MENDIS AND ANOTHER
v.
THE REPUBLIC OF SRI LANKA

SUPREME COURT
COLIN-THOME, J.
RANASINGHE, J. AND L. H. DE ALWIS, J.
S.C. APPEAL NO. 33/84
HC GALLE NO. 517
01 AND 02 OCTOBER 1985

Criminal Procedure – Section 334(1) of the Code of Criminal Procedure Act No. 15 of 1979 – Right of Court of Appeal to quash conviction if the Court holds that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence.

Held:

An appeal against a conviction based on the verdict of the jury will be allowed if the Court thinks that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe and unsatisfactory. The verdict of the jury should be set aside in such a case even though all the material was before the jury and the summing-up was impeccable. The verdict of the jury is unreasonable where it is not sound or sensible or not governed by good sense.

In a case where the material evidence on identification was contradictory and based on inherent inconsistencies and improbabilities the verdict of guilty cannot be allowed to stand as it would be unsafe and unsatisfactory.

Cases referred to:

1. *Gardiris Appu v. The King* 52 NLR 344, 348.
2. *Sinniah Palaniyandy v. The State* 76 NLR 145.
3. *The King v. Andris Silva* et al. 41 NLR 433.
4. *The King v. Wegodapola* 42 NLR 459, 469.
5. *Rex v. Don Andrayas & Attapattu* 21 CLW 93, 97.
6. *The King v. Mustapha Lebbe* 44 NLR 505, 507.
7. *Bradley* (1910) 4 Cr. App. R 224, 228.

8. *Parker* (1911) 6 Cr. App. R 285, 286.
9. *Schrager* (1911) 6 Cr. App. R 253, 254.
10. *Chadwick* (1917) 12 Cr. App. R 247, 250.
11. *Hall* (1919) 14 Cr. App. R 58, 64.
12. *Scranton* (1920) 15 Cr. App. R 104, 110.
13. *Armstrong* (1922) 16 Cr. App. R 104, 110.
14. *Margulas* (1922) 17 Cr. App. R 3, 5.
15. *Shefsky* (1922) 17 Cr. App. R 28, 29.
16. *Wallace* (1931) 23 Cr. App. R 32, 35.
17. *Dent* (1943) 29 Cr. App. R 120, 125.
18. *Sean Cooper* (1969) 53 Cr. App. R 82, 85.
19. *Stafford v. D. P. P.* (1973) 3 WLR 719.

APPEAL from Judgment of the High Court of Galle.

Dr. Colvin R. De Silva with *Mrs. Manourie Muttetuwegama*, *N. V. De Silva* and *Miss Saumya De Silva* for 2nd and 3rd accused-appellants.

Rohan Jayatilleke, SSC for Attorney-General.

Cur adv vult.

5th December, 1985.

COLIN-THOME, J.

The accused-appellants who were the second and third accused in H.C. Galle Case No. 517 were indicted along with three others under seven counts. The first count was a charge of unlawful assembly the common object of which was to cause injuries to Geesin Perera. The second to the fourth counts were based on the liability of the accused for the acts of one or more members of the unlawful assembly in furtherance of the common object in causing the death of Geesin Perera and in the attempted murder of Sendrick Perera and Sunil Perera. Counts 5, 6 and 7 charged the accused with

the murder of Geesin Perera and the attempted murder of Sendrick Perera and Sunil Perera on the basis of a common intention.

At the close of the trial the jury by a divided verdict of 6 - 1 found all the accused not guilty on counts 1, 2, 3, 4, 6 and 7. The jury found the second and third accused guilty of the murder of Geesin Perera under count 5. They were sentenced to death.

The appeal of the accused-appellants to the Court of Appeal was dismissed. The appeal is from the judgment of the Court of Appeal. The main submission of learned Counsel for the accused-appellants is that the Court of Appeal has misconceived the scope and applicability of section 334 of the Code of Criminal Procedure Act, No. 15 of 1979, in refusing to interfere with the conviction of the appellants as the verdict of the jury was "unreasonable or cannot be supported having regard to the evidence".

The alleged offences were committed on or about the 31st October 1976 at Balapitiya. Count 5 states:

> 5. At the same time and place aforesaid and in the course of the same transaction you did commit murder by causing the death of M. Geesin Perera, and that you have thereby committed an offence punishable under section 296 read with section 32 of the Penal Code.

The main witnesses for the prosecution were Sendrick Perera and Sunil Perera, who received gunshot injuries during the incident, and Chandra Somawathie, the daughter of the deceased Geesin Perera. As this was a case of night shooting the identification of the suspects was a crucial issue.

