JINADASA
v.
ATTORNEY-GENERAL

COURT OF APPEAL.
H. A. G. DE SILVA, J., ABEYWARDENE, J. & SIVA SELLIAH, J.
APPLICATION No. 122/82 – HIGH COURT COLOMBO CASE No. 649/79.
JUNE 5, 6, 7, 8 AND JULY 2 AND 3, 1984.

Murder – Sections 293 and 294 of the Penal Code – Requirements to prove a charge of murder under the fourth limb of Section 294 – Propriety of questioning of Jury by Judge to elicit reasons for verdict – Sections 235 (1) and (2) of the Code of Criminal Procedure Act.

The appellant in this case was indicted in the High Court on the charge of having committed the murder of one Jezima Gray by inflicting fatal gunshot injuries. At the conclusion of the trial the Jury returned an unanimous verdict of culpable homicide not amounting to murder. The presiding Judge purporting to act under Sec. 235 (1) of the Code of Criminal Procedure Act No. 15 of 1979 inquired from the Jury as to the basis on which they arrived at this decision. In answer, the Foreman replied that they had doubts as to whether the gunshot was directed solely at the deceased. On further questioning by the Trial Judge the Foreman of the Jury informed court that they were unanimous in their view that the gunshot was fired by the accused. The learned Trial Judge not satisfied by the verdict, purporting to act under Sec. 235 (2) of the Code of Criminal Procedure Act gave further directions to the Jury in respect of the charge of murder dealing particularly with the fourth limb of Sec. 294 of the Penal Code. Thereafter the Jury unanimously found the appellant guilty of murder.

The accused appealed against the conviction to the Court of Appeal.

Held–

(*a*) In view of the direction given by the Trial Judge in his original summing up pertaining to the question of culpable homicide not amounting to murder on the ground of knowledge, the original verdict brought in by the Jury is not perverse.

(*b*) The verdict returned on the first occasion by the Jury was unambiguous and unanimous.

(*c*) If the learned Trial Judge disagrees with the verdict of the Jury he could give further directions under Sec. 235 (2) and ask the Jury to reconsider their verdict.

(*d*) In terms of Sec. 235 (1) the learned Trial Judge can only pose questions to the Jury as to the reason for their verdict only for the purpose of ascertaining their verdict and not to find out the reason or basis therefor.

(*e*) The learned Trial Judge has failed to direct the Jury, that to prove that the accused is guilty of murder under the fourth limb of Section 294 of the Penal Code the prosecution must prove beyond reasonable doubt that the person committing the act knew that it was so imminently dangerous that (1) it must in all probability cause death or (2) in all probability cause such bodily injury as is likely to cause death, and that the accused committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Cases referred to:

(1) *M. E. A. Cooray v. The King, (1952) 53 NLR 73.*

(2) *The Queen v. H. Ekmon (1966) 67 NLR 49.*

(3) *Emperor v. Derajtulla Sheik, 31 Cr. L. J. (1930) 1150.*

(4) *Henry Larkin 29 Cr. App. Rep: 18.*

(5) *Emperor v. Mukhun Kumar (1878) 1 Cal. L. R. 275.*

(6) *In the Matter of Trial of Thomas Perera alias Banda (1929) 29 NLR 6.*

(7) *Queen v Arnolis Appuhamy (1968) 70 NLR 256.*

(8) *King v. Rajakaruna (1941) 42 NLR 337.*

(9) *Rafat Sheik v. King Emperor (1933) AIR Cals. 640.*

(10) *King v. Navaratnam (1946) 46 NLR 181*

(11) *R. M. Gunatillake Appuhamy v. Queen (1972) 74 NLR 536.*

(12) Somapala v. Queen (1970) 72 NLR 121.

Dr. Colvin R. de Silva for the accused-appellant.

Hector Yapa S.S.G. for Attorney-General.

Cur. adv. vult.

August 10, 1984.

