[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* E. HANDY

Appeal No. 50 of 1959, with Application No. 61

S. C. 32—M. C. Galle, 5400

Trial before Supreme Court—Jury's verdict of acquittal—Judge's disapproval of it—Discharge of jury on that ground—Retrial—Plea of autrefois acquit*—Must be tried by jury—Failure of accused to raise the plea—Power of Court of Criminal Appeal to consider the plea—Miscarriage of justice—Court of Criminal Appeal Ordinance, s. 5 (1)—Criminal Procedure Code, ss. 6, 230, 247, 248, 249, 330, 331.*

Section 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the jury in a case in which the Judge disagrees with the jury's view of the facts.

Where the jury's verdict of acquittal is not duly entered on account of the Judge's disapproval of it, the accused is entitled to raise the plea of *autrefois acquit* if he is tried again for the same offence. The plea is one that must be tried by the jury in accordance with the practice in England.

Where the accused fails to raise the plea of *autrefois acquit* timeously at the trial, the Court of Criminal Appeal may consider that defence and acquit him under section 5 (1) of the Court of Criminal Appeal Ordinance on the ground of miscarriage of justice.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *H. A. Chandrasena*, *M. L. de Silva* and *E. B. Vannitamby* (assigned), for Accused-Appellant.

Ananda Pereira, Acting Senior Crown Counsel, for the Crown.

Cur. adv. vult.

September 8, 1959. BASNAYAKE, C.J.—

This is an unusual appeal. On 1st April 1959 the appellant was tried on charges of murder of Danny Dissanayake and attempted murder of Albert Dissanayake. In the course of the trial the appellant gave evidence on his own behalf and called two witnesses in his defence.

2—J. N. B 20501-1,995 (1/60)

At the conclusion of the learned trial Judge's summing-up the jury retired to consider their verdict. What took place thereafter is thus recorded in the transcript of the proceedings—

" *Clerk of Assize :*

387. Q : Mr. Foreman, are you unanimously agreed upon your verdict as regards each of the counts in the indictment ?

" *Foreman :* Yes.

" *Clerk of Assize :*

388. Q : By your unanimous verdict do you find the prisoner guilty of the offence of murder on count No. 1 ?

" *Foreman :* No.

" *Clerk of Assize :*

389. Q : Do you find him guilty of any other offence ?

" *Foreman :* No.

" *Clerk of Assize :*

390. Q : By your unanimous verdict do you find the prisoner guilty of attempted murder on count No. 2 ?

Foreman : No.

" *Clerk of Assize :*

391. Q : Do you find him guilty of any other offence ?

" *Foreman :* No.

" *Clerk of Assize :*

392. Q : That means you do not find this prisoner guilty of any offence on this indictment ?

" *Foreman :* Yes.

" *Court to Clerk of Assize :*

Don't record this verdict. I refuse to accept this verdict."

The learned trial Judge then made the following order :—

" The jury in this case have returned a verdict of not guilty of either offence. The evidence in this case is quite clear. The defence in this case was palpably false. A part of the evidence for the defence went to prove the prosecution case. I can only conclude that the jury have neither understood the law on which I gave them adequate direction nor understood the nature of the evidence and the implications arising therefrom. In the circumstances I do not think it is either necessary or desirable to ask the jury to reconsider the verdict,

and acting under the provisions of section 230 of the Criminal Procedure Code, I think the interests of justice require that the accused be tried before another jury from a different panel."

Thereafter the appellant was tried by another jury before the same Judge on 15th April. At that trial also the appellant gave evidence on his own behalf and called one of the witnesses whom he had called at the previous trial. The jury after a deliberation lasting thirteen minutes returned a unanimous verdict of guilty on both charges and the appellant was sentenced to rigorous imprisonment for life on the first charge and rigorous imprisonment for five years on the second charge.

