[COURT OF CRIMINAL APPEAL]

1949 *Present :* **Canekeratne J. (President), Dias and Windham JJ.**

THE KING *v.* DHARMASENA *et al.*

Appeals 10–11 of 1949

S. C. I—M. C. Colombo 36,089

Court of Criminal Appeal—Charge of murder—Cross-examination by Judge—Hostility to accused—Presumption of innocence—Jury might disregard—"Any other ground"—Ordinance 23 of 1938—Section 5 (1).

Where a Judge takes on himself the burden of cross-examination of the accused and conducts it in a manner hostile to the accused there is a miscarriage of justice if such cross-examination may be reasonably considered to have brought about the verdict of "Guilty" where on the whole facts and without this attitude on the part of the Judge the Jury might fairly and reasonably have found the appellant "Not guilty".

An act of this kind on the part of a Judge comes within the words "any other ground" in section 5 (1) of Ordinance 23 of 1938 and the Court of Criminal Appeal can grant a re-trial.

APPEALS from two convictions in a trial before a Judge and Jury.

S. B. Lekamge, for 1st accused appellant.

A. B. Perera, for 2nd accused appellant.

H. A. Wijemanne, Crown Counsel, with *J. A. P. Cherubim, Crown Counsel*, for the Crown.

March 26, 1949. CANEKERATNE J.—

The two appellants were convicted of the murder of Govipolagodage Dionysius de Silva Seneviratne, and were sentenced to death, the first appellant being convicted on count one of the indictment, an offence punishable under section 113B read with sections 296 and 102 of the Penal Code, and on count two, an offence punishable under section 296 of the Penal Code. The second appellant was also convicted on count one. She was also charged with having abetted the first accused in the commission of the offence set out in count two but the Jury did not consider that count, as the learned Judge told the Jury that if they were left in a state of honest doubt as regards the charge of conspiracy then both counts one and three fall. On March 16, 1949, this Court dismissed the appeal of the first appellant and quashed the conviction of the second appellant and ordered a new trial, and we now proceed to give our reasons for so doing.

According to the evidence, the first appellant who lives at Nugegoda came to the house of the deceased, 107, College Street, Kotahena, about 8.45 in the morning at a time when the servant woman, Alice Nona, was the only inmate in the deceased's premises and having sent the servant woman away or just after she left the place awaited the arrival of the deceased and proceeded to kill him. Apparently just after this he ran to the adjoining house, threatened the servant woman there, dropped the knife he had and also his sarong with which he had covered his head and ran outside. He had left his umbrella at 107, College

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Street; one Khalid saw this accused drop his coat which was found to be stained with human blood, and a purse a little further away and then depart.

The first and main contention of counsel for the first accused was that the method adopted by the learned Judge of refreshing the memory of the witness Alice Nona by reading the passage marked X (in page 96 of the record) was contrary to law. In this connection he referred to what he said, was the rule laid down by the majority view in the case of *The King v. Namasivayam* [1], and to the passage from the case of *Noor Bux Kazi v. The Empress*, quoted in the former case. It is unnecessary to discuss the views expressed in the former case. Even without the evidence of Alice Nona there was ample evidence in the case to establish the guilt of the first accused. It is not necessary to discuss the question of conviction on the other count. The other matter on which Mr. Lekamge relied as misdirection was his contention that the learned Judge allowed some photographs to be produced in evidence. In considering the admissibility of these there are always two questions to be met—competency, and materiality and relevancy. If the photograph is an accurate and honest representation of the facts one then comes to consider whether it is material and relevant, whether the matter pictured will genuinely and properly aid the Jury in determining the true facts. If it passes both tests it becomes good evidence. A photograph comes in as a part of the testimony; it is used to explain or make oneself intelligible to a Judge; it is referred to in section 3 of the Evidence Ordinance. A photograph may be demonstrative evidence or documentary evidence. It may be that cameras do lie, (*e.g.*, one not held at eye-level, one with a long focus lens, &c.), but one does not dispense with all witnesses because there are perjurers. If real evidence (*e.g.*, a knife) can be brought, why not a photograph? If a jury may view a scene, why not a photograph of the scene? There was no misdirection and the contention fails.

The second appellant began her evidence on January 25, her cross-examination by leading counsel for the Crown occupied a little over one day. A series of questions were then put to her by the learned Judge, these and the answers occupy pages 520 to 529.

After this examination the witness was re-examined by her counsel; in the course of the re-examination too, as of the cross-examination, the trial Judge put certain questions to her. A few of the questions were loaded with all the observations that arose upon all the preceding parts of the case and they would tend to detract the attention of everybody, including that of the witness. Some of the questions to which objections were taken, together with the explanatory ones, are the following:—

"*Q.*—He generally did the marketing, dropped in to see his children at school, fed them at their meals, he was an old man, not in the best of health, careful of his habits. Do you seriously suggest that he would get about outside every day of the week, or practically so?

A.—Yes. [2]

[1] *(1948) 49 N. L. R. 289.*

[2] *Page 520.*

Q.—Will you agree that if anyone wished to murder this poor man the best opportunity was while you were living at 107, College Street ?

A.—No.

Q.—So that if anyone had killed the deceased then, you would have been in the house in the morning ?

A.—Yes.

Q.—Two weeks before his death you took a teaching job without even knowing what the salary was. Was that because you wanted to get out of the house ?

A.—No.

Q.—You said yesterday that you took up teaching at your husband's request ?

A.—Yes.

Q.—Is it not easy to put everything on a dead man who cannot answer for himself ? You say he ill-treated the children, he borrowed money from [1] Afghans, he insisted on your not leaving the school without the children, he got you this teaching job. He is not here to say no. Is that not so ?

