[IN THE COURT OF APPEAL OF SRI LANKA]

1973 *Present* : **Fernando, P., Sirimane, J., and Samerawickrame, J.**

WALIMUNIGE JOHN and another, Applicants, *and* THE STATE, Respondent

APPLICATION No. 20 OF 1973—C. C. A. CASE No. 118-119/72

S. C. 164/72—M. C. Matara, 56669

Summing-up—Rights and duties of jury—Misdirection—Criminal Procedure Code, s. 243.

In the course of his summing-up, the trial judge addressed the jurors thus :—

" It is your duty to arrive at a finding in this case, at a verdict in this case, and whatever decision you arrive at is not going to be called into question in any other forum. On the other hand, if I make a mistake on the law, there is a higher body which can correct me, but there is no such body to correct you."

Held, (i) that it was factually incorrect to say either that the jury's decision is not going to be called in question in any other forum or that there is no body to correct them.

(ii) that it was incorrect in law to say that a mistake of fact by the jury is incapable of being corrected.

(iii) that it was incorrect on the part of the trial judge to have given to the jury the direction reproduced above, and a direction in those or similar terms should be avoided by trial judges.

APPLICATION for leave to appeal from a judgment of the Court of Criminal Appeal reported in *(1973) 76 N. L. R. 488.*

G. E. Chitty, with *Justin Perera,* for the applicants.

Kenneth Seneviratne, for the State.

July 10, 1973. FERNANDO, P.—

After hearing learned counsel for the applicants and for the State we refused leave to appeal because we were satisfied that there has been no miscarriage of justice in this case. We nevertheless decided that it was our duty to indicate to the learned Commissioner that certain directions he has given to the jury were capable of leaving in the minds of the jurors a wrong understanding of their powers and their functions. Our decision to advert to these directions has been influenced also by the fact that this is by no means the only occasion on which this particular judge has given directions to juries to the same or a similar effect and by our belief that our views may be of some assistance to trial judges on the matters that formed the subject of criticism by learned counsel for the applicants.

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Section 243 of our Criminal Procedure Code enumerates the duties of the jury, and the learned trial judge, in explaining to the jurors that it is their duty to decide which view of the facts is true, addressed them thus:—

> "It is your duty to arrive at a finding in this case, at a verdict in this case, and whatever decision you arrive at is not going to be called into question in any other forum. On the other hand, if I make a mistake on the law, there is a higher body which can correct me, but there is no such body to correct you."

It was, first, factually incorrect to say either that the jury's decision is not going to be called in question in any other forum or that there is no body to correct them. The jury's decisions on fact are challenged almost invariably in every petition of appeal submitted to the Court of Criminal Appeal; and now, after the establishment of the Court of Appeal by Act No. 44 of 1971, they are capable of being challenged, albeit within very narrow limits, even after a decision reached in the Court of Criminal Appeal.

It was, next, incorrect in law to say that a mistake of fact by the jury is incapable of being corrected. One has only to examine the grounds of appeal set out in section 4 of the Court of Criminal Appeal Ordinance of 1938 to discover that a person convicted on a trial before the Supreme Court may appeal, with the leave of the Court of Criminal Appeal or upon the certificate of the trial judge, against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact. There is now also the further right of an aggrieved person to appeal to this Court (the Court of Appeal) after obtaining its leave, from any judgment of the Court of Criminal Appeal. As a matter of strict law, there is nothing in the relevant provisions of the Court of Appeal Act to indicate that in no circumstances can leave to appeal be granted on questions of fact.

It was, in our opinion, incorrect on the part of the learned trial judge to have given to the jury the direction reproduced above, and a direction in those or similar terms should be avoided by trial judges. We feel it right to add that trial judges would do well to refrain from informing jurors that they are the "supreme" judges of fact. If that be intended as a statement of the law, the provisions of the Court of Criminal Appeal Ordinance or the Court of Appeal Act we have referred to already would militate against its correctness. Even when a

trial judge says that the jurors are the sole judges of fact, all that he intends to convey thereby is that the jurors are the judges of fact to the exclusion of the trial judge.

We may now reproduce a sample of the other directions which have also given rise to complaint by the applicants :—

> "I have drawn your attention to certain aspects of the evidence which I thought might be of some material assistance to you, but as I have cautioned you over and over again, please keep in mind and remember that you have the absolute liberty to disregard everything I have said, to throw out every suggestion I have made either directly or indirectly, and act on your own assessment of the evidence. Similarly, whatever said by the prosecution or the defence, the law says, since you are the judges of the fact, that you should have the absolute liberty to disregard completely."

Mr. Chitty argued that directions of this nature amount to statements that it is open to the jury not to consider the expression of views of the judge or the arguments or submissions of counsel. He submitted that the accused persons cannot help it if the judge himself states that expressions of his own view be not considered, but that it is a matter for serious complaint if the jurors are informed that they are at absolute liberty to disregard the arguments and submissions of counsel.

While we think that expressions like "you are at complete liberty to disregard and discard" and "you have the complete liberty to disregard wholesale" may tend to induce in the minds of aggressive jurors the belief that the views of the judge and the arguments of counsel are entitled to trifling or no weight when "sole and supreme" judges have the power to decide questions of fact, there are other directions in the charge of the learned trial judge which serve to show that in reality he was informing the jury (which we have a right to presume was a reasonable jury) of its right to disregard the views and arguments respectively only after giving due consideration to them. For example, the judge said "You are entitled to take into consideration all reference made by them (counsel), but the finding will be independently by you." It would have been better if the judge had informed the jury that it was their duty to take into consideration all views and arguments put before them. In spite of this shortcoming, we cannot think that the jury could reasonably have understood the directions actually given as an indication to them that they were entitled not to

take into consideration every view and argument which the trial judge either placed or permitted counsel to place before the jury.

Application refused.