[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present :* **Basnayake, C.J. (President), Abeyesundere, J., and G. P. A. Silva, J.**

THE QUEEN *v.* W. M. PUNCHI BANDA and another

Appeals Nos. 143 and 144 of 1962, with Applications Nos. 153 and 154

*S. C. 6—M. C. Kuliyapitiya, 11570*

*Trial before Supreme Court—Jury divided four to three—Resulting position—Criminal Procedure Code, ss. 223 (2), 247 (2), 250.*

**Where, in a trial before the Supreme Court, the jury, after retiring to consider their verdict, are divided four to three, neither section 247 (2) nor any other provision of the Criminal Procedure Code empowers the presiding Judge to direct the jury to retire for further consideration. In such a case, the only course open to the Judge is to discharge the jury under section 250.**

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

*Colvin R. de Silva*, with *M. L. de Silva*, *Nihal Jayewickrema* and *R. Rajasingham* (assigned), for Accused-Appellants.

*S. S. Wijesinha*, Crown Counsel, with *Cecil Goonewardena*, Crown Counsel, for Attorney-General.

February 12, 1963. BASNAYAKE, C.J.—

The appellants have been convicted of the offence of murder of Wijesundera Arachchilage Marthinahamy and Karunanayake Pathirannehelage Andiris Appuhamy and sentenced to death.

Learned counsel for the appellants urged only two of the grounds stated in the notice of appeal. They are—

" (2) When the foreman of the jury, after retirement and due consideration, announced that they were divided by 4–3 in their verdict, the trial judge invited the jury to further consider their verdict to make it an acceptable one. In doing so in the way he did, and considering the fact that without any further directions from the trial judge, and within seven minutes of their second retirement they returned a 5–2 verdict against the appellants, the jury were made to believe or they might well have been made to believe that they were precluded from announcing a 4–3 division. The course adopted by the trial judge in suggesting to them to bring an acceptable verdict on the face of their 4–3 division was not warranted by the law, and in any case his failure to make it clear to the jury that if even after further consideration they were unable to agree upon an acceptable verdict it was still open to them to announce any division, depending upon the view each of them took on the evidence adduced, amounted to a misdirection resulting in a miscarriage of justice.

(3) The trial judge wrongly admitted the evidence of H. Don Peter Jayatilleke, Inspector of Police, that the 1st accused-appellant had made a statement to him as follows :—

'At Kalugamuwa, near the fibre mill I hid the sword under a culvert, and I can point it out.'

in consequence of which the sword P1 was alleged to have been recovered. There was no evidence that P1 was the sword used to inflict the injuries on the deceased persons, and the wrongful admission of this evidence gravely prejudiced the case of the 1st accused-appellant, resulting in a miscarriage of justice."

The facts material to a consideration of the first ground are as follows:—

The jury retired at 3.33 p.m. and returned at 3.57 p.m. The Clerk of Assize addressed the Foreman thus:

"Mr. Foreman, are you unanimously agreed upon your verdict in respect of each of these accused?"

The Foreman replied—

"We are divided."

Then he was asked—

"How are you divided"?

He answered—

"Four to three."

Then the presiding Judge asked the Foreman—

"Is there any chance of your reaching another proportion?"

The Foreman then asked—

"Is it by further discussion, My Lord?"

The learned Judge replied—

"Yes. Four to three is not a legal verdict. You think you could arrive at something nearer unanimity if you could consider further?"

The Foreman answered—

"We will consider further, My Lord."

The jury then retired and returned in ten minutes. The questions put by the Clerk of Assize and the answers given to them are as follows:—

"5132. Q: Mr. Foreman, are you unanimously agreed upon your verdict in respect of the 1st accused in respect of count 1?

A: We are divided.

5133. Q: How are you divided?

A: Five to two.

5134. Q: Do you find the 1st accused, Wijesundera Mudiyanselage Punchi Banda, guilty of the offence of murder on count 1?

A: Guilty.

5135. Q: Are you unanimously agreed upon your verdict in respect of the 1st accused on count 2?

A: We are divided, five to two.

5136. Q: Do you find the 1st accused Wijesundera Mudiyanselage Punchi Banda guilty of murder on count 2?

A: Guilty of murder.

5137. Q : Are you unanimously agreed upon your verdict in respect of the 2nd accused, Kaluaratchilage Don Martin on count 1 ?

A : We are divided.

5138. Q : How are you divided ?

A : Five to two.

5139. Q : Do you find the 2nd accused Kaluaratchilage Don Martin guilty of murder on count 1 ?

A : Guilty of murder.

5140. Q : Are you unanimously agreed upon your verdict in respect of the 2nd accused Kaluaratchilage Don Martin on count 2 ?

A : We are divided.

5141. Q : How are you divided ?

A : Five to two.

5142. Q : Do you find the 2nd accused Kaluaratchilage Don Martin guilty of murder on count 2 ?

A : Guilty of murder."

Was the learned Judge right in law when he asked the jury to retire for further consideration ? Does section 247 (2) or any other provision of the Code empower a Judge to direct the jury who are divided four to three to retire for further consideration in order that they may arrive at " something nearer unanimity " or reach " another proportion " ? Section 247 deals with a case in which the jury are ready to give their verdict. When they are divided four to three, are they ready to give their verdict ? We think not, for the reason that section 223 (2) provides that the verdict returned shall be unanimous or by a majority of not less than five to two. Where the jurors are divided and are unable to reach a majority of not less than five to two, they cannot be said to be ready to give their verdict, for, no verdict can be returned when their division is four to three. Such a case does not fall within the ambit of section 247 (2) and the power conferred thereby cannot be exercised. The learned Judge was therefore wrong in taking the course he took. Where the jury cannot agree on a verdict, section 250 provides that the Judge shall, after the lapse of such time as he thinks reasonable, discharge them. If the jury were directed at the end of the summing-up that their verdict must be one of not less than five to two, the situation that arose in the instant case could have, perhaps, been avoided. If the jury are unable to arrive at the required majority and do not return with their verdict within such time as the Judge thinks reasonable, he must discharge them. But if, despite the direction that the verdict must be by a majority of not less than five to two, the jury do what in law they should not do, and return without

having arrived at a verdict and say they are unable to arrive at a verdict, then what is the presiding Judge to do ? The only course open to him is to discharge the jury under section 250.

The other point argued by the learned counsel was that the statements made by the first appellant to the police officer in the course of investigation under Chapter XII have been illegally admitted in evidence. Those statements are to the following effect :—" At Kalugamuwa, near the fibre mill I hid the sword under a culvert, and I can point it out ". Having travelled with the Inspector in a jeep up to the culvert he said that the sword was there. Clearly these statements were illegally admitted as they are excluded by section 122 (3) of the Criminal Procedure Code for the purpose for which the prosecution sought to prove them. A further illegality in the same connexion is that the Inspector was permitted to give oral evidence of the contents of a document.

We are of opinion that the conviction should be quashed. The only question that merits further consideration is whether we should direct that a judgment of acquittal be entered or order a new trial. We are of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted, but for the illegalities upon which the appeals are allowed. We therefore order a new trial.

*New trial ordered.*