ATTORNEY GENERAL
V.
GUNAWARDENA

SUPREME COURT.
SAMARAWICKRAMA, A.C.J.
RAJARATNAM, J.
WIJESUNDERA, J.
VYTHIALINGAM, J.
TITTAWELA, J.
S.C. 503/76
H.C. KANDY 67/74
M. C. ANURADHAPURA 50580
03, 04, 05, 06, AUGUST 1976.

Administration of Justice Law-S.11, 13. S.14(3), S.54, S.212, S.348, S.349, S.354 of the Act - High Court - Indicted - Jury Trial - Application by Accused to direct the Jury to return a verdict of not guilty - Acquittal - Premature - Applicability of S 212(2) - Revisionary powers of the Supreme Court - material irregularity. Functions of the Jury - Failure to conform to S.212(2), is it Fatal?

The Accused - Respondent was indicted on a charge of Murder committed on 15.05.73. The trial commenced on 6.07.1976 and on 13.07.1976 after 4 out of 49 witnesses listed had given Evidence the Counsel for the Accused - Respondent applied to the judge to direct the jury to return a verdict of not guilty, on the ground that the evidence led up to that point of time as well as the evidence that could be led through the other witnesses listed, did not disclose that the Accused committed the offence. The learned trial judge accepted this position. The Attorney-General sought to revise the said order.

Held:

(1) In terms of S.11, 13 and 54 of the AJL the Supreme Court appears to have the widest powers of Revision in respect of the proceedings of a High Court. By its nature revision involves the supervision by a Superior Court of the proceedings of a subordinate Court to ensure the due and orderly administration of Justice, and prima facie its exercise is peculiarly called for in cases in which no remedy such as an appeal is available.

Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and not primarily or solely the relieving of grievances of a party.

The provision that the Court may upon Revision make such order, as it might have made had the matter been brought up in due course of appeal may have been enacted because of the recurring discussion in Courts, whether powers of revision can or should be exercised where the matter might have been brought up in appeal, had S.354 stood alone the argument that, by reason of the Provision relating to the orders which a Court may make in revision, the remedy by way of revision may be exercised only in a case where an appeal lay may have been valid. S.354 being an enabling provision it does not have the effect of impliedly excluding the exercise of the wide powers of Revision given by other provisions in cases where no appeal lies.

"In exercising the powers of Revision this Court is not tremelled by technical rules of pleading and procedure. In doing so this Court has power to act whether it is set in motion by a party or not and even ex mere motu".

(2) Under the provision of S.212(2) AJL the judge can direct the jury to return a verdict of not guilty only at the close of the prosecution case. However a practice appears to have developed in our Courts of judges stopping a case even before that stage is reached. There is no reason to disagree, if it is apparent to Court as well as to counsel that to continue is to waste time and to flog a dead horse, the case should of course be stopped.

Again if prosecuting counsel conceeds or is constrained to admit that all the Evidence on which the prosecution case is based has been led and what remains to be led is formal Evidence or other supporting Evidence which will not take the case any further, then the virtual end of the prosecution case has been reached and a Court may fairly act under S.212(2) AJL.

(3) However if there is such other Evidence still to be led on behalf of the prosecution which the Judge has to reckon and give weight to in considering whether there is a case to go to the Jury it appears that a judge will be acting contrary to S.212(2) AJL in making a direction before he hears that Evidence.

(4) The Learned Judge acted not in compliance with but contrary to S.212(2) when he took up considering of the question whether there was a case to go to the jury, before he heard all the material evidence he had to consider in coming to a decision.

This was a case of circumstantial evidence. As the prosecution relied for proof of its case on circumstantial evidence, he had to consider the total effect of the relevant facts and circumstances. The Learned Judge has not

really done so, he has failed to consider the total effect of the facts relied on by the prosecution in such manner as was required in a case of circumstancial evidence, and that he has been led into committing this error by according to the application, to go into the matter before the close of the case for the prosecution.

(5) Failure to conform to S.212(2) was not Technical but substantial and material as it has resulted in an erroneous decision to withdraw from the jury a case which had to be left to their decision.