This is a convenient point at which to state briefly the evidence for the prosecution and the defence at the trial at which a verdict of acquittal was returned. The chief witness for the prosecution was Albert Dissanayake the brother of the deceased. His story is as follows :—The appellant was a man who lived about 100 fathoms from his house and he had known him for fifteen years. At about 6.30 p.m. on the day in question (19th May 1958) his deceased brother came home to give him a loan of Rs. 10 which he had sought from him. The money was needed to pay the fees of a lawyer whom he wished to retain in a criminal case in which he was charged with arson along with his younger brother Robert Dissanayake, an elder brother of his, the appellant, and the appellant's brother-in-law Sardiris. At about 7.30 p.m., while the deceased was still there, the appellant came to the witness's house and shortly after that his brother-in-law Sardiris also came. They discussed the question whether in addition to the proctor they had already retained another proctor should be retained on their behalf as there were five accused in the case. In the course of their discussion Sardiris said, " The Court does not know the truth or otherwise of this allegation. You should not be loafing here and there. You must try to retain another counsel for the case." The witness agreed and when he said, " As we have retained another lawyer the fees will be more and all will have to share the additional fee", the appellant replied, in a loud tone, that he did not want any additional lawyer and that he was not going to pay anything more. The witness then told the appellant that it was not necessary to shout and that his children will be frightened and asked him to leave his house. Whereupon the appellant left. The deceased who took no part in the discussion about the case, as he was not an accused, was seated on a bench in the verandah. The appellant returned about fifteen minutes later and exclaiming, " I have come to spend ", struck the deceased with a sword. The witness sought to intervene and was struck by the appellant with the same sword. The witness's wife who was at the time nursing her infant in the hall of the house rushed into the compound and shouted, " Gunapala is going away after committing murder." The prosecution did not suggest any motive for the attack on the deceased. The witness also denied that there was any enmity either between the appellant and himself or his brother. In cross-examination it was suggested that the deceased and the witness were

injured in a brawl which occurred while the appellant, his brother-in-law, Danny, another brother of the deceased, and some others were gambling, not at the hands of the appellant but at the hands of some other person. It was also suggested that the appellant had won Rs. 300.

The appellant's story is that he usually drank two cups of toddy at Albert Dissanayake's house. On the day in question also when he stepped in for his drink he found that gambling, which was a regular feature at the house of the witness Dissanayake, was in progress and he joined the party. In the course of the gambling the two brothers Albert and Danny Dissanayake had an argument over a bet and Albert kicked the bottle lamp that was there. Albert and Danny then had a fight. The appellant left the place when the fight started. Among others present were Sardiris, Robert Dissanayake, K. H. Martin, and two others. Martin the appellant's witness said that there was gambling in which he joined ; but that he left early and did not see what happened. There were two versions before the jury who, as judges of fact, were entitled to decide which version they accepted as true.

At the second trial the appellant did not raise the plea of *autrefois acquit*. He was defended by the same proctor who was assigned to him at the previous trial. The questions that arise for decision are—

(*a*) Is the trial Judge right in refusing to permit the verdict to be recorded at the earlier trial ?

(*b*) If he is not, has the appellant been acquitted at the first trial of the offences of murder and attempted murder ?

(*c*) If so, does the failure of the appellant at the second trial to raise the plea that by virtue of section 330 of the Criminal Procedure Code he is not liable to be tried preclude this Court from examining the legality of the action taken by the trial Judge at the previous trial ?

There is no doubt that the appellant was at the first trial tried by a court of competent jurisdiction for the offences of murder of Danny Dissanayake and the attempted murder of Albert Dissanayake. Was he acquitted of the offences ? All trials before the Supreme Court are by a jury before a Judge (s. 216). It is the duty of the jury to decide which view of the facts is true and to return a verdict which under such view ought, according to the directions of the Judge, to be returned (s. 245). The jury discharged that duty by returning a unanimous verdict of acquittal. The Registrar was under a duty in the circumstances of this case to make an entry of the verdict on the indictment as required by section 249 of the Criminal Procedure Code. That duty he was precluded from discharging by the order of the Judge. There is no provision of the Code which empowers the Judge to forbid the Registrar to make an entry of the verdict on the indictment. What the Judge may do when the jury are ready to give their verdict or after they have given their verdict is to be found in sections 247 and 248. These sections read as follows :—

"247. (1) When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2) If the jury are not unanimous the Judge may require them to retire for further consideration.

