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16/1963

IN THE PRIVY COUNCIL

No. 30 of 1962

ON APPEAL FROM
THE COURT OF CRIMINAL APPEAL, CEYLON

B E T W E E N :

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
17 JUN 1962
77 RUSSELL SQUARE
LONDON, W.C.1.

ALUTHGE DON HEMAPALA Appellant

- and -

THE QUEEN Respondent

74120

CASE FOR THE RESPONDENT

Record

- 10 1. This is an appeal by special leave granted on the 30th July 1962 from the judgment and order of the Court of Criminal Appeal of Ceylon dated the 25th day of October 1961, dismissing an appeal against the Appellant's conviction and sentence on the 20th December 1960 by the Supreme Court at Kalutara. p.82.
- 20 2. The Appellant was indicted with one Babbu Singho on a charge that on the 27th June 1960 the Appellant murdered Mahawattage Don Carolis and that Babbu Singho abetted the murder. The Appellant was convicted and sentenced to death. Babbu Singho was acquitted. p.1.
3. On their committal for trial by the Magistrates Court the accused elected to be tried by an English speaking Jury under section 165B of the Criminal Procedure Code. p.4.
4. At the trial an English speaking Jury was empanelled and after they had been sworn the following passage occurred:-
- 30 "Court: May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them? p.4. 1.28.

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Foreman: Yes My Lord.

Court: And also address of Counsel if it is made in Sinhala?

Foreman: Yes.

Court: Mr. Tampoe, are you able to follow the proceedings in Sinhala?

Mr. Tampoe [Defence Counsel]: Yes My Lord.

Court: You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer.

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Crown Counsel opens his case to the Jury. (in Sinhala)."

5. It was observed by Weerasooriya J. in the course of his judgment in the Court of Criminal Appeal that:-

p.88, 1.2.

"Two, or may be three, out of the nine witnesses called by the prosecution, and the only witness called by the defence, appear to have testified in English, and the others in Sinhala. At the conclusion of the evidence, counsel for the defence addressed the jury and Crown Counsel replied. The transcript does not show in what language these addresses were delivered, but it may be assumed that Crown Counsel adopted the same language as in his opening speech, while defence counsel spoke in English. The summing-up also be assumed to have been in English."

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6. The principal questions arising in this appeal are:-

(i) whether, the failure by the trial Judge to insist on the interpretation of the two addresses of Crown Counsel into English or on the interpretation of the evidence of some of the witnesses into English (except for the purpose of the record), was a wrong decision of law or constituted a miscarriage of justice;

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(ii) whether, if the Criminal Procedure Code required the addresses of Counsel or the evidence of the witnesses to be in English, or to be interpreted into English for the benefit of the Jury, the proviso to section 51 of the Court of Criminal Appeal Ordinance No. 23 of 1958 was applicable and was rightly applied by the majority of the Court of Criminal Appeal.

10 7. Evidence was led for the prosecution that the deceased was stabbed outside a boutique and died from his wounds in hospital the next day.

The deceased's brother-in-law Aron Singho said he and his wife were near the boutique when they heard cries of "stabbed with a knife" and then saw the Appellant and Babbu Singho running from the direction of the cries. He saw them in the light of the torch. The Appellant was carrying a knife. When he found the deceased by the boutique the latter said "Babbu Singho held me and Hemapala 20 stabbed me." Aron Singho's wife gave evidence confirming her husband's account except that she gave no evidence about a statement by the deceased. She was the deceased's sister and Babbu Singho's cousin. p.21, 1.36. p.23, 1.2. p.35.

A doctor in the hospital where the deceased was taken gave evidence that the deceased had told him that he was stabbed by one Hemapala and Babbu Singho but then corrected himself and said that Babbu Singho held him while Hemapala stabbed him. p.5, 1.12.

30 The deceased had made a statement to the police in hospital that:-

"Today at about 8 p.m. I went to a boutique at Kebellagoda to buy some cigarettes the boutique keeper said that she had no cigarettes. Then I came out. As I came out I met Hemapala and Babbu Singho. The latter embraced me and Hemapala stabbed me with a knife on my left arm pit and on the back of my chest. I then went to the same boutique. I shouted 40 out that I was stabbed. I do not know what the motive is. None of them are angry with me." p.112.

The boutique keeper gave evidence that the deceased had bought a cigarette in her boutique and p.10, 1.29.

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p.11, 1.15.

returned about 10 or 15 minutes later. She asked him to leave, which he did, because she was afraid her child would be frightened.

8. The Appellant did not give evidence.

9. The Notice of Appeal did not raise the question whether the conduct of part of the trial in Sinhala was a breach of the Criminal Procedure Code, but this ground of appeal was raised by Counsel for the Appellant on the hearing and was the only ground on which it was sought to have the conviction set aside. Despite its absence in the Notice of Appeal the Court permitted this point to be argued.

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p.82.

10. Basnayake C.J. said in his judgment, with which de Silva J. concurred, that the procedure followed in a trial by a Jury drawn from an English speaking panel of jurors was so well established and so well known that when an accused person elected to be tried by such a jury it could be presumed that he did so with the certain knowledge of the procedure that would be followed at his trial. The trial would be conducted in English and evidence given in a language other than English would be interpreted to the jury. In this case there had been a departure from that procedure and a procedure not authorised by the Criminal Procedure Code had been adopted on the direction of the trial Judge. There had been a fundamental departure from the procedure prescribed, which amounted to a miscarriage of justice and left the Court no option but to quash the conviction. The defect could not be cured by the fact that neither the accused nor his Counsel took objection to the procedure.