According to Dr. G. T. Dalpathadu the deceased had 14 gunshot injuries consisting of 9 entrance wounds and 5 exit wounds. There was a gunshot injury near the left nipple which had lacerated the left lung and fractured the 4th rib. This injury was necessarily fatal. There was an injury on the left side of the abdomen which lacerated the small intestines. This injury was fatal in the ordinary course of nature. There were 5 injuries on the left thigh and 3 injuries on the right thigh.

He also had 4 injuries close to the left knee. The spread of the injuries from chest to knee was 20 inches. This fact together with the absence of blackening and singeing on the wounds indicated that the shooting was at a range of about 15 to 30 yards or more though, of course, the doctor admitted that he was no ballistics expert. The direction of the shooting was from front and a little to the right. The doctor was unable to say whether the injuries were caused by one shot or more than one shot. He recovered a pellet from the abdomen of the deceased.

The doctor examined Sendrick Perera on 31.10.76 at 10 p.m. Sendrick had a gunshot injury 3 inches below the left knee and an exit wound on the outer side of the left leg. This injury had caused a fracture of the leg. The shooting was not at close range. Sendrick told him that "Sirisena (5A), Siriwardene (3A), Upasena (2A) and Wijesiri (4A) shot at about 8.15 p.m. at Weliwatte". Sendrick told him that these persons fired four shots.

The doctor examined Sunil Perera on 31.10.76 at 11 p.m. Sunil told him that "Siriwardene (3A), Upasena (2A) and Wijesiri (4A) shot at Weliwatte at 8.15 p.m." Sunil had a gunshot injury on his right thigh and another injury close to that injury from which he removed a pellet. This injury was non-grievous.

Sendrick Perera, aged 68 years, brother of the deceased Geesin, lived about 80 feet from the deceased's house. On the day of the incident at about 8 p.m., he heard shouts "being killed". He ran towards the deceased's house. Geesin said "have come to shoot" and pointed out the 2nd, 3rd, 4th and 5th accused. They were the only accused present. The 1st accused was not there. Geesin was on the foundation in front of his house and about 22 feet away were the four accused inside Geesin's land about 2 or 3 feet from the fence. Beyond the fence was a breadfruit tree in a garden belonging to a villager. Upasena, the 2nd accused, and Siriwardene, the 3rd accused, had guns. Wijesiri, the 4th accused, had a sword and Sirisena, the 5th accused, had a iron rod or a club. In his statement to the doctor and to the Police Sendrick did not mention that the 4th accused had a sword and that the 5th accused had an iron rod or club.

Sendrick stated that just as he warned Geesin to take cover the second and third accused fired their guns at about the same time. Both the deceased and he received injuries. Under cross-examination he said "Upasena (2A) fired the first shot and my brother received it. The second shot was fired by Siriwardene, (3A). I did not hear any shots when I was at home." In his statement to the police he stated. "Last night when I was at home I heard a report of a gun from the direction of the railway." This contradiction was marked D2.

He stated that there was no enmity with the accused. He denied making the statement to the police: "Then, as there was a tense situation for the last two or three days I went to my brother's house crossing the garden." This contradiction was marked D3.

He stated that he told the doctor that only the 2nd and 3rd accused fired their guns. According to the doctor Sendrick informed him that all four accused fired four shots.

Sendrick said that he did not see Somawathie at any stage. He said: "They were inside the house having closed the doors at the time of shooting."

At the time of the shooting he was 17 feet from the deceased and 35 feet from Sunil. He was between the deceased and Sunil at the time.

Sendrick stated that he identified the accused with the aid of the light from three bulbs in the Weaving Centre and by moonlight. The light from the Weaving Centre did not fall at the foundation where Geesin was and where he was. According to Police Sergeant Jayakody there was bright light at the foundation from two bulbs at the Weaving Centre.

Sunil Perera, nephew of the deceased, lived in a house about 80 feet from the deceased's house. Their houses faced opposite directions. On the day of the incident at about 8 p.m. he heard a report of a gun from the railroad. He saw the 2nd, 3rd, 4th and 5th accused together by the edge of the road. The 1st accused was not with them. He did not see the 1st accused anywhere that night.

He was able to see the accused as there was moonlight and light from the Weaving Centre. They had weapons like clubs. He saw them from near a billin tree behind his house. He did not see any of the accused with a sword. He did not see the 2nd, 3rd and 4th accused having a gun. He admitted that if he told the doctor that the 2nd, 3rd and 4th accused fired guns at 8.15 p.m., it would be incorrect.

