[COURT OF CRIMINAL APPEAL]

1951 *Present:* **Dias S.P.J. (President), Gratiaen J. and de Silva J.**

GARDIRIS APPU, Appellant, *and* THE KING, Respondent

Appeals 29-30 of 1951

S. C. 48—M. C. Galle, 17,289

Court of Criminal Appeal—Verdict of Jury—" Unreasonable verdict "—Circumstances when the Court will interfere—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 5 (1)—Power of jury to separate truth from falsehood.

The Court of Criminal Appeal does not sit to retry cases, thereby usurping the functions of the Jury. If there has been no misdirection, no mistake in

[1] *(1950) A. C. 481 : 51 N. L. R. 491.*

law, or no misreception of evidence, the verdict of the Jury as a rule will not be upset on the ground that the verdict is " unreasonable ". This, however, is not an inflexible rule to be applied indiscriminately. Each case must be decided on its peculiar facts and circumstances.

Where on a proper summing-up, the jury found a lawful verdict, the Court of Criminal Appeal refused to interfere with the findings of fact of the jury holding that to do so in the circumstances of the case would be to substitute trial by the Court of Criminal Appeal for trial by Jury.

When false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth.

APPEAL, with leave obtained, against two convictions in a trial before the Supreme Court.

U. A. Jayasundera, K.C., with *D. Wimalaratne* and *O. M. de Alwis* for the accused appellants.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

May 4, 1951. DIAS S.P.J.—

Out of the 14 grounds formulated in the application for leave to appeal learned counsel for the applicants abandoned all of them with the exception of the last ground, namely, that the verdict of the jury was an unreasonable one. This Court gave the appellants leave to appeal on that ground.

On the facts of this case it is undoubted that at about 9 or 9.30 p.m., on April 18, 1950, a clash took place between certain persons in which several individuals were wounded, and the deceased man Sadiris or Hinnimahatmaya was fatally injured. He died without making any statement.

As to how this clash originated the prosecution and the defence are at variance. The case for the prosecution is that the witness, Arlis, who was peacefully going along a road or path in order to attend a *thovil* ceremony, was wantonly attacked by the three accused who are cousins. It is alleged that the motive for this attack was the previous ill-feeling said to exist between the 1st accused and Arlis. When Arlis was attacked he cried out for help, and the deceased man as a peacemaker came up asking the accused to desist. Thereupon the 1st accused felled the deceased man to the ground with a blow on the head which fractured his skull causing a fatal injury. Arlis, who had been cut and stabbed in the melee, took to his heels. Two witnesses, Paulis and Edoris, also came up but by that time the fatal blow had been inflicted on the deceased man. Paulis sustained a fracture of one of his fingers.

On the other hand, the case for the defence was disclosed by the 1st accused in his unsworn statement from the dock. According to him the story told by Arlis as to the genesis of this transaction is false. The 1st accused says that Arlis had reached the *thovil* ceremony and proposed that they should indulge in a game of cards. The 1st accused, who was

invited to join, declined on the ground that he had reason to believe that the police were active and that there might be a raid for unlawful gaming. According to the 1st accused a quarrel then developed between himself and Arlis who struck the 1st accused. He then retreated abusing, whereupon Arlis and several others rushed at him and assaulted him again. He then ran home chased by Arlis and the others and as he entered his verandah he was again assaulted and Arlis cut his neck. Then a free fight developed in which blows were given and received. After everything was over the 1st accused discovered the deceased man lying dead in the verandah.

It is to be noted that Arlis himself was severely injured. He had cuts, stabs and abrasions, while the witness Paulis had a fractured finger. 1st accused in his statement cannot explain how these injuries were caused. On the other hand, the 1st accused himself had no less than seven injuries including an incised wound 5 inches long on the back of his neck cutting through the muscles and reaching down to the spine. In the doctor's opinion this injury could not have been self-inflicted or caused by "a friendly hand". The 2nd accused also sustained two incised wounds. The prosecution witnesses are totally unable to explain who injured the two accused or the circumstances under which they received those injuries.

It is, therefore, manifest that all these persons were injured in one and the same transaction which did not begin as stated by the prosecution witness Arlis. It is also more than probable that one side or the other, or both sides, are suppressing material facts—a situation which is not unknown in the Assize Courts. The strange inactivity of the village headman on this night has also contributed to the difficulties of the case.

There is the circumstance that when the police reached the scene next morning, they found in the verandah of the house, where the body of the deceased was found by the headman, several rock stones which probably had been hurled at the house during the row. The police also found marks on the walls and certain damaged shutters which led them to infer that during the row stones had been pelted at this house. According to the police officer, he found unmistakable signs that a free fight or struggle had taken place in that verandah. The effect of all these circumstances seems to indicate that the story told by the chief prosecution witness Arlis is not the whole truth. According to him the attack on the deceased man took place on the road or path. How then did the body of the deceased get on to the verandah ? The medical evidence proves that the deceased sustained a comminuted fracture of the skull and there was compression of the brain. Would not a man on receiving such an injury at once drop unconscious to the ground and be incapable of walking or crawling to the verandah ? It is true the doctor says that after receiving the head injury the deceased might have walked a short distance but that he would do this aimlessly—" like a mechanical man". The doctor further stated: "After the receipt of the head injury the injured man could have walked a short distance before he fell. After the fall he would not be able to get up and walk". The evidence of Arlis is that the deceased man collapsed and fell immediately

he was hit on the head. There is no evidence that some well disposed person carried the body to the shelter of the verandah particularly as there was a shower of rain after this incident. Therefore the prosecution is unable to explain how the body of the deceased was found by the headman in the verandah. This is another circumstance which makes the story of Arlis suspect as to the manner in which this row originated. It corroborates the statement of the 1st accused that the row took place in the verandah and not on the road. Then there is the circumstance that while there was a pool of blood in the verandah, there was no blood on the road where the assault is alleged to have taken place according to the prosecution. There is evidence, however, that there was a shower of rain that night and it is possible that any blood stains might have been washed away.

