[COURT OF CRIMINAL APPEAL]

1973 *Present :* **H. N. G. Fernando, C.J. (President), Wijayatilake, J., Deheragoda, J., Walgampaya, J., and Wimalaratne, J.**

R. C. RAJAPAKSE and others, Appellants, *and* THE STATE, Respondent

APPEALS NOS. 4-8 OF 1973, WITH APPLICATIONS 4-8

S. C. 427/71—M. C. Maho, 22825

Criminal Procedure Code—Sections 230, 330—Verdict of Jury—Failure of Jury to understand directions of law concerning a difficult topic—Prejudice caused to the accused in regard to certain serious charges against them—Power of Court to discharge the Jury then —Whether pleas of autrefois acquit *or* convict *can be raised at the second trial—Plea of* autrefois acquit*—Whether it must be tried by the Jury.*

Five persons were indicted before the Supreme Court upon charges, *inter alia,* of unlawful assembly and of the murder of two persons A and B committed by one or more members of that unlawful assembly. The Jury, however, found all the accused guilty of the murder of A but returned a verdict of culpable homicide only against the 4th and 5th accused in respect of the death of B. The verdict brought by the Jury showed that the Jury had not understood the directions of law concerning the difficult topic of vicarious criminal liability. The Jury was then discharged and a fresh trial was held, at which the accused were convicted on both the former charges.

Held, that, at the first trial, there was established such confusion in the minds of the Jury that it was quite unsafe to accept from the Jury a verdict involving the imposition of sentences of death on five persons. The Jury was therefore properly discharged by the Judge in the exercise of the powers conferred on the Judge by section 230 of the Criminal Procedure Code to discharge the jury whenever in the opinion of the Judge the interests of justice so require. In the circumstances there was in law neither a conviction nor an acquittal at the first trial and no plea of *autrefois acquit* or *convict* could arise for decision at the second trial.

Quaere, whether the plea of *autrefois acquit* is one that must be tried by the Jury in a case before the Supreme Court.

APPEALS against five convictions at a trial before the Supreme Court.

G. E. Chitty, with *A. C. de Zoysa, Sarath Muttetuwegama, Justin Perera, G. E. Chitty* (Jnr.), *G. L. M. de Silva, Everard Ratnayake* and *J. N. David* (assigned), for the accused-appellants.

Noel Tittawella, Deputy Solicitor-General, with *T. M. K. U. Seneviratne,* Senior State Counsel, and *D. S. Wijesinghe,* State Counsel, for the State.

Cur. adv. vult.

September 25, 1973. H. N. G. FERNANDO, C.J.—

This appeal was set down for hearing before the present Bench of five Judges of this Court, because the Bench of three Judges before whom the appeal had been earlier listed felt it desirable that a statement of the law expressed in some previous decisions is worthy of re-consideration. The statement was (as far as we are aware) first made in the judgment of this Court in the case of *Handy,*[1] 61 N. L. R. 265 at p. 271.

> "The plea of autrefois acquit when pleaded is one that must be tried and disposed of before the issues raised by the other pleas are tried (s. 330 (2)). *The plea is one that must be tried by the Jury in a case before the Supreme Court.*"

[1] *(1959) 61 N. L. R. 265 at p. 271.*

The circumstances of the case of *Handy* are briefly as follows :

The appellant was tried on two charges, of the murder of one person and the attempted murder of another. At the conclusion of the summing-up by the trial Judge, the Jury retired to consider their verdict; and upon their return they stated in answer to the usual questions from the Clerk of Assize that by their unanimous verdict they found the prisoner not guilty of the offence of murder and also not guilty of the offence of attempted murder. The trial Judge then immediately stated: " Don't record this verdict. I refuse to accept this verdict. " The Judge thereafter made an order in which he quite clearly stated his view that the defence in the case was palpably false, and that the Jury had obviously not understood his directions on the law and on the evidence. The Jury was then discharged and a fresh trial was held, at which the prisoner was convicted on both the former charges.

In the judgment of this Court (delivered by Basnayake, C.J.) the questions for decision in the appeal were stated as follows :—

(*a*) Is the trial Judge right in refusing to permit the verdict to be recorded at the earlier trial ?

(*b*) If he is not, has the appellant been acquitted at the first trial of the offences of murder and attempted murder ?

