[COURT OF CRIMINAL APPEAL]

1954 *Present*: **Nagalingam A.C.J. (President), Pulle J. and Weerasooriya J.**

D. D. THEMIS, Appellant, *and* THE QUEEN, Respondent

APPLICATION NO. 27 OF 1954

S. C. 9—M. C. Kalutara, 18,826

Trial before Supreme Court—Jury are sole judges of fact—Requirement of such direction in summing-up—Charge of murder—Duty of Judge to place before Jury every possible defence.

In a trial before the Supreme Court it is the duty of the Judge to caution the Jury that any views he may express on questions of fact are not to be regarded as binding upon them and that they are the sole judges of fact.

In a trial for murder, the fact that the accused or his Counsel does not advert to a possible plea of private defence that may reasonably be said to arise upon the facts does not relieve the Judge from the duty imposed upon him of placing it before the Jury in his summing-up.

APPLICATION for leave to appeal from a conviction in a trial before the Supreme Court.

Wesley D. Thamotheram, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 5, 1954. NAGALINGAM A.C.J.—

This is an appeal from a conviction for murder, based upon grounds of non-direction amounting to misdirection. The prisoner and two others were indicted upon a charge of murder. The latter were acquitted, while the former was convicted and sentence of death was passed on him. In a very lucid and careful charge the learned Commissioner presented the case to the jury, and the charge, so far as it goes, is beyond criticism.

Two points have been raised by counsel for the appellant in that the charge does not go far enough in that the learned Commissioner failed to caution the Jury that any views he may express on questions of fact are not to be regarded as binding upon them and that they were the sole judges of fact, and secondly that the plea of private defence which arose on the evidence in the case was not placed before them.

To deal with the second point first, the defence of the prisoner as disclosed in his evidence showed that the deceased woman had abused and attacked him by delivering a blow with her fist on his face which loosened one of his teeth and not content with that act she proceeded to get hold of him by his testicles and squeezed them so hard that he felt excruciating pain and that she dragged him in that way causing unbearable pain ; that he in order to release himself from her mortal hold waved a knife which was handy on his person as a result of which the deceased came by her death.

It was conceded at the argument that Counsel for the defence did not himself attempt to rely upon any plea of self defence, nor does it appear that Crown Counsel himself adverted to the possibility of such a defence arising upon the facts established. Counsel for the defence confined himself to putting forward the mitigatory plea of grave and sudden provocation. The learned Commissioner dealt with this plea himself but failed to direct the attention of the Jury that the plea of self-defence was one that arose on the facts as presented by the prisoner. The fact that the prisoner or his Counsel does not advert to a possible defence that arises upon the facts does not absolve or relieve a Judge from the duty imposed upon him by law of placing before the Jury every aspect of the case, including every possible defence that may reasonably be said to arise upon the facts disclosed at the trial. Quite recently this Court had occasion to make a pronouncement on this topic in the case of

Murugesu [1] where on analogous facts the trial Judge dealt in his summing up with the plea of self defence but failed to direct the Jury adequately on the plea of grave and sudden provocation which arose on a possible view of the facts. In that case the learned trial Judge dismissed the whole plea of grave and sudden provocation with one sentence. This Court held that that direction was inadequate and altered the verdict from one of murder to one of culpable homicide not amounting to murder. We think that the non-direction in regard to the plea of self defence that evidently arises in this case amounts to a misdirection.

There remains for consideration the first point submitted by learned Counsel for the appellant. The learned Commissioner at no stage of his summing up brought home to the minds of the Jurors that they were the sole judges of the facts and that though he himself may express any opinion on questions of fact they were not bound by his views on such questions of fact and that it was entirely a matter within the special province of the Jury to determine whether they would take a particular view or not of the facts. That the learned Commissioner did, as undoubtedly he is entitled to, express his views and give indications of the views he had formed on questions of fact is plain from a reading of the summing up. In fact in this case the learned Commissioner had expressly directed the Jury to bring in a verdict of not guilty against the 2nd and 3rd accused, and when in dealing with the case against the prisoner he expressed his own opinions on questions of fact and disclosed how his mind was working, though on more than one occasion he told them that they must be satisfied in regard to the facts necessary to be established, the criticism that the Jurors may have felt themselves bound by the opinion expressed by the Judge in the absence of a specific caution to the contrary is a criticism that cannot be lightly repelled.

The Court of Criminal Appeal in England in the case of *Frederick Mason* [2] allowed the appeal of a prisoner on the ground that when the trial Judge, while in the course of his summing up said, " I invite you to take such and such a course ", that was sufficient to amount to a misdirection in the absence of an accompanying direction that the right of deciding on the facts was solely theirs. Lord Hewart C.J. in delivering judgment expressed himself thus :

> " In the present case there is reason to apprehend that with regard to both the acceptance of certain evidence and the finding in that evidence of corroboration of other evidence the Jury may not have been left sufficiently clearly in the belief that the responsibility was theirs. "

In this case, as observed earlier, there was no indication whatsoever given to the Jury that the determination of questions of fact was solely for them and that they were not under any duty of feeling obliged to accept the view of the Commissioner on questions of fact. We are therefore of opinion that the non-direction with regard to the functions of the Jury is also a misdirection.

[1] *(1951) 53 N. L. R. 469.*

[2] *(1924) 18 C. A. R. 131.*

We have given anxious consideration as to what the order is that we should make in this case, and we think that upon a true view the proper order to make is to set aside the conviction and to order a new trial, which we do.

New trial ordered.

Cur. adv. vult.