[CROWN CASE RESERVED.]

1920.

Present: Shaw J. and De Sampayo J.

THE KING *v.* APPU SINNO.

4—P. C. Matara, 17,821.

Plea of autre fois acquit—*Verdict of acquittal by jury 5 to 2—Direction of Judge to reconsider verdict—Jury divided 4 to 3—Re-trial before another jury—Plea of* autre fois acquit—*Evidence—Witness not tendered for cross-examination by accused in Police Court—Disappearance of witness—Reading of evidence to jury—Criminal Procedure Code, ss. 248, 331—Evidence Ordinance, ss. 33 and 167.*

The jury returned a verdict of not guilty against the accused, who was charged with murder. The Judge directed the jury to reconsider the verdict. The jury were then divided in proportion of 4 to 3. The Judge discharged the jury. The accused was re-tried before another jury, and the plea of previous acquittal was taken on his behalf.

Held, that the plea was untenable.

A witness gave evidence before the Magistrate when the accused was not present. The Magistrate issued a warrant, but the accused was not arrested for some months. The witness had by this time disappeared, and consequently he was not recalled for cross-examination by the accused. The deposition of the witness was read at the trial before jury without objection.

Held, that the evidence was inadmissible, and should not have been read to the jury.

Held, further, that the provisions of section 167 of the Evidence Ordinance applies to the consideration of a "case stated" after trial by jury.

CASE stated under section 355 (1) of the Criminal Procedure Code by Bertram C.J.:—

1. In this case, before the jury was empanelled, counsel for the defence raised a plea of previous acquittal under section 331 of the Criminal Procedure Code. He argued that a valid acquittal had taken place at a previous trial, which was held at the Galle sessions in July of this year. The note of the Registrar upon the record of the case at that trial was as follows: "*Trial:* June 30, July 1 and 3, 1920. *Verdict:* Jury being unable to bring a verdict unanimously, or by the statutory majority, they are discharged, and the prisoner remanded into the custody of the Fiscal to be brought to trial in due course."

2. It was stated by counsel for the defence, and not contradicted by Crown Counsel, that at the previous trial the jury in the first instance returned a verdict of not guilty by a majority of 5 to 2, but that the presiding Judge, under section 248 (2) of the Criminal Procedure Code,

1920.

The King v. Appu Sinno

not approving of the verdict, directed the jury to reconsider it, and that thereupon having further retired, the jury announced that they were divided in the proportion of 4 to 3. The Judge thereupon discharged the jury.

3. It was contended by counsel for the defence that under the circumstances the original verdict, being the only verdict delivered, must be taken to be a valid verdict, and that the provision of section 240, which states that "the verdict given after such reconsideration shall be deemed to be the true verdict," only applied when after such reconsideration a verdict is in fact arrived at.

4. I was unable to admit this contention. It appeared to me that in the circumstances no "true verdict" had been arrived at in the trial at all. I would further add that this sub-section is clearly designed to give effect to a principle of the English law of criminal procedure, being drawn in accordance with the express terms of a judgment in an English case. There can be no doubt that in the English law, if a jury was asked to reconsider their verdict and on reconsideration fail to agree, they would be discharged, and the original verdict would be held to have no force. I consider that section 250 must be held to apply to the present case, but if any doubt is entertained as to whether it does apply, and if it is suggested that this is a case in which no express provision has been made, then, in my opinion, it is a case in which recourse may legitimately be had to the principles of English criminal procedure under section 6 of the Criminal Procedure Code.

5. I accordingly over-ruled the plea, but informed counsel for the defence that, in the event of the trial taking a certain course, I would further consider any application he thought fit to make in the matter.

6. At the conclusion of the trial the jury unanimously found the prisoner guilty. Counsel for the defence then applied to me to reserve the point under section 355. Although I do not myself entertain any doubt on the point, yet, as the question involves the execution of a capital sentence, I reserved the question of law raised by counsel for the defence, and refer it to the decision of a Court consisting of two Judges.

