[COURT OF CRIMINAL APPEAL]

1970 *Present :* Sirimane, J. (President), Samerawickrame, J., and Wijayatilake, J.

R. M. GUNATILAKE APPUHAMY, Appellant, *and* THE QUEEN, Respondent

C. C. A. 131 OF 1969, WITH APPLICATION 190

S. C. 240/69—M. C. Kuliyapitiya, 43639

Trial before Supreme Court—Verdict of jury based on a pure finding of fact—Power of judge to direct the jury to reconsider it—Misuse or incorrect use of it—Criminal Procedure Code, ss. 230, 248 (2), 244, 245.

Where, at a trial before the Supreme Court, the question which the jury have to decide is purely one of fact, the provisions of section 248 (2) of the Criminal Procedure Code do not enable the Judge to direct the jury to reconsider their verdict, unless it is quite clear that the verdict is unreasonable or perverse. When two views on the facts are possible, and the view taken by the jury is different from that taken by the Judge, it would be improper to use section 248 (2) in such a manner as to substitute the Judge's view of the facts for that of the jury.

Per Curiam : " When a trial Judge uses section 248 (2), we think it is very desirable that he should give further directions to the jury and specifically inform them that they are still the judges of fact and perfectly free to bring the same verdict after reconsideration if they remained of the same view, and further that the second verdict will be deemed to be the true verdict which would be binding on the Judge as well."

APPEAL against a conviction at a trial before the Supreme Court.

Colvin R. de Silva, with *Neville de Alwis* and (assigned) *V. Sachithananthan*, for the accused-appellant.

Ian Wikramanayake, Crown Counsel, for the Crown.

Cur. adv. vult.

March 17, 1970. SIRIMANE, J.—

The main contention of Counsel for the appellant in this case was, that there was a misuse or an incorrect use of section 248 (2) of the Criminal Procedure Code when, purporting to act under that section, the learned trial Judge disapproved of the majority verdict of " not guilty " returned by the jury at the conclusion of the trial, and directed them to re-consider that verdict.

It is necessary to set out very briefly the evidence led at the trial :—

The deceased had been shot at from close range when he was sleeping at night on a cot in the verandah of his house. His widow, Premawathie, stated in evidence, that some time after midnight she heard a gunshot, and on peeping through the space between the planks, which separated the room in which she slept from the verandah, she saw the appellant standing near her husband's cot with something like a pole in his hand. She raised no alarm till next morning ; and it was the contention for the defence that she became aware of her husband's death only next morning when she found him injured. It was proved that in her statement to the police she had said that her husband *had been stabbed* and that she *suspected* the appellant. She had also stated in her deposition in the Magistrate's Court that she had *informed* one Dingiri Banda and Pemiyanu who had turned up next morning that her husband had been stabbed.

The next witness was one Ukku Banda, according to whom, the appellant for no apparent reason, put him up late at night,—said that he wanted to shoot a hare,—and went along with him to borrow a gun from one Paul Francis ; and that thereafter the appellant in the presence of this witness shot the deceased. The deceased was killed on the night of 2nd/3rd November, 1968. The defence pointed out that he made no statement to the Magistrate who visited the scene on the 4th before noon, and his statement was made only after the police questioned him on the afternoon of the 4th. It was suggested for the defence that this belated statement was made to save himself from being named as a suspect in the case. Witness Paul Francis said that the appellant borrowed the gun P1 and returned it an hour or two later. He did not mention Ukku Banda, and according to him, he did not detect any smell of gun powder when the gun was returned. But there was evidence from the police that the gun had been recently fired, and from the Government Analyst that an empty cartridge (P4), alleged to have been found by the police on a foot-path just 34 feet from the body of the deceased, had

been fired from the gun (P1). The contention of the defence was that after the gun was found the empty cartridge (P2) had been introduced, in order to build up a case against the appellant. This empty cartridge was not found on the 3rd, though, according to the evidence of the Inspector in cross-examination, on his arrival at the scene on the 3rd he had requested the people present (nearly 200 of them) to look for an empty cartridge. According to the Inspector (P4) was found at about 11 o'clock on the 4th November.

