

[COURT OF CRIMINAL APPEAL.]

1945

Present: Keuneman, Wijeyewardene and Rose JJ.

THE KING v. APPUHAMY.

59—M. C. Ratnapura, 38,273.

Court of Criminal Appeal—Charge of Murder—Circumstantial evidence—Deceased last seen with accused—Exact time of death of deceased must be proved—Absence of motive for murder—Prompt explanation by accused.

In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased. Among other points which may be emphasised in favour of the accused are (1) the absence of any motive whatever for the accused to murder the deceased, and (2) a reasonable explanation given by the accused fairly promptly after his arrest.

APPPLICATION for leave to appeal against a conviction by a Judge and Jury before the Western Circuit.

A. Rajasingham, for the 1st accused, appellant.

E. H. T. Gunasekere, C.C., for the Crown.

Cur adv. vult.

March 15, 1945. KEUNEMAN J.—

In this case this accused was found guilty of murder on purely circumstantial evidence. The material evidence in the case was given by Dingiri Appu, a trader in a boutique at Lelopitiya, and by his nephew Jainhamy to this effect. Dingiri Appu, the deceased his brother, and Jainhamy were seated in Dingiri Appu's boutique on the night of December 3, 1943, when the 1st accused came to the window and said that two people had brought a couple of fine gems and that the people were on the estate road. Dingiri Appu was not willing to go out, but the deceased left the boutique with the 1st accused. They carried a lighted candle in a coconut shell.

In about half or quarter of an hour the 1st accused returned to the boutique of Dingiri Appu and said—"Your brother has looked at the gems, and you are required to come and assess them". The first accused tried his best to induce Dingiri Appu to go with him but Dingiri Appu was unwilling and the 1st accused went away. He returned a third time and told Dingiri Appu that his brother was coming along the estate road with the other men, and wanted him to go out and meet them. Dingiri Appu became suspicious and refused to go out, and in fact loaded his gun and kept it beside him. According to Dingiri Appu, the 1st accused came about 11 P.M., while according to Jainhamy the deceased left the boutique about 8.30 or 9 P.M.

Dingiri Appu took no action to search for the deceased for about an hour, and then he sent Jainhamy to the deceased's boutique. In consequence the two sons of the deceased went in search of him towards the rubber estate, actually passing not far from where the deceased's body was found later, but they saw nobody. They carried a lantern which did not throw its light very far, and it was possible that if the body was there it may have been hidden behind some rocks at the spot. The two sons of the deceased returned to their boutique.

Early next morning Sirisena went out and discovered the body of the deceased near the top of a hill, beside a rock.

The medical evidence showed that the deceased had three incised wounds in the region of the neck, the longest 6 inches long, which could have been caused by a heavy sharp cutting instrument. The *post-mortem* examination was held at 2.30 P.M. on December 4, 1943, and the doctor found that signs of rigor mortis were well marked. He however gave no details with regard to the onset of rigor mortis. He was not able to say "with mathematical accuracy" how many hours after death he held the *post mortem*. He added—"Rigor mortis usually sets in about 4 or 5 hours after death. It is well marked in many cases after about 18 hours. Rigor mortis disappears about 36 hours after death. It commences to vanish in about 24 hours after death and completely vanishes in about 36 hours." The doctor said it was "possible" for the man to have died about 9 P.M. the previous day. The Trial Judge correctly summed up this evidence as being "not inconsistent with" the deceased having died about this time, but the evidence is not sufficient to establish the exact hour of the death.

The doctor also found in the deceased's stomach a small quantity of rice and curry undergoing digestion, and said that the deceased must have had the meal three or four hours before death, and that traces of rice and curry could be found three or four hours after death. Here again there is an absence of details as to the extent to which digestion had progressed, but the point is not without significance in this case. The evidence of the deceased's son Upasena was that the deceased had not partaken of rice and curry since "the midday meal" but the exact hour of that meal has not been spoken to. At any rate it was not unreasonable for the defence to make the suggestion that the deceased had actually partaken of a meal of rice and curry that night, and on the evidence he must have done so after he went out with the 1st accused, and have been killed some hours after he had this meal.

As regards motive on the part of the 1st accused, the Trial Judge rightly said that there was "no real evidence with regard to motive" and that the suggestion that robbery was the motive hardly fitted in with the death of the deceased.

Two other matters have been suggested against the 1st accused. The first is that on December 6, 1943, he brought the sword (P 9) to the witness Suwaris and suggested that Suwaris should give him even Rs. 2 and keep the sword in pawn. Suwaris refused to lend the money, and the 1st accused then left the sword with Suwaris saying that he was going on an urgent journey and would return for the sword on the 10th. The 1st accused did not in fact return to claim the sword which was later given to the Police. The doctor said that the injuries could have been caused by a weapon like P 9 but in fact there was not a vestige of evidence to connect this sword with the injuries found on the deceased. Those injuries could have been caused by a heavy sword or by a heavy long manna knife. The sword does not appear to have been sent to the Government Analyst for examination for traces of human blood, and the evidence of Suwaris was that it was not rusty but shining when he received it.

