1940 *Present :* **Moseley S.P.J. and de Kretser and Wijeyewardene JJ.**

THE KING *v.* ANDRIS SILVA *et al.*

9—M. C. Balapitiya, 35,765.

Court of Criminal Appeal—Appeal on question of fact—Function of Court—Expression of opinion by Judge on question of fact after a warning to the Jury—Court of Criminal Appeal Ordinance, No. 23 of 1938, s. 5 (1).

In an appeal involving questions of fact only it is not the function of the Court of Criminal Appeal to retry a case, which has already been decided by a Jury.

The Court in such a case is only required to say whether the verdict of the Jury is unreasonable or whether it cannot be supported having regard to the evidence.

It is not a misdirection to tell the Jury that they must not pay the slightest attention to any suggestion put to the witness in cross-examination unless such suggestion is supported by proof.

There is no objection to the expression by the Judge in his charge to the Jury of opinions on questions of fact where he cautioned the Jury that such matters were entirely within their province and that they should reject his views unless they happened to coincide with their own.

Evidence that the accused were discharged after the preliminary inquiry before the Magistrate is irrelevant and should not go to the Jury.

APPEALS from a conviction for murder at the 1st Southern Circuit on questions of law and an application for leave to appeal on the facts.

The Court granted leave to appeal on the facts which were argued in the first instance.

The grounds of appeal are stated in the judgment.

R. L. Pereira, K.C. (with him *M. T. de S. Amerasekere, K.C., S. Alles,* and *N. M. de Silva*), for the accused, appellants.—The appeal on the law is accompanied by an application for leave to appeal on the facts. To deal first with the fact, the verdict of the jury is unreasonable and cannot be supported on the evidence of the three alleged eye-witnesses, viz., Upasiri and Anulawathie, two children of the deceased, and one Simon. The evidence given by Upasiri at the trial relates only to the fact of the shooting of William by the first accused and is totally contradictory of all matters the witness had sworn to in the Magistrate's Court and in the first information given to the Police. Similarly, the other two witnesses too have contradicted each other and themselves grossly. It is clear that the witnesses were tutored to implicate not only these two accused, but also one David, who was discharged at the end of the Magistrate's investigation. Even these two accused had been discharged by the Magistrate and it was only at the instance of the Attorney-General that the proceedings were re-opened against them.

[At this stage leave to appeal on the facts was granted and the Court asked to be furnished with instances in which the verdict of a jury had been set aside on the ground that it was unreasonable or could not be supported having regard to the evidence.]

E. G. P. Jayatilleke, K.C., S.-G. (with him *E. H. T. Gunasekere, C.C.*), for the Crown—This Court will not set aside a verdict on questions of fact except on the strongest evidence—*R. v. Graham* [1], *R. v. Hancox* [2]. The Court of Criminal Appeal does not sit to try cases again. To do so would be to substitute another form of trial for trial by jury—*R. v. Jenkins* [3], *R. v. Simpson* [4]. Some cases in which the Court did interfere are *R. v. Matthews* [5], *R. v. Smith* [6], *R. v. Hall* [7], *R. v. Scranton* [8], *R. v. Armstrong* [9], *R. v. Margulas* [10], *R. v. Shefsky* [11], *R. v. Rice* [12], *R. v. Mc Locklin* [13], *R. v. Wallace* [14], see also *Archbold's Criminal Pleadings and Practice (30th ed.), pp. 333 and 334.* Those cases, however, are not applicable to the circumstances of the present case inasmuch as there was evidence before the jury which they could have accepted but did not.

R. L. Pereira, K.C., called upon to address on the law.—The notice of appeal sets out ten grounds.

In dealing with the question of the credibility of the witnesses for the prosecution, the jury were directed to ask themselves the question "Are the witnesses for the prosecution influenced by any motive to come here and perjure themselves?". Thus an unwarranted burden was cast on the defence and the direction tended to make the jury believe that, if no adequate motive was proved for the witnesses to give false evidence, the witnesses had to be believed.

The Judge failed to separate the cases of the two accused. Beyond reading section 32 of the Penal Code, he did not indicate in any way any evidence from which the jury could have inferred that the accused were acting with a common intention.

The general trend of the charge to the jury was calculated to persuade the jury to accept the Judge's own conclusions on important questions of fact.

The Judge drew the attention of the jury to the contradictions in the evidence of Anulawathie and Upasiri but at no stage did he warn them of the possible danger of acting on such evidence.

The question whether the accused were discharged by the Magistrate was wrongly ruled out as irrelevant. The fact of the discharge taken in conjunction with the fact that the girl Anulawathie changed her evidence at the Assize Court would have influenced the minds of the jury considerably.

