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[IN THE COURT OF CRIMINAL APPEAL]

1961 *Present :* **Basnayake, C.J. (President), Gunasekara, J., Weerasooriya, J., H. N. G. Fernando, J., and L. B. de Silva, J.**

THE QUEEN *v.* ALUTHGE DON HEMAPALA

Appeal No. 230 of 1960, with Application No. 253

S. C. 41—M. C. Horana, 27640

Court of Criminal Appeal—Notice of appeal—Right of appellant to rely on a ground of appeal not stated in the notice—Trial before Supreme Court—English-speaking jury—Proceedings conducted in Sinhala—Validity—Criminal Procedure Code, ss. 165B, 224 (1), 225 (b) (e), 229, 232, 254, 257, 261 et seq., 299, 300, 302, 425—Official Language Act, No. 33 of 1958, s. 2—Language of the Courts Act, No. 3 of 1961, s. 8—Court of Criminal Appeal Ordinance, s. 5 (1).

Held : (i) Although Counsel for an appellant cannot as of right rely on a ground not stated in the notice of appeal, the Court of Criminal Appeal may in an exceptional case permit such a ground to be argued where it is in the interests of justice to do so. (Observations to the contrary in previous judgments delivered by the Court of Criminal Appeal when constituted only of three Judges, not followed.)

(ii) (H. N. G. FERNANDO, J., dissenting) Where, in a trial before the Supreme Court, the accused elects in terms of section 165 B of the Criminal Procedure Code to be tried by a jury drawn from an English-speaking panel of jurors, not only the evidence of the witnesses but also the addresses of Counsel in Sinhala must be interpreted into English, even when the Jury and Counsel have expressed their ability to understand and follow the proceedings in Sinhala.

The accused-appellant had elected to be tried by an English-speaking jury. At the commencement of the trial, the presiding Judge enquired from the jury whether they were sufficiently conversant with Sinhala to be able to understand well (1) the questions put to witnesses and answers given by them, (2) the address of Counsel if it was made in Sinhala. The Foreman answered in the affirmative. The defence Counsel also, on being questioned by Court, stated that he was able to follow the proceedings in Sinhala. He was then told by Court : "You are at liberty to put any question in English at any

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stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer ". During the trial the addresses of Crown Counsel, both at the opening and at the end, were delivered in Sinhala only, without interpretation into English. Although many of the witnesses were examined in Sinhala, their evidence was in fact interpreted into English by the interpreter, whose interpretation was loud enough to have been heard by the jury.

Held (H. N. G. FERNANDO, J., dissenting), that the delivery of the addresses by Crown Counsel in Sinhala without any interpretation of them into English was not in accordance with the law governing the procedure at a trial by a jury drawn from an English-speaking panel.

Held further (BASNAYAKE, C.J., and L. B. DE SILVA J., dissenting), that no substantial miscarriage of justice occurred in the circumstances of the present case in consequence of any irregularity or illegality in the delivery of the addresses of Crown Counsel in Sinhala. Accordingly, the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should be applied.

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

Colvin R. de Silva, with *Nanda K. Rodrigo* (retained) and *Lucian Jayetileke* (assigned), for Accused-Appellant.

Douglas St. C. B. Jansze, Q.C., Attorney-General, with *Ananda Pereira*, Senior Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for the Crown.

Cur. adv. vult.

December 11, 1961. BASNAYAKE, C.J.—

The question for decision on this appeal is whether the procedure adopted by the learned trial Judge is wrong in law. The material facts briefly are as follows :—

The accused-appellant had elected to be tried by a jury drawn from an English-speaking panel of jurors. This election he is required to make under section 165B of the Criminal Procedure Code. That section reads :

" On committing the accused for trial before any higher court the Magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial in the event of the trial being held before the Supreme Court, and the Magistrate shall record such election if made. The accused so electing shall, if the trial is held before the Supreme Court be bound by and may be tried according to his election, subject however in all cases to the provisions of section 224. "

At the trial an English-speaking panel was in attendance in accordance with the accused's election and a jury was drawn from that panel in accordance with the provisions of section 224 (1) of the

Criminal Procedure Code. After the jury had chosen their Foreman and had been sworn, in accordance with section 227 of the Code, the learned trial Judge addressed them thus : " May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them ? ". To that inquiry the Foreman replied " Yes My Lord ". The learned Judge then inquired " And also address of counsel if it is made in Sinhala ? ". The Foreman said " Yes " to that question also. He next asked the counsel for the defence " Mr. Tampoe, are you able to follow the proceedings in Sinhala ? " and received the answer " Yes My Lord ". The learned Judge then stated : " You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer. "

The Crown Counsel then opened his case in Sinhala. Except in the case of Dr. Gamini Edirisinghe and Police Sergeant De Waas Tillekaratne the transcript does not indicate in what language the witnesses who were able to give evidence in English testified. There is also nothing in the transcript to indicate that the evidence given by Sinhalese speaking witnesses was interpreted into the English language in a tone loud enough to be heard by the jury. The transcript does not expressly state in what language Crown Counsel delivered his closing address. But as he opened the case in Sinhala it can be assumed that his address at the close of the case was in that language. The transcript makes no special mention of the language in which counsel for the defence delivered his address. But as the learned Judge did not in the words addressed to him at the outset of the trial inquire whether he was able to address the jury in Sinhala, it may be assumed that he addressed in English. It would appear that whenever it was necessary to address the jury the Judge did so in English and his summing-up was also in that language.

