[COURT OF CRIMINAL APPEAL.]

1946 *Present:* **Soertsz A.C.J. (President), Wijeyewardene and Canekeratne JJ.**

THE KING *v.* BEYAL SINGHO *et al.*

Appeals 48-50, with Applications 184-188.

S. C. 117—M. C. Chilaw, 25,756.

Bias—Suspicion of bias on part of trial Judge—Circumstances when such suspicion cannot vitiate trial—Requirement of proof of miscarriage of justice—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 5 (1).

Where the trial Judge had, prior to his appointment as Judge and while officiating as Attorney-General, advised the committing Magistrate with regard to the recording of evidence as against the sixth accused who was subsequently acquitted at the trial—

Held, that the conviction of the first five accused should not be quashed in the absence of the slightest suggestion that there had been any miscarriage of justice by reason of the fact that the trial Judge had in his capacity as Attorney-General advised the committing Magistrate in respect of the sixth accused in the circumstances aforesaid.

APPEALS, with applications for leave to appeal, against five convictions in a trial before the Supreme Court.

F. A. Hayley, K.C. (with him *G. E. Chitty*), for the accused, appellant.—The presiding Judge, when he was Attorney-General, had advised the Magistrate in the matter of committing the sixth accused for trial in this case. That means at a certain stage in the case he was acting as the prosecutor. Therefore the conviction of all the accused is bad in that there is a violation of the well recognized principle that the prosecutor should never be the Judge in his own case. The fact that the sixth accused was acquitted and the fact that no prejudice has been caused to the accused makes no difference. Even if there is no miscarriage of justice the confidence of the public in the administration of justice should be maintained. For that purpose it is of importance that justice should not only be done but manifestly and undoubtedly seen to be done. See *Dingiri Mahatmaya v. Mudiyanse*[1]; *Dyson v. Kanagamma*[2]; *Ratemahatmaya v. Ranasinghe*[3]; *Rex v. Sussex Justices, ex parte MacCarthy*[4]; *The King v. Essex Justices, ex parte Perkins*[5]; *Regina v. Milledge and others, Justices of Weymouth*[6].

H. A. Wijemanne, C.C., for the Attorney-General.—The Judge when he was Attorney-General only considered the effect of section 297 of the Criminal Procedure Code and instructed the Magistrate that it was not necessary to re-record the evidence, already recorded in the absence of

[1] *(1922) 24 N. L. R. 377.*
[2] *(1930) 31 N. L. R. 473.*
[3] *(1934) 14 C. L. R. 2.*
[4] *(1924) L. R. 1 K. B. 256.*
[5] *(1927) L. R. 2 K. B. 475.*
[6] *(1879) 40 L. T. 748.*

the sixth accused, for the purpose of committing the sixth accused for trial. The sixth accused has been acquitted and obviously no prejudice has been caused to any accused at all.

The jurisdiction of this Court has been conferred on it by the Court of Criminal Appeal Ordinance, and consequently this Court cannot exercise any powers other than those given by that Ordinance. This Court has no revisionary or residuary powers like the Supreme Court. Section 5 of that Ordinance is the relevant section in this case, and under that section, apart from other grounds which do not arise in this case, this Court can only allow an appeal if there has been a miscarriage of justice. Clearly there is no miscarriage of justice in this case.

In the cases of *Stephen Sharman alias Henry Sutherland*[1]; *Berkerly Bernard Bennet and Arthur John Edward Newton*[2], it was held that where the trial Judge sat on the Court of Criminal Appeal the Court had a discretion whether to grant an adjournment or not on that ground.

Hayley, K.C., in reply.—The English cases do not apply. Apart from the fact that there is nothing which prohibits the trial Judge sitting in the Board of Appeal he would sit in either case as Judge, but in the present case the trial Judge, when he was Attorney-General, acted as prosecutor.

Cur. adv. vult.

December 16, 1946. WIJEYEWARDENE J.—

Six accused were charged in this case on various counts under sections 140 and 144, and sections 316 380, 382 and 383 read with section 146. After trial, the sixth accused was acquitted and the other accused were convicted on all the counts.

When the Crown Counsel was examining the second witness in the case, Mr. Chitty, Counsel for the first, second, third and sixth accused, submitted that the evidence of that witness and the other witnesses "was not relevant because the evidence was not taken (in the Magistrate's Court) in the presence of the sixth accused". As the record showed that the sixth accused "was not to be found" when the Magistrate was taking down the evidence of those witnesses, the trial Judge ruled that the evidence objected to by Mr. Chitty was admissible against the sixth accused, since "the evidence was read over (by the Magistrate) in the presence of the accused after the appearance of the sixth accused in the Magistrate's Court". At a later stage of the case, during the cross examination of the fourth witness, Mr. Chitty brought to the notice of the trial Judge that, as Attorney-General, he had advised the committing Magistrate that it was not necessary to record afresh, after the appearance of the sixth accused in the Magistrate's Court, the evidence already recorded during his absence. Thereupon, the trial Judge made the following order:—