H. A. G. DE SILVA, J.

The 1st accused-appellant and two others viz : H. L. A. Sumathipala and R. A. Sumanadasa alias Edwin stood indicted on four counts. In count 1 all three accused were charged with having committed on 17th September 1977 at Stace Road, Grandpass, the murder of one Jezima Gray, an offence punishable under Section 296 of the Penal Code. On count 2, the 2nd accused Sumathipala stood charged with attempting to commit the murder of one H. N. R. Alwis by means of a bomb, an offence punishable under Section 300 of the Penal Code while on count 3 he was charged with the attempted murder of the said A. N. R. Alwis with a bomb but made punishable under Section 4(2) of the Offensive Weapons Act No. 18 of 1966. On count 4 the 3rd accused R. A. Sumanadasa alias Edwin stood charged with voluntarily causing hurt with a sword to one U. G. Dayaratne, an offence punishable under Section 315 of the Penal Code.

At the end of the prosecution case the State Counsel withdrew counts 2 and 3 against the 2nd accused and he was therefore acquitted on those two counts at that stage. Later the Court directed the jury to acquit the 2nd and 3rd accused on count 1 with the result that counts 2 and 3 against the 2nd accused having already been withdrawn, he was acquitted on all charges against him while the 3rd accused was acquitted on count 1.

The 1st accused was called upon for his defence on count 1 while the 3rd accused was called upon for his defence on count 4.

The jury by an unanimous verdict acquitted the 3rd accused on count 4 and found the 1st accused guilty of murder on count 1 and he was accordingly sentenced to death.

Evidence of the incident in which Jezima Gray came by her death was provided by one Dayaratne who had been living in Jezima's house for about 12 years and Farook, her brother.

Dasa the 1st accused was known to these two witnesses for about 4 to 5 months prior to the date of the incident and he was living near the Grandpass Police Station. The 2nd accused Sumathipala was known to Dayaratne for about 12 years while Farook did not give the period of time he had known the 2nd accused. The 2nd accused too

was living near the Grandpass Police Station, this Police Station being about 500 yards from the Jezima theatre where the incident took place.

Two days prior to this incident i.e. on 15th September 1977, Dayaratne had made a complaint to the Grandpass Police Station against the 2nd and 3rd accused. The 1st accused was a close associate of these two accused.

Jezima theatre has two gates, the one on the right hand side was kept closed and it was near the open left hand side gate that the shooting had taken place. Leading from Stace Road was a motorable gravel road leading to Jezima Gray's house bounded on two sides by walls, one 12 ft. high on the boundary of the land of one Sirisena, and the other 5 to 8 ft. high being the wall of the Jezima theatre. Near the left hand side gate was the boutique of one Kesawan, and was also known as Kochchiyage kade.

The incident had taken place between 10.30 and 11.30 p.m. Dayaratne and Farook had come to see the 9.30 p.m. show at Jezima theatre along with one Tilak and Rohita. While they were watching the film, Jezima Gray had come to the cinema hall at about 10.30 or 11.30 p.m. and informed them that Dasa, the 1st accused had come to meet them. Farook, Dayaratne, Rohita and Tilak came out of the cinema hall and with the deceased got on to Stace Road. The 1st accused was near the boutique of Kesawan with an unidentified man in a red shirt. When Dayaratne went close, the 1st accused in general asked that the complaint made on 15th September be withdrawn. The 2nd and 3rd accused said they cannot do anything and to ask Dayaratne. Then Dayaratne had said that he was not going to withdraw the complaint he had made and to do whatever they wanted. At this time the deceased too was present but she did not speak a word. The 1st accused told Ranjith and Tilak not to interfere but Ranjith had said that if anything happened to Dayaratne, he would come forward. At this stage, the 1st accused pulled out a pistol from his waist and said in general, "I will kill you now". Then the deceased came forward saying "Dasa, don't, don't". The 1st accused saying "who are you to stop me" aimed the pistol in the direction of the deceased and when she tried to turn the shot was fired. The deceased fell down on receipt of the gunshot. Dayaratne ran to Sirisena's land while Farook ran in the direction of the house for about 75 yards and looked back.

Dayaratne entered Sirisena's land near the boutique and he had hardly gone 5 or 6 ft. when the 3rd accused who was near the boutique called out "ado" and aimed a blow with a sword at Dayaratne which Dayaratne took on his left hand. Dayaratne had run across the land, jumped over the boundary wall and entered the deceased's garden. There he met Farook who saw him with bleeding injuries and Dayaratne had told him that the 3rd accused had cut him. No evidence was led by the prosecution against the 2nd accused with regard to injuring of Ranjith Alwis by means of a bomb, though Farook as well as the Police Officers who came to the scene say that there was the sound of an explosion of a bomb and pieces recovered from the scene by the Police Officers have been identified by the Government Analyst as parts of an exploded bomb.

