

## [IN THE COURT OF CRIMINAL APPEAL]

1959 Present : Basnayake, C.J. (President), Pulle, J., and Sansoni, J

THE QUEEN *v.* L. A. PIYADASA and 3 others

APPEALS NOS. 22 TO 25 OF 1959, WITH APPLICATIONS NOS. 29 TO 32

*S. C. 3—M. C. Colombo South, 88795*

*Trial before Supreme Court—Jury divided four to three—Incapacity of Judge to require them to retire for further consideration—Quorum for verdict—Criminal Procedure Code, ss. 223, 247, 248, 249, 250.*

*Held* (by the majority of the Court) : In a trial before the Supreme Court, the power conferred on the Judge by section 247 (2) of the Criminal Procedure Code to require the jury to retire for further consideration is exercisable only when the jury are not unanimous but are agreed by the required majority of not less than five to two. If the jury are divided four to three they have no power under the Code to return a verdict, and the Judge, in such a case, must discharge them in accordance with the imperative requirement of section 250 and cannot require them either under section 247 (2) or under section 248 (2) to retire for further consideration.

**A**PPEALS against four convictions in a trial before the Supreme Court.

*G. E. Chitty, Q.C.*, with *K. Shinya, L. Y. P. Wettasingha* and *Neville Wijeratne* (assigned), for Accused-Appellants.

*A. C. M. Ameer*, Acting Deputy Solicitor-General, with *V. S. A. Pullenayegum*, Crown Counsel, for Attorney-General.

*Cur. adv. vult.*

July 27, 1959. BASNAYAKE, C.J.—

The four appellants were indicted on the following charges :—

“ 1. That on or about the 29th day of May 1958, at Dehiwela in the division of Colombo South, within the jurisdiction of this Court, you did agree to act together with a common purpose for or in committing or abetting the offence of illegal removal of textiles and other articles from Ranees Stores, premises situated at No. 39, Galle Road, Dehiwela, an offence against Regulation 22 of the Emergency (Miscellaneous Provisions & Powers) Regulations, published in Government

Gazette No. 11,321 of the 27th May 1958 and made by the Governor-General under Section 5 of the Public Security Ordinance, No. 25 of 1947 (as amended by Act No. 22 of 1949 and Act No. 34 of 1953) and you are thereby guilty of conspiracy to commit the said offence, in consequence of which conspiracy the said offence of illegal removal of textiles and other articles from the said premises was committed, and you are thereby guilty of an offence punishable under the said Regulation 22 read with Sections 113B and 102 of the Penal Code.

“ 2. That at the time and place aforesaid and in the course of the same transaction, you did illegally remove textiles and other articles from the said Ranee Stores, premises situated at No. 39, Galle Road, Dehiwela, and you are thereby guilty of an offence against the said Regulation 22 punishable under the said Regulation.”

“ 3. That at the time and place aforesaid and in the course of the same transaction you did commit house breaking by night with intent to commit theft by entering the said Ranee Stores in the occupation of one Anthony Pulle Alfred, and that you have thereby committed an offence punishable under Section 443 of the Penal Code.

“ 4. That at the time and place aforesaid and in the course of the same transaction you did in a building used for the custody of property to wit, the said Ranee Stores, commit theft of textiles and other articles all to the value of about Rs. 992.93 property in the possession of the said Anthony Pulle Alfred, and that you have thereby committed an offence punishable under Section 369 of the Penal Code.”

The trial lasted seventeen days. It commenced on 2nd February 1959 and ended on 25th February. The learned Commissioner's summing-up commenced on 23rd February and was concluded shortly before 12.18 p.m. on 25th February. The jury retired at 12.18 p.m. and returned at 1.25 p.m.

When the foreman was asked by the Clerk of Assize “ Mr. Foreman, are you unanimously agreed upon your verdict in regard to the 1st prisoner, Liyana Arachchi Piyadasa, on the 1st count of the indictment ?” he answered “ Not unanimous ”. In answer to the question “ How are you divided ?” he said “ 4 to 3 ”. He gave the same answer in regard to each of the other counts of the indictment. The learned Commissioner then asked the following question :—“ Are we to take it that you are divided 4-3 in respect of all these accused upon all these charges ?” To this the foreman answered “ Yes ”.

Thereupon the learned Commissioner addressed the jury thus—

“ Gentlemen of the jury, under our law, your verdict cannot be acted upon by this Court unless there is a majority verdict of 5-2. Otherwise it will mean a fresh trial of this case. In view of that I

request you to re-consider your verdict a little further and see whether you can arrive at a verdict on which this Court can act. Of course I am not asking anyone of you to consider it again merely for that purpose. But considering the consequences of such a verdict inconvenience and expense, which all parties, especially the accused, may be put to in the event of a fresh trial being held in this case it may be worthy of your consideration. It may be a matter for you to consider further to find a verdict of at least 5-2.