E. G. P. Jayatilleke, K.C., S.-G., in reply.—An appeal cannot succeed owing to any weaknesses in small points picked out of a long and careful summing-up—*R. v. Wyman* [15]. A summing-up need not touch on all the

[1] *4 Cr. App. R. 218.*
[2] *8 Cr. App. R. 193.*
[3] *2 Cr. App. R. 247.*
[4] *2 Cr. App. R. 128.*
[5] *12 Cr. App. R. 247.*
[6] *14 Cr. App. R. 81.*
[7] *14 Cr. App. R. 58.*
[8] *15 Cr. App. R. 104.*
[9] *16 Cr. App. R. 147.*
[10] *17 Cr. App. R. 3.*
[11] *17 Cr. App. R. 28.*
[12] *20 Cr. App. R. 21.*
[13] *22 Cr. App. R. 138.*
[14] *23 Cr. App. R. 32.*
[15] *13 Cr. App. R. 163.*

minute details of the case—*R. v. Farrington* [1]. See also *R. v. Nicholls* [2], *R. v. Pope* [3], *R. v. Smith* [4], *Archbold's Criminal Pleadings and Practice (30th ed.), p. 332.*

[WIJEYEWARDENE J.—Has the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance ever been applied in a murder case?]

Yes, it has held that the proviso makes no distinction between a capital case and any other case—*Woolmington v. Director of Public Prosecutions* [5], *R. v. Lee Kun* [6].

The issues of fact were definitely left to the jury. The Judge has given his opinion on the facts but at the same time has told the jury that they were not bound by his view—*R. v. O'Donnell* [7].

M. T. de S. Amerasekere, K.C., in reply.

Cur. adv. vult.

July 16, 1940. MOSELEY S.P.J.—

These are appeals against conviction on grounds involving questions of law, and applications for leave to appeal on grounds of fact. The appellants were convicted of murder at Galle Assizes on May 29, 1940, and sentenced to death by Soertsz J. There were two counts in the indictment. The first alleged that the appellants committed murder by causing the death of one William Silva ; the second that in the course of the same transaction they committed murder by causing the death of Chalo Nona, who was the wife of William Silva. The appellants had been originally charged in the Magistrate's Court together with a third accused, one David. All three were discharged by the Magistrate and it was at the instance of the Attorney-General that proceedings were reopened against the two appellants. The fact of their previous discharge is mentioned since one of the grounds of appeal is in connection therewith.

After hearing some of the submissions of the Counsel for the appellants we granted leave to appeal on the facts and that aspect of the appeal was first argued.

Now section 5 (1) of the Court of Criminal Appeal Ordinance sets out specific grounds upon which the Court may allow an appeal against a conviction. The relevant part of the section which particularly applies to the present case, in so far as the appeal is on grounds of fact, is as follows :—

> "The Court of Criminal Appeal on any such appeal . . . . shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence . . . ."

Since the section further provides for the determination of appeals on the ground of a wrong decision of any question of law, it must be assumed that the words above-quoted presuppose that the verdict of the Jury has been arrived at upon evidence properly admitted and after a proper direction by the Judge.

[1] *1 Cr. App. R. 113.*
[2] *1 Cr. App. R. 167.*
[3] *4 Cr. App. R. 123 at 127.*
[4] *11 Cr. App. R. 81 at 84.*
[5] *25 Cr. App. R. 72 at 96.*
[6] *11 Cr. App. R. 293.*
[7] *12 Cr. App. R. 219 at 221.*