The Criminal Procedure Code gives an accused person a right to elect to be tried by a jury drawn from any one of three panels. The panels are drawn in the manner prescribed in section 261 *et seq.* from lists prepared by the Fiscal under section 257 and published in the *Gazette* under section 260. By the former section he is required to prepare three lists of persons who satisfy the requirements of section 254, possess the prescribed income, and who can—

(*a*) speak, read, and write the English language,
(*b*) speak, read, and write the Sinhalese language,
(*c*) speak, read, and write the Tamil language.

The procedure followed in a trial by a jury drawn from a panel of jurors able to speak, read, and write the English language is so well established and so well known that, when an accused person elects to be tried by such a jury, it may be presumed that he does so with the certain knowledge of the procedure that would be followed at his trial.

In a trial by a jury drawn from a panel of those who can speak, read, and write the English language, the counsel would put his questions to the witnesses in English, address the jury in English, the evidence given in a language other than English would be interpreted to them, the Judge would address them and they would address him in English. In the instant case there has been a departure from that procedure and a procedure not authorised by the Criminal Procedure Code has been adopted on the direction of the trial Judge. It is essential in a trial by jury that the safeguards prescribed by law to ensure that the jurors understand the proceedings should be observed. The jury was drawn from a panel which under the law consisted of persons competent in law to try the accused in proceedings conducted before them in the English language. The Crown Counsel's opening address which is an essential part of a trial by jury (s. 232) was in a language in which in law they were not competent to try the accused. He also appears to have examined the witnesses who did not give evidence in English in a language in which the jury were not competent in law to try the accused and in which he had not chosen to be tried. It is a fundamental right of an accused person to be tried in accordance with the procedure prescribed in the Criminal Procedure Code and the practice established thereunder. In the instant case there has been no such trial and the complaint of the accused is one that is justified. It is illegal in a criminal trial to follow a procedure not warranted by the Code or the practice thereunder. We recall the following words of Lord Herschell L.C. in *Smurthwaite v. Hannay* [1] :

> "If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

Although he was there dealing with a set of rules which were meant to be a code of civil procedure the principle is applicable with even greater force to a code of criminal procedure as would appear from the following words of Lord Goddard in the case of *R. v. Neal* [2] :

> "There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leaves the court no option but to quash the conviction."

He was there following Lord Sumner's decision in *Crane v. Director of Public Prosecutions* [3]. The fact that neither the accused nor his counsel took objection to the procedure is no ground for refusing to uphold the submissions of counsel. We find support for our view in the following words in the judgment of the Privy Council delivered by Lord Phillimore in *Abdul Rahman v. The King Emperor* [4] :

> ". . . they wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused."

[1] *(1894) A. C. 494 at 501.*
[2] *(1949) 2 All E. R. 438.*
[3] *(1921) 2 A. C. 299.*
[4] *(1926-27) I. A. 96 at 104.*

It is also well established in criminal law that an accused person cannot waive a rule of evidence or procedure even if it would be an advantage for him to do so (*R. v. Gee & others*) [1]. There has been an essential departure from the well established rules of procedure prescribed for the accused's trial that we have no option but to hold that there has been no trial of the accused according to law.

We accordingly quash the conviction and direct a new trial.

In regard to the argument of learned counsel for the appellant based on the Official Language Act 33 of 1956 it is sufficient to observe that it is common ground that at the time of the enactment of the Official Language Act No. 33 of 1956 English was the language of the Courts and that at the relevant time—15th to 20th December 1960—it was lawful to use English as the language of the Courts by virtue of the notification published in *Gazette* No. 10,949 of 7th July 1956.

The procedure adopted in the instant case gains no support from the Official Language Act. The Language of the Courts Act No. 3 of 1961, section 8 of which proceeds on the assumption that after 1st January 1961 English is not the language of the Courts, has no application to the instant case as it was enacted after the trial.

GUNASEKARA, J.—

I entirely agree with the judgment that has been prepared by my brother Weerasooriya and I have nothing to add.

WEERASOORIYA, J.—

The accused-appellant was convicted of murder and sentenced to death.

The only ground on which learned counsel for the appellant sought to have the conviction set aside is one involving a question of procedure. It is not a ground taken in the notice of appeal. But despite observations to the contrary in previous judgments delivered by this Court when constituted only of three Judges, we entertained this ground on the basis that although counsel for an appellant cannot as of right rely on a ground not stated in the notice of appeal, this Court may in an exceptional case permit such a ground to be argued where it is in the interests of justice so to do.

The trial took place before a jury chosen from an English-speaking panel in accordance with the election made by the appellant under section 165B of the Criminal Procedure Code. After the members of

[1] *(1936) 2 All E. R. 89.*

the jury had been sworn or affirmed the trial Judge put certain questions to them and to defence counsel. Those questions and the replies thereto are recorded as follows in the transcript of the notes of evidence :

" *Court :* May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them ?

Foreman : Yes My Lord.

Court : And also address of Counsel if it is made in Sinhala ?

Foreman : Yes.