The medical evidence regarding the injuries on the deceased was that the bullet had entered in the area of the right armpit, travelled through the body causing injuries to vital organs of the body such as the liver, spleen and the aorta and had come out of the body in the area of the left armpit. This was a necessarily fatal injury and had been caused by a revolver or pistol. The shot had been fired with the weapon held slightly downwards and between two to five or six feet from the deceased. Death was due to shock and extensive haemorrhage resulting from this injury.

The Police Officers who investigated into this incident had arrived at the scene shortly after the incident. They had found blood near the left hand side gate post of the cinema on the road. Pieces of a bomb were also recovered from the vicinity. Inspector David had gone that night itself in search of the suspects. He had gone to the house of one Sokkalingam at Urugodawatte. Behind this house there was a small room like structure. He heard noises coming from that room and when the Police entered the room, the three accused were seen jumping out of a window and running away. The 1st and 3rd accused were apprehended.

The 1st accused neither gave evidence nor called witnesses but the 3rd accused made an unsworn statement from the dock. After the summing up of the learned Trial Judge, the jury returned their verdict. It is necessary at this stage to reproduce verbatim what transpired in Court.

"The Officiating Registrar questions the Jury as follows :–

Q. Are you unanimous in your verdict against the 1st accused Mudunkotuwage Jinadasa alias Dasa on charge No. 1 against him ?

A. Yes

Q. Is the 1st accused Mudunkotuwage Jinadasa alias Dasa guilty or not guilty of the offence of murder of Jezima Gray ?

A. No.

Q. If so, is he guilty or not guilty of a lesser offence ?

A. Guilty.

Q. Guilty to what ?

A. To culpable homicide not amounting to murder.

Court from the Foreman of the Jury :

Q. On what basis did you find the 1st accused guilty to culpable homicide not amounting to murder ?

A. We had a doubt amongst ourselves as to whether the shot was directed solely on the deceased.

Q. Did you come to a decision that a shot was fired ?

A. Yes.

Q. Who fired the shot ?

A. Upon the unanimous verdict the 1st accused fired the shot.

I inform the Jury that I am directing them to reconsider their verdict on charge No. 1 under Section 235 (2) of the Criminal Procedure Code".

The learned trial Judge then went on to ascertain the verdict of the jury in respect of the 3rd accused on Count 4 of the indictment. The jury found the 3rd accused not guilty on that charge. The learned trial Judge thereafter, purporting to act under Section 235 (2) of the Code of Criminal Procedure Act No. 15 of 1979 went on to give further directions to the jury in respect of the 1st accused on count 1 of the indictment i.e. on the murder charge. This further summing-up dealt mainly with the applicability of "fourthly" of Section 296 of the Penal Code to facts as found by the jury.

Learned Counsel for the 1st accused-appellant submits that after the jury returned a verdict of culpable homicide not amounting to murder, and particularly in view of the fact that directions had been

given by the learned trial Judge in the course of the main summing-up on culpable homicide not amounting to murder on the ground of knowledge, the learned trial Judge should have accepted the verdict returned by the jury. He further submitted that the jurors had taken an oath of secrecy and the learned trial Judge could not and should not, have probed the reasons for their verdict. It was learned Counsel's contention that in any event the direction on the "fourthly" of Section 294 were wrong. In the circumstances he submitted that asking the jury to reconsider their verdict amounted to an usurpation of the jury's functions and hence the later verdict was tainted with illegality. I will now deal with each of these submissions in turn.

Section 235 (1) of the Code of Criminal Procedure Act No. 15 of 1979 states "unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is".

Learned counsel contends that the first verdict returned by the jury of culpable homicide not amounting to murder in the light of the directions given by the learned trial Judge could have been based solely on the ground of knowledge and nothing else as the facts in this case did not give rise to any of the special exceptions enumerated in Section 294 and in fact no directions were given by the learned trial Judge on the special exceptions. It therefore followed that if the jury brought in a verdict of culpable homicide not amounting to murder it could have only been brought in the circumstances of this case, on the basis of knowledge and no other, hence the need to probe the jury's verdict did not arise.

