[COURT OF CRIMINAL APPEAL]

1971 *Present:* **H. N. G. Fernando, C.J. (President), Alles, J., and Samerawickrame, J.**

P. PIYADASA, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPLICATION No. 3 OF 1971

S. C. 494/69—M. C. Anuradhapura, 27198

Trial before Supreme Court—Verdict—Jury divided 4 to 3—Resulting position.

Where the jury's verdict upon a count in the indictment is divided 4 to 3, it is the duty of the Judge, if he is of opinion that the jury should reconsider their verdict on that count, to address them further after making some effort to ascertain the points upon which they have disagreed. If the jury retire again without any such instruction, they are liable to change their minds merely because a 4 to 3 verdict is not acceptable.

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

G. M. S. Sameraweera (assigned), with *Mousoof Deen*, for the accused-appellant.

Noel Tittawella, Senior Crown Counsel, for the Attorney-General.

March 26, 1971. H. N. G. FERNANDO, C.J.—

At the close of the trial in this case, in which the jury had to return verdicts on two counts of murder, the jury upon being questioned by the Clerk of Assize, stated that they were unanimous on the 1st count but divided 4 to 3 on the 2nd count. The learned trial Judge then informed them that an acceptable verdict is one which is unanimous or 6 to 1 or 5 to 2, and that if the verdict is 4 to 3 then the law requires a retrial to be ordered. The jury retired again and returned quite soon thereafter and then brought in unanimous verdicts of guilt of murder on both counts.

Having regard to the evidence we see no reason to doubt the correctness of the verdict on the 1st count.

With regard to the 2nd count, there was some evidence upon which the jury may have considered that some provocation had been offered to the accused. Their inability to agree on their verdict on this count is explicable on this ground, and it may well have been the case that some of the jurors preferred to return on this count a verdict of culpable homicide not amounting to murder on grave and sudden provocation although they ultimately returned a verdict of murder on this count. We have not before us any material upon which we can understand how it was that the jurors, who were divided 4 to 3, were able to return a unanimous verdict of murder after a few minutes of consideration.

The only material on record is that the learned trial Judge instructed them that a verdict of 4 to 3 was unacceptable. In the situation which arose, if the learned trial Judge did not record the 4 to 3 verdict and order a re-trial, his alternative was to address the jury further after making some effort to ascertain the points upon which they had disagreed. In the absence of any such instruction, the only reasonable inference is that the jury changed their minds merely because a 4 to 3 verdict was not acceptable. That being so, the verdict of murder on the 2nd count has to be set aside. As it happens, the accused did at the beginning of the trial plead guilty of culpable homicide not amounting to murder on this count.

We think the ends of justice would be met by substituting for the verdict on the 2nd count, a verdict of culpable homicide not amounting to murder on the ground of grave and sudden provocation and we impose for that count a sentence of ten (10) years' rigorous imprisonment. The verdicts and sentences on the 1st and 3rd counts are affirmed.

Verdicts on 1st and 3rd counts affirmed.
Verdict on 2nd count altered.