[ASSIZE COURT]

1952 *Present :* **Choksy A.J.**

THE QUEEN *v.* J. J. KANAGARATNAM *et al.*

S. C. 32—M. C. Nuwara Eliya, 6,298

Juror—Bias—"Presumed partiality"—Criminal Procedure Code (Cap. 16), ss. 225, 230.

At a late stage of a trial in a criminal session of the Supreme Court it was discovered that one of the jurors was a relative of a material witness for the prosecution and that from the very outset there had been contacts between them and opportunities of communication. The witness in question was not one to speak merely to any formal facts, or facts of slight importance ; on the contrary, there was a strong conflict of interests between him and the first accused.

***Held,* that, in such circumstances, it could not be said that it would be unreasonable to presume partiality in the juror. In the interests of justice, therefore, the Jury should be discharged.**

ORDER made in the course of a trial before the Supreme Court.

R. A. Kannangara, Crown Counsel, with *L. B. T. Premaratne,* Crown Counsel, for the prosecution.

G. E. Chitty, with *A. I. Rajasingham,* and *A. S. Vanigasooriyar,* for the 1st accused.

G. Mudanayake, for the 2nd accused.

Izzadeen Mohamed, for the 3rd accused.

A. I. Rajasingham, for the 4th accused.

Cur. adv. vult.

June 20, 1952. CHOKSY A.J.—

An application has been made on behalf of the first accused for the discharge of the jury under Section 230 of the Criminal Procedure Code on the ground that it was found towards the end of last week that one of the jurors, namely, Mr. C. Charavanapavan (Assistant Chemist, Department of Agriculture, Peradeniya), is related to the witness Mr. S. R. Thambiah, who is to be called by the prosecution. It is stated that these two gentlemen are married to two sisters and that both of them have had opportunities of meeting each other in the house of their mother-in-law, during the course of this long trial, because Mr. Thambiah and his wife have stayed in her house whenever the witness has come from Colombo (where he is permanently resident) to Kandy to attend Court for the purpose of giving evidence in this case. The juror, who is resident in Peradeniya, calls at the house of his mother-in-law every afternoon to pick up two of his children, who attend school in Kandy, and take them home to Peradeniya.

Mr. Chitty for the first accused stated that neither his client nor his Proctor, Mr. V. Ponnusamy, had been aware of either the relationship or the other facts stated above, until Mr. Ponnusamy personally verified the information which his client, the first accused, had received in the course of last week. Had he known these facts Mr. Chitty states he would have challenged Mr. Charavanapavan as he says that it is not in the interests of justice that Mr. Charavanapavan should be a member of the jury which is trying this accused.

Mr. Thambiah is not a witness to speak to any formal facts, or facts of slight importance, but is to be called by the prosecution to prove that the Tivoli Cinema Theatre, in which the first accused, the witness Mr. Thambiah, and two others were partners, could not have yielded such a large income as would account for the large sums of money which were going into the first accused's personal account at the National Bank of India, Nuwara Eliya branch.

The first accused was the Chief Shroff of the National Bank of India Nuwara Eliya branch, and the second accused was one of the two assistant shroffs. The third accused was the ledger-keeper and the fourth accused the head clerk of that branch. All four have been charged with criminal conspiracy to commit criminal breach of trust of money of the Nuwara Eliya branch of the National Bank between 15th February and 9th December, 1949. There are further charges to the effect that in pursuance of the conspiracy the second accused used numerous documents which bore the forged signatures of the respective managers of that branch as genuine. The first accused is also charged with having made false entries in the books of the Bank to achieve the object of the conspiracy. In the result, it is alleged, the Bank lost a sum of Rs. 103,445·28 between the above dates.

The prosecution has already led evidence of many thousands of rupees—totally disproportionate to his salary and other allowances—going into the private account of the first accused at the branch of which he was the shroff. As against such credits large sums of money have been drawn by the first accused from his account between the above dates. The monies alleged to have been misappropriated came out of payments which had to be credited to the account of the Government in the National Bank, Nuwara Eliya, where those who had to make payments at the Nuwara Eliya Kachcheri deposited monies to the credit of the Government Account. These deposits ran into several thousands of rupees at a time per day and almost every day. There were frequent withdrawals too. On occasions these withdrawals ran up to as much as from one to two lakhs per day.