Court : Mr. Tampoe, are you able to follow the proceedings in Sinhala ?

Mr. Tampoe : Yes My Lord.

Court : You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer. "

The transcript also shows that the opening speech of Crown Counsel was made in Sinhala. Two, or may be three, out of the nine witnesses called by the prosecution, and the only witness called by the defence, appear to have testified in English, and the others in Sinhala. At the conclusion of the evidence, counsel for the defence addressed the jury and Crown Counsel replied. The transcript does not show in what language these addresses were delivered, but it may be assumed that Crown Counsel adopted the same language as in his opening speech, while defence counsel spoke in English. The summing-up may also be assumed to have been in English.

Learned counsel for the appellant submitted that the trial was not held in accordance with law in that—

(*a*) the two addresses of Crown Counsel were delivered in Sinhala without any interpretation of them into English ;

(*b*) the evidence of six, or, perhaps, seven of the witnesses examined at the trial was in Sinhala, and although such evidence was interpreted into English for the purpose of the record, the jury were in effect invited by the trial Judge to follow the evidence as given in Sinhala ;

(*c*) the procedure at (*a*) and (*b*) amounted to a denial to the appellant of a trial by an English-speaking jury in terms of his election.

Section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, provides that an appeal against a conviction shall be allowed by the Court of Criminal Appeal if " they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ; or that the judgment of the court before which the appellant was convicted should be

set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal ". Then follows a proviso to which I shall refer later. While counsel for the appellant did not rely on the first of these grounds, he invited us to interfere with the conviction on the grounds that there was a wrong decision of a question of law by the trial Judge as regards the mode of trial and also that a miscarriage of justice had resulted.

It will be convenient to refer at this stage to those provisions of the Criminal Procedure Code which have a bearing on the question of procedure arising for consideration in this case. Section 254 deals with the liability of a person, who has the requisite qualifications, to serve as a juror. One of the qualifications is that he should be able to speak, read, and write English, Sinhalese or Tamil. Under section 257 the Fiscal is required, *inter alia*, to prepare " three several lists of the persons who, under section 254, are qualified and liable to act as jurors ". Section 261 provides for the summoning of three panels of jurors for attendance and service as jurors at each criminal sessions of the Supreme Court, and that one panel shall be prepared from each of the three lists of persons who can speak, read, and write English, Sinhalese or Tamil and possess the other qualifications in respect of income or property. For convenience I refer to these panels as the English-speaking, Sinhalese-speaking and Tamil-speaking panels. Section 224 (1) provides that the jury shall be taken from the panel elected by the accused unless the court otherwise directs. In the present case no direction was given by the trial Judge that the jury should be taken from a panel other than that elected by the appellant. Section 225 specifies what objections taken at the trial to a juror, if made out to the satisfaction of the court, shall be allowed. One objection (section 225 (*b*)) is on " some personal ground such as deficiency in the qualification required by any law or rule having the force of law for the time being in force ". Another objection (section 225 (*e*)) is on the ground of " his inability to understand the language of the panel from which the jury is drawn ". A deficiency in the requisite qualifications would include a juror's inability to speak, read and write the language of the panel from which the jury is drawn. The objection in section 225 (*e*) is on the ground of his inability to *understand* the language of the panel. The legislature seems to have recognised that, as a general rule, a person who is able to speak, read and write a language may be assumed to possess a sufficient understanding of it for the purpose of following proceedings in that language at a trial in the Supreme Court. But provision was also made in section 225 (*e*) for a case where this assumption may not be justified, and it is shown to the satisfaction of the court that a juror, although included in the panel on the basis that he possesses, among other qualifications, the ability to speak, read and write the language of the panel, is unable to understand that language. In such a case the court is required to uphold the objection.

In my opinion, section 225 (*e*) and the other sections to which I have referred, necessarily imply that proceedings at a trial by jury in the Supreme Court shall be held either in the language of the panel from which the jury is drawn or be interpreted into that language. Section 229 was relied on to some extent by the learned Attorney-General for his argument *contra*. The relevant part of section 229 provides that if " in the course of a trial by jury at any time before the return of the verdict . . . . it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted, the Judge may either order a new juror to be added or discharge the jury and order a new jury to be chosen. " But even in framing section 229 the legislature seems to have had in contemplation that evidence adduced at a trial by jury, if not given in the language of the panel from which the jury is drawn, will be interpreted in that language. Hence, the power given to the Judge under section 229 to order a new juror to be added or discharge the jury and order a new jury to be chosen, should, I think, be construed as referable to a case where a juror is unable to understand the language of the panel, when evidence is given or interpreted in that language. On this construction it may be that sections 229 and 225 (*e*) to some extent overlap, but the power given under section 229 can be exercised at any time before the verdict is returned, whereas the application of section 225 appears to be limited to the early stages of the trial.

Counsel for the appellant also submitted that English is the language of the courts. The Attorney-General conceded that all evidence taken at a trial in a language other than English must be translated into English for purposes of the record. I do not think that it is necessary to decide in this appeal whether the Official Language Act, No. 33 of 1956, has any application to the language of the Courts, or whether English continued to be the language of the Courts at the time when the trial took place, by virtue of the notification under the proviso to section 2 of the Act and published in *Government Gazette* No. 10,949 of the 7th July, 1956.