A direction in terms of S.212(2) erroneously made in such a case would defeat the proper working of a Trial by jury before a judge and would amount to a non-compliance with a fundamental principle relating to such a trial.

As the contravention of S.212(2) was not Technical but substantial and material and it has led to a decision which would have as its effect or result, the breach of a fundamental rule relating to a Criminal Trial by judge and jury - the Supreme Court would act in Revision.

Application in Revision by the Attorney-General of an order made by the High Court Judge of Kandy.

Cases referred to:

1. *Goonewardene v. Orr* 1 ACR 172.
2. *Amarasuriya Estates Ltd., v. Ratnayake* 59 NLR 476.
3. *Bandulahamy v. Silva* 2 Current LawReports 67.
4. *Sabapathipillai v. Arumugam and Another* 27 CLW 5.
5. *Perera v. Agidahamy* 48 NLR 87.
6. *AG v. Podisingho* 51 NLR 385 at 391.
7. *Pauline de Croos v. Queen* 71 NLR 169.
8. S. C. 66/67 M. C. Colombo 34638/A Trial at Bar.
9. *Curly v. United States* 81 U.S. App. D. C. 389.
10. *Rathinam v. Queen* 74 NLR 317 at 327.
11. *Queen v. Karthenis de Silva* 70 NLR 66 at 67.

Ranjit Abeysuriya, D. P. P. with *Tilak Marapona, S.S.C.* and *Tivanka Wickremasinghe, S.S.C.* for A.G.
Dr. Colvin R de Silva with *A. C. de Zoysa, Mrs. M. Muttettuwegama, W. de Silva S. J. Gunasekara, J. de Silva, B.C. de Saram*
A. Deen and *W. Wickremaratne* for Accused-Respondent

Cur. adv. vult.

14 September, 1976.
JUDGMENT OF THE COURT

This is an application by the Attorney-General for revision of an order made by the learned High Court Judge of Kandy, holding that there is no evidence, upon which the Jury could find the Accused-Respondent guilty. The trial in which the order was made commenced on 6th July, 1976 and on 13th July, after four out of the 49 witnesses listed on the indictment had given evidence, counsel for the Accused-Respondent applied to the Judge to direct the Jury to return a verdict of not guilty, on the ground that the evidence led up to that point of time, as well as the evidence that could be led through the other witnesses listed on the indictment, did not disclose that the Accused committed the offence.

After hearing submissions of the defence counsel and State Counsel, the learned trial Judge made the order which is sought to be revised, State Counsel then stated that it was the intention of State to file papers in revision, if they desired to contest the order after consideration, and moved for an adjournment before a verdict was made and an order of acquittal entered in the indictment. The learned High Court Judge acceded to his application.

The Accused-Respondent was indicted on a charge of murder committed on 15.05.1973. A trial on the indictment was held at the High Court of Kandy at which the evidence of 37 witnesses was led on behalf of the prosecution. At the conclusion of the case, the Accused-Respondent was by the unanimous verdict of the Jury found guilty. On appeal this Court ordered a retrial to be held on the same charge, stating, "we are of the opinion that there was material before the Jury upon which the Accused might reasonably have been convicted, but for the misdirections referred to earlier, we would accordingly order a new Trial".

As this application raised for the first time the question, whether the powers of revison of this Court extended to proceedings of a trial at a High Court before a Judge and Jury, an order was made under Section 14(3) of the Administration of Justice Law that it be heard by a Bench of five Judges, and the present Bench was accordingly constituted to determine this matter.

In support of the application the learned Director of Public Prosecutions took the points, that the learned trial Judge acted prematurely, before all the evidence was led, and not at the close of the prosecution, that he failed to evaluate correctly the circumstantial evidence that was available against the Accused, and that in the circumstances the exercise of the powers of revision of this Court was called for to prevent a failure of Justice. Learned Counsel for the Accused-Respondent submitted that the powers of this Court did not extend to acting in this matter, that, even if they did, the Court should not exercise them on the facts of this case, and that the learned trial Judge had acted correctly and justifiably.