Sunil stated in cross-examination that he did not see anyone take cover behind the breadfruit tree. He admitted he stated to the police: "Then when I was on the road I saw Upasena Mendis, Siriwardene Mendis, Wijesiri and Corporal Sirisena by the side of the road in front of Alison Zoysa's land taking cover behind a breadfruit tree."(D5)

He stated that two shots were fired one after another. A pellet struck his right thigh. He ran to the Weaving Centre where there were two policemen. He did not tell them who shot.

Sunil stated at first that there was no enmity with the accused. Later he stated: "There was a row. They cut Alison's hand. I do not know who cut."

He stated that the distance from the foundation to where the accused were was 60 feet contradicting Sendrick. He heard three gunshots while Sendrick heard only two. The foundation could not be seen because of darkness.

Chandra Somawathie, daughter of the deceased, was about 15 years of age at the time of the incident. She said at about 8 p.m. she heard a shot from the railroad. The deceased and she went to the verandah of Alison's house which was only about 6 feet away. Then she saw Peiris Mendis, the 1st accused, going along the road with a torchlight. When he got near the breadfruit tree he said to the other accused: "Why do you wait further, Thiyapiyaw." Then the deceased got on the foundation as if to make himself an easy target for his assailants. The 2nd, 3rd, 4th and 5th accused who were taking cover behind the breadfruit tree came to the road. Under cross-examination she stated that she did not see the accused take cover behind the breadfruit tree.

The 2nd and 3rd accused who had guns levelled their weapons at the deceased and fired. The deceased ran some distance on the foundation and fell. She did not see any accused with an iron rod.

She could not say whether the foundation was well lit. She identified the accused by the light from the Weaving Centre which was about 50 feet from the foundation.

Soon after the shooting a crowd of about 20 or 25 persons gathered at the scene. She did not tell anyone who shot her father.

Somawathie was the only witness who stated that the 1st accused was at the scene inciting the other accused with guns to shoot. She did not see Sendrick and Sunil at the place where the shooting took place. Learned Senior State Counsel jettisoned her evidence in the Court of Appeal presumably because the jury had rejected her evidence at the trial.

Romalyn Alwis, wife of Alison Zoysa, stated that on the day of the incident the deceased and Somawathie came to the verandah of her house. From the verandah she saw 2 or 3 persons taking cover behind the breadfruit tree. She could not identify them as it was a dark night and as there were trees obstructing her view. It was dark under the breadfruit tree. After the deceased and Somawathie left her verandah she heard two shots.

J. A. S. Jayakody, Police Sergeant 2181, who visited the scene on the night of the incident found stains like blood on the right side of the foundation trailing towards the deceased's house. The light from two bulbs in the Weaving Centre fell near the breadfruit tree as well as on the foundation. There was a fence between the foundation and the breadfruit tree. It was a live fence about 4 to 5 feet high. There were shrubs and coconut trees as well. The fence was about 20 feet from the foundation. The girth of the breadfruit tree was about 4 feet.

Inspector K. T. Jacob who visited the scene at 9 a.m. the following day found two under waddings (P7) near the breadfruit tree and a top wadding (P6) on the foundation. He found pellet marks on the leaves of the breadfruit tree at a height of about 4 feet.

Section 334 (1) of the Code of Criminal Procedure Act, No. 15 of 1979, which is based on section 5(1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, indicates the circumstances under which the Court of Appeal can quash a conviction if the Court holds that the verdict of the jury, *inter alia,* is "unreasonable or cannot be supported having regard to the evidence." It states:–

> 334. (1) The Court of Appeal on any appeal against conviction on a verdict of jury shall allow the appeal if it thinks that such verdict 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 any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
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> Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

In *Gardiris Appu v. The King*[1] the Court of Criminal Appeal held (per Dias, S.P.J.) that: "The powers of this Court to quash the verdict of a jury in a proper case being undoubted, the difficulty is to know when such powers should be invoked and in what cases the verdict of the jury in an apparent case of hardship should be allowed to stand . . . These (the general principles) may be summarised thus: Questions of fact are for the jury. The Court of Criminal Appeal does not sit to retry cases, thereby usurping the functions of the jury : This Court sits as a Court of Appeal, and if there has been no misdirection, no mistake in law, and no misreception of evidence, cannot upset the verdict of the jury even though the Court feels that had the members of the Court been on the jury, they would have come to a different conclusion from the one which the jury reached. This, however, is not an inflexible or hard and fast rule to be applied rigorously and indiscriminately to every case. **Each case must be decided on its peculiar facts and circumstances.** The Ordinance which defines our powers has enacted that there may be cases where this Court will interfere, and should interfere, on the ground that the

verdict of the jury is unreasonable, that is to say, not sound or sensible, or not governed by good sense. The question is whether this is such a case."