In *M. E. A. Cooray v. The King,*(1) the appellant was charged under Section 392 of the Penal Code with committing breach of trust of a sum of Rs. 155,557.93 in the way of his business as an agent. In the course of the trial the prosecution narrowed down the sum in respect of the charge to Rs. 94,976.93. The jury found the appellant guilty of criminal breach of trust in respect of a sum of about Rs. 57,500. It was held that (1) the verdict of the jury could not be said to be vague on the ground that it did not specify the exact amount that had been misappropriated. The jury need not have mentioned any sum at all in their verdict and (2) that as the verdict was clear and unambiguous it

was not competent for the trial judge to have asked the jury as to how they arrived at the figure of Rs. 57.500. Neither Section 248 nor Section 247 of the Criminal Procedure Code permitted such questions

Nagalingam J. delivering the judgment of the Court at pages 82 and 83 stated as follows :

"In regard to the contention that the learned trial Judge should have asked the Jury as to how they arrived at the figure of Rs 57,500 I need only say that such a course would have been entirely outside the province of the Judge, for such a question would seek to ascertain the ground or grounds upon which the Jurors came to arrive at their verdict. According to the majority of us it is conceivable, though we do not say it must be so in this case, that the Jurors themselves may each have differed widely in regard to the quantum which in their individual opinion had been misappropriated by the prisoner but they may all have agreed arriving by different methods that at the lowest a sum of about Rs. 57,500 had been misappropriated by the appellant. On this basis they may have agreed upon their verdict. Section 248 of the Criminal Procedure Code confers and limits the powers of a Judge to question a jury in regard to its verdict and provides that a Judge is only empowered to ask the Jury such questions as may be necessary to ascertain what their verdict is. So that where the verdict is clear and unambiguous such as it is in this case, no occasion arises for a Judge to put any question to the Jurors in regard to the verdict, and if he did so he would run the risk of subjecting such procedure to well founded criticism of an adverse character. . . . The verdict should therefore be one of guilty or not guilty. It need not have been qualified by the addition of the amount which in the opinion of the Jury had been the subject of criminal breach of trust by the prisoner. These added words relating to the amount may, if need be, according to the majority of us, be treated as more surplusage and ignored, because the verdict is not rendered uncertain or vague by the addition of those words and the verdict that the prisoner is guilty is clear and precise without their addition. These observations of ours however have no reference to the undoubted right that a Judge has to question a Jury with a view to assess the appropriate sentence that he should pass on a prisoner".

In *The Queen v. H. Ekmon* (2)–

"Where in a trial before the Supreme Court, the verdict of the jury is clear and unmistakable, the presiding Judge has no power to put questions to the jury. The power to ask questions conferred by Section 248 (i) of the Criminal Procedure Code is limited to such questions as are necessary to ascertain what the verdict of the jury is. . . . . " It transpired that "After the Foreman of the jury had delivered the verdict of the jury on the first five counts of the indictment the presiding Judge asked him a number of questions and stated that it was impossible to accept that part of the verdict according to which none of the accused-appellants was guilty of murder (count 2 in the indictment). He directed them to retire and reconsider their verdict on the charge of murder. When the jury returned forty-five minutes later the Foreman stated again in answer to Court, that the jury wished to be directed on certain points. The Judge then re-charged the jury and asked them to retire and reconsider their verdict. In no uncertain terms he indicated that they should return a verdict of guilty of murder against all the appellants. Thereafter the jury unanimously found the appellants guilty of murder also." It was held inter alia "that the trial Judge acted wrongly (a) in refusing to take the verdict returned by the jury after the first summing-up, (b) in questioning them when their verdict was unmistakable (c) in giving them further directions on one aspect of the case alone after the summing-up, (d) in not taking the verdict on all the counts once he had directed the jury to reconsider their verdict (e)in expressly telling them what their verdict should be on the charge of murder".

In the case of *Emperor v. Derajtulla Sheik* (3) it was held that–

" where the verdict of the jury is clear and precise the Judge is not entitled to examine the Jurors as to the grounds upon which they have based their verdict."

