[In Revision.] *May 4, 1910*

Present: Mr. Justice Wood Renton.

THE KING *v.* NOORDEEN *et al.*

D. C. (Crim.), Negombo, 2,779.

Acquittal—Refusal of Attorney-General to sanction an appeal—Application for revision—Powers of Supreme Court—Criminal Procedure Code, ss. 356 and 357.

The Supreme Court has full powers of revision in all criminal cases. That power is not limited to those cases in which either no appeal lies, or for some reason or other an appeal has not been taken; it extends, as a matter of law, to cases in which the Attorney-General has refused to sanction an appeal from an acquittal, provided proper materials have been laid before the Court to call for its exercise.

IN this case the accused, who belonged to the Ceylon Police Force, were indicted before the District Court of Negombo on five counts: (1) Being members of an unlawful assembly, the common object whereof was to cause hurt to Carry; (2) using force; (3) criminal trespass; (4) grievous hurt to Carry; (5) voluntarily causing hurt to Planson.

The learned District Judge convicted all, except the 1st, 3rd, and 7th to the 11th accused. Carry petitioned the Attorney-General to appeal against the acquittal of the accused. The Attorney-General refused to appeal. Carry then moved the Supreme Court to exercise its powers of revision under section 356, Criminal Procedure Code. The Supreme Court issued notice on the accused.

Van Langenberg, Acting S.-G., for the Crown, intervened with His Lordship's permission.—The Attorney-General desires to say

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nothing on the merits of the case; but he desires to bring a matter of principle before Your Lordship as regards the exercise of the right of revision. The Legislature has vested in the Attorney-General the first right of asking Your Lordship to say whether the decision of acquittal is right or wrong. He has exercised his discretion. Will Your Lordship, under the circumstances, entertain an application to revise, practically, his decision in the matter? [Wood Renton J.: It would involve two questions: first, the power of the Court to entertain applications of this nature.] No. I cannot question that power at all. It is a pure question of expediency. Under section 357 of the Criminal Procedure Code, sub-section (3) enacts that the Supreme Court cannot in revision convert a finding of acquittal into one of conviction. The only order the Supreme Court can make, if it disapproves of the acquittal, is to order a new trial. An awkward situation may arise if the Attorney-General exercises his right to enter a *nolli prosequi* when the Supreme Court orders a new trial. Under the old Code of 1883 there was an appeal from orders of discharge in non-summary cases. In an appeal against an order in a non-summary case discharging an accused on the instructions of the Attorney-General, Burnside C.J. said: "That we have a right to reverse this order I do not doubt, but the question is, except under exceptional circumstances, should we exercise that right. I think not. Unless, indeed, the circumstances were such as would justify the Court in interfering, it is better to leave these questions to be dealt with by the Attorney-General's Department."

Bawa, for the 1st accused, who was acquitted.—Under section 202, Criminal Procedure Code, the Attorney-General can nullify the effect of any order the Supreme Court may make by entering a *nolli prosequi*. The Supreme Court has in many cases refused to interfere with an order discharging an accused (see *Usoof v. Bharat Shing*[1]). The Supreme Court should not exercise its powers of revision except in exceptional cases. [Wood Renton J.: It is clear that the power must not be exercised so as to admit, by a side wind, an appeal.] The prosecutor in this case is the Attorney-General. He had a right to appeal. He has decided not to appeal. Where there is a remedy by appeal no revision is allowed. Mr. Carry is a mere witness. Is it open to him to apply for revision? Counsel cited *Perera v. Silva*,[2] *Goonawardana v. Orr*.[3]

Sandrasegra, for the 3rd and 7th to 11th accused.—Unless there be very strong grounds the Attorney-General's decision should not be questioned. He cited *25 All. 128*.

[Wood Renton J.: I think I will now hear Mr. Pereira on the merits. I suppose you will admit, Mr. Pereira, that an exceptional case must be made out?]

