1954 [COURT OF CRIMINAL APPEAL]

Present : **Nagalingam A.C.J. (President), Pulle J. and Swan J.**

S. CHARLES SILVA, Appellant, *and* THE QUEEN, Respondent

APPLICATION 131 OF 1953

S. C. 12—M. C. Gampaha, 11,680

Charge of murder—Defence of alibi—Intoxication alleged in dying deposition of deceased —Summing-up—Misdirection.

In a prosecution for murder, the defence was an alibi. In his dying deposition, however, the deceased had stated that the accused was drunk and staggering at the time he inflicted the fatal injury and that there was no altercation or previous ill feeling between the accused and the deceased.

Held, that in the circumstances it was the duty of the trial Judge to have considered in his summing-up whether the accused by reason of intoxication was incapable of realising the natural and probable consequences of the violence he used on the deceased.

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

R. R. Crossette-Thambiah, Q.C., with *S. B. Lekamge* and *S. Sharvananda*, for the accused appellant.

Ananda Pcreira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 1, 1954. PULLE J.—

By a verdict of six to one the appellant was convicted on the charge that on the 13th April, 1953, he committed murder by causing the death of one Senasige Isadoru Silva *alias* Isan Silva. The case for the prosecution was that on the night of 13th April the appellant inflicted on the deceased one stab wound on the abdominal wall one inch long and penetrating to a depth of two inches as a result of which he died on the 15th April. The scene of the offence was a public highway close to the house of the witness S. Sebastian Fernando. This witness did not see the stabbing. He heard the voice of a person crying out, " Mudalali, Chaipolis stabbed me with a knife ". He came out of the house with an electric torch and as he flashed it he saw the appellant running away. Another witness Senasige Marthinu Silva who happened to be on the road stated that he also heard the same cry and as he proceeded towards Sebastian Fernando's house he saw the appellant running past him towards the house of one D. M. de Soysa, a Police constable, who was married to a niece of the appellant. The defence was an alibi. The appellant in his evidence stated that at about 7.30 p.m. he was sleeping in the verandah of the boutique of his brother one Kulasekera. This boutique is on the same road, a short distance away from the house of de Soysa. When he was sleeping he heard a commotion from the direction of de Soysa's house and he then went to that house where, later in the night, he was arrested.

In appeal the finding of the jury that the appellant stabbed the deceased was not canvassed. It was submitted on his behalf that the learned Commissioner had inadvertently omitted to ask the jury to consider whether the appellant by reason of intoxication was incapable of forming the intention necessary to constitute the offence of murder. The submission was based on the dying deposition which was read at the trial as part of the evidence for the prosecution. It was taken at the hospital on the 14th April and is as follows :

> " Yesterday at about 8 p.m. one Charles Silva stabbed me on my abdomen. This happened on the high road near Charles' house. I raised cries and 10 or 12 people came up.
>
> " Sebastian Mudalali saw Charles running away with the knife in hand. Charles is no relative of mine. *Charles was drunk, I saw him come staggering.* There is no previous ill feeling between me and Charles. There was no talk or altercation before the stabbing. "

The whole of this deposition was read out by the Commissioner to the jury but only as relevant to the issue whether it was the appellant who stabbed the deceased. He dealt with the question of knowledge but in that context he made no reference to intoxication.

The question we have to decide is whether there was no evidence on which the jury, properly directed, could find that by reason of intoxication the appellant could not form a murderous intention at the time he inflicted the injury. A point was made by learned Crown Counsel that the appellant stated in his evidence that he did not take any liquor on

the 13th April but it is conceded that his claim to have been sober on that night did not conclude the question whether in fact he was intoxicated or not.

It is a circumstance of some weight in this case that there was no proof of any motive for the offence and that the attack on the deceased was not preceded or accompanied by an exchange of blows or words. The deceased said that the appellant was not merely drunk but staggering. When one regards the totality of the evidence it cannot be said that the jury could not possibly infer that the appellant by reason of intoxication was in such a condition that he was incapable of realising the natural and probable consequences of the violence he used on the deceased.

We are of the opinion that there has been a non-direction on a material issue arising on the dying deposition and we accordingly set aside the conviction and sentence. We do not think that there should be a re-trial. Accordingly we substitute a verdict under section 297 of the Penal Code and sentence the appellant to eight years' rigorous imprisonment.

Conviction altered.