[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Gunasekara J. (President), Swan J. and H. A. de Silva J.**

JUAN APPUHAMY, Appellant, *and* THE QUEEN, Respondent

*Application 92 of 1952*

*S. C. 22—M. C. Chilaw, 49,370*

*Jury—Verdict—Quorum necessary—Discharge of jury when they cannot agree—Criminal Procedure Code, ss. 223, 247 (1) and (2), 248 (2), 250.*

If the jury or the required majority of them cannot agree in regard to the verdict it is a matter for the trial Judge to decide, in the exercise of his discretion, whether he should discharge the jury or advise them to continue their deliberations for a further period and see if they can arrive at a verdict.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

*M. M. Kumarakulasingham,* with *J. C. Thurairatnam* and *Mahesa Ratnam* (assigned), for the accused appellant.

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

*Cur. adv. vult.*

October 31, 1952. GUNASEKARA J.—

This is an appeal against a conviction for murder. The appellant, who was convicted on the 10th September, had been defended at the trial by three counsel, including an advocate assigned by the court. Nevertheless, all the grounds set out in the notice of appeal were abandoned (as, in our opinion, they ought to have been) by counsel who appeared for him at the hearing of the appeal. Mr. Kumarakulasingham confined

himself to the following supplementary ground, of which notice was given by Mr. Mahesa Ratnam on the 3rd October :

> " The learned Judge was not warranted by law to ask the Jury to return an acceptable verdict when they were divided by 4 to 3. "

In view of the importance of the question involved and the circumstance that this is an appeal against a conviction for murder we permitted learned counsel to argue this ground of appeal although notice of it had not been given within the prescribed time.

The material facts appear from the following passage in the shorthand notes of the proceedings at the trial :

" Court sums up.

*Verdict*

(Jury retire at 3.43 p.m. and return at 5 p.m.)

*Clerk of Assize :* Mr. Foreman, are you unanimously agreed upon your verdict ?

*Foreman :* No.

" *Clerk of Assize :* How are you divided ?

*Foreman :* Four to three.

*Court to Jury :* An acceptable verdict is a verdict of 5 to 2. Is it possible that if you reconsider the matter you will arrive at such a verdict ? Each of you is entitled to his own opinion but there is no objection to a change of opinion based on further discussion. Will you kindly go back and see whether you can arrive at an acceptable verdict of 5 to 2 ; or do you think it is not possible ?

*Foreman :* We will retire again.

(Jury retire again at 5.05 p.m. and return at 5.20 p.m.)

*Clerk of Assize :* Mr. Foreman, are you unanimously agreed upon your verdict ?

*Foreman :* No.

*Clerk of Assize :* How are you divided ?

*Foreman :* Five to two.

*Clerk of Assize :* Do you find the prisoner guilty or not guilty of the offence of murder ?

*Foreman :* We find him guilty of murder. "

The Criminal Procedure Code provides, by section 223, that the jury shall consist of seven persons and that the verdict returned shall be unanimous or by a majority of not less than five to two ; and, by section 250, that if the jury or the required majority of them cannot agree the judge shall after the lapse of such time as he thinks reasonable discharge them. It is contended for the appellant that when the foreman stated that the jury were divided in the proportion of four to three the only course open to the learned judge was to discharge them.

Under section 247 (2) a jury who are ready to give their verdict may, if they are not unanimous, be required by the judge to retire for further consideration before a verdict is returned, and under section 248 (2) a jury who have returned a verdict of which the judge does not approve may be directed by him to reconsider their verdict. Mr. Kumarakulasingham contends, and we agree with him on this point, that in this case there was no exercise of the power given to the presiding judge by either of these provisions. When the jury retired a second time they had not returned a verdict nor, being divided in the proportion of four to three, had they been "ready to give their verdict": as was observed in the judgment of this court in *R. v. Navaratnam* [1], a statement by the foreman that the jury were divided four to three "cannot in any sense be regarded as a verdict".

Section 247 (1) provides that when the jury are ready to give their verdict and all are present the registrar, whose functions may in terms of section 442A be performed by a clerk of assize, shall ask the foreman if they are unanimous. The clerk's question to the foreman, when the jury returned at 5 p.m., as to whether they were unanimously agreed upon their verdict, may have been put upon the assumption that they were ready to give their verdict. The foreman's answer to the next question, however, showed that they were not ready to give a verdict, and therefore that the stage contemplated by subsection (1) of section 247 had not been reached. In this view of the matter it is not necessary to discuss a question that was raised by Mr. Kumarakulasingham as to whether the power given to the judge by subsection (2) can be exercised after he has ascertained in what proportion the jury are divided.

The effect of the foreman's answers to the questions put by the clerk on this occasion was that at the end of their deliberations for about an hour and a quarter the jury or the required majority of them could not agree. We do not understand the law to be that in such circumstances the judge has no discretion as to whether he should discharge the jury or not but must discharge them. What is laid down in section 250 is that he "shall *after the lapse of such time as he thinks reasonable* discharge them". We are therefore of opinion that when the learned judge was informed of this inability on the part of the jury or the required majority of them to agree it was a matter for his decision in the exercise of his discretion whether he should discharge the jury or advise them to continue their deliberations for a further period and see if they could arrive at a verdict. We may here observe that it would not be entirely accurate to say that what the learned judge did was "*to ask the jury to return an acceptable verdict*". What he actually said was: "Will you kindly go back and reconsider the matter *and see whether you can arrive at an acceptable verdict* of 5 to 2; or *do you think it is not possible?*". Thereupon the jury themselves, through the foreman, indicated that they wished to retire again. In our opinion there was no irregularity in the procedure that was adopted.

The appeal is dismissed.

*Appeal dismissed.*

[1] *(1945) 46 N. L. R. 181 at 182.*