(3) After such further consideration for such time as the Judge considers reasonable or if either in the first instance the foreman says that they are unanimous or the Judge has not required them to retire, the Registrar shall say (the jurors being all present) : 'Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged ? '

(4) On this the foreman shall state what is the verdict of the jury. "

" 248. (1) 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.

(2) 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 reconsideration shall be deemed to be the true verdict. "

These sections do not authorise the action taken by the trial Judge, nor does section 230 under which he purported to act. That section reads—

" 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 would appear from the observations of the learned Judge that in his opinion section 230 authorises the presiding Judge to discharge the jury in a case in which the presiding Judge disagrees with the jury's view of the facts. The provisions of the Criminal Procedure Code which prescribe the respective duties of the Judge (s. 244) and the jury (s. 245) in a trial by jury are designed to serve the interests of justice. They are served when the Judge does not encroach on the functions of the jury. Any departure from those provisions would defeat and not serve the interests of justice. There are many instances in the judgments of this Court where convictions have been quashed because the Judge encroached on the functions of the jury or usurped them. Where the jury in discharge of their duty of deciding questions of fact return a verdict it would be wrong for the Judge to arrest the course prescribed by law because he does not agree with their view of the facts. An exercise of the Judge's authority in derogation of the express provisions of the Code would amount to a denial of justice and section 230 affords no authority for the discharge of the jury in such a case.

We were referred to the case of *Thomas Perera alias Banda*[1] as supporting the view that a Judge may, acting under section 230, discharge the jury when he does not agree with their decision on questions of fact. We are unable to agree that Garvin J. held in that case that section 230

[1] *29 N. L. R. 6.*

enables the presiding Judge to thwart the course of justice by discharging the jury whenever he does not agree with them. If that judgment is capable of such an interpretation we wish to express, with respect, our disagreement with it.

In the instant case the jury having, as they are empowered by the Code to do (s. 245 (*a*)), decided which view of the facts is true and returned a verdict which under that view ought according to the directions of the Judge to be returned, it cannot be said that the interests of justice require that they should be discharged without their verdict being recorded as provided in section 249 which reads :

" (1) The Registrar shall make an entry of the verdict on the indictment and shall then say to the jury the words following or words to the like effect :

'Gentlemen of the jury : Attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A. B. is guilty ' (or ' not guilty').

(2) The foreman shall sign the verdict so entered and the verdict when so entered and signed, but not before, shall be final.

(3) When by accident or mistake a wrong verdict is delivered the jury may before it is signed or immediately thereafter amend the verdict. "

In forbidding the Registrar to make an entry of the verdict on the indictment and declaring that he refused to accept the verdict the learned trial Judge was acting not only contrary to the provisions of the Criminal Procedure Code but also against his very directions to the jury. Here is what the learned Judge said in his summing-up :

" In this case, gentlemen, the prosecution must establish to your complete satisfaction, and leave no reasonable doubt in your mind, that it was this accused in the dock, Gunapala, who caused the death of Danny by cutting him with some sharp cutting heavy weapon across his shoulder and who also caused that injury on the shoulder of Albert.

. . . .

" In every criminal case, as you have been told at the commencement of the case, there is a presumption of innocence which surrounds the accused person, it is there, as it were, a shield, which he can put forward, but to ask from the jurors a verdict of guilty the prosecution must pierce that shield, pierce it in such a way that the jurors are left in no doubt, no reasonable doubt, that the prosecution witnesses have substantially spoken the truth . . .

" It is your duty, gentlemen, to decide on the facts of this case. Now, you have seen those two witnesses, and you must make up your minds whether you are satisfied they spoke the complete truth. After all, you have had an opportunity of listening to them here ; listening to their answers in cross-examination. In the course of this case you have had the opportunity of listening to the accused and his witness Martin and to the witness Robert Dissanayake.

"Now, in law, the jurors are the judges of the credibility of witnesses, and proceed to judge as a judge would, of the credibility of a witness.

