conviction by a Judge and Jury before the Second Midland Circuit, 1945.

S. S. Kulatileke, for the accused, applicant.

M. F. S. Palle, C.C., for the Crown.

Cur. adv. vult.

September 19, 1945. WJYEWARDENE J.—

The accused was convicted of the murder of one Sandanam. The accused did not deny that he stabbed Sandanam but pleaded that Sandanam was stabbed by mistake and that in view of certain mitigating circumstances the offence he committed was culpable homicide not amounting to murder.

The material witnesses for the Crown were Martin Silva, Podi Appuhamy and Kannangara. Martin Silva said that the accused met Podi Appuhamy at the Jaffna road junction and asked for a sum of money due to him. Podi Appuhamy replied that he had no money then and would pay it later. The accused and Podi Appuhamy began to abuse each other and at that time accused had a chisel in his hand. Manikam Banda, "usually known as the Chandiya of the locality" took the chisel from the accused and the "accused did not indicate his resentment at that". Then the accused took out a knife from his waist saying, "Though you took the chisel away from me I have yet another thing with me". Manikam Banda then picked up a pingo stick and went towards the accused who "was retreating backwards". Manikam Banda dealt a blow at the accused's head with a pingo stick. Thereupon the accused stabbed Manikam Banda. Within a minute or two the witness heard that Sandanam too had been injured. In cross-examination this witness admitted the correctness of his evidence before the Magistrate to the effect that Podi Appuhamy struck the accused with his hands after Manikam Banda took away the chisel and before the accused pulled out his knife and that Manikam Banda gave the blow with the pingo stick before Podi Appuhamy gave his blow. According to the evidence at that stage what happened immediately after the abuse was briefly as follows:—(a) Manikam Banda took away the chisel, (b) Manikam Banda struck the accused with the pingo stick, (c) Podi Appuhamy struck the accused with hands, (d) accused took out the knife, (e) accused stabbed Manikam Banda and then Sandanam. The witness was then reminded that he had said earlier that the accused had the knife in his hand when he was struck with the pingo stick and thereupon he gave the following version:—(a) Podi Appuhamy struck the accused with his hands, (b) Manikam Banda took away the chisel, (c) Podi Appuhamy struck accused a second time, (d) accused pulled out his knife, (e) Manikam Banda struck accused with the pingo stick and (f) accused stabbed Manikam Banda and deceased.

Podi Appuhamy said that he "did not strike the accused a single blow". This statement, if true, throws a great deal of doubt on the evidence of Martin Silva. Martin Silva's position at the end of his evidence was that the accused took the knife from his waist after he received a blow

but that blow was a blow given by Podi Appuhamy with his hands and not the blow given by Manikam Banda with the pingo stick. The denial of Podi Appuhamy makes it probable that the blow which the accused received before he drew out his knife was the blow with the pingo stick. He said also that the accused "chased after (him) for some distance" after stabbing Manikam Banda. That statement contradicts the evidence given by Kannangara that the accused chased after Podi Appuhamy and after that Manikam Banda came with a pingo stick when the accused stabbed Manikam Banda. Podi Appuhamy stated further in cross-examination that Manikam Banda struck the accused with the pingo stick "before the accused took the knife out". He qualified that statement later by saying that the accused "drew the knife out when Manikam Banda was coming to strike him with the pingo stick". Still later he said that when Manikam Banda struck the accused with the pingo stick the accused had the knife in his hand.

It is, no doubt, the experience of most Judges who preside at the Assizes that very often truthful witnesses make contradictory statements at different times. But it is very difficult to consider the various discrepancies referred to by me as of no importance in view of the fact that the only point that was in issue between the prosecution and the defence was the circumstances in which the accused stabbed Sandanam. These discrepancies tend to make more probable the version given by the defence.

The defence was that the accused stabbed Sandanam by mistake when he was assaulted by a number of Sinhalese men.

The accused who gave evidence stated he took his noon day meal at Sandanam's house that day and went with Sandanam to the house of Murugesu. He got back from Murugesu the chisel which he had left there and went with Sandanam to the Jaffna road junction where he happened to meet Podi Appuhamy. Words passed between him and Podi Appuhamy, and Manikam Banda came and took away his chisel. Then Podi Appuhamy, Martin, Manikam Banda and three other Sinhalese struck him with hands and a pingo stick. He then drew the knife from his waist and "waved it about in fear". This evidence is consistent with the statement he made to the Assistant Superintendent of Police immediately after his arrest.

Admittedly, Sandanam took no part whatever in this incident. He was a friend of the accused. Sandanam's widow stated that the accused and Sandanam "worked together like brothers and moved together like brothers". The accused had no reason whatever to attack Sandanam. This fact makes it highly probable that the accused stabbed Sandanam by mistake and that the mistake was due to the presence of a crowd of assailants surrounding the accused and Sandanam who happened to be there as an innocent spectator.

Having regard to the special circumstances of this case we are of opinion that in finding the accused guilty of murder the Jury have failed to give due consideration to the discrepancies in the evidence of the witnesses for the Crown and to test the probability of the evidence given by the defence in the light of these discrepancies. It appears to us also as if the learned trial Judge had some doubts as to the correctness

of the verdict as he told the accused after the verdict that "on the evidence in the case it would not have been very difficult for the Jury to return a verdict other than the verdict they have returned".

While it is not the function of this Court to interfere with the verdict of the Jury on a question of fact and retry a case yet under section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, it is the duty of this Court to set aside the verdict of the Jury if the Court finds that it "cannot be supported having regard to the evidence".

We are of opinion that the verdict of the Jury finding the accused guilty of murder cannot be supported. Acting under section 6 (2) we would substitute for the verdict of the Jury a verdict of guilty of culpable homicide not amounting to murder under section 297 of the Penal Code and sentence the accused to rigorous imprisonment for ten years.

Varied.