Section 11 of the Administration of Justice Law, which is part of Chapter 1 dealing with "The Judicature", confers the widest revisionary jurisdiction on this Court. That provision reads:-

"The Supreme Court shall be the only superior Court of record and shall have, subject to the provisions of this law, jurisdiction for the correction of all errors in fact or in law committed by any subordinate Court, and sole and exclusive *cognizance* by way of appeal, revision and restitutio in-intergrum of all actions, proceedings and matters of which such subordinate court may have taken cognizance and such other jurisdiction as may be vested in the Supreme Court by law. In the exercise of its jurisdiction, the Supreme Court may, in accordance with law, affirm, reverse or vary any judgment or order, or give directions, to such subordinate court, or order a new trial or a further hearing. It may if necessary, receive and admit new evidence additional to, or supplementary of, the evidence already taken in such subordinate court."

Section 13 of the Administration of Justice Law provides what the Supreme Court may do in the exercise of its revisionary powers:

S.13.The Supreme Court, may, *ex mere motu*, or on application made, inspect and examine the records of any subordinate court, and, in the exercise of its revisionary powers make any order thereon as the interests of justice may require".

It is provided that in Chapter 1, in which Sections 11 and 13 are included "subordinate court" means any High Court, District Court or

Magistrate's Court vide: Section 54 of the Administration of Justice Law.

In terms of these provisions, the Supreme Court would appear to have the widest powers of revision in respect of the proceedings of a High Court.

Dr. de Silva, while conceding that a very wide jurisdiction is conferred on this Court, submitted that the powers that may be exercised by it are restricted by subsequent provisions. He said that the exercise of powers conferred by section 11 is in respect of appeals expressly restricted by Section 348, that provision reads:

"Subject to the provisions of the next succeeding sections the Supreme Court may upon the hearing of an appeal exercise any of the powers conferred upon it by Section 11".

Section 349 deal with the orders this Court may make on hearing of appeals in criminal cases or matters from District Courts or Magistrates Courts and High Courts respectively. He submitted that a similar restriction is effected in respect of the exercise of powers of revision by the provision for the kind of order that may be made contained in Section 354(1) which reads:-

"The Supreme Court may call for and examine the record of any case, whether already tried or pending trial in any Court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such court, and may, having adopted such procedure as it may consider fit, upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought before it in due course of appeal."

Dr. de Silva submitted that, there being no appeal in a matter of this kind, there was no judgment or order which could be made in revision in this matter in terms of the above provision. This submission involves or amounts to the contention that unless there is an appeal available in respect of any matter, there can be no exercise of powers of revision. But by its nature revision involves the supervision by a

superior Court of the proceedings of a subordinate Court to ensure the due and orderly administration of Justice and, prima facie, its exercise is peculiarly called for in cases in which no other remedy, such as an appeal is available. In fact, in the past this Court has interfered by the exercise of its powers of revision in a large number of cases in which no appeal lay. Dr. de Silva, however, submitted that in 1972 with the Republican Constitution there was a complete break with past legislation and that Section 354 of the Administration of Justice Law should be construed by reference to the plain meaning of the words used. The learned Director of Public Prosecutions, however, pointed out that the provision is not new but is one that was found in Section 753 of the Civil Procedure Code in almost identical terms. That enactment reads:-

"The Supreme Cout may call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed thereon, or as to the propriety of the proceedings of such court, and may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought before it in due course of appeal instead of by way of revision."

In *Goonewardene v. Orr*[1] Hutchinson, C.J. held that the practice was not to exercise the power of revision under Section 753, where the remedy of appeal was open, and, on that ground, dismissed the application for revision. If, owing to the nature of the order provided for by Section 753, revision could only be exercised in cases in which an appeal lay, and the practice was not to exercise the powers of revision, where the remedy of appeal was open, revision would have been available only in the very small and limited number of cases in which there was ground for departure from the practice. But this court has not in fact found any difficulty in exercising its powers of revision in civil cases in which no appeal lay and has commonly done so. It has acted at the instance of persons who were not parties to an action, and to whom an appeal was therefore not available, vide *Amarasuriya Estates Ltd. v. Ratnayake*[2] . In fact, it is where an appeal is available that this Court has found difficulty about acting in revision. In *Bandulahamy v. Silva*[3] it was stated:-

"Although the Supreme Court will not generally deal in revision with decisions which could have been brought before it by way of appeal, there is no hard and fast rule which precludes it from doing as under proper circumstances".

