1973 *Present :* **Wijayatilake, J. and Pathirana, J.**

THE SOLICITOR-GENERAL, Appellant *and* NADARAJAH MUTHURAJAH, Accused-Respondent

S. C. 6/73—D. C. Mannar, 212

1. *Criminal Procedure Code, section 338 (2)—Computation of time within which an appeal must be preferred—Whether from date of verdict or date on which judgment was delivered.*

The District Judge at the conclusion of the trial delivered his verdict on 27th April, 1973 finding the accused not guilty. He did not deliver the reasons on that day but put if off for 10th May, 1973, on which date under the heading of 'Judgment' he delivered his reasons for acquitting the accused. The Solicitor-General filed petition of appeal on 11th June, 1973. Preliminary objection was raised on behalf of the respondent that the appeal was filed out of time by reason of the provisions of section 338 (2) of the Criminal Procedure Code.

Held : That the period of time within which an appeal should be preferred must be calculated from the date on which the reasons for the decision are given and not from the date on which the verdict was entered.

Haramanis Appuhamy v. *Inspector of Police, Bandaragama,* 66 N.L.R. 526 followed.

Kershaw v. *Rodrigo, 3* C.W.R. *44, King* v. *De Silva, 3* C.W.R. *235* and *Jones* v. *Amaraweera,* 41 N.L.R. 263 not followed.

2. *Appeal—Power of Appellate Court to interfere with order of a lower Court on a question of fact—Grounds on which it could so interfere.*

Held : That an appellate Court has the power to review at large the evidence upon which the order of acquittal was founded and to reverse that decision having given due weight to the opinion of the trial judge. A court is justified in interfering with the lower Court's decision where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts.

Cases referred to :

Kershaw v. *Rodrigo, 3* C.W.R. *44.*
King v. *de Silva, 3* C.W.R. *235.*
Jones v. *Amaraweera,* 41 *N.L.R.* 263 ; 15 *C.L.W.* 18.
Haramanis Appuhamy v. *Inspector of Police,* 66 *N.L.R.* 526.
Sheo Swarup v. *King Emperor,* AIR 1934 P.C. 227.
Benmax v. *Austin Motor Co. Ltd.,* (1955) 1 All E. R. 326.

S. L. Gunasekera, State Counsel for the appellant.

S. Sharvananda with *S. Mahenthiran* for the accused-respondent.

Cur. adv. vult.

November 22, 1973. PATHIRANA, J.

The Solicitor-General appeals against the order of acquittal made by the District Judge in this case where the accused-respondent was charged: (1) with having on the 4th of July, 1970 being a Public Servant, to wit: a Grama Sevaka, solicited a gratification of a sum of money from D. Dhanapala, an offence punishable under Section 19 of the Bribery Act; (2) with having on the 24th of July, 1970, accepted a gratification of a sum of Rs. 50 from the said D. Dhanapala, an offence punishable under Section 19 of the Bribery Act.

The learned District Judge at the conclusion of the trial on 13.3.1973 put off the case for addresses for 30.3.1973. On 30.3.1973 as State Counsel was ill the case was put off for 26.4.1973. On 27.4.1973 the learned District Judge by his verdict found the accused not guilty and acquitted him. He did not deliver the reasons on that day as some of the documents marked by the prosecution had not been filed of reocrd and this was brought to his notice only that morning. Reasons were put off for 10.5.1973. On 10.5.1973 under the heading 'Judgment' he delivered his reasons for acquitting the accused.

The petition of appeal was filed by the Solicitor-General on 11.6.1973.

At the argument before us learned Counsel for the accused-respondent, Mr. Sharvananda, raised a preliminary objection that the appeal was filed out of time, and therefore, it should be rejected. His contention was that under Section 338 (2) of the Criminal Procedure Code the period of 28 days within which the petition of appeal must be preferred should be calculated from the date the verdict was delivered, which he submitted was the date when judgment was delivered, and as such the appeal was preferred out of time. Learned State Counsel, Mr. Gunesekera, on the other hand submitted that the period of 28 days should be calculated from the date on which the judgment, namely the reasons, were delivered, that is, 10.5.1973, in which event the appeal was preferred in time.

