[COURT OF CRIMINAL APPEAL.]

1943 *Present* : **Moseley S.P.J., Keuneman and Wijeyewardene JJ.**

THE KING *v.* MUSTHAPA LEBBE.

6—M. C. Kalmunai, 28,678.

Court of Criminal Appeal—Finding of fact—Verdict of jury—Court has a real doubt as to guilt of accused—Verdict set aside.

The Court of Criminal Appeal will not interfere with the verdict of a jury unless it has a real doubt as to the guilt of the accused or is of opinion that on the whole it is safer that the conviction should not be allowed to stand.

APPEAL from a conviction by a Judge and jury on the second Eastern Circuit, 1943.

M. M. Kumarakulasingham (with him *G. Thomas*), for appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

October 4, 1943. MOSELEY S.P.J.—

The appellant was convicted of rape. The act of intercourse is admitted and the only issue to go to the Jury was the one of consent. The story of the girl is that she was sweeping the compound of her house when she was seized from behind by the appellant, pulled into the house in spite of her resistance, placed upon the floor and raped. Her story in respect of what occurred outside the house is corroborated by the evidence of three persons who claim to have been eye-witnesses of the struggle which she says took place there. They are Aliar, a boy of ten or twelve years of age and a cousin of the girl, Adam Kandu and Kalanden Lebbe, both next-door neighbours of the girl and either distant or so-called relatives. As to the events which followed inside the house there is only the evidence of the girl. Her story is that she resisted until she realized that resistance was futile. As she somewhat naively put it "I did not wish to struggle to the extent of preventing the accused from having intercourse with me." She explained that statement by saying that she realized the futility of struggling with a man who was stronger than herself. Parenthetically it may be observed that the medical witness was of opinion that the girl, who is twenty-two years of age, and the appellant are equal in strength. The injuries found on the girl were an abrasion on the cheek, an abrasion on the breast, and congestion of the left outer labia. The first two injuries are said by the girl to be due to bites by the appellant; the injury to the labia to the forcible introduction of the appellant's penis. In this connection the appellant was not found to have suffered any injury. The hymen of the girl was found to have been ruptured, the injury being several months old. The appellant, while setting up an act of voluntary intercourse, does not account for the abrasions to the cheek and breast. A further circumstance worthy of note is that the eaves of the house are admittedly very low and would provide a serious obstacle to a forcible

carriage of the girl into the house without injury to her. Moreover, she said that she entered the house in advance of the appellant. We do not think it can be said that the above-mentioned circumstances go any distance towards corroborating the girl's evidence that she was an unwilling party.

In regard to the three eye-witnesses, they cannot claim to be entirely disinterested. Counsel for the appellant sought to discredit their evidence on the ground not only that they are all related, in varying degrees, to the complainant, but that there was considerable delay in the recording by the Village Headman of their statements. On the latter point the evidence is somewhat conflicting, but, apart from the first information which was carried to the Village Headman by Adam Kandu, there would seem to have been ample time for the concoction and embroidery of a story. Adam Kandu, indeed, in his statement, gave details of a struggle in the compound, but at the trial in cross-examination he confessed that he was unable to say whether the struggle was real or feigned. A similar attitude was adopted by Kalanden Lebbe. This witness, for reasons best known to himself and which he was unable to formulate, adopted the extraordinary course of locking the couple in the house and taking the key to the Village Headman. Neither of these witnesses, both able-bodied men, and relatives of the girl, made the slightest move towards rendering assistance to the girl, although the mere appearance of either on the scene would no doubt have been sufficient to prevent the act of intercourse whether it were forcible or voluntary. The account given by the boy, Aliar, convincing enough intrinsically, lost some of its value by his somewhat premature and spontaneous denial that he had been tutored, a possible inference being that his story has been at least embellished.