The history of the origin and subsequent career of the Tivoli Theatre, as disclosed by the evidence of the witness Mr. Thambiah given in connection with the present application, and his evidence in the District Court of Nuwara Eliya in a civil case which is now pending in that Court in connection with the Tivoli Theatre, and also the pleadings in that action (which have been produced in the course of the present inquiry) as also the evidence of Mr. Ponnusamy on the present application all tend to reveal that feelings between the first accused, the witness Mr. Thambiah,

and two others, all four of whom started the Theatre a few years ago, are strained and antagonistic. The first accused, who was said to have been the Chairman of the Urban Council of Nuwara Eliya at the beginning of the venture and who later was the Mayor of the Municipal Council of Nuwara Eliya, took on lease in his own name (but apparently on behalf of all the partners) the land upon which the Theatre now stands. All four joined in the project of erecting the Theatre and equipping it as a Cinema Theatre, at a total cost to all of them together of some Rs. 148,000. The witness Mr. Thambiah managed the Theatre until June, 1948. The first accused thereafter took over the management. The evidence in the civil case shows that the four persons had not entered into any written partnership, although it was registered under the Business Names Ordinance; and that trouble started between them before the accounts of even the very first year had been gone into; that no distribution of any profits had been made between the partners but that a certain part of the debts of the partnership incurred in connection with the building and equipping of the Theatre were paid from the income; that from the time the first accused took over the management, in June 1948, he did not make any payments to either the witness Thambiah or the other partners out of the income of the theatre; that troubles reached such a pitch that parts of the sound equipment were removed from the Theatre; and that the first accused in the present case, and others with him, were charged in the Magistrate's Court of Nuwara Eliya with unlawful assembly and connected charges. It appears that the first accused was acquitted of these charges but there can be no doubt whatsoever that considerable bitterness and ill-feeling must necessarily have been engendered between the first accused on the one side and his co-partners on the other in connection with the various disputes that had arisen between them.

The civil case in the District Court of Nuwara Eliya was filed by one of the co-partners in June 1950 against the first accused, as the first defendant therein, the witness Mr. Thambiah as the second defendant, and the fourth partner as the third defendant. The plaintiff claims, as against the first accused, declaration of title to one-fourth share of the Theatre and of the profits thereof and asks that the first accused, who has apparently been in possession of the entire Theatre to the exclusion of his three co-partners, be ejected from the plaintiff's one-fourth share. The other two partners were made defendants because they are said to be partners but the plaintiff claimed no relief as against them. The plaintiff also alleges that the first defendant has unlawfully appropriated to himself all the profits of the Theatre and also alleges mismanagement by the first accused. The position taken up by the first accused, in his answer, is that he is entitled to remain in possession of the entire premises as the lease is in his own name. He admits that the plaintiff and the other two defendants "contributed monies and put up the said building with a view to running the Theatre", and alleges collusion between the plaintiff and the second and third defendants and pleads that the action must fail in the absence of any written document constituting any partnership between the plaintiff and himself

and the co-defendants. Mr. Thambiah was the first witness called on behalf of the plaintiff. His evidence makes it quite clear that although there was a partnership in fact between the parties there was no written document constituting the partnership.

In these circumstances one can well understand the allegation of animosity and therefore of bias made against the witness Mr. Thambiah as Mr. Thambiah and his co-partners are faced with what they would regard as a dishonest attempt on the part of the first accused to defeat their claims by relying on the technical point of the absence of a writing constituting the partnership when in fact all four of them had worked on the basis of their being partners in the business. It is said, on behalf of the first accused, that in these circumstances Mr. Thambiah would be most interested in doing what he could to ensure the conviction of the first accused because, quite apart from such satisfaction—moral or morbid—as he may derive from such a fate befalling a supposedly dishonest partner of his, a compulsory confinement of the first accused in prison would, in the view of the witness, facilitate his getting back possession of the Tivoli Theatre for himself and his co-partners, and working it to their advantage so as to retrieve as far as possible the loss they have so far sustained.

I am quite satisfied that there is a strong conflict of interests between the first accused on the one hand and the witness Mr. Thambiah on the other. But the question is whether that renders Mr. Thambiah's brother-in-law, Mr. Charavanapavan, "improper as a juror" (section 225 of the Criminal Procedure Code) and so makes it necessary for me to discharge the Jury "in the interests of justice".