Mr. Sharvananda relied on *Kershaw* vs *Rodrigo,* 3 C.W.R. 44, where Ennis J., held : " that in a case of an acquittal (that is the record of a verdict or finding of not guilty) the pronouncement of the fact is the judgment." He considered section 304 and 306 of the Criminal Procedure Code and however observed :—

> " From Section 306 it would seem that the judgment is something other than the reasons for the decision for the reasons have to be recorded in the judgment and only in cases where there is an appeal, while Section 304 indicates that the judgment is not necessarily contained in the verdict. "

He goes on to say that :—

> " A finding of not guilty is final and the record of it is a verdict, and an order and is final on being pronounced as nothing more remains to be done to conclude the proceedings. "

He then proceeds to draw a distinction in the case of a finding of guilt and states that :—

> " there are clear indications in the Code that finality is not reached till sentence is pronounced ; " and that, " In the case of a conviction the judgment must necessarily follow the conviction in a separate pronouncement. "

Ennis J., in *King* vs. *De Silva,* 3 Ceylon Weekly Reporter 235 held :—

> " Where the District Judge recorded a judgment convicting the accused and sentencing him to a fine and gave the reasons for his decision the following day, that the computation of the time within which an appeal should be preferred, must be made from the date on which the conviction and sentence were recorded and not from the date on which the reasons for the decision were given. "

The principal laid down in these two cases was followed by Soertsz, A. C. J., in *Jones* vs. *Amaraweera,* 41 N. L. R. 263 who held that :—

> " The computation of time within which an appeal should be preferred must be made from the date on which the conviction and sentence were recorded and not from the date on which the reasons for the decision were given. "

The learned State Counsel, however, relied on the decision of Sri Skanda Rajah, J., in the case of *Haramanis Appuhamy vs. Inspector of Police, Bandaragama,* 66 N.L.R. 526 where he held not following *Jones* vs. *Amaraweera* that :—

> " Where an accused person is convicted and sentenced, the time within which an appeal should be preferred must be computed from the date on which the reasons for the decision are given, and not from the date of conviction and sentence. "

Having examined these cases and also the relevant sections of the Criminal Procedure Code, I prefer to follow the judgment of Sri Skanda Rajah, J., in *Haramanis Appuhamy* vs. *Inspector of Police, Bandaragama.*

Under Section 338 in Chapter XXX of the Criminal Procedure Code subject to certain provisions any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court or District Court in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment for any error in law or in fact by lodging within 10 days from the time of such judgment or order the petition of appeal addressed to the Supreme Court. Under Section 338 (2) subject to the provisions of Section 335, the Attorney-General may prefer an appeal to the Supreme Court against any judgment or final order pronounced by a Magistrate's Court or District Court in any criminal case or matter and where he so appeals, or where he sanctions an appeal, the time within which the petition of appeal must be preferred shall be 28 days.

Under Section 336, "there shall be no appeal from an acquittal by the District Court or Magistrate's Court expect at the instance or with written sanction of the Attorney-General. " Under section 393 this power may be exercised by the Solicitor-General.

I have next to consider Section 304 of the Criminal Procedure Code which states that :—

> " The judgment in every trial under this Code shall be pronounced in open Court either immediately after the verdict is recorded or at some subsequent time of which due

notice shall be given to the parties or their pleaders, and the accused shall if in custody be brought up or if not in custody shall be required to attend to hear judgment delivered except when his personal attendance during the trial has been dispensed with and the sentence is one of fine only."

In my view Section 304 draws a clear distinction between a verdict which is a finding where the accused is guilty or not guilty of the charge and the judgment.

Under Section 190 in the Magistrate's Courts at the conclusion of a trial, the magistrate shall record a verdict of acquittal or guilt. Likewise under section 214 at the conclusion of the trial in the District Court, the District Judge shall forthwith or within not more than twenty-four hours record a verdict of acquittal or conviction.

Section 304 which is the first Section in the Chapter XXIV headed 'Of the Judgment', states that, 'The judgment in every trial under this Code shall be pronounced in open Court.' In my view, therefore, both in the Magistrate's Court and District Court the Code speaks not only of the verdict, but also requires that in every trial under the Code a judgment shall be pronounced in open Court.