In the case of *Henry Larkin* (4) it was held that–

"where the verdict of a jury is entirely inconsistent, proper questions may be put by the Judge to invite the jury to explain what they mean, but where the verdict is plain and unambiguous, it is most undesirable that the Judge should ask the jury any further question about it".

Learned Senior State Counsel submitted that the learned trial Judge had the power under Section 235 (1) to ask the questions he did ask, if he considered the verdict to be perverse.

Sohoni's The Code of Criminal Procedure (16th edition) Vol :II page 1999 commenting on Section 303 (1) of the Indian Code which is analogous to Section 235 (1) of our Code says :

> "A Judge ought not to put any question to any of the jury as to his reasons for the verdict he has given. . . .A Judge is not entitled to ask the jury their reasons for the verdict. He is not entitled to put questions to them to show that the conclusions at which they arrived were not logical or consistent. . . . . Any ambiguity in the verdict is the only justification for any question by the Judge. . . . .The Code does not empower a Judge to question the jury as to their reasons for a unanimous verdict where there is nothing ambiguous in the verdict itself. It is a serious irregularity opposed to the fundamental principle and scheme of trial by jury if a Judge puts questions to each of the jurors and record their opinions. A judge should not treat them as assessors."

In the case of *Emperor v. Mukhun Kumar* (5) Prinsep, J. held that the law did not prevent the Judge from questioning the jury as to the ground on which they based their verdict and such a course is desirable in the ends of justice, but Markby J. held to the contrary. It appears from the judgments of Prinsep J. and Markby J. that the right to question the jury is permissible when the trial Judge considered the verdict to be an unreasonable or perverse verdict.

Learned Senior State Counsel submitted that in the instant case too the course adopted by the learned Trial Judge was permissible under the provisions of Section 235 (1) if he considered the verdict to be perverse, as he submitted it was, when the jury returned a verdict of culpable homicide not amounting to murder . Though the above quoted case appears to justify a trial Judge inquiring from the jury the grounds for their decision, it seems to me that the majority of the cases veer the other way and justify such procedure only when the verdict is ambiguous.

Learned Senior State Counsel drew our attention to certain passages in the evidence of Dayaratne and Farook to show that when the first accused shot he had aimed the pistol at the deceased Jezima Gray and no other.

Dayaratne in his evidence in chief describing the incident has stated that the 1st accused pulled out a pistol from his waist and said "I will kill you now". In answer to Court he stated that the 1st

accused had addressed these words in general. Then the deceased Jezima came forward saying "Dasa, don't, Dasa don't". Then the 1st accused saying "who are you to stop me" levelled the pistol towards Jezima. Farook in his evidence stated that Dayaratne, himself, Ranjith, Tilak, the deceased and the 1st accused were talking to Ranjith and Tilak jumped backwards about a foot. When they were jumping, his elder sister the deceased, saying something went forwards. At that time he saw the 1st accused taking a pistol from his waist. His elder sister saying something turned and as she was turning the 1st accused shot.

Our attention was also drawn to items of evidence given by Dayaratne and Farook showing displeasure between the 1st accused and the deceased. Dayaratne had stated that there may have been displeasure between the 1st accused and the deceased. In cross-examination in the absence of the jury this witness had said that three months prior to this incident the 1st accused and his friend had thrown a bomb at the gate of the cinema hall and the deceased had made a complaint to the Police about it. When the 1st accused requested the deceased to withdraw the complaint, the deceased had complied with it, but the 1st accused may have had a grudge against the deceased for having made the complaint in the first place. This evidence was not placed before the jury as it connected the 1st accused with the earlier bomb incident.

Farook in cross-examination gave as a motive for the shooting of the deceased by the 1st accused that complaints had been made against the friends of the 1st accused before this incident took place. They were angry because they thought his sister did not allow the complaints to be withdrawn.

