Privy Council Appeal No. 30 *of* 1962

Aluthge Don Hemapala – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1963

Present at the Hearing:

VISCOUNT RADCLIFFE

LORD EVERSHED

LORD MORRIS OF BORTH-Y-GEST

LORD DEVLIN

SIR KENNETH GRESSON

[*Delivered by* SIR KENNETH GRESSON]

This was an appeal *in forma pauperis* by special leave from the judgment and order of the Court of Criminal Appeal of Ceylon dated 25th October 1961 whereby the appellant's appeal against his conviction and sentence of 20th December 1960 by the Supreme Court at Kalutara was dismissed. The appellant had been found guilty of murder and sentenced to death. He had together with one Babbu Singho been indicted on a charge that on 27th June 1960 he had murdered Mahawattage Don Carolis and that the said Babbu Singho had abetted the murder. On their committal for trial by the Magistrate's Court the accused elected to be tried by an English speaking jury under section 165B of the Criminal Procedure Code. The Code gives an accused person a right to be tried by a jury drawn from any one of three panels. The Fiscal is charged with the duty of preparing three lists of persons who, as well as having certain property or income qualifications can respectively speak read and write (a) the English language (b) the Sinhalese language (c) the Tamil language. The accused elected to be tried by a jury drawn from the panel the members of which could 'speak read and write the English language'. Such a jury was empanelled accordingly. But the learned Judge who was presiding at the trial thereupon interrogated the jury in these terms:—

> " 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? "
>
> Foreman: " Yes, My Lord."
>
> " And also address of Counsel if it is made in Sinhala ? "
>
> Foreman: " Yes."
>
> " Mr. Tampoe (who was Defence counsel), are you able to follow the proceedings in Sinhala ? "
>
> Mr.Tampoe: " Yes, My Lord."
>
> " 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."

The Crown Counsel opened his case in Sinhala. Thereafter the testimony of the witnesses was taken. The first of these gave his evidence in English.

But apparently the evidence of other witnesses was given in Sinhalese and though it would necessarily be translated into English for the Record it is not clear that it was done in such a way as to ensure that the jury heard the translation. It was assumed that the closing address of the Crown Counsel was in Sinhala; the Record was silent as to whether Counsel for the defence addressed in English or Sinhala. The summing up by the learned Judge was in English.

The appellant was found guilty of murder and sentenced to death; the second accused was acquitted and discharged.

On appeal from the conviction it was contended that since the accused had elected to be tried by an English speaking jury the conduct of the case partially in Sinhalese was a contravention of the Criminal Procedure Code. The Court of Criminal Appeal—comprising five Judges—were not altogether in agreement. Basnayake C.J. and L. B. de Silva J. held that there had been an essential departure from the well established Rules of procedure—that the trial had not been ' according to law ' and accordingly that the conviction should be quashed and a new trial ordered. Weerasooriya J. and Gunasekara J. held the trial to have been irregular but there to have been no substantial miscarriage of justice and that the appeal should therefore be dismissed. H. N. G. Fernando J. held there had been no irregularity and that the appeal should be dismissed. In the result the appeal was dismissed by the majority of three to two. Special leave to appeal to Her Majesty in Council was granted on 30th July 1962.

The crucial question is whether the accused having elected to be tried by an English speaking jury the conduct of the trial so contravened the Criminal Procedure Code as to vitiate the trial or at the least to amount to a miscarriage of justice. The Criminal Procedure Code provides (section 165B) that an accused person having elected, he " shall be bound by and may be tried according to his election, subject however in all cases to the provisions of section 224 ". Section 224 (1) enacts that " the jury shall be taken from the panel elected by the accused unless the Court otherwise directs ". There was no direction otherwise.

The Court of Criminal Appeal Ordinance in a set of provisions dealing with appeals against conviction enacts in section 5 that

> " The Court of Criminal Appeal on any such appeal against conviction 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, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred ".

A provision in similiar terms to this enactment is to be found in many jurisdictions e.g. in the English Criminal Appeal Act of 1907. There have been many cases in which its application has been discussed.

It has often been held that the adoption of a procedure other than that authorised by the Code under which an accused person is being tried can constitute a miscarriage of justice; but it is a well established principle that this Board will not recommend Her Majesty to review or interfere with the course of Criminal proceedings unless there has been such a disregard of the procedure laid down as to occasion substantial injustice. The question is whether there was, in the trial of the appellant, such a departure from the normal or proper procedure as to amount to a miscarriage of justice.

Their Lordships do not think that the trial in this case can be said to have been a nullity because of the course followed, but there are good grounds for holding that the way in which it was conducted may have resulted in

withdrawing from the accused a protection which the Code was designed to secure. As was said by Lord Goddard in *R v Neal* ([1949] 2 K.B.590: 1949 2 All E.R.438):—

> " There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leave the Court no option but to quash the conviction ".

The provisions of the Criminal Procedure Code under which the appellant was tried contemplate that where there has been an election to be tried by an English speaking jury (as was the case) the trial will be conducted throughout in the English language. Though the evidence of the witnesses who testified in Sinhala was translated for the purposes of the Record this may not have been heard by the jury, or all of them, and as to the addresses of counsel it is not certain that they were translated at all. The course the learned Judge took was based upon an interrogation of the jury conducted by himself. He accepted an assurance from the foreman that the jury understood Sinhala. But this falls short of establishing that each and every one of the jury had such an understanding. There was a complete absence of any sort of assent by the accused to the course being followed.

There are provisions in the Code which emphasise the importance of the trial being had in a language which the jury is able to understand, e.g., section 225 under which objection may be taken to a juror on the ground " (c) of his inability to understand the language of the panel from which the jury is drawn " and section 229 which authorises where " it appears that any juror is unable to understand the language in which the evidence is given ", the substitution of a new juror or the discharge of the jury. The assurance given by the foreman of the jury to which the other members of the jury gave no more than a mute assent does not, in their Lordships' opinion provide a sufficiently solid foundation upon which to assume that all the members of the jury were in fact able to understand and appreciate evidence not given in English and the addresses of the defence counsel. Accordingly their Lordships hold that there having been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction.

Ordinarily in such a case as this where a conviction has to be quashed and the sentence set aside because of procedural irregularities a new trial would be directed. But their Lordships think that the discretion as to whether there should be a new trial after so great a lapse of time should be exercised by the Court of Criminal Appeal of Ceylon. Their Lordships therefore do no more as they have done, than humbly to tender to Her Majesty advice that the appeal should be allowed, the dismissal of the appeal by the Court of Criminal Appeal of Ceylon be reversed leaving that Court to exercise a discretion whether there should be a new trial.

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In the Privy Council

ALUTHGE DON HEMAPALA

v.

THE QUEEN

DELIVERED BY SIR KENNETH GRESSON

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