The section follows precisely section 4 (1) of the Imperial Criminal Appeal Act, 1907, and confers upon the Court a power which is capable of wide application; but from its inception, in 1908, the English Court has shown in a series of decisions its disinclination to question a verdict given by a Jury on questions of fact. In *R. v. Martin*[1] an appeal heard and determined within two months of the first sitting of the Court, Channell J. prefaced the judgment of the Court with these words:— "The case has been argued as if this Court was to retry the case, but that is not its function." A year later in *R. v. Jenkins*[2] the Lord Chief Justice observed: "We have had to point out from time to time that this Court does not sit to try cases again." The Solicitor-General brought to our notice a number of cases in which verdicts have been set aside by the Court of Criminal Appeal and Counsel for the appellants asked us to infer from these decisions that the point of view originally expressed by the Court has been modified. Since the present case is the first to come before this Court in which it has been sought to reverse the verdict of a Jury on a question of fact it may be convenient to refer briefly to these cases, for it appears to us that in each there exists a feature which enabled the Court to distinguish it from those in which they had first enunciated the principles which they deemed to govern their procedure in the determination of such appeals. In *R. v. Mathews*[3] identification which alone connected the accused with the offence charged, had been obtained by unsatisfactory means. In *R. v. Smith*[4] the evidence of the prosecutrix on a charge of rape was uncorroborated and, according to the argument of Counsel as reported, the Jury had not been warned of the danger of acting on her evidence alone. It would seem therefore that the conviction was quashed not on a question of fact alone. In *R. v. Scranton*[5] the appeal was brought on the certificate of the trial Judge who indicated that the verdict was unsatisfactory, a fact which the Court held to be an element to be taken into consideration. In *R. v. Armstrong*[6] the Court, by a majority decision, held that it was not safe to convict upon the slight evidence before the Jury. In *R. v. Margulas*[7] and *R. v. Shefsky*[8] there had been three co-accused, of whom one had been acquitted by the Jury upon precisely the same evidence as that upon which the other two were convicted. The appeals of the latter were therefore allowed. In *R. v. Rice*[9], which was a case of unlawful carnal knowledge, the Court held that the story of the prosecutrix was an impossible one. Moreover the defence had proved an alibi by two unimpeachable witnesses. In *R. v. McLocklin*[10] the conviction rested on the evidence of identification given by one witness only, who had in the first place expressed doubt and only became positive of the identity of the accused under pressure from the police. Lastly, in the case of *R. v. Wallace*[11] in which the evidence was purely circumstantial, the Court expressed themselves as "not concerned with suspicion, however grave" and held that the case was not proved with that certainty which is necessary to justify a verdict of guilty.

[1] *1 Cr. App. R. 52.*
[2] *2 Cr. App. R. 247.*
[3] *12 Cr. App. R. 247.*
[4] *14 Cr. App. R. 81.*
[5] *15 Cr. App. R. 104.*
[6] *16 Cr. App. R. 147,*
[7] *17 Cr. App. R. 3.*
[8] *17 Cr. App. R. 28.*
[9] *20 Cr. App. R. 21.*
[10] *22 Cr. App. R. 138.*
[11] *23 Cr. App. R. 32.*

It does not seem to us that these decisions, or any one of them, indicate any material departure from the view that it is not the function of a Court of Criminal Appeal to retry a case which has already been decided by a Jury.

In the case now before us the prosecution relied mainly upon the evidence of three persons, each of whom claimed to be an eyewitness of part or the whole of the incident. Two of these are children of the deceased, namely, Anulawathie, a girl of 15, and Upasiri, a boy of 11; the third is Simon who appears to have accompanied the male deceased on his way home on the evening in question. Each one of these three persons was in a position, if his or her evidence is to be believed, to see what happened in the course of the incident. In the case of each, however, there are unsatisfactory features which might very well cause a Jury to entertain serious doubts as to the value of their evidence. Simon, for instance, in his first statement to the police implicated the accused rather by inference than by claiming to have seen them play the parts which he subsequently allotted to them. His claim to have actually seen what transpired was, however, corroborated by other witnesses to whom, unless their evidence and that of a police sergeant is rejected, he made statements implicating the appellants very shortly after the incident. Anulawathie, who in the Magistrate's Court had implicated the man David as well as the two appellants, at the trial eliminated him until her previous evidence was put to her in cross-examination. She then denied that she had made in the Magistrate's Court innumerable statements which she is recorded as having made. The boy Upasiri professed at the trial to have no recollection of what he had said in the Magistrate's Court, and the Jury were pratically invited by the Judge to reject his evidence.

Now we are asked to say that the verdict is unreasonable or that it cannot be supported having regard to the evidence, that is to say, in this case, the evidence of these three witnesses who gave direct evidence supported by the corroborative evidence of the persons to whom statements are said to have been made by them shortly after the incident. So far as this particular aspect of the appeal is concerned, we must assume, and indeed we have no difficulty in so doing, a proper direction by the Judge. We have carefully considered all the points put to us by Counsel for the appellants, notably, that the evidence of Anulawathie as to the range at which the shots were fired is inconsistent with the medical evidence; that Simon's evidence is not only contradictory of Anulawathie's but of his own previous statement; that Anulawathie's evidence at the trial indicated a desire on her part to come into line with Simon.

The Solicitor-General cited the case of *R. v. Hancox* [1] in which Pickford J. observed as follows:—

> "This case turned on the manner in which the witnesses gave their evidence; there was a proper direction to the Jury, and the Court does not see that it can interfere with the verdict without substituting

[1] *8 Cr. App. R. 193, at 197.*

itself for the Jury, which was the proper tribunal to decide the matter. It is not necessary to say whether we would have given the same verdict."

So here. it is not necessary for us to say whether we would have given the same verdict. We do not expect Jurymen to be endowed with legal training nor can we say that our impressions gathered by a perusal of recorded evidence are as valuable as those of persons who have heard witnesses give evidence. We might say that the arguments for the appellants created a strong impression on our minds, and if the Jury had seen fit to acquit the accused we should not have been able to take exception to the verdict. All that we are required to say is that it has not been shown to our satisfaction that the verdict is unreasonable or that it cannot be supported having regard to the evidence. The appeals on grounds of facts fail.