There is a solitary instance where a single Judge took the view that Section 753 confers revisionary jurisdiction only in cases in which an appeal lay but for some reason was not taken, vide *Sabapathipillai v. Arumugam and another*[4]. In a later case, Nagalingam, A.J. rejected this proposition and stated that the observations made in *Sabapathipillai v. Arumugam* (*supra*) should be confined to the facts of that case, vide *Perera v. Agidahamy*[5] Nagalingam, A.J. went on to say:-

"The limitation that is imposed by this clause is as regards the order the Court may pass, namely, if it could not have passed a particular order on an appeal then such an order could not be made even if the matter be brought before it by way of revision."

Notwithstanding this dictum, however he acted in revision though the matter was one in which no appeal lay; moreover, the dictum, if interpreted in the way sought to be done on behalf of the respondent, is inconsistent with and at variance with the settled practice of this Court.

Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due Administration of Justice and not, primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right, and its object is the grant of relief to a party aggrieved, by an order of a court, which is tainted by error. Revision is so much regarded as designed for cases in which an appeal does not lie, that some provisions granting powers of revision expressly provide such a limitation. For example, Section 115 of the Indian Civil Procedure Code reads:-

"The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto ."

There is no doubt that the provisions of our law granting powers of revision have been expressed in wide terms, without any limitation to cases in which no appeal lies. But whether powers of revision extend to such cases, or whether they should be exercised in such cases, have been the subject matter of consideration in judgments given from time to time in both civil and criminal cases.

The provision, that the Court may upon revision make such order as it might have made had the matter been brought up in due course of appeal, may have been enacted because of the recurring discussion in the Courts, whether powers of revision can or should be exercised where the matter might have been brought up in appeal. Be that as it may, had Section 354 stood alone, the argument that, by reason of the provision relating to the orders which a Court may make in revision, the remedy by way of revision may be exercised only in a case where an appeal lay, may have been valid. But Section 11 and 13 also provided for the exercise of powers in revision. Section 354 being an enabling provision, we are unable to take the view, that it has the effect of impliedly excluding the exercise of the wide powers of revision given by other provisions in cases where no appeal lies. We are, fortified in the opinion we have formed by the fact that over a long period, despite the identical provision in Section 753, this Court has had a practice of exercising powers of revision, in civil cases where no appeal lay so much was this its practice, that the only matter which troubled the court was whether, it should exercise powers of revision in a case where an appeal lay.

It was next contended on behalf of the Accused-Respondent that, as the caption to the petition filed in these proceedings stated it was an application made under S.354 of the Administration of Justice Law, this Court should exercise the powers of making orders conferred by that section alone and should not exercise the powers of making orders conferred by the other provisions in Section 11 and 13. This contention seeks to apply to the matter of revision a degree of technicality which is quite inappropriate, for this Court may exercise revisionary powers in terms of Section 13 even *ex mere motu*. In *Attorney-General v. Podisingho*,[6] Dias S.P.J. said:-

"I desire to point out that in exercising the powers of revision

this Court is not tremelled by technical rules of pleading and procedure. In doing so this Court has power to act whether it is set in motion by a party or not and even *ex mere motu*."

It was urged that there was no order made by the learned High Court Judge which could be the subject of revision; that the learned High Court Judge had only set out a determination or opinion and that, eventhough he termed it an order, it did not become one till he acted on his views and gave a direction to the Jury. It is unnecessary to consider whether what has been set down by the learned trial Judge is or is not an order; the short answer to this contention is that in the exercise of revisionary powers this Court can consider not only the legality or propriety of a judgment or order but also the regularity of proceedings.