In my opinion, the delivery of addresses by Crown Counsel in Sinhala was not in accordance with the law governing the procedure at a trial by a jury drawn from an English-speaking panel. The addresses should have been in English. The irregularity or illegality may be brought within the terms of section 5 (1) of the Court of Criminal Appeal Ordinance by stating that in initiating a procedure whereby those addresses were delivered in Sinhala, the learned trial Judge wrongly decided a question of law relating to procedure. In regard to the evidence given by those witnesses who testified in Sinhala, the position is, however, different. More likely than not, Sinhala was the only language in which they were able to testify. The questions put to them by counsel and Judge (if they were directly questioned in Sinhala), and the evidence which they gave, were duly interpreted into

English, though this was done for the purpose of the record. The remarks of the trial Judge quoted earlier indicate that the interpretation was loud enough to have been heard by the jury. In the circumstances I am unable to hold that any irregularity or illegality has been made out on this ground.

The further question that arises is whether the conviction of the appellant should be set aside because of the irregularity or illegality in the delivery of the addresses of Crown Counsel. It is necessary, in this connection, to consider the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance which reads as follows :

> " Provided that the court may, notwithstanding that they are of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. "

This proviso is the same as the proviso to the corresponding section 4 (1) of the English Criminal Appeal Act of 1907. The expression " no substantial miscarriage of justice has actually occurred " in the proviso has been considered in several decisions of the Court of Criminal Appeal in England. In the case of *Alfred Williams and Albert Woodley* [1], where information as to the previous convictions of the appellants was inadvertently given to the jury before the verdict, it was held that notwithstanding the irregularity, which the court considered to be a serious one, the proviso should be applied as the verdict returned was the only reasonable and proper verdict on the evidence. In the case of *Percy Herbert* [2] the court was of the view that the jury would have come to the same conclusion if the irregularities had not occurred and that, therefore, the proviso should be applied as no injustice had been done. The meaning of the expression was discussed at length by Humphreys, J., who delivered the judgment of the court in the case of *Albert Edward Haddy*[3]. Applying his reasoning to the present case, what we have to consider is whether, had there been no wrong decision of a question of law by the trial Judge, the jury might fairly and reasonably have found the appellant not guilty, or, to put the matter in another way, whether the appellant, as a result of the wrong decision lost the chance which was fairly open to him of being acquitted.

To turn to a local case, in *The King v. A. A. Kitchilan et al.*[4] the point taken in appeal was whether there was a misjoinder of charges which vitiated the convictions of the appellants. The court, by a majority decision, held there was no misjoinder of charges and stated, further, that even had they held otherwise they would have applied the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance which in their view, conferred a discretion wider than that conferred upon an appellate court by section 425 of the Criminal Procedure Code.

[1] *14 C. A. R. 135.*
[2] *23 C. A. R. 124.*
[3] *29 C. A. R 182.*
[4] *(1944) 45 N L. R. 82.*

An irregularity or illegality in the mode of conducting a criminal trial may be of such a serious nature as to render the trial a nullity. The question of applying the proviso would not then arise. In my opinion, the irregularity or illegality in the present case was not of a serious nature for the following reasons : The addresses of Crown Counsel in Sinhala came after the trial Judge had asked the members of the jury (all of whom, if their surnames are any indication, appear to have been Sinhalese) whether they had a sufficient understanding of that language. There is no reason to think that the affirmative replies of the foreman to the questions put by the Judge were not given with the full assent of each member of the jury. Learned counsel who appeared for the appellant at the trial also stated that he was able to follow the proceedings in Sinhala. The fact that the irregularity or illegality is not even referred to in the grounds set out in the notice of appeal may be regarded as indicating that neither he nor the appellant felt that any prejudice was thereby caused to the defence.

I do not, therefore, consider that, had the addresses of Crown Counsel been in English, the jury might fairly and reasonably have returned a different verdict, or that as a result of the addresses being delivered in Sinhala the appellant lost the chance which was fairly open to him of being acquitted. In my opinion the proviso to section 5 (1) should be applied as no substantial miscarriage of justice has actually occurred in this case, and the appeal should be dismissed.

H. N. G. FERNANDO, J.—

The appellant was convicted of the offence of murder by the unanimous verdict of the jury and sentence of death was passed upon him. I am in agreement with the observations of my brother Weerasooriya concerning the discretion of this court to admit argument on behalf of an appellant of grounds of appeal not taken in the petition of appeal.

When the appellant was committed for trial by the Magistrate under section 163 of the Criminal Procedure Code he was asked under section 165(B) to elect from which of the respective panels of jurors a jury shall be taken for his trial, and the Magistrate thereafter recorded that he elected to be tried by an English-speaking jury. In accordance with this election an English-speaking jury was empanelled at the commencement of the trial. The following questions from the court and the replies thereto have been recorded :

" *Court :* May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them ?

Foreman : Yes My Lord.

Court : And also address of counsel if it is made in Sinhala ?

Foreman : Yes.

Court : Mr. Tampoe are you able to follow the proceedings in Sinhala ?

Mr. Tampoe : Yes My Lord.