That was the main evidence relied on by the Crown. There was no question of law involved as far as the evidence was concerned, and I think it would be clear from the recital of the evidence above that the jury might quite reasonably have thought that it would be unsafe to act on that evidence. It was a pure question of fact which they had to decide. As the learned trial Judge put it, in the last para of his summing-up :

> "The issue in this case is very simple—either you acquit the prisoner because the case has not been proved beyond reasonable doubt, or you convict the accused if you find that the evidence establishes that he shot the deceased, and the verdict you should bring in such a case is a verdict of murder."

We are unable to agree with the submission made by learned Crown Counsel that the evidence was so cogent and compelling that any verdict other than that of guilt would be unreasonable or perverse. During the course of the trial there had been some sharp exchanges between the Bench and Counsel for the appellant, and the address for the defence had apparently not improved matters in any way. In a good part of the summing-up, at its beginning, the learned trial Judge explains to the jury why "in the interests of justice" he had to interrupt and correct Counsel during the course of the trial. We do not think it necessary to go into this matter except to observe that it is clear from a reading of the summing-up as a whole that the learned trial Judge's view on the facts was that the appellant was guilty ; and that there must have been an atmosphere of stress and strain when the jury retired to consider their verdict. They returned after having deliberated for 32 minutes, and what transpired on their return is recorded as follows :

> "Clerk of Assize : Mr. Foreman, are you unanimously agreed upon your verdict ?
>
> Foreman of the Jury : Yes.
> (on being prompted by Juror No. 2) Foreman : No.
>
> Clerk of Assize : How are you divided ?
>
> Foreman : Five to two.
>
> Clerk of Assize : By your majority verdict of five to two, do you find this accused Randunu Mudiyanselage Gunathillaka Appuhamy guilty of the offence of murder ?
>
> Foreman : No.

Court to Foreman of the Jury : Do you find him guilty or not guilty ?

Foreman : Not guilty.

Court to Jury : I don't approve of the verdict ; will you please go back and consider it again ?

Court : What is the section, Mr. Crown Counsel ?

Crown Counsel : 248 (2) My Lord.

Court to Jury : Yes, I will ask you to reconsider your verdict. If you have any matters on which you are not clear—if you want any further directions—consider among yourselves and let me know.

Foreman of the Jury (after discussing with the other jurors) : My Lord, we wish to retire and discuss.

Court : Yes. "

The Jury then retired again, and returned after 27 minutes, and by a majority verdict (5 to 2) found the appellant guilty of murder. After the verdict was signed, there is this record :

" Court : Tell the accused that I agree with the verdict of the majority of the jury that he is guilty of murder."

It clearly shows that it was the trial Judge's view on the facts that the appellant was guilty, and *for that reason* the earlier verdict did not meet with his approval.

Section 248 (2) of the Criminal Procedure Code reads as follows :

" If the Judge does not approve of the verdict returned by the Jury, he may direct them to re-consider their verdict and the verdict given after such re-consideration shall be deemed to be the true verdict."

This section is one of a group of sections (216 to 253) in chapter 20 of the Code which sets out the procedure for trials before the Supreme Court. One has to bear in mind that " all trials before the Supreme Court shall be by jury before a Judge or a Commissioner of Assize " (section 216 (1)). Sections 244 and 245 set out the respective functions of the Judge and the Jury, and it is the duty of the jury " to decide which view of the facts is true (245 (*a*)) and to decide all questions which according to law are to be deemed questions of fact " (245 (*c*)).

Section 248 undoubtedly gives the Judge very wide powers, but without in any way suggesting that there should be any limitations or fetters placed on the powers granted to the Judge by the plain words in the section, yet, having regard to the context in which the section appears, we would like to observe, that the section should be very sparingly used generally in those cases where there is some ambiguity in the verdict or an apparent misunderstanding of the summing-up (see *Henry Crisp*,[1] 7 Criminal Appeal Reports, 273) or where the verdict on the face of it shows that the jury has misapplied the law to the facts proved, or again where the verdict is incomplete or uncertain. When the verdict is based

[1] *7 Cr. App. Rep. 273.*

on a pure finding of fact a reconsideration by the jury should be ordered only when it is quite clear that it is unreasonable or perverse. When two views on the facts are possible, and the view taken by the jury is different from that taken by the Judge, it would be improper to use the section in such a manner as to substitute the Judge's view of the facts for that of the jury. That would be an encroachment on the duties of the jury set out in section 245, and would render meaningless the familiar direction given to juries in all cases (and this one was no exception) to remember that they and they alone are the sole judges of fact.