Section 306 then proceeds to say what the judgment shall contain. Section 306 (1) is a very important section in this connection. It says that:—

"The judgment shall be written by the District Judge or Magistrate who heard the case and shall be dated and signed by him in open Court at the time of pronouncing it, and *in cases where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*"

I, therefore, agree with Sri Skanda Rajah, J., when he states that, "This would clearly indicate that in cases where appeal lies the point or points for determination should be set out and the reasons for the decision should also be given. If one gives this interpretation to the word "judgment" in section 338 (1)

one cannot resist the conclusion that an appeal can be filed within 10 days of the delivery of the reasons (judgment) ". I may add that in the case of an acquittal there is no appeal by an aggrieved party unless it is at the instance or with the sanction of the Attorney-General. It would be certainly impossible for the Attorney-General to consider the question whether he should appeal or sanction an appeal unless he had not only the verdict of the Court, but also reasons of the Court, and the party dissatisfied with the verdict in a case cannot set out the reasons for his asking the Attorney-General for his sanction to appeal unless he peruses the reasons given by the Court in the judgment.

I do not see any reason also for the distinction that was sought for by Mr. Sharvananda that in the case of an acquittal the period within which an appeal should be filed should be reckoned from the date the verdict was given, whereas in the case of a finding of guilt it should be from the date the reasons are given. This was apparently the view taken by Ennis J., in *Kershaw* vs. *Rodrigo*. In view of the express provision of section 306 (1) that, " in cases where appeal lies, the judgment shall contain the point or points for determination a decision thereon and the reasons for the decision," I do not see any reason for this distinction.

I would, therefore, hold that in reckoning the time within which an appeal should be preferred to the Supreme Court, the word " judgment " in section 338 means, the date on which the reasons for the decision are given. The preliminary objection is, therefore, over-ruled.

An Appeal Court is, no doubt, reluctant to interfere with an order of acquittal, but at the same time I must say that the Criminal Procedure Code draws no distinction regarding the powers of this Court in dealing with the appeal from an order of acquittal and an appeal from a conviction. The rules and principles which should generally guide an Appellate Court in interfering on a question of fact with an order of acquittal are set out by the Privy Council in the case of *Sheo Swarup* vs. *King Emperor*, AIR 1934 P. C. 227. Lord Russel of Killowen in delivering the judgment of the Privy Council observed that there was no foundation for the view that the Appellate Court

has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court has "obviously blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice or has in some other way so conducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result." I would adopt the words of Lord Russel when he considered the corresponding provisions of the Indian Criminal Procedure Code in this connection with the necessary changes in the context and state that under our Code this Court has full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code, and before reaching its conclusions upon facts, this Court should and will always give proper weight and consideration to such matters as:—

(1) "the views of the trial Judge as to the credibility of the witnesses";

(2) "the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial.";

(3) "the right of the accused to the benefit of any doubt"; and

(4) "the slowness of an Appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

Different phraseology has been used in describing the grounds upon which an Appeal Court interferes with an order of acquittal such as:—

(1) "Substantial and compelling reasons";
(2) "Good and sufficient cogent reasons";
(3) "Strong reasons";
(4) "Manifestly wrong conclusions."

But these epithets have been never intended to curtail the power of an Appellate Court in an appeal against an acquittal to review the entire evidence and come to its own conclusions, but merely serve as guide lines.

Learned State Counsel has brought to our notice instances in this case where the learned District Judge has misdirected himself on questions of fact, drawn wrong inferences and failed to evaluate the evidence. In particular, he strongly urged for our consideration the failure of the trial Judge to consider the evidence of an important prosecution witness B. C. Abeyratne, the Police Sergeant, who accompanied witness Dhanapala and, who was an eye witness to the crucial event in the case, namely, the handing over of the bribe of Rs. 50 to the accused. The evidence of Abeyratne, if accepted, would constitute strong corroborative evidence of witness Dhanapala. According to Abeyratne he was requested by Inspector of Police Moorthy, also a witness for the prosecution to accompany Abeyratne. He was given Rs. 50 in ten rupee notes after their numbers were noted down. He was instructed to go with Dhanapala to the accused's house and to pose as Dhanapala's brother and discuss about the land and give the money if the accused demanded the money. When they met the accused he asked Dhanapala whether he brought the money. The accused asked for Rs. 100, but Dhanapala said that he could not give the money. Whereupon the accused asked for Rs. 50. Dhanapala asked the accused whether if he gave Rs. 50 he would get the permit for the land. The accused replied that it was alright. Dhanapala then asked him for the Rs. 50 and Dhanapala gave this money to the accused. The accused called one Thurairajah and handed over the money to him. The accused next called for one Rasiah and talked something with Thurairajah and Thurairajah gave Rs. 10 out of the Rs. 50 to Rasiah. Rasiah took the Rs. 10 and went behind the house. A signal was given to Inspector Moorthy, who came to the spot when Dhanapala and Abeyratne narrated to Moorthy what happened. Thurairajah was searched and Rs. 40 was found in his pocket, the numbers of which tallied with the numbers which Moorthy had noted down in his notebook. The accused tried to escape and a crowd collected.