Court : You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer. "

Upon this material and having regard to certain statements made to this court by the Attorney-General, we agree with counsel for the appellant that it must be assumed that during the trial,

(1) many of the witnesses were examined and cross-examined by means of questions framed by counsel in Sinhala and answered those questions in Sinhala,

(2) that nevertheless each question and answer was in fact translated into English by the interpreter,

(3) that the opening address of Crown Counsel and the closing addresses both of Crown Counsel and of defence Counsel were delivered in Sinhala but not interpreted.

It was pointed out at the argument in this court that the record does not show that the foreman consulted with the other members of the jury before answering the two questions put to them by the learned trial Judge. For myself I feel it only proper to assume that no Judge or Commissioner of Assize of the Supreme Court would have accepted and acted upon the foreman's answers unless the Judge was satisfied that the answers were given after adequate consultation. This assumption is certainly valid in regard to the Judge of long experience both on the bench and as a Senior Law Officer of the Crown who tried the case. My consideration of the arguments urged on behalf of the appellant is certainly based on this assumption.

It was suggested also that even if each member of the jury was consulted before the foreman answered questions put by the trial Judge some or all of the members of the jury may have been reluctant to disclose ignorance of or unfamiliarity with Sinhala, and that the foreman's answer may accordingly not have been a correct answer to the question put. Similar consideration, it was suggested, might have induced counsel for the defence to render an incorrect answer to the questions asked of him by the Judge. For myself again it seems only proper to assume that no juryman empanelled to try a charge of murder and no counsel engaged to defend in a trial for murder would have given any but a correct answer to the question whether his knowledge of the Sinhala language was adequate to enable him to understand sufficiently everything that was said in Sinhala at the trial.

As to the matter of the interpretation into English of all the evidence given at the trial, it is necessary to refer to a note which the learned Judge who tried the case sent to this court with reference to a case previously tried by him (S. C. No. 20 M. C. Panadura 59300/1960) in which, similarly, questions and answers had been framed in Sinhala. In that note the Judge stated :

> " Questions to witnesses were generally addressed directly in the Sinhala language and the answers were also given in that language. Every question and answer was without a single exception translated by the court interpreter into English for the benefit of the stenographer. Such translation was audible to counsel for the defence as well as to the members of the jury. "

Here again I consider it proper to assume that in the present case as well the interpretation into English of questions and answers were in fact audible to the members of the jury. Having regard to my own familiarity with the court in which the trial took place, there is no reason to doubt that whatever the interpreter said when he made his oral translation for the benefit of the stenographers would have been clearly audible to the Judge, jury and counsel. Since it is not at all uncommon for the Judge or defence counsel to question the correctness of the interpreter's oral translation, his interpretation is always listened to by both ; and since the interpreter speaks loud enough to be heard by Judge and counsel he is equally audible to the members of the jury, I must assume that the jury must necessarily have heard the translation.

I feel the more confident in making the assumptions I have just mentioned for the reason that the petition of appeal filed by the appellant makes no single suggestion that what took place in the court was not that which I assume to have taken place.

Sections 254 and 257 of the Criminal Procedure Code read together provide that a person who can speak, read and write English, Sinhalese or Tamil and who possesses an appropriate income or property qualification is qualified and liable to serve as a juror ; and the Fiscal is directed to prepare separate lists of those who are so qualified and liable, the lists to contain respectively the names of persons who can speak, read and write the English language or the Sinhalese language or the Tamil language, as the case may be and the fourth list being of persons selected from the first but possessing a higher income or property qualification. Under the proviso to subsection (1) of *section 257*, a person possessing the necessary qualification in more than one language must, if he expresses a preference for *one* of the lists for which he is qualified, be placed on that list. Under *sections 261* to *264* three panels are drawn for attendance as jurors at each criminal session of the Supreme Court, one panel being drawn from each of the three first lists already mentioned which panels are for convenience referred to as the English-speaking, Sinhalese-speaking and Tamil-speaking panel respectively.

Section 224 provides that the jury shall be taken from the panel elected by the accused unless the court otherwise directs. At the present trial the jury was taken accordingly from the English-speaking panel which as already stated was elected by the accused under section 165 (B).

Section 225 provides that any objection taken to a juror on any specified grounds, if made out to the satisfaction of the court, shall be allowed. Relevant for present purposes are the following grounds :

" (*b*) some personal ground such as deficiency in the qualification required by any law or rule having the force of law.

(*e*) his inability to understand the language of the panel from which the jury is drawn. "

Section 229 provides *inter alia* that " if in the course of a trial by jury at any time before the return of the verdict . . . . it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language into which it is interpreted, the Judge may either order a new juror to be added or discharge the jury and order a new jury to be chosen. "

Apart from these provisions of the Code, counsel for the appellant also relied on the fact that the English language is the language of the court for purposes of record. (Irrespective of the question whether any alteration in this respect has been effected by reason of the enactment of the Sinhala Only Act, No. 13 of 1956, the Attorney-General has conceded that all evidence taken at a trial in a language other than English must be translated into English for purposes of record, and that all orders and acts of the court must similarly be recorded in the English language.