7. Since the conclusion of the trial. I have observed another point which requires consideration. The deposition of a boy named Hendrick, who gave evidence at the Magisterial inquiry, but subsequently disappeared, was tendered in evidence by the Crown, and without objection from counsel for the defence was read at the trial. It was overlooked that at the time the deposition was made (January 8, 1919) the prisoner was not present. He had disappeared, and his arrest was not effected till September 30, 1919, by which time Hendrick himself had disappeared. The condition prescribed by section 33 of the Evidence Ordinance that "the adverse party in the first proceeding had the right and opportunity to cross-examine" was thus not complied with, and the deposition was therefore, in my opinion, wrongly admitted. I do not think that the admission of this evidence in any way affected the result of the trial. But, as a capital sentence is involved, I think it right that the question of the admission of this evidence and of its effect upon the trial should be adjudicated upon by independent minds, and I therefore refer this question in the same manner. A copy of the deposition of Hendrick is attached to this case.

8. Hendrick was a homeless boy, who had taken refuge in the house of Heenhamy, the sister of the murdered woman. According to his own account he came up at the moment of the murder, and being

shocked by what he saw fainted on the spot. He saw, but did not know the man who committed the murder. It was not proved that he knew either the accused Appu Sinno or the "husband" of the deceased woman (also called Appu Sinno), who, according to the defence, was the real murderer. The Magistrate, in recording the deposition, makes him refer to the murderer as "Appu Sinno," but this is clearly an error on the part of the Magistrate. There were two other eye-witnesses, Heenhamy and Karonchihamy, and three others who came upon the scene immediately afterwards, one of whom, Peter, swore that he saw the murderer going to and returning from the spot, and another of whom, Hinniappu, swore that he saw him running away with a knife in his hand and blood on his clothes. The evidence of Hendrick was of comparatively little weight. It was consistent with the case put forward by the defence, and the fact of his disappearance was capable of being used, and was in fact used, as an argument for the defence, as it was open to the explanation that he ran away sooner than give false evidence in support of those who had befriended him. In charging the jury, I recommended them to attach no special importance to the evidence of Hendrick either one way or the other, and I do not think that it is possible that it in any way swayed their minds.

9. It may be well, therefore, that I should explain on what, in my opinion, the case actually turned. The evidence of the witnesses above referred to was full, explicit, and unshaken. Apart from one point—the fact that one witness said he was sawing wood, whereas before the Magistrate he said he was planting potatoes—there was nothing in their evidence to suggest any doubt as to its truth, and it was strengthened by the finding of an umbrella, said to have belonged to the accused, upon the spot. There were, however, two circumstances which affected the case for the prosecution, and which were made the basis of the case for the defence. The first was a certain shiftiness in the evidence of Appu Sinno, the "husband" of the deceased, and the second, a delay which took place in the reporting of the murder to the authorities.

10. With regard to the evidence of Appu Sinno, the circumstances were as follows: The deceased woman had lived with him at her own house for six years as his mistress (though she is throughout the case spoken of as his wife). The accused was also a member of the household, being a suitor for the hand of a daughter of the deceased, Missi Nona, and having indeed, according to statements made by both the deceased and the daughter, already lived with the girl as her husband. Three weeks before the murder, in the absence of the witness Appu Sinno, a quarrel took place owing to an alleged assault upon Missi Nona by the accused. In consequence of this incident, Missi Nona was withdrawn from the house and sent to Appu Sinno's house at Weligama. The deceased and the accused, however, appear to have settled their difference, and the accused returned to the house (or, possibly, lived in the house adjoining). From this time to the murder, a period of about three weeks, Appu Sinno (who was a carter baas), though he saw the deceased from time to time, if he had occasion to sleep in the village, did not sleep in his wife's house, but at the gala of one Digala Ralahamy, where he left his carts. Before the Magistrate he explained this absence on the ground that he was ashamed of the scandal caused by the family quarrel, and he hinted that he disapproved of a settlement under such circumstances. At the trial, however, he gave a wholly different explanation, namely, that he was afraid of the accused as a man likely to do him mischief, but thought that his "wife" being in her own village might safely be left to look after herself.

1920.