(*c*) If so, does the failure of the appellant at the second trial to raise the plea that by virtue of Section 330 of the Criminal Procedure Code he is not liable to be tried preclude this Court from examining the legality of the action taken by the trial Judge at the previous trial ?

The judgment proceeded to refer to various provisions of the Code concerning the relative functions of Judge and Jury and held as follows :—

> " In the instant case the Jury having, as they are empowered by the Code to do (s. 245 (a), decided which view of the facts is true and returned a verdict which under that view ought according to the directions of the Judge to be returned, it cannot be said that the interests of justice require that they should be discharged without their verdict being recorded as provided in section 249 ..... "

Having thus decided that the order discharging the Jury was unjustified, the judgment further held that effect could be given to the verdict of acquittal returned by the Jury at the first trial, even though that verdict had not been formally recorded and signed as provided in S. 249. Accordingly, this Court thereafter ordered a judgment of acquittal to be entered.

We are thus far in entire agreement with the judgment in *Handy's* case.

We note however that the passage in the judgment in *Handy's case* which we have earlier cited, to the effect that the plea of autrefois acquit " is one that must be tried by a Jury in a case before the Supreme Court ", consists of an observation which was *obiter* in the circumstances of that case. The result of the decision that the order discharging the Jury was unlawful had the effect of reviving the verdict of acquittal actually returned at the first trial. Thus there was no necessity for this Court in *Handy's case* to decide whether it be Judge or else Jury who should try a plea of *autrefois acquit* or *autrefois convict.*

In the case of *Geedrick*[1] (63 N. L. R. 303), this Court again stated that a trial Judge had acted without jurisdiction in himself trying a plea of *autrefois convict* and in not allowing the plea to be tried by the Jury. Although a great part of the judgment in this case dealt with the matter of *autrefois convict,* the ultimate decision in appeal was stated thus :—

> " In regard to trial upon the indictment the accused has been acquitted on counts 1, 2 and 3, all of which depend on the inference which may properly be drawn from the recent possession of property which had been stolen from M. P. Gomez and Company. It is difficult to reconcile his acquittal on counts 1, 2 and in particular count 3, with his conviction on counts 4 and 5. We think that his convictions on counts 4 and 5 are unreasonable and we accordingly quash those convictions and direct that a judgment of acquittal be entered in respect of counts 4 and 5. "

Thus we see that in *Geedrick's* case also, there was no necessity for the statement that a plea of *autrefois acquit or convict* must be tried by the Jury. Indeed, it is not clear from the judgment what order this Court would have made in the appeal, if the convictions had not been quashed as being unreasonable.

We pass now to consider the circumstances of the instant case, and whether in such circumstances any plea of *autrefois acquit or convict* did arise for decision.

Five persons were tried in November 1972 upon an indictment charging them on seven counts. At the conclusion of the trial the Jury returned a verdict by which they convicted all five accused on the first count of unlawful assembly, on the 2nd count of mischief committed by one or more members of the unlawful assembly, and on the 3rd count of the murder of one Muthuwa committed by one or more members of that unlawful

[1] *(1959) 63 N. L. R. 303.*

assembly. The 4th count was also a charge of murder of one Elli by one or more members of the same unlawful assembly, but on this count the Jury returned a verdict of culpable homicide only against the 4th and the 5th accused. It is not necessary for present purposes to specify the findings on the remaining counts. After the verdicts were returned, State Counsel suggested to the learned Commissioner that the finding on count 4 and on certain other counts showed some confusion in the minds of the Jury and that he may ask them to reconsider their verdict. Counsel for the defence then stated that he did not think that this course would be proper. After some further discussion between Judge and Counsel, Counsel for the defence formally moved for a discharge of the Jury and for an order of retrial.

The learned Commissioner at first refused this application, and he proceeded to direct the Jury a second time under s. 248 (2) of the Code. The Jury retired after these fresh directions, but the Judge was apparently not satisfied with the course which he had taken, and within a few minutes he recalled the Jury and discharged them. There was thereafter a second trial at which the plea of *autrefois acquit* was taken, but this was rejected by the Court. At the conclusion of the second trial all the accused were found guilty on counts 1 to 4, which included the two counts of murder committed by one or more members of an unlawful assembly. In these circumstances the first question which arises is whether s. 230 of the Code authorised the discharge of the first Jury on the ground that the verdict which they returned showed confusion in their minds regarding the law applicable to the case and the evidence which had been adduced.

