[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Gratiaen, J., and Weerasooriya, J.**

THE QUEEN v. K. G. GUNAWARDENE

Application 147 of 1955

S. C. 6—M. C. Avissawella, 14,785

Court of Criminal Appeal—Conviction for murder—Appeal therefrom—Grounds of appeal other than those raised in the petition of appeal—Power of Court to consider them.

Charge of murder—Burden of proof—Misdirection.

(1) Although, in the case of a conviction involving sentence of death, the prisoner cannot claim as of right to make submissions in the Court of Criminal Appeal except on grounds specified in his petition of appeal or application for leave to appeal, the Court itself may set aside the conviction on any other ground which is sufficiently substantial to justify a decision that the verdict should not be allowed to stand.

Per Curiam—" Let it be said in conclusion that it is quite proper (and that it is indeed his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of this Court any substantial matter which, though not formally raised within the prescribed limit of time, nevertheless merits consideration in a pending appeal or application. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility. "

(2) The issues involved in a prosecution for murder were of such nature that the accused could only have been convicted of murder if, at the end of the whole case, the jury were perfectly satisfied that he was the person who had stabbed the deceased, and that he had thereby caused her death with a " murderous intention ". In the course of the summing-up, however, the Judge stated that the jury could not acquit the accused unless they were convinced that the story for the prosecution was improbable and that they should consider the whole case by applying the " test of probability ".

Held, that the conviction must be quashed for misdirection as to the burden of proof.

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

M. M. Kumarakulasingham, with *I. Perera* (Assigned), for the Accused-Applicant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 15, 1955. GRATIAEN, J.—

The applicant was convicted at the Avissawella Assizes of the murder of a young woman named Jane Nona. When the deceased woman and her husband Pinhamy were walking in the direction of her mother's house

shortly after 8.30 p.m. on 27th November 1954 a man suddenly emerged from the darkness and, having stabbed her once in the chest, ran away. The blade of the knife had cut through her second left rib and, according to Dr. Sella, injured the large blood vessels at the base of the heart. In the doctor's opinion, she must have died within a few minutes.

The applicant pleaded not guilty to the charge, and the issues which arose for the jury's decision were (1) whether his identification had been established beyond reasonable doubt, and if so (2) whether the circumstances pointed irresistibly to the inference that the injury resulting in Jane Nona's death had been inflicted by him with the requisite criminal intention which is an element of the offence of murder, or, alternatively, with guilty knowledge so as to form the basis of a conviction for culpable homicide not amounting to murder. No evidence was led or relied on which could support any special pleas of justification or mitigation. If the issue as to identification was answered against the applicant, the jury could not but return a verdict against him either of murder or of culpable homicide not amounting to murder or of grievous hurt.

With regard to the issue of identification, the Crown relied on the evidence of Pinhamy who claimed that, although he had previosusly met the applicant only once, he clearly saw the applicant stab Jane Nona on the night in question. Pinhamy was cross-examined for the purpose of raising doubts as to the reliability of his purported identification. The Crown also relied on a statement, admissible under section 32 (1) of the Evidence Ordinance, alleged to have been made by Jane Nona to Pinhamy immediately before she died to the effect that " Gunawardene " had stabbed her—" Gunawardene " being the name by which the applicant was known to her. The witnesses Ran Ethana and Sirisena also claimed to have heard Jane Nona's shouts to the same effect although they were some distance away from the scene of the crime. The evidence of Pinhamy, Ran Ethana and Sirisena with regard to this dying declaration was attacked by the defence as unreliable.

Finally, the Crown relied on the presence of human blood stains on the applicant's sarong when he was arrested within a few hours of the incident, and on the discovery of a pointed knife (P2) which had been concealed by someone near a stream not far from his home.

Mr. Kumarakulasingham who appeared for the applicant very frankly informed us that he could not support the argument that the verdict could not reasonably have been returned by a jury upon proper and adequate direction from the presiding Judge. As a complaint of " unreasonableness " can only be entertained upon the assumption that the summing-up was not tainted by misdirection, the ground of appeal relied on in the application necessarily fails.

Mr. Kumarakulasingham then referred us to certain passages in the summing-up which might well have been relied on as a separate ground of appeal against the conviction. Mr. Kumarakulasingham explained that, in view of the judgment recently pronounced in *Reg. v. Pintheris et al* [1], he could not claim the right to make a submission that the verdict

[1] *(1955) 57 N. L. R. 49.*

must be quashed on grounds not specified in the notice of application for leave to appeal. Nevertheless, he said, he considered it to be his duty to bring this matter to our notice in order that we might consider whether or not the verdict of the jury ought to be allowed to stand.

