[COURT OF CRIMINAL APPEAL.]

1945 *Present:* **Keuneman, Wijeyewardene and Jayetileke JJ.**

THE KING *v.* NAVARATNAM.

8—M. C. Mallakam, 26,492.

Right of judge to recharge jury—Jury divided 4 to 3—Judge directs jury on a matter relevant—Criminal Procedure Code s. 248 (2).

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.

The *King v. Rajakaruna* [1] followed.

APPEAL against a conviction by a Judge and jury before the Northern Circuit.

M. M. Kumarakulasingham for accused, appellant.

E. H. T. Gunasekera, C.C., for the Crown.

March 28, 1945. KEUNEMAN J.—

The appeal in this case arises under the following circumstances. After the charge by the Trial Judge, the jury retired and returned after an interval. The Clerk of Assize then asked the Foreman whether the jury was unanimous. The Foreman replied in the negative, and added in reply to a further question that the jury were divided 4 to 3. The Trial Judge then asked the Jury—" Is there anything on which I can be of assistance to you ? " The Foreman mentioned one matter and the

[1] *42 N. L. R. 337.*

Trial Judge explained the facts relating to that matter and pointed out the burden that rested on the Crown.

The record then runs as follows:—

" *Foreman.*—Will you give us further time to consider ?

" *Court.*—Very good, do so."

The jury do not appear to have retired at this point, but probably consulted among themselves. Thereafter the record runs—

" *Foreman:* We are agreed upon the verdict. We think the identity of the accused is not proved beyond any reasonable doubt, as the story ' Move away ' looks artifical. Besides these witnesses belong to the same group. So it creates some doubt in our minds."

At this stage the Foreman handed over to the Trial Judge a paper marked X in almost the same terms as his statement. This the Judge read and handed over to the Clerk of Assize.

The record goes on—

" *Court:* The doubt must be a reasonable one. It should not be a fanciful doubt, it should be a doubt which would make you hesitate to act, and say you are not satisfied. It must be a real doubt, such a doubt which might occur before you come to an important decision. Do you wish to discuss it any further ? "

The record does not show that the jury retired thereafter, but it is likely that they consulted together. Later, in reply to the questions put by the Clerk of Assize, the Foreman said that the jury was unanimous, and that the accused was guilty of voluntarily causing hurt with a dangerous weapon under grave and sudden provocation.

It was argued for the appellant that there were three verdicts in the case—(1) when the Foreman said the jury were divided 4 to 3, (2) when the Foreman said " We are agreed upon our verdict. We think the identity of the accused is not proved beyond reasonable doubt ", &c., and (3) when the verdict of guilty of grevious hurt under grave and sudden provocation was entered. It was also contended that the Trial Judge had no power to address the jury again, more particularly after (2). It was urged that all these were irregularities which vitiated the conviction that was finally entered.

(1) The argument that the statement by the Foreman that the jury was divided four to three amounted to a verdict was not put forward with any zest, and it is obvious that this cannot in any sense be regarded as a verdict in view of section 223 (2) of the Criminal Procedure Code which runs as follows:—" The verdict returned shall be unanimous or by a majority of not less than five to two ".

Counsel quite properly abandoned this argument very early.

(2) The statement by the Foreman—" We are agreed upon a verdict ", &c., is claimed as the return of a verdict of not guilty. We do not agree with this contention. Under section 247 (3) and (4) the procedure whereby a verdict is given is set out. The Registrar or Clerk of Assize asks—" Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged ". It is upon

this that the Foreman states what is the verdict of the jury. Now in the present case the jury were originally divided four to three, and since their return they had not been asked whether they were unanimous and if not how they were divided. It is urged that the Foreman's statement " We are agreed upon our verdict " must mean that they were unanimous. This view is probable but we do not think it is the only view that can be taken. Next the Foreman made no pronouncement on the vitally important question as to whether the accused was guilty or not guilty, and that is what the verdict should contain. It may be argued that a verdict of not guilty should follow on what the Foreman said, but that is not the same thing as giving a verdict. As we understand the matter, the Foreman was trying to explain to the Judge the view the jury had reached at that point on the facts. In reality he was explaining to the Judge how the minds of the jury were working. It was utterly unnecessary to do so, and although the common sense of the ordinary juror is and can be relied upon by our Courts he is not always the person best qualified to explain the logical processes by which his mind works, and still less how the minds of all the jurors work. We think the Judge regarded this statement in that light, and to assist the jury he explained further to them what was meant by " reasonable doubt ", a point of which they may not have had a clear recollection at that stage. With that explanation before them the jury came to a conclusion which certainly appears to be different from the conclusion they entertained a little earlier.

In the *King v. Rajakaruna* [1] it was held that when the jury were divided four to three the Judge was entitled to recharge the jury not only on the law but also on the facts, although there was no special provision in our Code to that effect. A passage from the judgment in *Hamid Ali v. Emperor* [2] was quoted with approval.

" If he (the Judge trying the case) thought it fairer and clearer and simpler to recharge the jury on certain specific points and to tell them to go and get their heads clear on the subject, there is nothing in the Code against it ".

In our opinion the Trial Judge in this case was entitled to recharge the jury on the specific matter which he thought relevant in order to clear their heads and enable them to arrive at a proper verdict. No doubt this right should be wisely and sparingly used, but we do not think that in the present case objection can be taken to the recharge.

We may add that under our Code the specific right is reserved to the Judge, if he does not approve of a verdict returned, to direct the jury to reconsider their verdict, and the verdict given after such reconsideration must be deemed to be the true verdict—see section 248 (2). In view of this it is difficult to see why the right should be denied to the Judge to assist the jury in any matter at any stage before the actual verdict is returned, if in the opinion of the Judge circumstances have arisen which indicate that such assistance is essential.

The appeal fails and is dismissed. The application for reduction of the sentence is also dismissed.

Appeal dismissed.

[1] *42 N. L. R. 337.*

[2] *A. I. R., 1930, Calcutta 320.*