[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Howard C.J., de Kretser and Wijeyewardene JJ.**

THE KING *v.* W. P. BUCKLEY.

98—M. C. Panadure, 18,345.

Verdict unreasonable—Evidence viewed by the Jury in sections—Failure to view the evidence as a whole—Court of Criminal Appeal Ordinance, s. 5 (1).

Where the Jury has viewed the evidence in a case in sections and accepted those parts that pointed to the guilt of the accused and disregarded those facts that pointed to the improbability of the story put forward by the Crown,

Held, that the Jury would have had a reasonable doubt as to the guilt of the accused if they had viewed the evidence as a whole and that the verdict could not be supported.

APPEAL from a conviction by a Judge and Jury before the 2nd Western Circuit.

H. V. Perera, K.C. (with him *C. S. Barr-Kumarakulasinghe, O. L. de Kretser* (Jnr.) and *S. Saravanamuttu*), for accused, appellant, who is also the applicant in the Application.

M. W. H. de Silva, K.C., A.-G. (with him *D. Janszé, C.C.*), for the Crown.

July 31, 1942. HOWARD C.J.—

The appellant in this case appeals on grounds of law and also applies for leave to appeal on matters other than law against his conviction for rape. We do not consider that there is any substance in his appeal on grounds of law. No real objection is taken by Counsel for the appellant to the summing-up of the learned Judge. The only question that arises for our consideration is whether this Court should exercise the

powers vested in it under section 5 (1) of the Court of Criminal Appeal Ordinance and set aside the verdict of the Jury on the ground that it is unreasonable or cannot be supported by the evidence. The principle on which these powers should be exercised was given careful consideration in *The King v. Andiris Silva*[1]. Following the English cases, it was held that it is not the function of a Court of Criminal Appeal to re-try a case which has already been decided by a Jury. Our decision in this case in no way represents a departure from this principle, which has been accepted by both the English and Ceylon Courts of Criminal Appeal. There is no doubt that in the present case the Jury have arrived at their verdict upon evidence properly admitted and after a correct direction by the Judge. If, however, the Court thought, after reviewing the whole of the evidence, that the verdict could not be supported, the Court was not only entitled, but was bound, to exercise the powers conferred upon it by section 5 (1) of the Ordinance and allow the appeal.

The defence of the appellant was based on the plea that the act of sexual intercourse with Missi Nona was committed with the latter's consent and that similar intercourse had taken place some ten days previously. The prosecution, however, contended that on May 7, when the offence is alleged to have taken place, the appellant was a stranger to Missi Nona and the other inmates of her house. This house is not visible from the Village Committee road and the wooden bridge where the appellant parked his truck. It seems extraordinary, if he had not been there before, that the appellant should have found his way to the house of Missi Nona, particularly as another house marked "I" on the plan produced was visible from the bridge. From remarks made when passing sentence, the learned Judge seems to think that the appellant may have been taken to a house some days before and when he found himself in the wrong house proceeded to rape the girl. It is, however, hardly credible that the appellant would proceed to the extremes he did without making a further effort to discover the location of his previous visit or that he would commit such an offence after he had attracted attention to himself by leaving his truck exposed to the view of everyone in the locality. The manner, therefore, of the appellant's approach to Missi Nona's house would seem to bear out his plea. If the appellant's presence at the house fails to fit into the picture painted by the Crown, the behaviour of some of the inmates of the house is incredible, if their story of a rape of Missi Nona is to be accepted. According to his story, Manis Costa, Missi Nona's brother, on the arrival of the appellant at the house, rushed over to the house of his relation, Louis Appuhamy, who was a person of some position in the village. Louis Appuhamy, thereupon, came over to the house with Manis and found Missi Nona crying. After asking her three or four times why she was crying she said she had been harmed. Louis Appuhamy said that he understood her to mean that Missi Nona had had intercourse with the appellant and had been used as a wife. Missi Nona's mother also told him that the man had harmed

[1] *41 N. L. R. 433.*

the girl and gone away. On the same day, Manis Costa made a statement to the headman in the following terms:—

> "At about 1.30 P.M., an Australian, armed with a gun, came and told him something that he did not understand, that the Australian then went inside, got hold of his sister by the hand and pulled her, that they then raised cries, that the Australian got out of the house, pointed a gun at them and walked away. That at this time, M. D. Louis Appuhamy and Baron Appuhamy came at our cries and that others also saw this."

No suggestion is made in this statement that the girl had been raped or that the Australian had even had sexual intercourse with her. Moreover, an entirely false picture was created by the statement that Louis Appuhamy and Baron Appuhamy came as the result of cries and that others saw what had happened. The headman did not take action, but stated in evidence that he would have done so if there had been any complaint of rape. In fact, the first complaint to any person in authority that a rape had been committed was made on May 13, 1942, six days after the offence was alleged to have been committed—when Manis made his statement to the Police. The unsatisfactory character of Manis' evidence is manifest. The testimony of Missi Nona's mother and sister is also not calculated to increase confidence in the truth of the story put forward by the Crown. The mother maintains that she was an eye-witness of what took place. Yet she states that, when the appellant and her daughter got up, she asked the latter what he had done to her. Moreover, she states that she told her daughter not to cry as otherwise he might murder her. Her sister—Jane Nona—states that, on the arrival of the accused, she ran to her Aunt's house where she stayed for two hours. She came back to find her sister crying and saying that the accused had molested her. She understood this to mean that the accused had chased after her but nothing else. She also says that her sister did not tell her that the appellant had had intercourse with her. Missi Nona, in her evidence, says that she was dragged some distance along the ground and yet sustained no injuries, not even a scratch.

The Attorney-General, whilst conceding that some of the witnesses called by the Crown and, in particular, Manis have given evidence of an unsatisfactory character, maintains that the behaviour of Missi Nona is consistent with her story that the offence was committed and such story was accepted by the Jury. Inasmuch as it does not lack corroboration it is sufficient to support the conviction. The Attorney-General also makes the point that the Doctor's evidence establishes that Missi Nona was a virgin when this offence was committed and hence the appellant's story of previous sexual intercourse must be untrue. Perusal of the Doctor's evidence, however, indicates that his testimony was not as unequivocal and precise as claimed by the Attorney-General. In cross-examination, the Doctor admitted that Missi Nona could have had sexual intercourse before. In fact, his testimony is consistent with her having been a virgin or having had previous sexual intercourse.

We are of opinion that in arriving at a verdict of guilty the majority of the Jury must have viewed the evidence in sections and accepted and

convicted the appellant on those parts that were satisfactory and disregarded those facts that pointed to the improbability of the story put forward by the Crown. The Jury should have viewed the evidence as a whole. If they had done so, we are of opinion that they must have had a reasonable doubt as to the guilt of the appellant. The verdict is, in our opinion, unreasonable, inasmuch as taken as a whole the evidence does not support the conviction. In these circumstances it ought not to stand. The appeal is accordingly allowed and the conviction quashed.

Appeal allowed.