"Sometimes a Judge may intrude his opinion on the jury. The law gives him that right, with this reservation, that even if he does intrude his opinion on a question of fact, the jury are not bound by it. Why ? The law must always preserve to the jury, the sole judges on questions of fact, the right to choose, and they do not give way even to the presiding judge on questions of fact. Therefore, we have our proper functions here in this Court. You are the sole judges of fact, and I am the sole judge on the law."

It is difficult to reconcile the action taken by the Judge with the directions given by him. And having regard to the facts of this case in which there were two versions of what occurred on the night in question in the house of Albert Dissanayake, it is not clear why the learned Judge prohibited the entering of the verdict on the indictment. The integrity of the jurors is not impugned nor is it alleged that anything which affects their verdict occurred or came to the trial Judge's notice. In the circumstances there is no justification in law for the course adopted by him.

The question then is whether, although there is no formal entry of the verdict under the foreman's hand, in law it can be held that the appellant has been acquitted of the offences with which he was charged. We are of the opinion that it can be so held. The fact that the verdict was not entered on the indictment does not deprive the appellant of the benefit of the verdict. Except for the entry on the indictment no other formal step remained to be done in order to give efficacy to it. The law does not require the trial Judge to make a formal order of acquittal. That result follows automatically on the verdict. The effect of subsection (2) of section 249 is that the verdict once entered on the indictment cannot be altered except in the circumstances set out in subsection (3) of that section. It does not mean that where a verdict of acquittal has been duly returned by the jury it is not a legal verdict till it is entered as required by section 249 (1) and signed as prescribed by subsection (2) of that section.

The position then is that the appellant was entitled at the second trial, if he chose to do so, to take the plea prescribed in section 331 of the Criminal Procedure Code. The plea of *autrefois acquit* when pleaded is one that must be tried and disposed of before the issues raised by the other pleas are tried (s. 330 (2)). The plea is one that must be tried by the jury in a case before the Supreme Court. That is the practice in England, and, as neither the Criminal Procedure Code nor any other statute makes any special provision in that behalf, the law applicable is the law relating to Criminal Procedure for the time being in force in England which must be applied so far as it is not in conflict or inconsistent with the Code and can be made auxiliary thereto (s. 6). The trial of the plea of *autrefois acquit* by jury is not only not in conflict or inconsistent

with the Code but it is also in accordance with it for section 216 (1) enacts that all trials before the Supreme Court shall be by jury before a Judge or a Commissioner of Assize.

This brings us to the last of the questions that arise for decision on this appeal. If the appellant can bring his appeal within the ambit of any one of the grounds specified in section 5, should the fact that he failed to raise the plea timeously preclude us from exercising our powers under section 5 ? The material portion of that section reads —

> " (1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:"

Of the grounds on which this Court may allow an appeal only the last mentioned need be considered in the instant case. Was there a miscarriage of justice in this case caused by the denial to the appellant of the benefit of the verdict returned in his favour at the previous trial ? There undoubtedly was. It is a miscarriage of justice for an accused person, without any legal authority in that behalf, to be denied the benefit of a unanimous verdict of the jury returned in his favour in accordance with the directions of the Judge and to be tried again by another jury with just the opposite result. If such a course were permitted an accused person would be liable to be brought to trial repeatedly for the same offence till a jury returns a verdict of guilty. In the case of *Annie Tonks*[1] the Court of Criminal Appeal in England dealt with a somewhat similar matter by allowing the appeal on the basis of a notional plea that had been tendered and wrongfully ruled upon. In doing so Reading L.C.J. observed —

> " Counsel for the appellant has contended that we must regard this case as if a plea of *autrefois convict* had been properly entered at the trial, and as if the judge had wrongfully ruled as a matter of law that there was no case to go to the jury upon the point. We think that that view is right."

We have not deemed it necessary to resort to such an expedient as in our view section 5 is wide enough.

We accordingly quash the conviction of the appellant and direct that a judgment of acquittal be entered.

Accused acquitted.

[1] *11 Cr. App. R. 284.*