Inspector Moorthy in his evidence said that when he received the signal from Abeyratne, he went to the spot ,and saw a person running away from the rear of the compound. This was presumably Rasiah. He supported Abeyratne's evidence that when Thurairajah was searched Rs. 40 was found in his shirt pocket, the numbers of which tallied with the numbers which he had noted down.

The accused in his defence stated that Dhanapala and another person, who was a member of the Bribery Squad, came up to him. Dhanapala held out a bundle of notes and stretched towards him and asked him to take it. He did not take the money. Then the other person, that is, witness Abeyratne, took the bundle of notes from Dhanapala's hands and put it into Thurairajah's pocket and asked him to take it. Thurairajah told him that he was forced to take the money and, therefore, he took it. The accused admitted that he gave Rs. 10 to Rasiah asking him to buy a bottle of arrack and Rasiah left with the Rs. 10.

The defence called Thurairajah. No doubt, he supported the accused's version, and also the evidence of the prosecution that the sum of Rs. 40 was taken from his pocket. He was contradicted by his statement to the police, which is marked P6, wherein he had stated that two persons came and gave money to the accused. The accused gave that money to him. The accused then called Rasiah and took Rs. 10 from him (Thurairajah) and gave it to Rasiah. Despite this very material contradiction in the evidence of Thurairajah, the learned District Judge, in the course of his judgment observed as follows:— "The fact that the money had been recovered in the possession of Thurairajah (who was not called by the prosecution but called by the defence) lends support to the defence version that the money in fact had been handed over to Thurairajah. Otherwise there is no reason why the accused did not have the money in his possession." Although the statement P6 proved as a contradiction. is not substantive evidence, but it is certainly evidence which discredits the testimony of Thurairajah on a very material point. Dealing with this aspect of the matter the learned District Judge states:— "Although Thurairajah has been contradicted by his former statement to the police, the fact remains that Thurairajah had not supported the case for the prosecution and, therefore, *there is no corroboration by best evidence of the fact that the money had been handed over to Thurairajah by this accused.*" I must say that the learned District Judge had come to a conclusion which is manifestly wrong and which is not supported by the evidence in the case.

There was the evidence of Sergeant Abeyratne which, if accepted, supports the evidence of Dhanapala that money was handed over to the accused and the accused thereafter handed over the money to Thurairajah. The learned District Judge has completely ignored the evidence of Abeyratne in this connection and failed to consider his evidence, which, if accepted, strongly corroborates Dhanapala's evidence in this regard. I find no reason given in the judgment why the evidence of Abeyratne should be completely ignored when he was in a sense an independent witness to the transaction. He has not examined and considered the evidence of this eye witness bearing on the main incident in the case and attached no value at all to this evidence. This itself is, to my mind, a substantial and compelling reason for interfering with the verdict of acquittal.

There is, therefore, no question which arises regarding the credibility of the evidence of witness Abeyratne in this case because the learned District Judge had failed to consider his evidence at all. I am justified in interfering with the finding of the learned District Judge also on the principle set out by Lord Reid in *Benmax vs. Austin Motor Co., Ltd.,* (1955) Volume 1 A.E.R. 326 : " Where there is no question of the credibility of the witness, but the sole question is the proper inference to be drawn from specific facts, an Appellate Court is in as good a position to evaluate the evidence as a trial Judge, and should form its own independent opinion, though it will give weight to the opinion of the trial Judge."

I am, therefore, of the view that the learned District Judge came to a manifestly wrong conclusion in acquitting the accused in this case There are substantial and compelling reasons before us to set aside the order of acquittal. In doing so, I am mindful of the rules and principles I have quoted above.

I, therefore, set aside the order of acquittal. Learned State Counsel submitted that he did not seek to substitute a verdict of conviction instead, but was satisfied if we order a re-trial. We, therefore order a re-trial of the accused-respondent on the charges in the indictment before another District Judge.

WIJAYATILAKE, J.—I agree.

Re-trial ordered.