We are accordingly of the view that this Court has the power to act in revision in this matter, if it is satisfied that adequate grounds exist for the exercise of such powers. We are not unmindful, of the fact that as there is no appeal in this matter, the power of revision must not be exercised by us so as to admit, by a side wind, an appeal. We think that there must be shown such clear and manifest error and/or material irregularity as calls for the intervention of the Court or prevent or remedy the breach of a fundamental rule relating to a criminal trial or the failure of justice.

Section 212(2) of the Administration of Justice Law provides:-

"When the case for the prosecution is closed, if the Judge considers that there is no evidence that the Accused committed the offence he shall direct the Jury to return a verdict of "not guilty."

Under this provision the Judge can direct the Jury to return a verdict of not guilty only at the close of the prosecution case. A practice appears to have developed in our Courts of Judges stopping a case even before that stage is reached. This matter is referred to in a judgment of the Court of Criminal Appeal in *Pauline de Croos v. The Queen*,[7].

"The procedure actually adopted by the learned Judge in this case, is to our knowledge, not infrequently resorted to by Judges in this

country when it becomes apparent to the Court and counsel that to continue is to waste precious time and that there is no purpose of "flogging a dead horse". We ourselves have no desire, at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point of almost sanctifying it."

There is no reason to disagree with this dictum; if it is apparent to Court as well as to counsel that to continue is to waste time and to flog a dead horse, the case should of course be stopped. Again, if prosecuting counsel concedes or is constrained to admit that all the evidence on which the prosecution case is based has been led and what remains to be led is formal evidence or other supporting evidence which will not take the case any further, then the virtual end of the prosecution case has been reached and a court may fairly act under Section 212(2). But if there is such other evidence still to be led on behalf of the prosecution which the Judge has to reckon and give weight to in considering whether there is a case to go to the Jury, it appears to us that a Judge will be acting contrary to S.212(2) in making a direction before he hears that evidence. It was mentioned at the argument that it is not unknown for a Judge to listen to prosecuting Counsel's opening address, ascertain from him that he had referred to all the evidence on which he relies and forthwith turning to the Jury to direct them to bring a verdict of not guilty. This procedure, if it was in fact actually adopted appears to us to take the practice, referred to in the dictum cited above, beyond all legitimate bounds and to be one that should not be followed by High Court Judges.

In this case, the application to the learned trial Judge to act under Section 212(2) was made by the counsel for the Accused-Respondent, after only four of the forty two witnesses listed in the indictment had given evidence. We do not attach importance to the numerical ratio of the witnesses who gave evidence as against those who were yet to be called. But according to the order of the learned trial Judge there was evidence, still to be called, touching even the events of the day of the fatality, that is, the fifteenth itself. There was evidence relating to the entry made at the station by the Accused-Respondent at about 9.05 p.m. Apart from that, as this was a case of circumstantial evidence, there were facts and matters that took place prior to that day and after

that day that were vital to a proper consideration of the case for the prosecution. Learned State Counsel who appeared at the trial had submitted to the learned trial Judge that the application was premature at that stage. We are of the view that the learned Judge acted, not in compliance with, but contrary to, Section 212(2) when he took up consideration of the question whether there was a case to go to the Jury, before he heard all the material evidence he had to consider in coming to a decision.

As the prosecution relied for proof of its case on circumstantial evidence, he had to consider the total effect of the relevant facts and circumstances. The learned trial Judge has not really done so. In his order he considers first the evidence that was given and the evidence that the prosecution had not yet led but would be leading, in relation to the events of the 15th May, 1973 and states that there is nothing in that evidence, which could afford proof of a motive for the Accused to kill the deceased. He then examines that evidence further and states. "I would therefore hold that the evidence available to prosecution of events leading up to the time of the discovery of the body could not suggest a reasonable inference that the Accused was the killer."

He then addressed his mind to the evidence which the prosecution intended to lead of what transpired after the discovery of the body, and examines the effect of the facts on which the prosecution intended to rely. He then states his final conclusion thus, "I am therefore of the view that on the evidence tendered up to the present stage it is not possible for a reasonable inference to be drawn that the Accused was the killer. I am also of the view that the evidence which the Crown intends to tender and which has been indicated to me by learned State Counsel would not enable one to draw the inference that the presence of the Accused at the culvert when seen by Korassagolla is consistent only with his guilt".