The evidence of Mr. Ponnusamy, a Proctor and Notary of many years' standing, and the present Crown Proctor of Nuwara Eliya, and the evidence of the witness Mr. Thambiah, both of whom were put into the witness box for the purpose of this inquiry upon my directions and request, make it clear that Mr. and Mrs. Thambiah have stayed at the house of Mrs. Thampoe, in Kandy, on the 12th May last (the date on which this trial began), and on the 13th May, and again on the 16th of this month—June 1952. Mr. Thambiah had to be in attendance in Court on these three dates. His evidence also shows that both his wife and he have been in Kandy at Mrs. Thampoe's from the afternoon of Friday the 13th June although both of them, he says, were at Hanguranketta on Saturday and Sunday. He has admitted that he has had opportunities of speaking to Mr. Charavanapavan at Mrs. Thampoe's at least on two or three occasions during the course of this trial. He has also admitted that Mr. Charavanapavan used to go to Mrs. Thampoe's to take his children home after school. On one occasion, during the course of this trial, he says that when his wife and he were out shopping they both met Mr. and Mrs. Charavanapavan at one of the shops and that Mr. Charavanapavan staved off any attempt of the witness to make conversation with him by telling the witness that as he was a juror they should not talk. They have both been on the friendliest of terms and yet Mr. Thambiah would have us believe

that he always addressed his brother-in-law as " Mr. Charavanapavan " and that he addressed him in this formal style even when conversing with him in Tamil. When questioned about the civil case, where the interests of himself and the first accused are adverse to one another, he said that he did not think that Mr. Charavanapavan knew anything about that case. One should not forget that Mr. Thambiah had also given evidence, in connection with the present case, in the Magistrate's Court before the accused were committed for trial by the Supreme Court. Despite all this he said that he had discussed the civil case with no one else except his lawyers and his wife, who is the sister of Mrs. Charavanapavan, and that he had never discussed it in the family circle. Having regard to the normal course of human conduct I think the witness has endeavoured to portray a very artificial situation in connection with the civil case. Considering the large sum involved in the litigation over the Theatre, the circumstances in which Mr. Thambiah came to join in the venture after being condemned by a Medical Board as unfit to continue his duties as a Public Servant, the common basis of mutual trust upon which the four partners set out upon their business enterprise, the subsequent unfortunate developments resulting even in a criminal case, the attitude of the first defendant which resulted in the breaking up of all confidence reposed in him by his associates and which forced one of the partners to carry the dispute into the civil court, and, to cap it all, the utterly disingenuous, though perfectly legal, defence set up by the first accused in order to defeat the claims of his erstwhile partners, it is impossible for me to accept the statement that the witness did not discuss that case and the conduct of the first accused in relation to the business, with any other persons whomsoever except his lawyers and his wife. The probabilities are so strongly against Mr. Thambiah's version that I cannot give credence to it. When one adds to this the strong likelihood that the two sisters must at least have shared the knowledge derived by Mrs. Thambiah from her husband one can almost hazard with certainty that the dispute and everything connected with it must have been the topic of conversation between the respective families and probably a much larger circle of relatives and friends. Information about litigation between owners of such a public place as a Cinema Theatre quickly gets about and becomes a matter of common knowledge even amongst members of the general public of the place. In such circumstances it would be difficult to imagine that the brother-in-law of one of the principal parties to the dispute would not be made aware of what the position was.

I agree with the contention of Mr. Kannangara, Crown Counsel, that the mere existence of affinity between a juror and a witness, however strongly biased the witness may be against the accused, cannot of itself, in every case, necessarily be a ground for discharging the Jury. If however the Court is satisfied that as a result of such an affinity, and the very strong probability of the Juror's knowledge of the antagonistic relationship between the witness and the accused, there can be either actual partiality in the juror or some presumed partiality, then I think the interests of justice require that such a juror should not

be allowed to sit in judgment on the accused. It must be noted that the circumstances must be such as to raise a presumption of partiality or bias in the juror.

In the present case no evidence of actual partiality is made and I have therefore to consider whether in the circumstances there is " some presumed partiality " in the juror. Any one standing in such a relationship as this Juror to a person who has been treated in the manner in which Mr. Thambiah and his co-partners say they have been treated by the first accused, would naturally be disposed to view with much suspicion, if not with actual disbelief, any explanation given by a person in the position of the first accused in relation to such serious charges as those of criminal conspiracy and criminal breach of trust. Such a person cannot be said to be so free of all taint of partiality as to be regarded as an absolutely unbiased member of a tribunal who is prepared to enter upon his duties with a full belief in the innocence of the accused, which is the first presumption with which every trial should begin. There being a very strong probability that the juror in question was aware, if not of all the details at least of the salient features, of the trouble between the first accused and his brother-in-law, and giving the fullest credit for an honest endeavour on his part to exclude from his mind all that knowledge, I am afraid it cannot be said that he will be entirely free of sub-conscious bias against the first accused. There is of course just a possibility that he was not aware that he should have mentioned to the Court, immediately upon his being allowed to take his seat in the jury box unchallenged, his relationship to a witness for the prosecution. Counsel for the accused has commented on the fact that the particular juror in question has remained silent although, at the very commencement of this trial when all the jurors summoned were present in Court, one of the jurors whose name was drawn was challenged by Crown Counsel who stated to Court that that juror had mentioned to Crown Counsel his relationship with some one in the Colombo branch of the National Bank, and on that ground Crown Counsel had challenged that particular juror. One would have expected that ordinary prudence and a sense of the fitness of things would have prompted Mr. Charavanapavan to mention his relationship to the witness in open Court as soon as his name was called. In fairness to him it may well be that he thought that there would be no unfairness or even the slightest impropriety if he did not act upon any material beyond the actual evidence led in Court in his presence. Even so the question of sub-conscious bias has to be considered.