> "I was not aware that any such ruling had been made in the record but I came to the independent view by a reading of the section (*i.e.*, section 97 of the Criminal Procedure Code) that re-recording of this evidence was unnecessary. In any event, the fact that directions were

[1] *(1913) 9 C. A. R. 130.*

[2] *(1913) 9 C. A. R. 146 at 157.*

given to the Magistrate with regard to a question of law, I do not think, has influenced me in any way in arriving at the decision I made this morning. But if the decision is wrong, it can be set aside before another tribunal. But I do not think that the accused would be prejudiced by my answering the point of law in the way I have done." In the petition of appeal filed by some of the accused one of the grounds of appeal is stated as follows :—

"The record shows that the learned trial Judge had at the non-summary proceedings advised the Magistrate in the capacity of Attorney-General as head of the Department of Public Prosecutions. This fact was brought to the notice of the Court as soon as a document in the record was discovered by Counsel, revealing this fact, at an early stage of the trial. Although the learned trial Judge was previously unaware of this fact, it is submitted as a matter of law that he could not in the same proceeding function in these different capacities".

It has been laid down in *The King v. Sussex Justices, ex parte MaCarthy*[1] and a number of local and Indian cases that "it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" and the rule is that nothing is to be done which raises a suspicion that there has been an improper interference with the course of justice.

The question we have to consider is whether we could quash the conviction of the first five accused on the ground set out in the petition of appeal. The sixth accused on whose behalf the point was argued before the trial Judge has been acquitted. There is not the slightest suggestion that there has been the least miscarriage of justice whatever, so far as the other accused are concerned, by reason of the fact that the trial Judge had in his capacity as Attorney-General given his opinion to the committing Magistrate with regard to the recording of the evidence as against the sixth accused.

This Court has no jurisdiction to hear an appeal, unless the appellants can bring themselves within the provisions of the Court of Criminal Appeal Ordinance, No. 23 of 1938 (*vide Felstead's case*[2].) The appellants should, therefore, rely in this case either on a question of law or any ground which appears to the Court to be a sufficient ground of appeal (*vide* section 4 of the Court of Criminal Appeal Ordinance). Now section 5 (1) of the Court of Criminal Appeal Ordinance enacts—

"The Court of Criminal Appeal shall allow the appeal if they think . . . . . that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

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

[1] *(1924) 1 K. B. 256.* [2] *(1914) 10 Cr. App. R 129 at 135.*

In *Perera's case*[1] the relevant ground of appeal was that the appellant had not received a fair trial by reason of the fact that, owing to the date of trial having been advanced without sufficient notice, the Counsel retained by him was not able to be present and he was defended by an assigned Counsel. This Court considered that ground of appeal on the submission of Counsel that in the circumstances of that case there has been such a miscarriage of justice as to invalidate the trial. In *Woodward's case*[2] the Court of Criminal Appeal in England quashed the conviction of an appellant, because it considered that the refusal of the trial Judge to permit the appellant to conduct his own defence in person without the assistance of Counsel was wrong and "resulted in an injustice to the appellant".

The observations made in *Richard Lewis' case*[3] help to show the position a Court of Criminal Appeal has to take in dealing with certain appeals. In that case the trial Judge discharged the Jury after the trial had proceeded for some time, as the prosecution applied for an adjournment owing to the absence of some of the witnesses, though the application was opposed by the appellant. A few days later, the trial was taken up before a new Jury and the appellant was convicted. In dismissing the appeal, the Court of Criminal Appeal said—

"The established law to the effect that the discharging of the Jury is in the discretion of the Judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act, 1907, and therefore we have no jurisdiction to deal with it. However although we cannot say it judicially, we would like to intimate that the Judge's discretion in this case appears, if we rightly understand the facts, to have been exercised in a way different from that in which it has been our individual practice to exercise it. A Jury should not be discharged in order to allow the prosecution to present a stronger case on another trial. That is the rule on which Judges have acted and on which we think we ought to act, but we have no jurisdiction to deal with this matter."

On the question when the Court of Criminal Appeal should interfere where the matter alleged in the ground of appeal is one entirely within the discretion of the trial Judge, I would also refer to the dictum of Trevethin, L. C. J. in *Starkie's case*[4] that "the rule that a judicial discretion cannot be reviewed must be qualified by some such words as 'unless a manifest injustice is disclosed'".

As we are satisfied in this case that there has not been any miscarriage of justice occasioned by the learned trial Judge hearing the case, we are unable to quash the conviction on the particular ground with which we have dealt.

We direct that the appeals and applications be listed for the consideration of the other grounds urged by the accused.

Objection overruled.

[1] *(1946) 47 N. L. R. 37.*
[2] *(1943) 60 Times L. R. 114.*
[3] *(1909) 2 Cr. App. L. R. 180.*
[4] *(1921) 16 Cr. App. R. 61.*