It appears to us that the learned trial Judge has failed to consider the total effect of the facts relied on by the prosecution, in such manner as was required in a case of circumstantial evidence, and that he has been led into committing this error by acceding to the application to go into the matter before the close of the case for the prosecution.

The learned trial Judge may be strictly correct when he says that the submission that the deceased tried to force the hand of the Accused under threat of disclosure to the Accused's wife of their illicit and clandestine affair was not based on any facts. But the evidence relating to the association that had existed between the deceased and the Accused was by no means irrelevant. A police sergeant, living in official quarters with his wife and family at Galenbindunuwewa, would not welcome the advent at that place of a woman, with whom he has had an illicit and clandestine affair for a period of five years. There are further attendant circumstances. He had been making a monthly payment to her till February 1973, and apparently no payment thereafter. The woman had taken the same bus as he did from Kandy to Kekirawa, and when he changed into another bus at Kekirawa to come to Galenbindunuwewa, she too had got into the same bus, but she had no conversation with him. When he got down from the bus, she followed fifteen feet behind him and, though they were apparently going independently, a person who saw them got the impression that she had come with him. He thought that she would be going to the Police Quarters.

The Accused had to make a return entry at the station but was unable to do so, as the information book was being used by another officer. He left for his quarters and returned later and made the entry at 9.05 p.m. On both occasions he was wearing dark trousers. In between at about 8.30 p.m. he was seen by a witness on the road at a point, from which access could be had to the place where the body of the deceased was found the following morning. At that time he was dressed in a short sleeved shirt and khaki shorts. According to the medical evidence, the deceased would have come by her death between 8.30 and 11 p.m. that night. The entry made by the Accused at 9.05 p.m. was made in writing, quite unlike his usual writing, which suggested that he was greatly excited. On the next morning the body was found with the hands tied with the saree and the deceased's suit case ransacked and her belongings strewn. She had injuries on her private parts. These conditions suggested rape and robbery. The medical evidence, however, was that the injuries would not have been caused as a result of forcible sexual intercourse. The prosecution suggested that there had been a deliberate setting of the stage, as it were, to mislead. Pieces of two torn photographs of the deceased were found

at some distance and this might be an indication that the killer did not wish the identity of the deceased to be discovered. The Accused was one of the police officers who came to the scene on the next day. He remarked that he thought she was the woman who travelled in the bus the previous day, but he did not identify her. A bill written in Tamil was found and the Accused had one Mohamed Ali read it to him. On its back was the name of the deceased; the Accused suppressed it.

We wish to state at once that what we have set out above, is not what we hold or think has been proved by the evidence; we have set out the matters that had to be considered, on the assumption that the prosecution evidence is accepted and that all reasonable inferences that could arise from the facts deposed to are made. In other words, we have set out above the matters in regard to which there was evidence for the prosecution. In making a decision whether or not there is a case to go to the Jury, the trial Judge must proceed on the basis that the prosecution evidence will be accepted and that all inferences that may legitimately be drawn from them will be drawn. It is on that footing that we have adduced the matters that had to be considered by the trial Judge in coming to his decision and set them out above.

On this evidentiary material the case in our opinion, had to go to the Jury. It is not possible to take the view that on this evidence, if accepted in its entirety and acted upon, a jury could not find the Accused guilty beyond reasonable doubt. The proper approach to the question has been set out in an order of the Judges in the Trial-at-Bar with a Jury in S.C. 66/67[8].

"The true rule in our opinion is that where the Judge concludes that the evidence, even if believed by the jury and the legitimate inference therefrom do not permit a conclusion of guilt beyond reasonable doubt to a reasonable Juryman, he must direct an acquittal."