Relying on the material which has been set out above, the argument for the appellant has been that :—

(*a*) in providing for three separate (language) panels of jurors, and in giving the accused a right to elect the panel from which the jury must be drawn for his trial, the Code by necessary implication requires that a person tried by an English-speaking jury must be tried in English, that is to say, that all evidence and proceedings, including addresses, not actually taken or had in English, but in some other language, must be interpreted into English for the jury,

(*b*) in permitting questions and answers to be framed in Sinhala, and in not directing the jury that they must take account only of those questions and answers as rendered into English by the interpreter, the Judge wrongly decided a question of law, and that the conviction must be set aside in consequence.

(*c*) in permitting counsel to deliver addresses in Sinhala, which were not interpreted into English for the jury, the Judge wrongly decided a question of law and the conviction must in consequence be set aside,

(*d*) alternatively, even if the action of the trial Judge referred to in (*b*) and (*c*) above did not constitute a wrong decision on a question of law, the fact that the trial was not conducted in the manner stated at (*a*) above resulted in a miscarriage of justice.

The basic plank of the argument is that the relevant provisions of the Criminal Procedure Code, considered together with the admitted point that English is the language of record of the court, have the necessary implication that all evidence and addresses must be given in the English language or else be interpreted for an English-speaking jury in that language.

In considering this argument, it is useful to notice in the first instance certain provisions of the Code which require interpretation in particular cases. *Section 299*, in dealing with evidence taken at an inquiry before a Magistrate, provides that the evidence of each witness shall be read over to the witness by the Magistrate ; under subsection (3), " if the witness does not understand English the evidence shall be interpreted to him in the language in which it was given " ; again subsection (5) requires that after the deposition has been read over to the witness and when it has been interpreted to him as provided in subsection (3), the Magistrate shall append a certificate to the effect that the deposition was " read over and interpreted to the witness ". This is one of the express provisions which founds the perfectly valid argument that English is the language of record of the court. The section presupposes that evidence given by a witness in any other language will be recorded in English, presumably after interpretation, and will thereafter be re-interpreted into the other language for the purpose of being read over to a witness who does not understand English.

Again *section 302*, which provides for the recording by a Magistrate of a statement made by an accused in the course of an inquiry, requires the statement to be recorded in the language in which he is examined or if that is not practicable, in English ; where the latter course is adopted, his statement as recorded in English must be interpreted to him in a language he understands if he does not understand English.

Section 300 provides that whenever any evidence is given in any language not understood by the accused it shall be interpreted to him in a language understood by him.

What seems to be of significance in the three sections I have just mentioned is that they constitute three instances where the Code expressly requires a record made in English to be interpreted into some other language understood by the witness or accused person concerned.

If it was in the contemplation of the Legislature that evidence given at a trial by a jury drawn from a particular language panel must always be rendered into the language of the panel, it is strange that so important an intention was not declared by express provision in the Code.

The first step in the argument for the appellant is that the division of qualified jurors into three language panels considered together with the right of election conferred by section 165(B), has the result, as a matter of law, and without reference to the needs of any particular occasion, that all evidence not given in English must be interpreted into English for an English-language jury. In brief, it was argued that the division into panels was only a means of carrying out a basic intention that all proceedings must either be had in, or else interpreted into, the language of the panel.

But consideration of *section 254* leaves little doubt in my mind as to the reason why the Legislature was compelled to provide in *section 257* for three different language panels. Despite the fact that English was the language of record, it would have been discriminatory to require a knowledge of English as an essential qualification for jurors; large numbers of educated citizens would have been excluded by such a requirement. But when *section 254* declared that persons who can speak, read and write either English, Sinhalese or Tamil are qualified and liable to serve as jurors, there immediately arose the problem whether it would be practically feasible to have only one list of qualified jurors. If of the seven jurors selected from a single list to try a particular case, all of them did not have adequate knowledge of one common language, would it not have been extremely doubtful whether the necessary consultation could have taken place between the seven in performance of their functions? The difficulty could have been met by prescribing a procedure of investigation and exclusion at the stage of the selection of the jury, in order to ensure that there would finally be empanelled seven jurors who had sufficient understanding of any one language. But the Legislature did not choose to adopt such a procedure, which undoubtedly would involve delay and uncertainty. The difficulty was in fact met by more obvious and simple means, namely by the division of qualified jurors into three language panels, in the reasonable expectation that seven jurors selected from one panel would all understand a common language. The division into the language panels was manifestly dictated by necessity, and when that clear reason for the division is apparent from the provisions of *section 254*, surmise as to other possible reasons is not justified.

The opinion that such was the purpose of the division of jurors into language panels does not, however, obviate the need to consider the nature of the privilege, if any, conferred by the right of election for which *section 165(B)* provides. If that right be not referable to some intention other than that contended for by counsel for the appellant,

the intention for which he contends may have to be accepted. One has therefore to consider whether there should be imputed to the Legislature a more reasonable intention. Once the language panels were established, it may have been thought undesirable to leave to chance the determination of the panel from which to take jurors for a particular trial. One sound reason for the right of election in such a situation would be that in a country where to some extent manners and customs differed in correspondence with differences of language, it might have been thought desirable that the jurors who tried an accused belonging to one of the language groups, if he so opts, should be persons familiar with the manners and customs peculiar to that group. Would it not have been reasonable for the Legislature to think that an accused person would make his election upon such considerations, rather than with the object of securing that evidence or addresses would be given or rendered in some chosen language ? The fact that in the vast majority of cases accused persons do in fact elect to be tried by English-speaking juries does not assist greatly in determining what intention the Legislature had in mind. I much prefer the view that *section 165(B)*, in a context where there had of necessity to be three different language panels, merely conferred a privilege of a nature not substantially different from the right to be tried by one's peers.