Learned Senior State Counsel submitted that in the light of the prosecution evidence only two verdicts were possible (1) of acquittal on the basis that the 1st accused did not fire that shot and (2) of murder if the jury held that it was the 1st accused who had fired the shot. He submitted that any other verdict would have been perverse, accordingly he submitted that the verdict brought in by the jury of culpable homicide not amounting to murder was a perverse verdict. If learned Senior State Counsel's submission is to be accepted, one cannot understand why the learned trial Judge gave directions to the jury on culpable homicide not amounting to murder on the ground of knowledge. He did not desist from giving directions on this matter nor

did he specifically withdraw this possible verdict from the jury. Having been so directed it was open to the jury to have returned a verdict if they came to a finding that what the 1st accused had was the knowledge that the act done by him was likely to cause death without the intention to cause death or to cause bodily injury as was likely to cause death. We therefore do not consider that the 1st verdict brought against the 1st accused on the charge of murder is a perverse verdict and even if it is correct that the learned trial Judge has the power to ask questions from the jury if he considered the verdict perverse that situation did not arise in this instance.

The second question that arises for decision is whether the learned trial Judge could have in the circumstances have disagreed with the first verdict and not accepting the verdict requested them to reconsider their verdict after further directions Such a course of action is sought to be justified under the provisions of Section 235(2) of the Code of Criminal Procedure Act. This sub-section enacts that–

> "If the Judge does not approve of the verdict returned by the jury he may direct them to reconsider their verdict, and the verdict given after such re-consideration shall be deemed to be the true verdict".

Learned Counsel for the 1st accused-appellant submitted that in the face of a clear and unambiguous verdict the learned trial Judge was not entitled to enter upon the procedure that he appears to have embarked on.

Section 216 of the Code of Criminal Procedure Act states that–

> "The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar and whenever in the opinion of the Judge the interests of justice so require".

It may be argued that a combination of Section 235(2) and Section 216 would enable a Judge to make it impossible for a jury to return a verdict with which he dose not agree. *"In the Matter of Trial of Thomas Perera alias Banda* (6) Garvin, J. says–

> "But I am free with reference to the argument addressed to me to express my own opinion that to exercise in combination the powers committed by S.248(2) and S.230 solely for the purpose of preventing a jury from returning a verdict which is not in accord with the presiding Judge's view, of the case is not a use to which those

powers should be put. So long as a jury remains an essential part of the tribunal constituted by law for the trial of persons indicated before the Supreme Court the final verdict of the jury must prevail, and not the opinion of the presiding Judge".

and in *Queen v. Arnolis Appuhamy* (7) it was held that Section 230 of the Criminal Procedure Code does not entitle the Judge to discharge the jury in which he disagrees with the view of the facts taken by the jury.

Learned Senior State Counsel relied on the case of *King v. Rajakaruna* (8) where it was held that –

"where a Judge is not disposed to accept the verdict of a jury he is entitled to redirect them on the law as well as on the facts of the case".

Howard, C. J. cited with approval the case of *Rafat Sheik v. King Emperor* (9) where it was held that–

"where a Judge is not minded to accept what is obviously and edmittedly an inconsistent verdict of the jury, he can make further charge to the jury".

King v. Navaratnam (10) followed *King v. Rajakaruna* and held that –

"where a jury is divided 4 to 3, the Judge is entitled to recharge the jury on a specific matter which he thinks relevant in order to clear their minds and enable them to arrive at a proper verdict".

In the case of *R. M. Gunatillake Appuhamy v. Queen* (11) it was held that–

"where, at a trial before the Supreme Court, the question which the jury have to decide is purely one of fact, the provisions of Sec. 248(2) of the Criminal Procedure Code do not enable the Judge to direct the jury to reconsider their verdict, unless it is quite clear that the verdict is unreasonable or perverse. When two views of the facts are possible, and the view taken by the jury is different from that taken by the Judge, it would be improper to use Section 248(2) in such a manner as to substitute the Judge's view of the facts for that of the jury".

Per curiam : "when a trial judge uses Section 248(2), we think it is very desirable that he should give further directions to the jury and specifically inform them that they are still the judges of fact and perfectly free to bring the same verdict after reconsideration if they remained of the same view and further that the second verdict shall be deemed to be the true verdict which would be binding on the Judge as well".