The King v. Appu Sinno

11. With regard to the delay in reporting the murder, the circumstances are as follows : The murder took place in the forenoon. News of it was brought by Heenhamy to Appu Sinno at Digala Ralahamy's gala (which is about 2½ miles from the scene) at about 12 o'clock. Appu Sinno did not report it to the headman until 6 o'clock. He sent Heenhamy to report it. She went home first, took the witness with her, and ultimately reached the headman's about the same time as Appu Sinno. Allowing for the fact that the headman lived some miles away, there appeared to be a certain delay requiring explanation, particularly in the case of Appu Sinno. Appu Sinno accounts for the delay by explaining that Heenhamy told him that the murderer as he left the spot threatened to kill him also. The utterance of this threat was comfirmed by Heenhamy, Karonchihamy, and Hinniappu. In view of this threat Appu Sinno had kept out of the way until he heard that the murderer had left the neighbourhood by motor bus. This was on the face of it a reasonable explanation, and it was confirmed by the fact that Appu Sinno told this story to the Magistrate the next day. The headman also told the Magistrate that Appu Sinno had told him of the threat the previous evening. As against this there was the fact that none of the three witnesses mentioned this threat to the Police Magistrate, and there was the curious circumstance that when Appu Sinno reported the murder at the Akuressa police station, he said that he got news of it at 4 o'clock, although he had already told the headman that the news reached him at noon.

12. These two points form the basis of the theory of the defence. It was suggested that the accused and the deceased had formed an illicit intimacy ; that Appu Sinno had suspected it, and that this was the reason why he did not sleep at his wife's house when in the village the last three weeks of her life ; that he himself had committed the murder ; and that the interval above referred to had been spent in instructing the witnesses. As against this theory there was the fact that Digala Ralahamy himself swore that he was present when Heenhamy brought the news ; that Heenhamy mentioned the threat ; and that in consequence of the threat he advised Appu Sinno not to venture out for some time. That he ultimately learned that the murderer had left the neighbourhood, and that thereupon Appu Sinno went and told the headman. If Digala Ralahamy's evidence was accepted, it was fatal to the theory of the defence. The defence accordingly suggested that it was Digala Ralahamy himself who was primarily responsible for the fabricating of the case for the prosecution, and that the witnesses had all sworn falsely because of pressure from him. It was represented that he was a very powerful and influential man, that Appu Sinno was one of his dependents, and that he had intervened to save him from the gallows.

13. The evidence of Digala Ralahamy was thus of the first importance. He was a man of great respectability, and held various Government offices. He appeared to be a man of substantial means ; he had purchased and developed various lands in the neighbourhood. The case in large measure turned upon his evidence, which was of the most impressive character, and it became a question for the jury whether, in view of his evidence, they ought to have any reasonable doubt in acting on the evidence of the eyewitnesses. I drew the attention of the jury to the vital nature of his evidence, and it seemed to me that it was on this that the case turned. There was the further circumstance, on which Crown Counsel laid stress, that the theory of the defence involved the supposition that Heenhamy had seen her sister slaughtered before her eyes, had fabricated a false story to shield the murderer and to

implicate an innocent man. As I have already observed, I do not think it possible that the jury, in the verdict they arrived at, were in any way swayed by the evidence of Hendrick.

Colombo, November 5, 1920.

Wickreme Aratchige Hendrick (affirmed) : 14, son of Jas. Appuhamy Lenama. About noon yesterday I was preparing the ground there (he shows spot) to plant some brinjals. I heard a cry, so I came running. I saw a man, whose name I do not know, but whom I have seen before, and whom I can identify, stabbing Punchihamy with a knife. He held her hair and stabbed her on the chest. I then fell down unconscious (he here shows the spot). When I regained consciousness I came to the spot and saw no one except Heenhamy. Karonchihamy came at the same time as myself. At that time Appu Sinno had run away. From where I was originally I could see Appu Sinno dragging the woman (here he shows the spot). Accused held the deceased by the hair. I saw the accused running to the spot. He had an umbrella (A) and a shawl on his shoulder. When I came I found this umbrella (A), comb (B), and sheath (C).

(Signed) S. D. DHONDY,
Police Magistrate.

Akbar, Acting S.-G. (with him *Dias, C.C.*), for the Crown.

