[COURT OF CRIMINAL APPEAL]

1967 *Present :* **H. N. G. Fernando, C.J. (President), Tambiah, J., and Abeyesundere, J.**

THE QUEEN *v.* J. L. P. ARNOLIS APPUHAMY

APPEAL No. 76 OF 1967, WITH APPLICATION No. 99

S. C. 135/66—M. C. Anuradhapura, 10423

Trial before Supreme Court—Verdict of Jury—Duty of Judge to accept it—Autrefois convict—*Criminal Procedure Code, ss. 230, 248 (2), 251.*

Section 230 of the Criminal Procedure Code reads as follows :—

" 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."

Held, that section 230 does not entitle the Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury.

Accordingly, where, after a verdict of guilty is returned by the Jury, the Judge discharges the Jury because he disagrees with that verdict, the accused is entitled to raise, in appeal, the point of *autrefois convict* if he is convicted again at a second trial on the same indictment.

APPEAL against a conviction at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *Anil Obeyesekere*, *Nihal Jayawickreme*, *C. Chakradaran*, and *M. Kanakaratnam* (Assigned), for the Accused-Appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

October 19, 1967. H. N. G. FERNANDO, C.J.—

The appellant in this case was indicted on two counts with the murder of one Muthu Banda, and with the attempted murder of one Nanhamy. He was after trial convicted on 2nd July 1967 of culpable homicide not amounting to murder on the first count, and of attempted culpable homicide not amounting to murder on the second count, and sentenced to terms of imprisonment for 10 years and 3 years, to run concurrently. We allowed the appeal and ordered a verdict of acquittal to be entered. We now state our reasons.

The only point argued in appeal was one of *autrefois convict*, based on the following facts. The appellant had been previously tried on the same indictment and it is necessary to re-produce here the proceedings which took place at the end of the earlier trial on 28th May 1967 :—

" Jury return at 4.20 p.m.

Clerk of Assize :	Mr. Foreman, are you unanimously agreed upon your verdict in respect of charge No. 1 ?
Foreman :	Yes.
Clerk of Assize :	By your unanimous verdict, do you find the prisoner guilty of the charge laid against him ?
Foreman :	No.
Clerk of Assize :	Do you find him guilty of any lesser offence ?
Foreman :	Yes.
Clerk of Assize :	Of what offence ?
Foreman :	We find him guilty of culpable homicide not amounting to murder.
Clerk of Assize :	By your unanimous verdict, do you find the prisoner guilty of the charge laid against him in charge No. 2 ?
Foreman :	Not guilty.
Clerk of Assize :	Of any lesser offence ?
Foreman :	No.

Clerk of Assize : Gentlemen, your unanimous verdict is that you find the prisoner, Jayasekera Liyana Patabendige Arnolis Appuhamy guilty of culpable homicide not amounting to murder in respect of count No. 1, and not guilty of any offence in respect of Count No. 2 ?

Foreman : Yes.

Court : Mr. Foreman, the position is that you hold that the injuries on Nanhamy were not caused by gunshot injuries. I directed that the verdict you would have to bring in respect to that matter would be either attempted murder, grievous hurt or voluntarily causing simple hurt.

Foreman : My Lord, he exceeded the right of private defence.

Court : Your verdict was arrived at on that footing ?

Mr. Foreman : My Lord, simple hurt may have been caused by a pellet not directed towards Nanhamy.

Court : In other words, you held that that was accidental ?

Mr. Foreman : Yes.

Court : You said that your verdict of culpable homicide not amounting to murder was on the footing that he exceeded the right of private defence ?

Foreman : Yes.

Court : I did not tell you what the law in respect of private defence is. I told you to follow the law as I gave you.

Mr. Foreman : My Lord, what we say is that he used the gun before the other man used the gun.

Court to Crown Counsel : Shall I charge them again ?

Crown Counsel : It appears that the verdict is confused, there appears to be some grave confusion. The question of private defence never arose. If that was the basis on which the verdict was arrived at then there is no doubt that there was grave confusion.

Court : Mr. Kapukotuwa, have you anything to say ?

Mr. Kapukotuwa: The position in law is that the Jury are the sole judges on questions of fact. Even if a defence has not been taken, it is open to them to decide on what they can. But, if Your Lordship believes that the Jury has been confused in regard to the law, then it is open to Your Lordship to discharge the Jury and order a re-trial.

Court : In the circumstances of this particular case, I think that if I were to charge the Jury now, it might be prejudicial to the accused. In those circumstances, since they have come to a conclusion on a matter they were not addressed on and on which there was no evidence led, I think the only fair thing to do is to discharge the Jury and order a re-trial. I accordingly order a re-trial. The accused is to be on remand."

It is perfectly clear that the learned Commissioner disagreed with the unanimous verdict at the earlier trial because in his opinion the evidence did not justify the finding of the Jury that the accused had fired his gun in self-defence—the learned Commissioner had himself not directed the Jury on the matter of self-defence. But with respect, it seems to us that the defence could properly arise. According to the evidence of Nanhamy at the second trial, Muttu Banda and Nanhamy were both Game Watchers at the Wilpattu Sanctuary. The two men were about to retire for the night when they heard a gun shot some distance away, and they proceeded in that direction, Muttu Banda carrying a gun and Nanhamy a torch. They then saw three men and gave chase to those men, whereupon two of the men ran in one direction and the third in another. They chased the third man who was running into the jungle and they stopped after chasing for a few fathoms. The third man himself apparently stopped in the jungle, for Nanhamy then recognized him as the accused. At this stage, the accused fired a gun, killing Muttu Banda and injuring Nanhamy. Although there was no evidence that Muttu Banda had actually aimed his own gun at the accused before the latter fired his shot, the circumstances might well have led the Jury to think that such was probably the case. A man with a gun in hand who runs away when chased by another with a gun, particularly by a game watcher, is prima facie trying to make his escape ; and if he subsequently fires when "at bay", it is not unlikely that in the words of the Foreman "he used the gun before the other man (Muttu Banda) used the gun." Had the learned Commissioner appreciated this aspect of the matter and acted according to law, the interests of justice would have been served far better than they are in the ultimate result.

It is most unfortunate that neither the learned Commissioner nor Crown Counsel appear to have been aware of a judgment of this Court which is completely in point. It was held in *The Queen v. Handy*[1] that s. 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the Jury in a case in which he disagrees with the view of the facts taken by the Jury. The relevant provisions of the Code were fully examined in that judgment, and we are in entire agreement with the judgment. We need mention only one additional point, for the sake of completeness. In *Handy's* case, as in the present case, the presiding Judge quite clearly did not approve of the Jury's verdict.

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

If for that reason the Judge was reluctant to accept the verdict, s. 248 (2) entitled him to direct a re-consideration of the verdict, and to charge the Jury afresh for that purpose. But short of having the verdict recorded and thereafter proceeding according to law, s. 248 (2) provided the only permissible alternative. But even then, the Judge would have been bound to accept the verdict given after re-consideration. This provision emphasises the principle that the object of a trial by Jury is to secure a verdict which the Jury holds to be proper, and not a verdict which a Judge will find acceptable.

The only difference between the instant case and that of *Handy* is that in the latter case the rejected verdict was one of acquittal, whereas here the verdict was a conviction of culpable homicide on the first count upon which sentence should have been passed. The accused has been fortunate in escaping punishment, for in view of s. 251 of the Code it is now too late to pass sentence on him. For that, he should be thankful to the presiding Judge and the Crown Counsel who conducted the prosecution at the first trial.

Accused acquitted.