In my view the verdict returned on the first occasion by the jury was unambiguous and unanimous. It is clear that the learned trial Judge questioned the jury as to the basis or reasons for their verdict as he did not agree with it. I have already held that it could not be considered a perverse verdict in the light of the learned trial Judge's directions in the first summing-up. Under these circumstances if the learned trial Judge disagreed with the verdict it was open to him to have given further directions under Section 235(2) and asked the jury to reconsider their verdict *but it was not open to him to question the jury as to the reasons for their verdict .under Section 235(1) as this sub-section empowers the Judge to pose questions only to ascertain their verdict and not to find out the reasons or the basis therefor.* The learned trial Judge not having summed-up on the special exceptions enumerated in Section 294 of the Penal Code, and having directed the jury on the availability of a verdict of culpable homicide not amounting to murder on the basis of knowledge, the need did not arise to find out the grounds on which their verdict was based to determine the sentence that should be imposed on the 1st accused. The only possible ground on which the verdict could have been brought was, that the jury had found that the 1st accused had no intention but only knowledge. I am therefore of the view that the procedure adopted by the learned trial Judge after the first verdict was returned was not warranted by the provisions of the Code of Criminal Procedure Act.

The next submission that comes up for consideration is that the learned trial Judge was not entitled to direct the jury to reconsider their verdict on an entirely new basis of fact and law. Learned Counsel for the 1st accused-appellant submitted that the 1st accused was charged and apparently the prosecuting counsel presented his case and the learned trial Judge summed up to the jury on the first occasion, on the basis that the 1st accused entertained a murderous intention but the learned trial Judge in his further summing-up directed the jury on an entirely new basis viz : "fourthly" of Section 294. He further submitted that no directions were given by the learned trial

Judge in his second summing-up on the ingredients that the prosecution should prove in respect of "fourthly" of Section 294 but contented himself by merely explaining illustration(d) to Section 294 of the Penal Code.

Section 293 of the Penal Code enacts that–

"whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

Section 294 states that –

"Except in the cases hereinafter excepted, culpable homicide is murder –

Firstly. . . . .
Secondly. . . . . .
Thirdly. . . . . .

Fourthly – "If the person committing the act knows that it so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid"

"Firstly and thirdly" of Section 294 is on the basis of intention and is covered by the first two limbs of Section 293. "Secondly and fourthly" depend on knowledge and is based on the third limb of Section 293 i.e. the knowledge of the doer of the act that someone's death would be caused (*Somapala v. Queen* (12)). The learned Trial Judge has, as submitted by learned Counsel for the 1st accused-appellant dealt at length with illustration (d) to Section 294 and has failed to direct the jury that to prove that the accused is guilty of murder under the fourth limb the prosecution must prove beyond reasonable doubt that the person committing the act knew that it was so imminently dangerous that (1) it must in all probability cause death or (2) in all probability cause such bodily injury as is likely to cause death and that the accused committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

It was also submitted that in his second summing-up the learned Trial Judge applying the illustration (d) to Section 294 to the facts of the case as found by the jury, as elicited from the jury by the questions put to them by the learned trial Judge, stated in no uncertain terms that it was a direction of law meaning thereby that they would have to follow such directions and bring in a verdict accordingly i.e. a verdict of murder. It was not left to the jury to bring in a verdict of their choice and as was stated in *R. M. Gunatilleke Appuhamy v. Queen* (supra) did not inform the jury "that they are still the judges of fact and perfectly free to bring the same verdict after re-consideration if they remained of the same view and further that the second verdict shall be deemed to be the true verdict which would be binding on the judge as well".

I am of the view that the submissions of learned Counsel for the 1st accused-appellant are entitled to succeed and the conviction of the 1st accused-appellant on count 1 cannot be allowed to stand. I therefore set aside the conviction and sentence on count 1 in respect of the 1st accused-appellant.

The next question that has to be decided is whether we should order a re-trial or convict him in conformity with the verdict first brought by the jury. It appears to me that the second verdict brought by the jury is tainted with illegality and the first verdict brought in by the jury of guilt of culpable homicide not amounting to murder, necessarily on the ground of knowledge, is the true verdict and one that they could have brought in terms of the directions given by the learned Trial Judge in the first summing-up. The facts as found by the jury are capable of sustaining a conviction for culpable homicide not amounting to murder and I therefore convict the first accused-appellant of culpable homicide not amounting to murder on the ground of knowledge, an offence under Section 297 of the Penal Code, and sentence him to seven years' rigorous imprisonment.

ABEYWARDANE, J. – I agree.

SIVA SELLIAH, J. – I agree.

Conviction and sentence set aside and conviction for culpable homicide not amounting to murder substituted.