[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Keuneman S.P.J. (President), Wijeyewardene and Dias JJ.**

THE KING *v.* MUTTU.

Appeal No. 45 and Application No. 166.

S. C. 2—M. C. Mallakam, 28,356.

Charge of murder—Plea of self-defence—Misdirection.

On a charge of murder, when there is sufficient evidence of the exercise of the right of private defence, it is a grave misdirection if the summing-up misleads the jury into thinking that the accused had exceeded the right of private defence.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

F. A. Hayley, K.C. (with him *H. Wanigatunga* and *T. A. de S. Wijesundera*), for the accused, appellant.

T. S. Fernando, C.C., for the Crown.

Cur. adv. vult.

November 11, 1946. KEUNEMAN S.P.J.—

The accused appeals against a conviction for culpable homicide not amounting to murder. The Jury on being questioned by the trial Judge said they held that the accused had exceeded the right of private defence.

The deceased had received two gunshot injuries. The first consisted of nine pellet marks spread over the left side of the chest. The pellets had barely penetrated the skin, and the expert evidence for the prosecution established that the shot was fired at extreme range, viz., over 70 feet. The second injury consisted of a hole 3 inches by 1½ inches, where the wadding and the shots had gone in as a solid column just above the right nipple, two of the slugs had made exit wounds in the back and others were embedded in the back of the chest. The expert evidence established that the shot was fired from not less than 8 feet or more than 15 feet.

The accused admitted that he had caused these injuries, but pleaded that he had acted in the exercise of the right of private defence. He stated that he had set out with his gun to go to Point Pedro. He saw the deceased man coming with a sword and calling on him to stop. The accused ran or hurried away in order to escape, and at the same time loaded his gun. He warned the deceased and when the deceased was some distance away—about 46 feet—fired the first shot at the deceased. That shot did not stop the deceased who continued to come on. The accused still retreated, at the same time warning the deceased not to come near him. The accused was unable to retire further because he reached a deep ditch or pit. So when the deceased came on with the sword the accused fired the fatal shot, at a distance of 8 to 10 feet. This was done because the accused feared he would be killed.

I may also add that the prosecution called no actual eye-witness of the shooting, but there was evidence that shortly before the event the deceased was not carrying a sword. It is most likely that the Jury accepted the story of the accused. Mr. Hayley contended that there were certain misdirections by the trial Judge which probably misled the Jury into thinking that the accused had exceeded the right of private defence. In the first place he contended that the trial Judge did not deal with the expert evidence called by the prosecution, and said that that evidence corroborated the evidence of the accused. He urged that it was very important that the shots had been fired one at extreme range and the other at very close quarters. Also the failure to comment on the expert evidence resulted in the fact that the Jury were not informed of the range at which each of the shots was fired. In addition to this the trial Judge inadvertently made an error in stating the distance at which the second shot was fired. In one part of the charge the Judge speaks of the

accused " standing far off with the sword in hand "—which is hardly an accurate description of what occurred. Later he said—" Consider the distance the deceased was at the time—at least 8 to 15 *yards* ". Still later he said " At least the deceased was about 10 *yards* away and he fired the fatal shot. The deceased could hardly strike the accused with a sword at that distance . . . . The accused might well have taken other steps ; he could have run off, or fired at his legs. Why fire at a vital part of the body like the chest or the upper part of the body ? " It is true that at one stage the trial Judge made the distance " 8 or 9 feet away " but this he did in presenting the accused's version of what happened, and he did not add that the expert evidence supported that.

We think there is substance in the contention that the Jury may have been confused by the charge, and may have been under the impression that the shot was fired at a distance three times as great as the facts demonstrated. Also the trial Judge did not point out that the further retreat of the accused was prevented by the deep ditch or pit, according to the accused's story. The omission to mention this fact may have affected the minds of the Jury.

In our opinion these are misdirections relating to a very vital matter. The distance at which the fatal shot was fired was of the utmost significance and had an immediate bearing on the question whether the accused exceeded the right of private defence or not. Had the correct facts been put to the Jury, we think they may well have considered that the accused had justification for firing as he did, with fatal results. It is difficult for us now to reconcile the verdict of the Jury with the facts as established in the case.

Our attention has also been drawn to another matter. It was in evidence that a woman Manickam had also met her death by gun shot injuries on this occasion. The accused had been tried for the murder of Manickam and had been acquitted. The trial Judge referred to the fact that " there were two persons murdered on this day " and asked the Jury to eradicate from their mind that the accused had killed the other person Manickam. " You should not take into consideration that he murdered another person on that day, and you must not therefore think he is a very bad man ". The use of the word " murder " in this connection was not justified, and the trial Judge failed to point out that the accused was found not guilty of the murder of Manickam. Unfortunately the trial Judge returned to this matter again in the latter part of his charge. " Why was the woman about ? Was she also trying to injure the accused ? Why was she killed ? Was it because she would be the only witness if she remained alive ? "

We are of opinion that these remarks of the trial Judge probably caused considerable prejudice in the minds of the Jury against the accused, and were not justified.

For these reasons we are of opinion that the conviction in this case cannot stand. We therefore set aside the conviction and sentence and acquit the accused.

Conviction set aside.