Dias, S.P.J. has interpreted the expression "unreasonable" in Section 5(1) of the Court of Appeal Ordinance, No. 23 of 1938, as "not sound or sensible or not governed by good sense," following the definition of the word in the Shorter Oxford Dictionary as "not acting in accordance with reason or good sense."

In *Sinniah Palaniyandy v. The State* [2], Alles, J. seems to give a more restrictive interpretation to the expression "unreasonable". At page 156 he states: "The unreasonableness of a jury verdict does not mean and cannot mean that the Court is entitled to substitute its view of the facts for that found by the jury. Numerous decisions of this Court have laid down the principle in unmistakable terms in *Andris Silva* [3], *Wegodapola* [4], *Don Andrayas and Attapattu* [5], *Mustapha Lebbe* [6]. These are early decisions of this Court which have hitherto been consistently followed, but this is a principle that does not appeal to be sufficiently appreciated today. When, for instance there has been an unanimous verdict of a jury who have accepted the evidence of direct eye-witnesses, even if there are criticisms that can be made about that evidence, these are matters that must necessarily have been brought to the notice of the jury by competent Counsel and if the jury, in spite of these infirmities, have chosen to accept the evidence of the eye-witnesses, it would be a usurpation of the functions of the jury, for this Court to substitute its verdict for the verdict of the jury. The only exception to this rule would be if the misdirections or non-directions are of such a substantial nature which might have affected the jury's verdict resulting in a miscarriage of justice or it can be demonstrated that the verdict of the jury is perverse, and not merely because the members of this Court feel some doubt about the correctness of the verdict."

Dr. Colvin R. De Silva submitted that the Court of Appeal has been influenced by the misinterpretation of the word "unreasonable" as "perverse" in the judgment in *Palaniyandy's case (supra)* and that a wrong stress has been incorrectly focussed in interpreting the word "unreasonable".

In *The King v. Andris Silva et al* [3] the Court of Criminal Appeal held that in an appeal involving questions of fact only it is not the function of the Court of Criminal Appeal to retry a case, which has already been decided by a jury. The Court in such a case is only required to say whether the verdict of the jury is unreasonable or whether it cannot be supported having regard to the evidence. The Court of Criminal Appeal in *The King v. Wegodapola* [4] and in *Rex v. Don Andrayas & Attapattu* [5] followed the dicta in *Andris Silva's case (supra)* without a clarification of the interpretation to be given to the phrase "unreasonable or cannot be supported having regard to the evidence."

In *The King v. Mustapha Lebbe* [6] the Court of Criminal Appeal in interpreting the phrase "unreasonable or cannot be supported having regard to the evidence" followed the dicta in English cases and held (per Moseley, S.P.J.) that 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.

Section 5(1) of the Court of Criminal Appeal Ordinance No. 23 of 1938, followed precisely section 4(1) of the Criminal Appeal Act, 1907, of England. It will be convenient now to examine the interpretation given to the phrase "unreasonable or cannot be supported having regard to the evidence" by the Court of Criminal Appeal in England.

In *Bradley* [7] the appellant was charged with rape. The Court held (at 228) that "On the whole we think it **safer** that the conviction should not be allowed to stand. There was not sufficient evidence before the jury to justify them in concluding that the girl did not consent."

In *Parker* [8] the Court held that "There is, therefore, a sufficient **doubt** as to the accuracy of the verdict for us to give the appellant the benefit of it."

The Court of Criminal Appeal held in *Schrager* [9] that "On the evidence of the prosecution the case against him was very doubtful, and 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."

In *Chadwick*[10] the Court held that "In view of all the facts, this Court has come to the conclusion that the verdict of the jury should be set aside on the ground that it cannot be supported by the evidence, and that the convictions are unsatisfactory and must be quashed."

The Court of Criminal Appeal held in *Hall*[11] (per Reading, L.C.J.) that "With this evidence before us we think that on the whole it would not be safe to allow the verdict of the jury to stand. We are prepared to exercise our powers under s. 4 of the Criminal Appeal Act, 1907, and say that the verdict should be set aside. The appeal will therefore be allowed and the conviction quashed. We may add that, in our opinion, the summing-up of the Learned Judge was quite complete, and that his direction to the jury was most careful."