The authorities cited at the argument, though not directly in point, clearly indicate that section 230 (which empowers a Judge to discharge a jury whenever in the opinion of the Judge the interests of justice so require) and section 248 (2) should not be used either singly or in combination in such a manner as to render ineffective a reasonable finding of fact by the jury merely because the Judge disagrees with that finding. In the case of *Thomas Perera v. the Queen* [1] (29 N.L.R. Page 6) the trial Judge directed the jury to reconsider their verdict but before such reconsidered verdict was delivered, he discharged the jury. Garvin, J. observed at page 9,

> "Inasmuch as the Commissioner's order is not open to review and since his reasons are not before me, I have neither the power, nor am I in a position to say anything judicially in regard to the order made in this case. But I am free with reference to the argument addressed to me to express my own opinion that to exercise in combination the powers committed by section 248 (2) and section 230 solely for the purpose of preventing a jury from returning a verdict which is not in accord with the presiding Judge's view of the case is not a use to which those powers should be put."

In *The Queen v. Handy* [2] (61 N.L.R. 265) it was held that section 230 of the Criminal Procedure Code does not entitle the presiding Judge to discharge the jury in a case in which the Judge disagrees with the jury's view of the facts. In *The Queen v. Elmon* [3] (67 N.L.R. 49), after the verdict was delivered by the foreman, the presiding Judge asked him a number of questions and said that it was impossible for him to accept that part of the verdict according to which none of the accused was guilty of murder. He directed the jury to retire and reconsider their verdict on the charge of murder. It was held *inter alia*, that the trial Judge acted wrongly in refusing to take the verdict returned by the jury after the first summing-up, and in questioning them when their verdict was unmistakable. In *The Queen v. Arnolis Appuhamy*,[4] (70 N.L.R. 256) it was held that section 230 does not entitle the trial Judge to discharge the jury in a case in which he disagrees with the view of the facts taken by the jury. H. N. G. Fernando, C.J. stated,

[1] *(1927) 29 N. L. R. 6.*
[2] *(1959) 61 N. L. R. 265.*
[3] *(1962) 67 N. L. R. 49.*
[4] *(1967) 70 N. L. R. 256.*

> "If..... the Judge was reluctant to accept the verdict, section 248 (2) entitled him to direct a reconsideration of the verdict *and to charge the jury afresh for that purpose.*"

When a trial Judge uses section 248 (2) we think it is very desirable that he should give further directions to the jury and specifically inform them that they are still the judges of fact and perfectly free to bring the same verdict after reconsideration if they remained of the same view, and further that the second verdict will be deemed to be the true verdict which would be binding on the Judge as well.

In the present case, the learned Judge gave no further directions at all. Having told the jury that he disapproved of their verdict of "not guilty" he asked the Crown Counsel, "What is the section?" and the Crown Counsel stated, "Section 248 (2)". As Counsel for the appellant urged this may have had the effect of making the jury think that in law the Judge could direct them to bring in the verdict which was acceptable to him, and that they were bound by that direction. In *Thurairatnam v. The Queen*,[1] (68 N.L.R. 347) T. S. Fernando, J. said.

> "A trial Judge should always refrain from using language which, though not intended, may have the effect of leading the jury to believe that their legal right to determine the facts is not really unfettered but is to some degree hedged in to permit the accommodation of the Judge's view of the facts."

Those remarks were, of course, made with reference to a summing up but would apply with even greater force to a situation as the one which arose in the present case. In this context, the learned Judge's question whether the jury wanted further directions on matters which were not clear, could have conveyed the impression, that the Judge wanted to know from the jury what it was that stood in the way of their returning, what in the Judge's view was the only correct verdict in the case.

Learned Crown Counsel conceded that after requesting the jury to reconsider their verdict, the failure of the learned trial Judge to reiterate that they were still judges of fact, and that their verdict after reconsideration, whatever it was, would be binding on him, was a non-direction which amounted to a misdirection. He submitted, however, that the case should be sent back for re-trial. We have indicated earlier our estimate of the evidence led by the Crown, and we cannot lose sight of the fact that before the misdirection the jury, in fact, found the appellant not guilty.

We do not think that this is an appropriate case in which the appellant should be placed in jeopardy a second time. For these reasons, we quashed the conviction and acquitted the appellant.

Accused acquitted.

1 *(1966) 68 N. L. R. 347.*