De Zoysa and *Mahadeva*, for the accused.

Cur. adv. vult.

November 29, 1920. SHAW J.—

This is a case stated under the provisions of section 355 (1) of the Criminal Procedure Code by the Chief Justice, sitting as Assize Judge at Matara criminal sessions, raising two questions for the consideration of this Court.

The accused has been convicted on an indictment charging him with the murder of a woman named Samaratungage Punchihamy, and has been sentenced to be hanged.

The first question is whether a plea of previous acquittal under section 331 of the Criminal Procedure Code, which was taken on behalf of the accused at the trial, was a good one ? The second is as to the admissibility of certain evidence that went before the jury at the trial, and its effect upon the trial should it be held to be admissible.

It appears that, at the previous sessions of the Southern Circuit held at Galle, the accused was charged and tried upon the same indictment before Mr. Justice Schneider.

At the conclusion of the trial the jury retired to consider their verdict, and on their return stated that they found the accused not guilty by a majority of 5 to 2. The Judge did not approve of the verdict, and, under the provisions contained in section 248 (2) of the Criminal Procedure Code, he directed them to reconsider their verdict. When they again returned, the foreman stated that

1920.

SHAW J.

The King v. Appu Sinno

they were divided in the proportion of 4 to 3. This was not such a majority as is required by the Code, the Judge accordingly discharged them under the provisions of section 250.

The contention on behalf of the accused is that, as the jury on their second retirement were unable to return such a verdict as could be accepted under the law, the verdict they were prepared to give after their first consideration must be received as the verdict to be entered in the case. I find myself quite unable to agree with the contention. The provisions of section 248, which follows the English procedure stated in *The Queen v. Meany*,[1] is as follows: "If the Judge does not approve of the verdict returned by the jury, he may direct them to reconsider their verdict, and the verdict given after such consideration shall be deemed to be the true verdict."

It appears to me that until the Judge has decided whether or not to exercise his discretion to direct the jury to reconsider their verdict, no final verdict can be given by the jury in the case.

The only "true verdict" they can give, if they are directed to reconsider their verdict, is the verdict given after such reconsideration. There is no direct authority either in the English reports or our own as to the effect of a disagreement after a reconsideration of a verdict, but it is inconceivable to me that the law can require a verdict to be entered to which the jury after consideration may possibly be opposed by a majority of 4 to 3.

In my opinion there was no true verdict returned at the first trial, and the Judge was right in discharging the jury without a verdict.

The plea of a previous conviction, therefore, in my opinion, fails.

The second question for our consideration is one of some difficulty. At the trial before the Chief Justice the deposition of a witness, Hendrick, taken before the Police Magistrate, was read in evidence, under the provisions of section 33 of the Evidence Ordinance, after proof that the witness could not be found. The deposition was also put in evidence at the previous trial before Mr. Justice Schneider, and on neither occasion was it objected to by counsel for the accused. It was only after the trial was completed and sentence pronounced that it occurred to the Chief Justice that the deposition might be inadmissible.

The deposition was that of a homeless boy, who at the time of the murder was lodging in the house of one of the witnesses for the prosecution. It was made before the Magistrate on the morning after the crime, when the accused was not present. After the depositions of the boy Hendrick and the other witnesses were taken, the Magistrate issued a warrant for the arrest of the accused, but he absconded, and was not produced before the Magistrate until

[1] *(1862) 32 L. J. M. C. 24.*

after the lapse of some eight months. By this time Hendrick himself had disappeared, and he has not been traced since. The consequence was that he was not recalled with the other witnesses for cross-examination by the accused.

The deposition of this witness was, therefore, inadmissible under section 33 of the Evidence Ordinance, which only makes the deposition of a witness admissible if he cannot be found in cases where the accused had the right and opportunity to cross-examine the witness on his deposition. It was suggested on the argument of this case that the deposition might be admissible under section 407 of the Criminal Procedure Code. That section provides for the recording of evidence and the subsequent reception of the deposition in evidence in cases where it is proved that an accused has absconded and that there is no immediate prospect of arresting him.