In *Pintheris' case* (supra) the convictions of two accused persons at the Matara Assizes were quashed on certain grounds which had not been specified in their notice of appeal. The majority of the Court pronounced, however, that in future cases argument would be " limited only to matters of law raised within the prescribed limit of fourteen days ".

Although no appellant or applicant for leave to appeal may claim *as of right* to make submissions except on grounds particularised in compliance with the terms of the Ordinance, this does not mean that the Court itself is powerless, when disposing of an appeal or application, to set aside a conviction on any other ground which is sufficiently substantial to justify a decision that the verdict under appeal should not be allowed to stand. Indeed the orders of acquittal made in *Pintheris' case* (supra) are themselves notable precedents for the exercise of these powers. We therefore agreed to examine the questions raised by Mr. Kumarakulasingham as *amicus curiae*.

The passages in the summing-up to which our attention was drawn all relate to the burden of proof of guilt. In this particular case, the onus was clearly on the Crown to establish beyond reasonable doubt against the applicant every fact which was material and necessary to constitute the offence of murder or alternatively of a lesser offence of which he could properly have been convicted on the indictment. The applicant could only have been convicted of murder if, at the end of the whole case, the jury were perfectly satisfied that he was the person who had stabbed Jane Nona, and that he had thereby caused her death with a " murderous intention ". It is therefore a pity that the learned Judge did not confine his direction as to the burden of proof to his preliminary observation that " if (the jury) had any reasonable doubt in weighing the evidence, (they) were bound to give the benefit of such reasonable doubt to the accused ". Unfortunately, however, he made certain later observations which could not be reconciled with his earlier elucidation of the true principle. For instance he said :

> " In this particular case the position taken up by the Proctor who has appeared for the accused is that he has let loose upon you a bundle of reasonable doubts and you would have no alternative but to acquit him. He has also commented upon what he has considered to be improbabilities. In considering the defence, gentlemen, to which I shall refer later, you must know that the law does not demand the same high standard of proof which is required to sustain the prosecution. *It is sufficient for the accused or his lawyer to raise such questions on the evidence already led with a view to convincing you that it is an improbable story. You have to be satisfied, before you acquit the accused, that the story for the prosecution is improbable. In considering that aspect of the matter you only take into account a mere balance of probabilities.*"

Again, in dealing with an item of evidence relied on by the Crown with reference to the issue of identification, he said :

> " As I said to you, gentlemen, in considering the defence you have to consider it on a balance of probabilities. "

and,

> "You have to consider the whole case by applying the test of probability. "

These directions were entirely inappropriate in the context of the issues which actually called for decision by the jury in the case. No evidence was led upon which the defence could call in aid any of the general exceptions to criminal liability laid down in Chapter 4 of the Penal Code ; nor was there evidence of mitigating circumstances which could bring the applicant's case within one or other of the exceptions to section 294. It was therefore quite wrong to leave the jury with the impression that any issue of fact could be decided against the applicant on a mere balance of probability or by applying a " test of improbability ". The proposition that the jury could not acquit the applicant unless they were " convinced " or " satisfied " that " the story for the prosecution was improbable " constitutes a very serious misdirection in law.

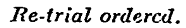
It might be asked whether the preliminary directions in which the burden of proof had been correctly explained were not so clear as to have removed the risk of the jury being confused, if not completely misled, by the later misdirections. In our opinion, it would be unsafe to assume that the jury would have paid regard to the general proposition that an accused person's guilt must be proved beyond reasonable doubt when they were subsequently led to believe, in the particular context of the issue of identification, that the applicant must establish on a balance of probability that (for instance) a mishap which allegedly occurred when he was opening a tin of sardines explained the presence of human blood on his sarong.

Learned Crown Counsel very fairly conceded that these misdirections were of so fundamental a character as to vitiate the verdict, and we were satisfied that justice required us to quash the conviction upon a ground not specified in the notice of appeal and we ordered a re-trial.

Let it be said in conclusion that it is quite proper (and that it is indeed his duty) for an Advocate (whether he represents the defence or the Crown) to bring to the notice of this Court any substantial matter which, though not formally raised within the prescribed limit of time, nevertheless merits consideration in a pending appeal or application. The assistance which the Court of Criminal Appeal expects in such a situation must, of course, be given with a due sense of responsibility.

There is one further observation which might usefully be made for the assistance of the Judge who will preside at the re-trial of the applicant. It relates to the dying declaration alleged to have been made by Jane Nona as to the circumstances resulting in her death.

When a dying declaration is relied on by the Crown, it is imperative that the jury should be adequately cautioned as to the weight to be attached to unsworn statements implicating an accused person who had no opportunity of cross-examining the declarant. *R. v. Asirvadam* [1].


Re-trial ordered.