In *Scranton* [12] the Court held that "the conclusion which they had come to in this case was that the evidence was not satisfactory to support conviction." In *Armstrong* [13] the Court had to decide "whether it was safe to convict the appellant in this state of the evidence."

The Court held in *Margulas* [14] that the "evidence cannot be considered sufficient." The conviction was quashed. The Court observed that "No complaint can be made of the summing-up." In *Shefsky*[15] it was held that "In these circumstances it appears to the Court that the evidence is insufficient, and the conviction unsafe and unsatisfactory."

In *Wallace*[16] it was held that the case against the appellant "was not proved with that certainty which is necessary in order to justify a verdict of guilty, and, therefore, it is our duty to take the course indicated by the section of the statute to which I have referred (s. 4, Criminal Appeal Act, 1907)." In *Dent* [17] it was held that "this is a conviction which cannot be safely allowed to stand."

A long line of English cases has interpreted the phrase "unreasonable or cannot be supported having regard to the evidence" as "unsafe" or "unsatisfactory". This interpretation was adopted by Moseley, S.P.J. in *The King v. Mustapha Lebbe* [6].

In England this interpretation has now become incorporated in a statute. The relevant portion of section 2 of the Criminal Appeal Act 1968 (U.K.) reads:–

> 2. (1) Except as provided by this Act, the Court of Appeal shall allow an appeal against a conviction if they think –
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> (a) (as amended by section 44 of the Criminal Law Act 1977) that the conviction should be set aside on the ground that under all circumstances of the case it is unsafe or unsatisfactory.

In *Sean Cooper* [18] the Court of Appeal (Criminal Division) observed (per Widgery, L.J.) that "The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, Mr. Frisby for the appellant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognize the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 – provisions which are now to be found in section 2 of the Criminal Appeal Act 1968 – it was almost unheard of for this Court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that

the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it."

In view of the decisions in several English authorities referred to in this judgment we are unable to agree with the observation in *Cooper (supra)* which states: "Indeed, until the passing of the Criminal Appeal Act 1966 – provisions which are not to be found in section 2 of the Criminal Appeal Act 1968 – it was almost unheard of for this Court to interfere in such a case." However, we agree with the rest of the dicta in *Cooper (supra)* quoted in this judgment.

In *Stafford v. D. P. P.*[19] the House of Lords approved the judgment of Lord Widgery in *Cooper, ante,* as correctly stating the effect of section 2(1)(a).

We agree with the interpretation given to the phrase "unreasonable or cannot be supported having regard to the evidence" by Moseley, S.P.J. in *The King v. Mustapha Lebbe (supra)* and in the English cases as unsafe or unsatisfactory. The verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory even though all the material was before the jury and the summing-up was impeccable. We hold that the expression "perverse" which according to the Shorter Oxford Dictionary means being "obstinate or persistent in what is wrong" is too restrictive an interpretation of the phrase "unreasonable or cannot be supported having regard to the evidence."

In the instant case learned State Counsel in the Court of Appeal jettisoned the evidence of Chandra Somawathie. The presence of under-waddings near the breadfruit tree outside the fence and pellet marks on the leaves of this tree demolish the testimony of Sendrick Perera that the shooting took place inside the fence in the compound

of the deceased. We are also mindful of the fact that Sendrick Perera told the doctor on the night of the incident that four shots were fired by four accused. At the trial he stated that only two shots were fired by the 2nd and 3rd accused. Both Sendrick Perera and the remaining eye-witness Sunil Perera did not see the 1st accused at the scene contradicting the evidence of Chandra Somawathie. Sunil Perera, contradicted Sendrick Perera on a vital matter when he placed the 2nd to the 5th accused at the time of the shooting on the edge of the road outside the fence. He did not see the 2nd, 3rd and 4th accused with guns. He admitted that his statement to the doctor on the night of the incident that the 2nd, 3rd and 4th accused fired shots was incorrect.

After due consideration of all the circumstances in this case we have decided that we regard the verdict of the jury as unsafe or unsatisfactory and accordingly we allow the appeal and set aside the judgment of the Court of Appeal. The convictions of the 2nd and 3rd accused-appellants are quashed.

RANASINGHE, J. – *I agree.*

L. H. DE ALWIS, J. – *I agree.*

Appeal allowed.
Convictions quashed.