The other point alleged against the 1st accused was that "he disappeared entirely from the neighbourhood where the killing took place. It is true that some search was made for the 1st accused in Lelopitiya where the body was found; but this is perhaps of little significance, for admittedly the 1st accused was living in Kuruwita, about 15 miles away and only came to Lelopitiya on casual visits. There is no evidence that he had disappeared from Kuruwita, and it is not unreasonable that the 1st accused should have returned to his village Kuruwita where he had employment. Certainly the witness Suwaris saw the accused close to Kuruwita on December 6 and 7, and it was not until that day that the accused set out on his journey. There is really no evidence of a flight immediately after the night of December 3. I may add that it was only on the 6th that the accused tried to pledge the sword P 9, and there is no evidence that the 1st accused had any weapon at all when he was seen on the night of the 3rd.

The Trial Judge summed up the evidence of the prosecution as follows:—"To sum up the whole case against the accused as it is put forward by the Crown, first of all you have got it established that he had

come to the house of Dingiri Appu that night and Dingiri Appu's brother the deceased, went away with him; that he came back twice after that in an attempt to get Dingiri Appu himself to go out, and therefore he was the last person with whom the deceased was seen alive."

"The doctor's evidence is not inconsistent with the deceased having met his death some time about the time he was last seen in the company of the accused; that he disappeared from the neighbourhood where the killing took place; that he attempted to dispose of this weapon which the doctor said could have caused the death of the deceased."

The accused was arrested on December 12, and on the 15th he made a voluntary statement to the magistrate which has been proved by the prosecution. In this the accused stated that he came to Lelopitiya on December 3, on the invitation of Amisa. At Amisa's house he met Mendis and an unknown man. Amisa told him that he had a gem which was a stolen gem, and wanted him to find a buyer. Amisa asked him to arrange with the Mudalali of the boutique, so the accused went to the Mudalali and spoke to him about the gem but the Mudalali refused to go to the jungle to see the gem. The accused returned to the men who had sent him, who were now on a footpath. These men refused to go to the boutique but said they would go to the estate. Accused returned to the Mudalali, who refused to go out but sent his elder brother. Accused and the elder brother of the Mudalali went out with a lighted candle to the place where the other three men were. Amisa however wanted the Mudalali himself to come, so the Mudalali's brother was asked by Amisa to stay there and the accused was again sent to fetch the Mudalali, whose brother sent a message to the Mudalali not to be afraid. The Mudalali and Jainhamy got out of the boutique with a lantern but did not go further than the smoke room. Then the Mudalali complained that he was bitten by leeches and went back to his boutique. The Mudalali asked accused to fetch his brother. When the accused went back to where the men had been there was no light there and the men were not there. Accused called out and there was no reply; he thought the men had gone somewhere else so he himself went away.

As the Trial Judge said, this story "agrees almost word for word with the story told by Dingiri Appu himself and Jainhamy." The only difference was that Dingiri Appu and Jainhamy had said that the deceased left with the accused on the first occasion, while the accused said that it was on the second occasion. This, the Trial Judge added, was "no real difference", and suggested that probably some duty rested on the accused "as he induced the deceased to go with him, to go and tell Dingiri Appu that he found no signs of his brother." Strictly speaking no inducement was offered to the deceased, who went voluntarily; but the comment does not lack justification.

The learned Trial Judge had on more than one occasion adequately instructed the Jury with regard to circumstantial evidence, viz., that they must be satisfied "that the circumstances are incompatible with the accused's innocence and that they were only consistent with his guilt. If the circumstances are consistent with his innocence then it is your duty to acquit him."

It is perhaps a little unfortunate that towards the end of his charge the Trial Judge said—"It is for you to say whether that statement explains his conduct, and whether the circumstances are consistent with his guilt".

We have anxiously considered the whole of the evidence, and we think that while the circumstances were perhaps consistent with the guilt of the accused, it was not possible to exclude a hypothesis pointing to the fact that the accused was not guilty of the offence with which he was charged.

The following points in favour of the accused may be emphasised:

(1) The absence of any motive whatever for the accused to murder the deceased.

(2) The really suspicious element in the evidence was the persistent return of the accused to the boutique of Dingiri Appu, but the point in favour of the accused is that he went there quite openly and did not attempt to conceal his identity.

(3) The evidence does point strongly to the fact that there were other men in the background who may have had a motive for the murder, and who may have used the accused as an innocent tool to lure the deceased and Dingiri Appu from the boutique.

(4) The accused was not in contact with the deceased on two occasions, and the murder could have been committed in his absence, *i.e.*, on his two subsequent visits to Dingiri Appu's boutique. More particularly there is a strong possibility that the murder may have been committed during the accused's last visit to the boutique.

(5) The prosecution failed to fix the exact time of the death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance. The presence of rice and curry in the stomach of the deceased also indicates a strong possibility that the death took place some hours after the deceased set out with the accused.

(6) The absence of evidence that on the night in question the accused was seen to carry a weapon neutralises to a large extent the evidence that the accused had the weapon P 9 and attempted to pawn it near Kuruwita. Further no connection between P 9 and the injuries caused to the deceased has been shown.

(7) There is no evidence that the accused was absconding immediately after December 3.

(8) The explanation of the accused was given fairly promptly after his arrest and is not unreasonable.

In all the circumstances we are of opinion that it was not open to the Jury to say that every reasonable hypothesis consistent with the innocence of the accused on the charge of murder had been eliminated. The case is undoubtedly a case of some suspicion but we do not think it amounts to more than that.

In the circumstances the application of the accused is allowed and he is acquitted.

Conviction quashed.