Passing on to events subsequent to the act, the Village Headman accompanied by Adam Kandu and Kalanden Lebbe arrived at the scene. With them, or following closely on their heels, were some Marikkars. The door was opened and apparently the girl lost no time in accusing the appellant of the offence. There appears to have followed a long discussion during which, according to the appellant, pressure was brought upon him to marry the girl. The girl herself spoke to the Marikkars' suggestion of marriage and to the appellant's rejection of the suggestion. Whatever was the object of the discussion, the fact remains that, according to the Village Headman, he was occupied from about 5 P.M. until 9 or 10 P.M. in recording the statements of three people which recording amounted to fifty lines of his diary. The possibility certainly presents itself that there must have been a certain amount of discussion as well, which would lend colour to the claim of the appellant that the question of marriage was brought up. There can be no doubt that prior to the incident there had been a proposal of marriage between the parties, a fact which was denied at the trial by the girl until she was confronted by her depositions in the lower Court. Knowledge of this fact was also denied by the other eye-witnesses and by the Village Headman although it is scarcely credible that it was unknown to them being, as they were, relatives or near neighbours. It is also pertinent to remark that, according to the girl, she remained lying on the floor after

the act until the door was opened, while the appellant was found to be singing. The jury might well have asked themselves whether these circumstances are more consistent with the aftermath of an act of rape or one of voluntary intercourse. Another circumstance, which is perhaps in favour of the story of the appellant that this was a plot so to compromise him with the girl that he would be forced into a marriage with her, is that, whereas the Village Headman came on the spot soon after 4.30 P.M., the girl was not taken for medical examination until noon next day. His case was that he was ready and willing to marry the girl, and always had been so-provided a dowry was forthcoming, and that it was only after the importunities of the Marikkars had failed that this charge was brought against him. Moreover, evidence had been led by the prosecution that, if a Muslim man and woman were found in such circumstances, the punishment prescribed is a whipping or fine for both, unless it can be shown that the woman was not a consenting party. Punishment can be avoided if the parties marry. It is therefore a matter of importance to the woman that she should prove absence of consent. Her anxiety in regard to this might conceivably be shared by her relatives.

It seems to us, in view of all these circumstances, that there must exist a reasonable and substantial amount of doubt as to the guilt of the appellant. This Court has, however, repeatedly laid down that, assuming a proper direction by the Judge, it is not its function to re-try a case unless it has been shown to the satisfaction of the Court that the verdict is unreasonable or that it cannot be supported having regard to the evidence. There is, in our opinion, as we have indicated, a real doubt as to the appellant's guilt. In *Rex v. Isaac Schrager*[1] the conviction was quashed because "in all the circumstances it did seem to the Court that there was a reasonable and substantial amount of doubt as to the guilt of the appellant. The conviction, therefore, could not stand." Again in *Rex v. John Reuben Parker*[2] where, in the opinion of the L. C. J. "there was evidence before the jury upon which they could act" there was held to be sufficient doubt as to the accuracy of the verdict for the Court to give the appellant the benefit of it, and the conviction was quashed. Even in the light of these authorities we are doubtful if we should be disposed to interfere in the present case were it not for one circumstance. The appellant gave evidence on his own behalf and the Jury, who seem to have followed the case throughout with great interest, cross-examined him at some length. One question put to him was this—

"Was it reasonable to let down a girl after you had several acts of intercourse with her—to let her down because you were not getting the dowry?".

It was argued on behalf of the appellant that the question indicates that the Jury had formed an opinion unfavourable to the appellant's character and that they were prepared to convict him, not because they were convinced that he had committed the offence, but because, after hearing his evidence, they regarded him as a young blackguard. Crown Counsel sought to explain the question as an intimation by the Jury that they found themselves unable to accept the appellant's story.

[1] *6 Cr. App. R. 253.*

[2] *6 Cr. App. R. 285.*

We were not impressed by that view and we feel it highly probable that the Jury had formed the view ascribed to them by Counsel for the appellant. To adopt the words of the L. C. J. in setting aside the verdict of the Jury in *Rex v. John Alfred Bradley* [1] " on the whole we think it safer that the conviction should not be allowed to stand ". The appeal is allowed.

Appeal allowed.