[COURT OF CRIMINAL APPEAL]

1971 *Present:* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Weeramantry, J.**

W. A. FERNANDO, Appellant, *and* THE QUEEN, Respondent

APPEAL No. 44 OF 1971, WITH APPLICATION 63

S. C. 424/70—M. C. Chilaw, 26953

Evidence—Charge of murder—An item of evidence casting serious doubts on guilt of accused—Duty of prosecutor to mention it to Court.

Where, at a trial upon an indictment for murder, extracts from the Police Information Book disclosed an item of evidence which cast serious doubts on the accused person's guilt—

Held, that, though a prosecutor is not bound to expose every infirmity and weakness in his case, yet when a person is brought up on a capital charge, and there is some item of evidence which casts serious doubts on his guilt, it is the duty of the prosecutor to draw the attention of the trial Judge to such evidence.

APPEAL against a conviction at a trial before the Supreme Court.

M. A. Mansoor (Assigned), for the accused-appellant.

J. R. M. Perera, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

June 6, 1971. SIRIMANE, J.—

This appeal is against the conviction for murder and sentence of death passed on the appellant.

The prosecution alleged that, around mid-night, the appellant had entered the house of the deceased through the roof, and struck both the deceased and his wife Maria with a blunt weapon, probably an iron rod.

The deceased succumbed to his injuries a couple of days later. He and his wife were both over 70 years of age ; and as there were no other inmates of that house, the prosecution case depended mainly on the identification of the appellant by Maria. She stated in evidence that on hearing a noise she got up, lit a lamp and saw the appellant striking a blow on her husband followed

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by a blow on her. She knew the appellant. He had been their tenant for about six months, and had left a few days before this incident after some unpleasantness, having, it is alleged, uttered a veiled threat. The prosecution relied on this fact as evidence of motive. If, indeed, he had been seen by Maria, she should have had no difficulty in identifying a person whom she knew so well.

The defence strongly challenged this evidence, and placed before the Jury the deposition of the Doctor who had examined Maria and her husband at about 10.00 a.m. next morning. Both of them had told him that they were assaulted " by burglars ".

In dealing with this serious discrepancy, the learned trial Judge had addressed the Jury as follows :—

> " It is a fact, is it not, that if this accused had entered the house, one may fairly assume that he had come to burgle, because Maria Fernando did not know at that stage whether she had lost any articles in the house, because she was at that time in hospital. Of course, it is correct that in that statement neither the deceased nor Maria Fernando has mentioned the name of the accused. It is a point that has been made by learned Counsel for the defence, but it is a matter entirely for you, Gentlemen, having regard to the condition in which the deceased and Maria Fernando were at the time ..... "

In other words, that Maria and her husband could have described the appellant as a " burglar " to the Doctor, instead of mentioning his name. A Doctor, of course, does not question a patient with a view to ascertaining the identity of the assailant. All he wants to know is " the history of the case ", as it is called, for purposes of treatment. But as it appeared to us that the discrepancy was a very serious one, we thought it necessary in the interests of justice to ascertain what exactly the witness Maria and her husband had told the Police Officer who questioned them, undoubtedly with the primary object of ascertaining the identity of the assailant. The extracts from the Police Information Book furnished to Court show that their statements were recorded at 5.15 p.m. on the following evening. Both of them had categorically stated that *they did not know who their assailant was.*

Though a prosecutor is not bound to expose every infirmity and weakness in his case, yet when a person is brought up on a capital charge, and there is some item of evidence which casts

serious doubts on his guilt, we think it is the duty of the Crown to draw the attention of the trial Judge to such evidence. Had this been done, as was pointed out by this Court in *Muthubanda v. The Queen*[1], the trial Judge would undoubtedly " have prominently placed this matter before the Jury and drawn their attention to the serious discrepancy between the evidence in Court and the statements to the Police."

Indeed, the doubt arising from the evidence of the Doctor might well have moved the trial Judge to peruse Maria's statement to the Police, and to utilise it at the trial.

The learned Crown Counsel submitted that the Jury may have convicted the appellant on circumstantial evidence. The case was not presented on that basis, and the learned trial Judge gave no directions whatsoever on circumstantial evidence. What were the circumstances ? If Maria's evidence is eliminated, there was only the evidence of motive referred to earlier, and the evidence of one Marimuttu who had stated, somewhat belatedly, we think, that on flashing a torch he saw the appellant fleeing from the scene. This type of evidence is always viewed with suspicion, and is not generally acted upon even in those rare instances when it happens to be the truth,—for, an innocent man may flee from a scene of offence for a variety of reasons. In this instance Marimuttu added further that Maria mentioned to him the name of the appellant as the assailant, i.e., long before her statements to the Doctor and the Police !

Learned Crown Counsel also suggested that we might consider ordering a re-trial.

In the circumstances of the present case, we do not think it fair to place the appellant in jeopardy a second time—and to place him in a position obviously more disadvantageous than at the trial which he has already faced.

Had the statements made by Maria and the deceased been placed before the Jury, it is impossible to say that they would have returned a verdict adverse to the appellant.

At the close of the arguments, therefore, we quashed the conviction and acquitted the appellant.

Accused acquitted.

[1] *(1969) 73 N. L. R. 8.*