Section 225 of the Code refers to peremptory objections to jurors which the court must allow. Paragraph (*b*) appears to refer to objections taken on the ground of the lack of the necessary qualifications and to admit objections of at least two kinds. It is convenient to take first the objection that the juror does not possess the income qualification required by *section 257*, and if the Judge is satisfied as to the lack of that qualification he must sustain the objection. Secondly it can be objected that the juror cannot speak, and/or read, and/or write the language qualifying the person for the appropriate panel. In this connection the Attorney-General argued that a man of twenty one who can speak, read and write the English language in the sense that he was promoted from the 3rd to the 4th standard in an English language school cannot be objected to as lacking the English language qualification prescribed by *section 254*. Having regard to the terms of *section 254*, it certainly seems that in the section the Legislature was merely providing for literacy qualification ; a person able to speak, read and write a language in the sense mentioned by the Attorney-General cannot be successfully objected to under paragraph (*b*) of *section 225*. Literacy in this connection would seem to be opposed only to illiteracy, and accordingly a person who is at all literate in a language does possess the qualification specified in *section 254*. That being so, there may well be a juror who, despite being literate in the language of the panel, should nevertheless not be permitted to function as a juror if in fact his understanding of the language of the panel is so meagre that his participation in the deliberations of the jury would be ineffective ; that eventuality seems to have been provided for by paragraph (*e*) of *section 225*, which permits an objection that the juror

does not understand the language of the panel. Although, therefore, a juror cannot be excluded under paragraph (*b*) on the ground of illiteracy he can nevertheless be excluded under paragraph (*e*) on the ground that he has insufficient understanding of the language of the panel to be able to perform all the functions of a member of the jury. It has to to be noted that *section 225* does not expressly refer to the capacity of a juror to *understand evidence*, but there can be little doubt that if a Judge is satisfied of the existence of such an incapacity as the inability to follow proceedings in court paragraph (*f*) of *section 225* could be called in aid. If it can be shown for instance that a juror is deaf or mentally deficient or generally of low intelligence, paragraph (*e*) would provide a remedy. But *section 225* is not even indirectly concerned with the medium by which the evidence in a trial is communicated to the jury. For example, no objection can be taken under *section 225* to a particular juryman on the ground that much of the evidence will be given in some language not understood by him. The section is therefore of no assistance in deciding whether or not the Law requires interpretation into any language of evidence given in another language.

The only provision in the Code which appears to have a direct bearing on the matter of interpretation is *section 229*. In the present context that section gives the Judge a power to discharge a juror who " is unable to understand the language in which the evidence is given or when such evidence is interpreted the language into which it is interpreted ". The section does not state that evidence *must* be interpreted in any specified circumstances. Analysed, its effect is that a juror may be discharged,

(1) if he does not understand the *language of the witness*, in a case where there is nc interpretation,

(2) if he does not understand *both the language of the witness and also the language of interpretation*, if there is interpretation. But if he does in fact understand either the language of the witness or else the language of interpretation when there is interpretation, the section will not apply. In other words, *if he does understand the language of a witness, section 229 neither authorises his exclusion, from the jury, nor requires interpretation into the language of his panel.*

Let me take the case of a trial before a *Tamil-speaking jury* at which a witness gives evidence in Sinhala. On such an occasion, because of the necessity to maintain the record in English, there would ordinarily be interpretation of the Sinhalese evidence into English. If then the Judge realises that any juror does not understand either Sinhalese or English, *section 229* would apply and the juror would have to be discharged or a new jury empanelled, or else the judge might direct interpretation into Tamil. But if in fact the Judge is satisfied that

all the jurors understand Sinhala, although none of them understand English, the jury will continue to try the case; *section 229* does not say that they cannot.

Similarly in the case of a trial before a *Sinhalese speaking jury*, where a witness gives evidence in Tamil, the Judge is not empowered by *section 229* to discharge a juror if in fact he is satisfied that the juror does understand Tamil. Accordingly a judge would have no power under *section 229* to discharge a member of an English-speaking jury, before which a witness gives evidence in Sinhala, if in fact he is satisfied that the juror does understand Sinhala.

It would seem therefore, whatever be the language of a particular panel, neither *section 225* nor *section 229* enpowers a Judge to discharge any juror on the ground that evidence is given by a witness in a language which is not that of the panel. If, as has been pointed out, a Sinhalese juror who knows no English is competent to function at a trial where evidence is given in Tamil, and a Tamil juror who knows no English is competent to function at a trial where evidence is given in Sinhala, it would follow that an English-speaking juror is competent to function at a trial where the evidence is given in Sinhala, provided he understands Sinhala.

The doubt in the present case therefore appears to arise through a matter not related to the competency or qualifications of the jurors, namely the fact that English is the language of record of the court. If to a Sinhalese or Tamil-speaking jury the language of record is unintelligible, interpretation of evidence into English is purely for the purposes of record and not for the benefit of the jurors. How then can it be said that merely because the language of the panel is English, interpretation into English for the benefit of the jury is a *sine qua non* although it may be clear that the jury do in fact understand the language in which the evidence is given.