Various cases have been cited to me as being of assistance in arriving at a correct decision of this matter. The case of *The King v. Vidanagamage Edwin*[1] has been referred to as being the nearest to the present case on the question of partiality, real or presumed, of a juror whose first cousin was married to the sister of one of the chief witnesses for the prosecution. Dias J. stopped the trial and discharged the jury. He emphasized one of the cardinal principles which govern the administration of justice, namely, that not only must justice be free from bias,

[1] *(1947) 48 N. L. R. 211*

but that it should also be free from " the faintest suspicion of bias". The relationship that existed between the juror and the witness in that case was a far more distant one than the affinity between the juror and the witness in the present case. Nevertheless, the learned Judge was of the view that the interests of justice required the jury to be discharged.

Mr. Kannangara argued that the administration of justice did not receive a set-back in that case, because, as the learned Judge himself pointed out, it was at a fairly early stage of the trial that the objection to the juror was brought to the notice of Counsel and the Court. Mr. Kannangara stressed that, in the present case, the effect on the administration of justice would be serious because of several circumstances such as that the alleged offences themselves were said to have been committed about three years ago, that the various acts and circumstances involved in these offences were spread over a period of about ten months, that numerous items of evidence had all to be collected and placed before the Court at very great trouble, expense and time, that most of the 899 documents which had been produced in the lower Court had already been placed before this Court, that a very large number of witnesses—fifty-seven, in fact—had been called to date in this Court, including two Managers of the Nuwara Eliya branch of the National Bank, who were in charge respectively at material dates, and whose attendance has been secured from abroad at great inconvenience and expense to all concerned, that the case for the prosecution had almost come to a conclusion, and that it would be prejudicial to the accused themselves and against their interests for the jury to be discharged at such a late stage and for the case to be retried *de novo*, particularly in the absence of any actual prejudice to the accused (as was apparent from the evidence of Mr. Thambiah who does not appear to have discussed this case at all with the juror). He argued therefore that, in the interests of justice, the objection should be overruled and the trial proceeded with.

While I appreciate the full force and weight of these facts, in themselves, I think there is a larger question involved than the trial of this particular case, and that is whether or not the interests of justice in the larger aspect—and not merely the interests of either the prosecution or even the accused in this particular case—require that the objection should be upheld, for it is an equally cardinal principle connected with the administration of justice that not only must justice be done but that it must also appear to be done. The Privy Council decision in *Ras Behari v. The Emperor* [1] cited on behalf of the accused is in point. Their Lordships pointed out that the duty of the Judge " to prevent a scandal and perversion of justice " is a " continuous duty " imposed on him throughout the trial. The interests of justice require the same continuous vigilance to guard the accused against any possible prejudice by some presumed or actual partiality in a juror. I have no doubt that, had the relationship, or the opportunities of contact, between the juror and the witness been known to the

[1] *A. I. R. (1933) P. C. 208*

accused earlier, the juror would have been challenged at the very outset. The material that is before me convinces me that if the accused had been aware of the objectionable situation he would not have kept quiet and taken the chance of a verdict and thereby precluded himself from thereafter taking the objection. In the words of the Privy Council "if the cause of objection is in fact unknown to him there appears to be no reason why the Court in a proper case should not give effect to it." In that particular case, the objection was given effect to at as a late stage as the hearing in the Privy Council because the cause of objection had existed right throughout the trial, although unknown to the accused until its termination.