A.—(No answer).

Q.—If he did get you this teaching job would you not know on what terms, or how much of it he was going to get and how much of it you were to get ? Is that not so ?

A.—(No reply).

Q.—Did you get this teaching job regardless of salary because you had made up a certain plan ?

A.—No.

Q.—If the servant was one whom you could persuade to take into your confidence, all that the servant had to say was that she was out at the time ? Is that not so ?

A.—(No reply). [2]

Q.—Alice told the jury that you told her that after the death there would be an inquiry which would be over in a month and that the matter would then be dropped. You heard her say that ?

A.—Yes.

Q.—Do you think she is intelligent enough to invent that ?

A.—I do not know.

Q.—She is a servant woman, illiterate and ignorant. Do you think she knows about court proceedings ? What happens when a person is killed, how long an inquiry like this is to last, and all such matters ?

A.—I do not know.

Q.—Some one has told her that, Who is that person ?

A.—I do not know.

Q.—So that the assailant would have had a clear one hour at least to make his get-away ?

A.—Yes.

Q.—And if Alice said, " I do not know ; I was in the market ", the inquiry would have to be dropped after about a month quite apart from the Police. There would be no evidence at all ?

[1] *Page 521.* [2] *Page 522.*

A.—Yes. [1]

Q.—How is it that Alice herself was reluctant to get back to the house after the marketing ?

A.—I do not know.

Q.—And you said you could not help it ?

A.—Yes. [2]

Q.—That is a common-sense answer. Instructions like that are for normal occasions, not for unusual occasions. Is that not so ?

A.—Yes.

Q.—Why did you tarry at standard five ?

A.—(No answer).

Q.—What on earth could the children have done in that crisis ?

A.—(No answer).

Q.—Answer these questions. I must put these matters to the Jury. I want an answer.

A.—As I was going home I took them along with me.

Q.—Once again is that not an indication of reluctance, to delay the inevitable of having to see your husband murdered ?

A.—No. [3]

Q.—When you saw his glasses in that pool of blood what did you do ?

A.—I went in to see what happened.

Q.—Is that all ?

A.—Yes. I started crying along with my two children.

Q.—Please listen to my question. When you saw his glasses in that pool of blood in the verandah what did you do ?

A.—I did not do anything but I went in.

Q.—Was that not the time to weep for your husband ?

A.—Yes. [4]

Q.—That was the last time you had seen your husband alive ?

A.—Yes.

Q.—If you did love him as you say, could you have ever forgotten that ? The thing would have been haunting in your mind till this morning ?

A.—(No reply).

Q.—You saw him then. That was the last occasion ?

A.—(No reply).

Q.—Did you weep when you went to the Police Station ?

A.—Yes. [5]

Q.—I must put it to you, was this weeping any part of the pretence you were carrying out ?

A.—No. [6]

Q.—The children were there in the house. Why did you not send Alice to the children ?

A.—She was there with me.

Q.—Why did it not strike you to say, My two children are there ; let this woman go and be with them ?

A.—(No reply).

[1] *Page 523.*
[2] *Page 524.*
[3] *Page 525.*
[4] *Page 526.*
[5] *Page 527.*
[6] *Page 528.*

Q.—I do not want to be too unfair to you. Did you think that Mrs. Wijesekera was looking after them ?

A.—Yes.

Q.—Mrs. Wijesekera was a teacher and had a job to do. Did you not think that your servant could have looked after them ?

A.—She told me that she would look after them till I returned ". [1]

It is, of course, always proper for a Judge—he has the power and it is his duty at times—to put such additional questions to the witnesses as seem to him desirable to elicit the truth. The part which a Judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the Judge, it was, I think, unfortunate that he took so large a part in examining the appellant. Though he was endeavouring to ascertain the truth, in the manner which at the moment seemed to him most convenient, there was a tendency to press the appellant on more than one occasion. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. If he takes upon himself the burden of the cross-examination of the accused, when the Government is represented by competent counsel, and conducts the examination in a manner hostile to the accused and suggesting that he is satisfied of the guilt of the accused, as some of the questions do, the impression would probably be produced on the minds of the jury that the Judge was of the fixed opinion that the accused was guilty and should be convicted. This would not be fair to the accused, for she is entitled to the benefit of the presumption of innocence by both Judge and jury till her guilt is proved. If the jury is inadvertently led to believe that the Judge does not regard that presumption, they may also disregard it.

Mr. Wijemanne contends that the Judge was, at the moment referred to (P. 529), endeavouring to get an explanation from the accused and thus to help her—he points to the question which followed these words. On the other hand, there is the next question. The effect of a few isolated questions to which objection can well be taken may not be such as to disturb a verdict where there is evidence to support it, and a fair and proper charge, but the number and nature of the questions may far out-weigh the good that is capable of being done by the use of the phrase, " it is a matter for you ". An act of this kind of the Judge comes within the very wide words " any other ground " (section 5 (1)) [2], so that the appeal should be allowed accordingly as there is or is not a miscarriage of justice. There is such a miscarriage of justice when the Court is of opinion that the examination of the accused by the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and without this attitude of the Judge, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one because the appellant has lost the chance which was fairly open to her of being acquitted, [3] and as the Court has power to grant a new trial, an order to that effect should be made. [4]

Re-trial ordered.

[1] *Page 529.*
[2] *Section 5 (1) of Ord. No. 23 of 1938.*
[3] *Cf. R. v. Haddy.*
[4] *Section 5 (2) Proviso.*