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p.87.

Weerasooriya J. held that sections 254, 257, 224(1) and 225 necessarily implied that proceedings at a trial by Jury in the Supreme Court should be held either in the language of the panel in which the Jury was drawn, or be interpreted into that language. He held that the evidence of witnesses who testified in Sinhala was duly interpreted into English. Though this was done for the purpose of the record the remarks of the trial Judge quoted in paragraph 4 above showed that the interpretation was loud enough to have been heard by the Jury. However, the delivery of addresses by Crown Counsel in Sinhala was an irregularity or illegality. He

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then went on to consider the proviso to section 5(1) of the Court of Criminal Appeal Ordinance and held that the appeal should be dismissed as no actual miscarriage of justice had occurred. On the facts of this case the irregularity was not of a serious nature as the Jury and the accused's Counsel understood Sinhala and the irregularity was not even referred to in the Notice of Appeal.

10 N.H.G. Fernando J. held that there had been no breach of the Criminal Procedure Code. He considered it proper to assume that the interpretation into English of questions and answers were audible to members of the Jury. He did not find that the relevant provisions of the Code had the necessary implication that all evidence and addresses must be in English or be interpreted into English for an English speaking Jury. If it was in the contemplation of the legislature that evidence given at a trial by a Jury drawn from a particular language panel must always be rendered into the language of the panel it was strange that so important an intention was not declared by an express provision in the Code. In his view the main purpose of the separate language panels was to enable the Jury to consult together adequately; and the reason for the right of the accused to elect his panel was to enable an accused belonging to one of the language groups to be tried by persons familiar with the manners and customs peculiar to that group. If his view of the provisions of the Procedure Code was not correct, he agreed that the proviso to section 5(1) of the Court of Criminal Appeal Ordinance should be applied in the circumstances of the case.

p.93

40 11. It is respectfully submitted that the Criminal Procedure Code does not require any implication that all evidence and addresses must be given in the English language, or be interpreted into English for an English speaking Jury, and that the Judgment of H.N.G. Fernando J. is right. It is further submitted that in all the circumstances of the case the majority of the Court of Criminal Appeal were correct in the exercise of their discretion to apply the proviso to section 5(1) of the Court of Criminal Appeal Ordinance.

12. The Respondent humbly submits that this appeal

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should be dismissed for the following amongst
other

R E A S O N S

1. BECAUSE there was no breach of the provisions of the Criminal Procedure Code.
2. BECAUSE the majority of the Court of Criminal Appeal rightly applied the proviso to section 5(1) of the Court of Criminal Appeal Ordinance.

MARK LITTMAN.

DICK TAVERNE.

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A P P E N D I X

The following are relevant statutory provisions:-

CRIMINAL PROCEDURE CODE

10 165B. On committing the accused for trial before any higher court the Magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial in the event of the trial being held before the Supreme Court, and the Magistrate shall record such election if made. The accused so electing shall, if the trial is held before the Supreme Court be bound by and may be tried according to his election, subject however in all cases to the provisions of section 224.

224. (1) The jury shall be taken from the panel elected by the accused unless the court otherwise directs.

225. Any objection taken to a juror on any of the following grounds if made out to the satisfaction of the court shall be allowed:-

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20 (b) some personal ground such as deficiency in the qualification required by any law or rule having the force of law for the time being in force;

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(e) his inability to understand the language of the panel from which the jury is drawn;

(f) any other circumstance which in the opinion of the Judge renders him improper as a juror.

30 229. If in the course of a trial by jury at any time before the return of the verdict any juror from any sufficient cause is prevented from

attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance or if it appears that any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted, the Judge may either order a new juror to be added or discharge the jury and order a new jury to be chosen.

257. (1) The Fiscals of the several provinces shall, with respect to each of the judicial districts within their provinces, prepare three several lists of the persons who, under section 254, are qualified and liable to act as jurors and assessors, setting forth their names in full, occupations, and places of residence, that is to say - 10
- (a) a list of persons who can speak, read, and write the English language, and each of whom possesses in his own or his wife's right an income of not less than two thousand rupees a year, or is in the enjoyment of a monthly salary of not less than two hundred rupees; 20
- (b) a list of persons who can speak, read, and write the Sinhalese language, and each of whom possesses in his own or his wife's right property, immovable or movable, not less than one thousand rupees in value, or an income of five hundred rupees a year;
- (c) a list of persons who can speak, read, and write the Tamil language, and each of whom possesses in his own or his wife's right property, immovable or movable, not less than one thousand rupees in value, or an income of five hundred rupees a year; and also 30
- (d) a list of persons selected from list (a), each of whom possesses an income of not less than three thousand rupees a year, or either in his own or in his wife's right property, movable or immovable, not less than twenty-thousand rupees in value, or is in the enjoyment of a monthly salary of not less than five hundred rupees, who shall be denoted in list (a) by an asterisk or other mark, and 40

shall be liable to serve as special jurors as hereinafter prescribed:

10 Provided always that if any person who shall be able to speak, read, and write more than one of the above-mentioned languages and shall be in other respects duly qualified shall at any time declare to the Fiscal his desire to be placed on any one of the lists (a), (b), and (c) respectively in preference to another of the same lists, the Fiscal shall, if such person be duly qualified, place him accordingly; and no person whose name shall be placed on any one of the same three lists shall be liable to serve on any other of the same lists, unless such person, with the leave of the presiding Judge, shall consent thereunto.

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London, S.W.1.