The case of *Dimes v. The Proprietors of the Grand Junction Canal* [1] is not of much assistance because there Lord Cottenham, the Lord Chancellor, who heard the appeal, had an interest in the subject matter of the suit in the shape of shares in the Company to the extent of several thousand pounds, partly in his own right and partly as Trustee for others, and so the House of Lords held that the Lord Chancellor's interest in the subject matter of the suit disqualified him from deciding upon it as no man could be a judge in his own cause. The case is only material to this extent that there too the defendant did not know of the Lord Chancellor's disqualification until after his appeal had been dismissed by the Lord Chancellor. The delay in the discovery of that fact did not affect the disability which attached to the Lord Chancellor all along. Similarly, in the present case, if there was a disqualification in the juror at the commencement of the trial, that disqualification remained right through the trial, and therefore could be given effect to at any stage of the trial. In *Kennedy's case* an objection to the composition of the Jury was taken only in the Privy Council because the accused and his legal advisers were ignorant of the facts at the proper time although the objection failed for other reasons. See *16 Ceylon Law Recorder LV*.

The case of the *The King v. Essex Justices, Ex parte Perkins* [2] is a very strong case indeed. The Clerk to the Justices was a Solicitor whose firm had been consulted by Mrs. Perkins in connection with the drawing of a deed of separation from her husband. The Clerk to the Justices was quite unaware of this except that that fact was briefly mentioned among other items of work during the week, in a weekly report which he received from his managing clerk. This item had passed out of his memory almost immediately after he had read the report as there was no reason for that item to make any impression upon his mind, especially as the report indicated that the fee would be a very small one. Later, Mrs. Perkins appeared before the Justices in connection with an application for maintenance against her husband. The husband was aware that his wife had consulted the firm of the Clerk to the Justices, but made no mention of that fact in the course of the case against him. Later, an application was made by him to set aside the order of the Justices made against him. The Court held that despite the fact that no injustice was in fact done in the particular

[1] *(1852) 3 House of Lords Cases 759.* [2] *(1927) 2 K. B. 475.*

case, nevertheless, it was possible that the impression on the mind of the husband would have been that justice was not being done seeing that the Solicitor was advising the Justices on the hearing of the summons which his wife had taken out against him. Avory J. held that in spite of that and also in spite of the fact that the Clerk to the Justices had in fact tendered advice to the Justices which was not against the husband but against Mrs. Perkins, the judgment of the Justices should be set aside. In his judgment, Avory J. relied upon the principle enunciated by Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1], where Lord Hewart said : " It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seem to be done . . . . The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered ; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". It should be observed that what was stressed was not what was actually done but the appearance of things. The Judge addressed himself to the question " whether or not there might appear to be a reasonable likelihood of his being biased. If there might, then justice would not seem to the applicant to be done ". The learned Judge held that " the necessary or, at least, the reasonable impression on the mind of the applicant would be that justice was not being done ". Although he freed both the Justices and their Clerk from moral blame, Avory J. set aside the judgment of the Justices. Swift J. put the decision on the ground that it was " essential that justice should be so administered as to satisfy *reasonable persons* that the tribunal is impartial and unbiased" . He was satisfied that, in the particular circumstances of that case, *a reasonable man* might well suppose, or even have a suspicion created in his mind, that there had been an improper interference with the course of justice even though in fact none had taken place. I cannot agree with Mr. Kannangara's submission that the decision of the King's Bench could be put on the principle that no man should be judge in his own cause. No reference was made to that principle nor were any authorities bearing on that principle relied on for the judgment. It seems to me that the principle given effect to was that not only must justice be done but that it must also appear to be done.

Applying that test to the particular circumstances of the present case, it seems to me that a reasonable man might suppose that, in view of the admitted relationship between the juror and one important

[1] *(1924) 1 K. B. 256.*

witness for the prosecution, the contacts between them and the opportunities of communication between the two furnished by such contacts, even though actual communication has been denied, might cause a reasonable man—I do not agree that it must be the accused himself—to suppose that there had been an improper interference with the course of justice ; at the least, the situation certainly lends itself to the creation of such a suspicion in the mind of a reasonable man. It would not be unreasonable for a reasonable person to feel that the accused had been handed over for trial to a jury where one of them was likely to be a biased juror. It could not be said that in such circumstances it would be unreasonable to presume partiality in the juror. If one adds to that the very strong probabilities that the juror would have known the facts forming the background of the relations between the 1st accused and the witness, namely, the troubles and litigation between them, then I think the presumption of bias becomes very strong indeed.

The possibility of prejudice to accused persons by a sensational newspaper report about explosives and burglars' tools being found in the possession of certain prisoners in the jail on the morning of their trial, which newspaper report had been read or brought to the notice of some of the jurymen, was considered a sufficient ground by the majority of the Court of Criminal Appeal for ordering a fresh trial in *The King v. Sugathadasa* [1].

I have questioned the particular Juror and see no reason to alter the view I have formed.

I am of the view that in the interests of justice the Jury should be discharged and I accordingly discharge the Jury.

Jury discharged.

[1] *(1949) 51 N. L. R. 93.*