As stated by us, the evidence in this case, if believed by the Jury, and the legitimate inferences therefrom did permit a conclusion of guilt beyond a reasonable doubt to a reasonable Juryman. The order in the Trial-at-Bar contains certain illuminating passages from the judgment in *Curly v. United States*,[9]. In some of them the Court appears to have been influenced by the American doctrine of substantial evidence but there are passages which are useful:-

"It is not disputed that upon a motion for a directed verdict, the Judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom."

Again dealing with the functions of the judge and the jury the Court has said:

"The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of facts from proven facts. It is the function of the Judge to deny the jury any opportunity to operate beyond its province; The jury may not be permitted to conjecture merely, or to conclude upon speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non existence of a reasonable doubt as to guilt. If the evidence is such that reasonable juryman must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is brand. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The Judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond a reasonable doubt within the fair operation of a reasonable mind."

We are of the view that the failure to conform to Section 212(2) was not technical, but substantial, and material, as it has resulted in an erroneous decision to withdraw from the jury a case which had to be left to their decision. For the proper working of trial before Judge and Jury, it is important that a Judge should not, by a premature and erroneous order that there is no case to go to the Jury, preclude the Jury from performing its proper function of determining the credibility of witnesses, the weighing of evidence, and the drawing of justifiable inference from the proved facts and thereby arriving at a verdict. The learned trial Judge has tried to be uniformly fair to both parties and has

made the order, because he conceived it to be his duty to do so to avoid possible injustice to the Accused. But as the acquittal of a guilty man also results in a failure of justice, it is necessary that a case in which there is evidence, should be left to the jury to decide.

A direction in terms of Section 212(2) erroneously made in such a case would defeat the proper working of a trial by Jury before a Judge, and would amount to a non-compliance with a fundamental principle relating to such a trial.

As we have indicated earlier, we are not disposed to exercise our powers in revision to give, by a side wind, an appeal in a matter where there is no right of appeal. Accordingly, if what was involved was no more than an error, we should not have been disposed to interfere. But in this matter the contravention of Section 212(2) was not technical but substantial and material, and it has led to a decision, which would have, as its effect or result, the breach of a fundamental rule relating to a criminal trial by Judge and Jury. Accordingly, we thought it right to intervene and act in revision, and at the end of the argument we made order setting aside all proceedings and directing a fresh trial on the same charge before another High Court Judge and another Jury.

It has been the practice not to direct a fresh trial of an Accused person for a third time, vide *Rathian*,[10]. The practice does not appear to be so where one trial has not reached the stage of verdict by the jury, vide *The Queen v. Karthenis de Silva*.[11] We gave anxious consideration to the matter of ordering a fresh trial and, much as we regretted the hardship to the Accused-Respondent, we were unable to take any other view than that such a trial should be held. We were of the view that in any event the practice referred to above should not be applied in this case because the need for a new trial arose in the way it did.

We wish to state that this Court will not exercise its powers of revision in regard to proceedings of a High Court, save in very exceptional circumstances. In particular, this Court will not entertain an application which will have the effect of interrupting the proceedings of a trial in a High Court. For example, no application will be entertained by this Court at the instance of either the prosecution or the defence in

respect of an order made by a High Court as to the admission or rejection of evidence. Generally, in respect of all matters which take place during the course of a trial, the parties, should await the final verdict as an acquittal or a conviction, as the case may be, may render unnecessary an application for the intervention by this Court. In this matter, the order of the learned High Court Judge, when given effect to by him, would have terminated the trial.

We wish to stress that we have not considered whether the evidence led by the prosecution is to be believed and what that evidence establishes. We have only done, what a Judge may do at the close of the prosecution, case, namely, considered what evidence the prosecution has led, and on the basis of that evidence considered whether there was a case to go to the Jury. We have not considered the weight, credibility or reliability of the evidence and we have definitely not considered the question whether the Accused is or is not guilty, and nothing we have said should be taken to imply any view on that question.

SAMARAWICKRAMA A.C.J.

RAJARATNAM, J.

WIJESUNDERA, J.

VYTHYIALINGAM, J.

TITTAWELA, J.

All proceedings set aside fresh trial directed on the same charge before another High Court Judge and another Jury.