[COURT OF CRIMINAL APPEAL]

1950 *Present:* **Dias S.P.J. (President), Gunasekara J. and Swan J.**

MARTIN APPU, Appellant, *and* THE KING, Respondent

APPEAL No. 28 OF 1950 WITH APPLICATION 63

S. C. 25—M. C. Balapitiya, 64,019

Court of Criminal Appeal—Statements in petition of appeal—Validity as fresh evidence —Summing-up—Misdirection.

(i) The Court of Criminal Appeal may take into consideration statements made by the appellant in his notice of appeal although such statements refer to matters outside the evidence given at the trial.

(ii) Where the evidence warrants it, it is the duty of the presiding Judge to direct the jury that an act done with the knowledge that it was likely to cause death is distinguishable from an act done with the intention of causing death.

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

M. M. Kumarakulasingham, with *N. Abeysinghe* and *K. A. P. Rajakaruna*, for the accused appellant.

A. C. M. Ameer, Crown Counsel, for the Crown.

Cur. adv. vult.

July 31, 1950. GUNASEKARA J.—

The appellant was convicted of murder. The deceased man died on the 25th September, 1949, in consequence of a wound inflicted on him on the night of the 22nd September. It was an incised wound on the axillary region of the left side of the chest, six inches long and cutting through the ninth rib and the diaphragm and injuring the edge of the spleen. The case for the prosecution was based mainly on statements alleged to have been made by the deceased to the effect that the appellant had met him on the high road in the neighbourhood of the appellant's house and had inflicted that wound with a sword. These statements were supported

by other evidence to the effect that soon after the attack on the deceased the appellant was seen within a hundred and fifty yards of the place walking away with a katty in his hands; that when the police visited his house on the same night they did not find him there; and that ultimately when they did find him, at 6.30 a.m., on the 27th September, they came upon him as he lay under a tree in a jungle. The defence adduced no evidence.

It has been urged on behalf of the appellant that the presiding Judge misdirected the jury on various matters bearing on the question whether it was the appellant who inflicted the fatal wound and also that on this issue the jury could not reasonably have accepted the case for the prosecution. It is not necessary to discuss these grounds of appeal because the appellant has admitted in his notice of appeal that he inflicted the wound with a katty and he pleads that he did so in the exercise of the right of private defence. We would adopt, with all respect, the language of the English Court of Criminal Appeal in *R. v. James Nicholls*[1] where that Court said, regarding an allegation of a miscarriage of justice within section 4 of the Criminal Appeal Act:

> " But on this question it has been decided that the court may take into consideration matters outside the evidence given at the trial. The court must take the whole circumstances into account, especially statements by appellant in his notice of appeal, just as the court may hear fresh evidence. If the court had had any doubt upon the evidence here it would have been entirely removed by the grounds stated in the notice of appeal."

It is also contended that the learned Judge misdirected the jury by omitting to direct them that they should convict the appellant of culpable homicide not amounting to murder if they were not satisfied that he acted with an intention to cause death but were satisfied that he caused the death of the deceased by doing an act with the knowledge that he was likely by such act to cause death. We are of opinion that there is substance in this contention. The learned Judge directed the jury that if they were satisfied that it was the appellant who inflicted the fatal injury they should find him guilty of murder or of voluntarily causing grievous hurt with a dangerous weapon, according as they found that he did or did not intend to kill the deceased. He did not leave it open to them to find the appellant guilty of culpable homicide not amounting to murder. His omission to do so may well have led the jury to regard an act done with the knowledge that it was likely to cause death as indistinguishable from an act done with the intention of causing death. We are unable to say that they would without doubt have convicted the appellant of murder even if their attention had been drawn to the distinction between the two states of mind, particularly as the learned Judge himself took the view that it was open to the jury to find the appellant guilty of voluntarily causing grievous hurt merely.

We quash the conviction of murder and substitute for it a conviction of culpable homicide not amounting to murder, and we sentence the appellant to eight years' rigorous imprisonment.

Conviction altered.

1 (*1908*) *1 Cr. App. R. 167 at 168.*