On the first, second and third counts, the Jury at the first trial decided that all five prisoners had been members of the same unlawful assembly ; on the third count the Jury also decided that the murder of Muthuwa had been committed by one or more members of that assembly, and accordingly in compliance with the relevant law they convicted all five prisoners of murder on this count. The verdict on the 4th count also indicated a finding that the death of Elli was caused by one or more members of the same unlawful assembly ; on this finding, all five prisoners were (as in the case of the 3rd count) liable for causing Elli's death and should have been convicted of some offence on the 4th count. The fact that the Jury convicted only 2 prisoners on this count indeed showed that the Jury had not understood the directions of law concerning the difficult topic of vicarious criminal liability. It was undoubtedly for this reason that Counsel for the defence (a practitioner of much experience), and ultimately the learned Commissioner himself, felt it unsafe

to act upon the verdict of murder on Count 3 which in fact the Jury had returned in respect of all five prisoners. If the Jury misunderstood the law when considering their verdict on Count 4, their conviction of all five prisoners on the 3rd count of murder might equally have been due to a misunderstanding of the law. We ourselves think that when there is established such confusion in the minds of the Jury as was obviously present in this case, it is quite unsafe to accept from that Jury a verdict involving the imposition of sentences of death on five persons. In such a situation it is eminently in the interests of the prisoners against whom so grave a verdict has been returned that they be permitted the advantage, which their counsel sought, of a fresh trial by a different Jury.

It is manifest from statements made in *Handy's* case by the trial Judge that he discharged the Jury because they returned verdicts of acquittal, instead of the verdicts of guilty which his own view of the facts would have justified.

In *Ekmon's* case[1] (67 N. L. R. 49), the trial Judge declined to accept a verdict of simple hurt returned on a count charging murder, because on his view of the facts the Jury should have found the accused guilty of a more serious offence.

In *Arnolis Appuhamy*[2] (70 N. L. R. 256) the trial Judge discharged a Jury which returned a verdict of culpable homicide, because in his view of the facts the accused could not have acted in self-defence.

In each of these cases, this court held that the trial Judge should have accepted verdicts favourable to the accused, instead of acting upon less favourable views of the facts entertained by the Judge himself.

We agree that it is not in the interests of justice for a trial Judge to deprive an accused of the benefit of a favourable verdict for the reason that his views of the facts are less favourable.

The circumstances of the instant case are as different as they could possibly be. Here the Jury had already returned a verdict (on the third count of murder) which if accepted by the learned Commissioner inevitably called for the pronouncement of five sentences of death. There was nothing favourable in that verdict, of which the prisoners were deprived, by the course taken by the learned Commissioner.

One of Mr. Chitty's early submissions was that the order discharging the Jury in this case was contrary to precedent. That submission had to be abandoned for obvious reasons.

[1] *62) 67 N. L. R. 49.* [2] *(1967) 70 N. L. R. 256.*

Mr. Chitty ultimately argued that once the learned Commissioner acted under s. 248 (1) of the Code, and directed the Jury a second time, he had no "jurisdiction" to stop the process which he had thus set in motion, and he had necessarily to await and accept the second verdict which the Jury had been invited to return. We are quite unable to agree that the power conferred by s. 230 to discharge a Jury "whenever the interests of justice so requires" is thus limited. What is obvious is that the learned Commissioner was himself not satisfied that his fresh directions would suffice to clear the minds of the Jury of the confusion which had previously prevailed, and that he ultimately agreed with the submission of defence counsel that the interests of justice required that the prisoners have the benefit of a trial by a different Jury.

We hold for these reasons that the Jury was properly discharged in the exercise of the powers conferred by s. 230 of the Code. That being so, there was in law no verdict upon which a plea of *autrefois convict* could be based ; and it is nearly absurd to think that a plea of *autrefois acquit* could be maintained considering that the Jury returned a verdict of murder against all five prisoners on one of the counts. Thus in our opinion there was in law neither a previous conviction nor a previous acquittal, and any question as to whether such a plea should be tried by a Judge or else by Jury does not arise for decision in this appeal.

We do not consider that any other questions of law or fact which may be raised in this appeal need be decided by the present Bench. The appeal will now be set down for hearing in the ordinary course.

Appeal to be listed for further hearing.