The notice of appeal on questions of law sets out ten grounds of appeal. Ground 1 is, in fact, that the Jury were directed that, unless a motive were proved for the giving of false evidence by the witnesses for the prosecution, this evidence should be believed. The passage quoted from the charge to the Jury, taken away from its context may appear to be somewhat strongly put, but if it is read in its context and, if for the word "motive" the word "reason" is substituted, the passage seems to us entirely unobjectionable and we do not think that the Jury can have been under any misapprehension in this respect.

Grounds 2 and 3 deal with the question of the existence of common intention on the part of the two appellants. As far as count 1 of the indictment is concerned it does not appear to us that any direction on this point was necessary, since the medical evidence showed that necessarily fatal injuries were caused both by a firearm and a cutting instrument which are the weapons which the eyewitnesses placed respectively in the hands of the first and second appellants. In any case, in our view, the charge on this point was adequate. In regard to count 2, since it is alleged that the two acts of killing took place in the course of the same transaction it can fairly be presumed that the common intention which clearly existed in the beginning continued throughout the transaction.

Ground 4 alleges that the Judge found as facts several matters which should have been left to the Jury, notably in regard to the state of the light which existed at the time of the incident. This is a matter upon which there was no evidence to contradict that given by the witnesses for the prosecution. Moreover, particularly where the extracts, to which objection is taken, are read in their context, they appear entirely unobjectionable. This ground further included an objection which is reiterated in ground 9, to the direction of the Judge that the Jury should not pay the slightest attention to any suggestions put to the witnesses in cross-examination unless those suggestions were supported by proof. We need say no more than that in our view that is a proper direction.

Ground 5 refers to the discrepancies in the evidence of the witnesses for the prosecution and alleges that the Judge did not warn the Jury

of the danger of acting upon such evidence. It is obvious that in the course of a very careful and exhaustive summing-up these discrepancies and contradictions were put in great detail to the Jury. The question of the credibility of the witnesses, in the light of the unsatisfactory features in their evidence could not have been dealt with more adequately.

Grounds 6 and 7 contain an objection to expressions by the Judge of his own opinion on questions of fact. It is sufficient to say that the Judge repeatedly cautioned the Jury that such matters were entirely within their own province and that they should reject his views unless they happened to coincide with their own.

Ground 8 alleges that the Judge failed to put the case for the defence to the Jury. The defence relied upon the weakness of the case for the prosecution and in particular upon the discrepancies and contradictions in the evidence. Since these, as we have already observed, were brought adequately to the notice of the Jury we do not think it can fairly be said that the case for the prosecution was favoured in this respect.

Finally, ground 10 is in connection with the discharge of the accused at the close of the preliminary proceedings before the Magistrate. At the trial, Counsel for the accused in cross-examination asked a police witness if the Magistrate had discharged the accused. The Judge interposed that the matter was irrelevant. Counsel for the accused appears to have agreed that the Judge should direct the Jury to put the matter out of their minds. Counsel for the appellants has urged that the fact that the accused had been discharged in the Magistrate's Court was relevant as bearing upon the alteration by Anulawathie of her evidence. It seems to us that it is quite unnecessary to go beyond that alteration. The alteration was patent ; the reasons underlying it, immaterial. The objection to evidence of the discharge going to the Jury is obvious.

The Judge's charge to the Jury was, as we have already observed, exhaustive and extremely careful. Taken as a whole it can only be described as unexceptionable.

It is almost unnecessary, in these circumstances, to refer to the authorities cited by the Solicitor-General in regard to the attitude which this Court should adopt in regard to misdirection. It may, however, not be out of place to quote the following observations of Lord Coleridge J. in the case of *R. v. Wyman*[1].

"Voluminous particulars illustrative of the original grounds of appeal were furnished to the Court at a late stage. They were evidently the creation or conception of some learned person, who, having the transcript of the shorthand notes of the evidence and of the summing-up, directed much ingenuity and industry to picking out from a long and careful summing up a number of small points, most of which are frivolous. On these we are asked to upset the conviction if we can find any possible slight oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence. The Court does not deal with matters of this kind. We are here to deal only with substantial points of

[1] *13 Cr. App. R. 163. at 164.*

misdirection. We strongly object to this practice which is growing, and we hope that in the future it may be more honoured in the breach than in the observance. It is not fair to learned Judges and others who have to sum up in elaborate cases for their remarks to be subjected to the minute scrutiny which has been applied in this case."

The appeals fail on all grounds. The convictions and sentence are affirmed.

Affirmed.