I do not think that that provision is applicable to the present case, as there was no evidence, at the time the deposition was taken, that the accused had absconded. Although his name was mentioned in the report to the Magistrate as the accused, no warrant for his arrest appears to have been issued until after the depositions of the witnesses had been recorded.

In my opinion the deposition was not admissible in evidence, and should not have been read to the jury. The more difficult question then arises whether the admission of this evidence necessarily vitiates the trial, or whether the verdict can and should be supported on the other evidence given, to which no objection can be taken. Whether it can be so supported or not appears to me to depend upon whether the provision contained in section 167 of the Evidence Ordinance applies to the consideration of a case stated after trial by jury. The provision is as follows :—

" 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been recorded, it ought not to have varied the decision."

On the face of the section there appears to me to be nothing to prevent its application to a reference to the Supreme Court under section 355 of the Criminal Procedure Code after a trial by jury, and, indeed, it has been treated as so applying by this Court in *R. v. Thegis* [1] and *R. v. Pila*.[2] In the latter case Lascelles C.J., in his judgment at page 458 says : " There can be no question but that this Court, under section 167 of the Evidence Ordinance, has power to uphold the conviction, if we are of opinion that the evidence improperly admitted did not affect the result of the trial."

[1] *(1901) 5 N. L. R. 107.* [2] *(1912) 15 N. L. R. 453.*

1920.

SHAW J.

The King v. Appu Sinno

In India it has been held that the provision contained in the corresponding section 167 of the Indian Evidence Act applies to the reconsideration of trials by jury by the High Court, and that in a proper case a verdict should be upheld, notwithstanding the admission of evidence that should not have been received. See *Queen Empress v. Ramchandra*,[1] *Emperor v. Waman Shivram Damle*,[2] *Makin v. Attorney-General of New South Wales*,[3] *Wafadar Khan v. Queen Empress*,[4] and other similar cases cited on behalf of the accused turned upon the construction of similar provisions to those contained in section 425 of our Criminal Procedure Code, and not upon provisions similar to section 167 of the Evidence Ordinance.

These cases were considered in *Queen Empress v. Ramchandra* (*supra*), and were held not to apply in India in consequence of the provision in the Evidence Act.

In my opinion, therefore, section 167 of the Evidence Ordinance applies to the present case, and we have the power to uphold the verdict on the admissible evidence should we think the circumstances warrant it.

Although we have this power, I think this Court should be careful not to attempt to usurp the functions of a jury, and where improper evidence has been admitted that might with reasonable possibility have affected the minds of the jury, I should myself in all cases set aside the conviction and send the case for a re-trial, however strong a conviction of guilt the other evidence might bring to my mind.

In the present case I consider that there is no reasonable possibility that the verdict of the jury was in any way influenced by the deposition of the boy Hendrick. The only effect of his evidence was that he saw some man, whose name he did not know, but whom he could identify, stabbing the deceased woman. The only real importance of his evidence is that he confirms the fact that the other two eyewitnesses came to the spot at the time of the murder. If the jury were not satisfied with the evidence of the eyewitnesses that they had before them, it seems impossible that they could have been influenced by the deposition of a homeless vagrant boy who did not appear in the witness box. The case stated by the Chief Justice informs us that the decision really turned on the question whether the evidence against the accused was or was not entirely false and suborned by the witness Digala Ralahamy. As the jury disbelieved this contention, the additional, more or less irrelevant, deposition of the boy Hendrick could in no way have affected their decision.

The opinion of the Chief Justice, who is in a better position than any one else to judge the effect of the evidence, is that he does not think it possible that the jury were in any way swayed by it.

[1] *(1895) I. L. R. 19 Bom. 749.*
[2] *(1903) I. L. R. 27 Bom. 626.*
[3] *(1894) A. C. 57.*
[4] *(1895) I. L. R. 21 Cal. 955.*

In my opinion the inadmissible evidence that went to the jury did not in any way affect the verdict, and, acting under the provisions of section 167 of the Evidence Ordinance, we should not interfere with the verdict arrived at.

I would, therefore, answer both the questions referred to us in favour of the Crown, and affirm the conviction and sentence.

DE SAMPAYO J.—I agree.

Affirmed.