[1] *(1896) 6 Tam. 96.* [2] *(1908) 4 A. C. R. 79.*
[3] *(1907) 2 A. C. R. 172.*

H. J. C. Pereira (with him *H. A. Jayewardene*), then argued the case on the merits.

May 4, 1910. Wood Renton J.—

I have had the advantage in this case of hearing counsel upon both sides on the questions as to the jurisdiction of the Supreme Court to entertain motions in revision where the Attorney-General has refused to sanction an appeal from an acquittal, and the class of circumstances in which that power, if it exists, should be exercised. On behalf of the applicant, who was the actual complainant in the Court below, Mr. H. J. C. Pereira has read to me the whole of the evidence, and has argued very clearly and fully every point which could be taken in his client's interest. I have come clearly to the conclusion that the application should be refused.

I propose, in the first place, to deal with the issues of law, and thereafter to indicate quite briefly the grounds on which I feel that it is impossible and would be wrong for me to interfere on the facts. Under section 357 (1) of the Criminal Procedure Code, the Supreme Court is empowered " in any case, the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge," to exercise its revisionary powers at its discretion. It appears to me that the language of that section invests the Supreme Court with full powers of revision in all criminal cases. I do not think that that power is at all limited to those cases in which either no appeal lies or, for some reason or other, an appeal has not been taken. I hold without hesitation that as a matter of law it extends to cases in which the Attorney-General has refused to sanction the appeal from an acquittal, provided that proper materials have been laid before the Court to call for its exercise. In the course of his observations on this subject the learned Solicitor-General called my attention to sub-section (3) of section 357, which provides that nothing in the foregoing sub-sections, of which I have already quoted the substance of the first, shall be deemed to authorize the Supreme Court to convert a finding of acquittal into one of conviction. He pointed out that all that the Supreme Court could do in such a case would be to direct a new trial, and he argued that any order of that nature would be a mere *brutum fulmen*, since it would be open to the Attorney-General, under section 202 of the Criminal Procedure Code, to enter a *nolli prosequi* at any stage of the subsequent proceedings prior to verdict. If the Supreme Court really possesses, as I hold it does possess, under section 357, sub-section (1), of the Code of Criminal Procedure, the power to entertain applications of this kind, in spite of the prior refusal of the Attorney-General to sanction an appeal, I feel quite sure that no Attorney-General would feel himself justified in exercising his powers under section 202, and I desire to guard

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myself expressly from being supposed to hold that in such a case where the Legislature has itself conferred jurisdiction on the Supreme Court, it would be competent for the Attorney-General to over-ride that jurisdiction under the provisions of section 202. At the same time there can be no doubt but that we are called upon to apply, in dealing with an application like the present, *a fortiori*, the same rule which the Supreme Court has laid down for its guidance in all cases where an application is made to it for the exercise of its powers in revision. I say *a fortiori*, for we are bound to take account of the fact that section 336 of the Criminal Procedure Code, in providing that there shall be no appeal from an acquittal by a District Court or a Police Court, except at the instance or with the written sanction of the Attorney-General, has clearly indicated its intention to invest the Attorney-General with a wide and almost judicial discretion in such matters, and, without in any sense attempting to lay down a general rule which should have the effect of fettering the discretion of future Judges, I am clearly of opinion that a very heavy onus rests upon the applicant who comes before the Supreme Court, for the purpose of inviting it in effect to over-ride the deliberate refusal by the Attorney-General to sanction an appeal. It is incumbent upon him, I should say, to make out a strong case amounting to positive miscarriage of justice in regard to either the law or the Judge's appreciation of the facts.

I am unable to agree with Mr. H. J. C. Pereira that any question of law is really involved in the case before us. It is a case which raises a question of fact that we are all familiar with in the Assize Court. I refer to the question whether a common intention has been proved affirmatively to have existed on the part of certain persons who are alleged to have committed, or to have participated, by virtue of a common intention and object, in the commission of a criminal offence. It is a question for a jury in the Assize Court, and in such a case as the present it is a matter for the decision of the Judge who fulfils the functions of a jury as well as of Judge.

I propose to say nothing at present in regard to the case of those of the accused who have been convicted. I will deal with that matter when I have heard the appeal. I will merely take one by one the case of the 1st, 3rd, 7th, 8th, 9th, 10th, and 11th accused in the District Court, and consider whether the finding of the District Judge in regard to each of them can be considered perverse. For it is only on the ground of perversity that, in the view which I take of the law, I should be entitled to interfere.

[His Lordship then proceeded to discuss the evidence.]

Application refused.