The recognised text-books on the construction of statutes contain no comment or citation in support of the argument that the courts must or even may read into the Criminal Procedure Code a mandatory requirement that all evidence at a trial by jury must be interpreted into the language of the panel. Craies, *Statute Law, 5th ed. p. 103*, dealing with construction by implication, states that "if the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions", and proceeds to cite a recent observation of Evershed, M.R.:

> "Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context (*Tinkham v. Perry*, (*1951*) *1 T. L. R. 91 at 92*).

The cases in which construction by implication is permissible or necessary are classified under two heads: *firstly*, " implication to prevent words from being deprived of all meaning ", and *secondly*, " implication where enabling statutes omit some detail ".

Under the first head are instances where it is permissible to supply words which appear to have been accidentally omitted without which existing words have no meaning. In each of the statutes referred to by Craies under this head the court only supplied omissions upon being satisfied that the omission was accidental, and also that the express provision in the statute would be " nonsense " or " of no effect " or " nugatory " unless the omission were supplied by implication.

In dealing with the same matter Maxwell, *Interpretation of Statutes, 10th ed. p. 250*, states that an omission which the context shows with reasonable certainty to have been unintended may be supplied. The authorities, it is said, " establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that this amendment probably does ". The principle here stated would admirably fit the situation which would have arisen if *section 299* of the Code contained no subsection (3). In such a situation, it would have been a manifest absurdity and injustice for the section to require evidence to be read to a witness in the language of record if that language is not understood by him. The courts therefore must necessarily have determined that the important object which the Legislature had in view, when it expressly required the evidence of a witness to be read to him, could not be achieved unless there was implied an intention that the reading must be so done that the witness would understand what was read.

No proper parallel can be drawn between the accidental omissions of the nature dealt with in Craies *Statute Law* under the first head and what was alleged on behalf of the appellant to have been omitted from our Code. What is said here to have been omitted is not some matter supplementary or ancillary to an object clearly expressed, but rather the object itself.

Under the second head of cases of construction by implication Craies instances a statute passed for the purpose of enabling something to be done, but which omits to mention in terms some detail of great importance to the proper and effectual performance of the work which the statute has in contemplation. In the cases under this head in which the courts have intervened, the intervention has only been for the purpose of implying some matter without which the expressed purpose of the Legislature could not be effectively carried out. Considering the problem now before us from this aspect there is not in the Criminal

Procedure Code any express provision manifesting some purpose of the Legislature in relation to which it can properly be said that such purpose cannot be achieved unless it is implied that all the evidence must necessarily be interpreted into the language of the particular panel.

Maxwell, *Interpretation of Statutes, at p. 370*, points out that a statute which confers judicial powers is understood as silently implying, when it does not expressly say so, the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure. To say that a proceeding has not been in accordance with the principles of natural justice means that there has been a breach of one of these fundamental rules. Maxwell mentions the rule which requires that the person sought to be prejudicially affected should have an opportunity of defending himself. Equally fundamental would be the rule embodied in *section 300* of our Code that an accused person must know the evidence against him, and the rule that a jury must understand the evidence given at a trial before it.

Undoubtedly it would be both absurd and unjust that at a trial by jury any evidence should be taken which is not understood even by one juror, and the practice of our courts whereby evidence given in some language other than that of the panel has always been interpreted into the panel's language was designed to avoid such absurdity or injustice. But however well entrenched that practice may be, the reason for adopting or following it could not have been that the Code by necessary implication required interpretation *in all cases* into the language of the panel. The reason which justified the practice was rather that the jury must understand the evidence; and if a jury is capable of understanding the evidence without interpretation, there would be no compelling reason necessitating the delay and expense of interpretation. The most that one can read into the Code by way of implication in this context is a fundamental rule that the evidence is understood by the jury. Natural justice would not necessitate any arbitrary rule that evidence must be interpreted into any particular language, but would certainly require interpretation if evidence would not otherwise be understood by a jury.

The simple question therefore is whether the learned trial Judge properly accepted the statement of the foreman of the jury that the members of the jury understood Sinhala well enough to follow evidence given in Sinhala and the addresses delivered in Sinhala. Reasons have already been stated above for the opinion that in the absence of any suggestion to the contrary, upto the stage of the hearing of this appeal, that the answers given by the foreman at the commencement of the trial and the Judge's satisfaction with those answers leave no room now for any doubts upon that question.

I have had the advantage of reading the judgment proposed by my brother Weerasooriya. For the reasons stated above I do not agree that the provisions of the Criminal Procedure Code " necessarily imply

that proceedings at a trial by jury in the Supreme Court shall be held either in the language of the panel from which the jury is drawn or be interpreted into that language", nor that "the delivery of addresses by Crown Counsel in Sinhala was not in accordance with the law governing the procedure at a trial by a jury drawn from an English-speaking panel". But assuming that the views of my brother on this matter be correct, I agree that the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should be applied in the circumstances of this case.

I would dismiss the appeal.

L. B. DE SILVA, J.—

I agree with the judgment of the Hon. the Chief Justice, the President of the Court.

Appeal dismissed.