If the transaction took place in the manner described by the 1st accused, it is clear that the charge of murder against him could not be sustained. At the most he would be guilty of culpable homicide not amounting to murder for killing the deceased in a sudden fight, or on the ground that he exceeded his right of private defence. Having regard to the serious injuries he received, it was quite open to the jury, if they thought fit to do so, to have acquitted the 1st accused and the other two accused on the ground that they were acting in self-defence and had not exceeded that right. Even accepting the evidence of Arlis as being the unvarnished truth, it is doubtful whether it could be successfully contended that the 2nd and 3rd accused shared any common intention with the 1st accused in what he did. There is no evidence of abetment. In fact, the evidence that the 3rd accused, even had he been present, did anything to the deceased man is extremely doubtful. The transaction took place in the dark or semi-darkness. That the jury shared these doubts with regard to the 2nd and 3rd accused is reflected in their verdict. They acquitted the 3rd accused, and while they convicted the 1st accused of causing grievous hurt to the deceased man, they convicted the 2nd accused of only causing him simple hurt. This indicates that they took the view that the 2nd accused was not actuated by a common intention with the 1st accused in what the latter did to the deceased man, but found that the 2nd accused on his own had caused simple hurt to the deceased.

Both sides are agreed that the charge of the learned trial Judge is not open to the slightest criticism. It was in every sense correct, fair and impartial. Reading between the lines of the summing-up, however, it appears to be manifest that the learned trial Judge inclined to the view that the trial should end in a verdict of acquittal. He dealt with all the difficulties of the case. He expressed his own views, but repeatedly made it clear that the jury, being the judges of fact, the verdict was theirs and the responsibility for their verdict was theirs alone. The learned trial Judge indicated that it would be open to the Jury, if they thought fit to do so, to convict the 1st accused of voluntarily causing grievous hurt to the deceased and to find the 2nd accused guilty of simple hurt. Neither side has argued that this was not a proper direction. The jury after deliberating for half an hour returned a unanimous verdict in accordance with the Judge's charge, acquitting the 3rd accused and

convicting the 1st accused under s. 317 of the Penal Code and the 2nd accused under s. 314. *The question for decision, therefore, is whether in the circumstances of this case it is open to this court to say that the verdict of the jury is "unreasonable".*

Section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, indicates the circumstances under which this Court can quash a conviction, namely, if the Court thinks that the verdict of the jury should be set aside *inter alia* on the ground that it is unreasonable. Section 5 goes on to say that this Court "in any other case shall dismiss the appeal".

It is necessary to remind ourselves of our statutory powers, because if these are not borne in mind there is always the risk of our unwittingly substituting Trial by the Court of Criminal Appeal for Trial by Jury.

The powers of this Court to quash the verdict of a jury in a proper case being undoubted, the difficulty is to know when such powers should be invoked and in what cases the verdict of the jury in an apparent case of hardship should be allowed to stand. It is unnecessary to cite authorities because the general principles are clear and have been laid down in a series of decisions both in Britain and in Ceylon. These may be summarised thus: Questions of fact are for the jury. The Court of Criminal Appeal does not sit to retry cases, thereby usurping the functions of the jury. This Court sits as a Court of Appeal, and if there has been no misdirection, no mistake in law, and no misreception of evidence, we cannot upset the verdict of the jury even though the Court feels that had the members of the Court been on the jury, they would have come to a different conclusion from the one which the jury reached. This, however, is not an inflexible or hard and fast rule to be applied rigorously and indiscriminately to every case. *Each case must be decided on its peculiar facts and circumstances.* The Ordinance which defines our powers has enacted that there may be cases where this Court will interfere, and should interfere, on the ground that the verdict of the jury is unreasonable, that is to say, not sound or sensible, or not governed by good sense. The question is whether this is such a case.

In the opinion of the Court this is not a case in which we should interfere. All the issues in the case were adequately before the jury who had been very ably and impartially guided by the learned trial Judge. The burden of proof was clearly on the prosecution to prove beyond all reasonable doubt in regard to each of the three accused either that the charge made in the indictment against them was established, or that some lesser charge was established. It is the experience of every Judge of Assize that not infrequently a certain amount of false evidence has been introduced into the case by the witnesses. In such cases the jury can do one of two things. It is open to them to say that the falsehoods are of such a magnitude as to taint the whole case for the prosecution and that they feel that it would be unsafe to convict at all. On the other hand it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth. The learned trial Judge made this aspect of the matter clear to the Jury, at the same time indicating very clearly that he himself inclined to a verdict of not guilty. But after all

it is not the Judge but the jury who are the judges of the facts, and the jury in this case have found a verdict which is in accordance with the directions of the trial Judge. It therefore appears to this Court that it would be improper to interfere with the verdict of the jury in this case. The Court thinks that should they interfere they would, in this case, be substituting Trial by the Court of Criminal Appeal for Trial by Jury.

The appeals are therefore dismissed.

Appeals dismissed.