“ If there is any point upon which you need any further directions from this Court I am quite prepared to deal with that matter with a view to resolve any doubt that you have in your minds. Of course I do not want to know what view has been taken by any of the jurors with regard to any point. If you can point out any points of difference that may have arisen in the course of your discussions I may assist you further. If you are in a position to do so I request you to refer any further matters for the directions of this Court now or else you can retire to the jury room and consider this matter further. Would you like to go back to the jury room and consider this matter further ? ”

The foreman of the jury said “ Yes ”. The learned Commissioner then proceeded to address them further—

“ If you wish you can consider the matter further and bring a verdict, or else if you want any further directions from Court you can come and ask, so that you can tell this Court that you wish to hear further directions upon these points. The verdict on which this Court could act would be a majority decision of 5-2. Failing that, of course, I have to order a retrial. Would you kindly retire and consider ? ”

The jury retired at 1.35 p.m. and returned at 1.45 p.m. This time when the Clerk of Assize addressed the foreman thus : “ Mr Foreman, are you unanimously agreed upon your verdict with regard to the 1st prisoner Liyana Arachchi Piyadasa on count No. 1 ? ” he answered “ We are divided on a majority verdict of 5-2 on all counts in respect of all the accused.” In answer to further questions by the Clerk of Assize the foreman said that they found each of the appellants guilty on each of the charges.

The appellants were each sentenced to undergo 7 years' rigorous imprisonment on the first charge, 10 years' rigorous imprisonment on the second charge, 7 years' rigorous imprisonment on the third charge, and 5 years' rigorous imprisonment on the fourth charge.

Learned counsel for the appellants submits that the course adopted by the learned Commissioner is not warranted by the Criminal Procedure Code and has resulted in a miscarriage of justice.

As the conviction of the appellants cannot be sustained if this submission is well-founded, we shall deal with it before the other submissions of learned counsel are discussed. The most convenient way of doing so is, first, to set out the relevant sections of the Code—

“ 223. (1) The jury shall consist of seven persons.

(2) The verdict returned shall be unanimous or by a majority of not less than five to two.”

“ 247. (1) When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2) If the jury are not unanimous the Judge may require them to retire for further consideration.

(3) After such further consideration for such time as the Judge considers reasonable or if either in the first instance the foreman says that they are unanimous or the Judge has not required them to retire, the Registrar shall say (the jurors being all present): ‘Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged?’

(4) On this the foreman shall state what is the verdict of the jury.”

“ 248. (1) Unless otherwise ordered by the Judge the jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) If the Judge does not approve of the verdict returned by the jury he may direct them to reconsider their verdict, and the verdict given after such reconsideration shall be deemed to be the true verdict.”

“ 249. (1) The Registrar shall make an entry of the verdict on the indictment and shall then say to the jury the words following or words to the like effect :

‘Gentlemen of the jury : attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A. B. is guilty’ (or ‘not guilty’).

(2) The foreman shall sign the verdict so entered and the verdict when so entered and signed, but not before, shall be final.

(3) When by accident or mistake a wrong verdict is delivered the jury may before it is signed or immediately thereafter amend the verdict.”

“ 250. If the jury or the required majority of them cannot agree the Judge shall after the lapse of such time as he thinks reasonable discharge them.”

It would appear from section 223 (2) that the Jury may return a unanimous verdict, or a verdict by a majority of six to one, or a verdict by a majority of five to two, and no other. If the Jury are divided four to three they have no power under the Code to return a verdict. So when section 247 (1) speaks of “ when the jury are ready to give their verdict ” it does not contemplate a case in which they are divided four to three ; because when they are so divided they have no power to return a verdict, and it cannot be said that they are ready to give their verdict.

It is the invariable practice of some Judges to inform the jury, at the end of the summing-up, that their verdict must be by a majority of not less than five to two. Where such a direction is given, the jury will so inform the Judge, if the required majority of them cannot agree. On being so informed, it is the view of the majority of us, that it is the duty of the Judge to discharge the jury in accordance with the imperative requirement of section 250.

But where such a direction is not given, and the jury do not on their return inform the Judge that the required majority of them cannot agree and the Clerk of Assize, assuming that they have arrived at a “ verdict ” asks them, as in the instant case, whether they are unanimous, and they disclose the fact that they are divided four to three, can the Judge require them under section 247 (2) to retire for further consideration? The majority of us think that he cannot, for the reason that, that power cannot be exercised in a case in which the jury have not arrived at a “ verdict ”. The power conferred by section 247 (2) to require the jury to retire for *further consideration* is exercisable only when they are not unanimous but the required majority agrees.

Although, in his brief address to the jury, the learned Commissioner used the word “ reconsider ”, it would appear from the context in which that word occurs that, when he invited the jury to reconsider their verdict he meant that they should retire for *further consideration* in order to arrive at a verdict, i.e., a finding by the required majority. As there is no clear indication that the learned Commissioner had section 248 (2) also in mind when he gave his direction, it is sufficient for the purpose of this judgment to state that, even the power conferred by that section cannot be exercised in a case in which the jury have not arrived at a verdict either unanimously or by the required majority.

In the instant case, after the foreman stated that they were not unanimous, the Clerk of Assize proceeded to ascertain how they were divided and after the jury had indicated that they were divided four to three the learned Commissioner proceeded to place before them certain

considerations and asked them to *reconsider* their verdict. Among the matters the jury were asked to take into account are—

- (a) that unless there is a majority verdict of 5 to 2 it will mean a fresh trial of the case,
- (b) the inconvenience and expense, which all parties, especially the accused, may be put to in the event of a fresh trial being held.

The learned Commissioner reminded them three times that unless they arrived at a verdict by a majority of five to two he would have to order a fresh trial. In his anxiety to avoid an abortive trial in this case, the learned Commissioner overlooked the fact that the discharge of the jury, on account of the failure of the required majority of them to agree, does not inevitably result in a second trial. It is open to the Attorney-General in a suitable case to enter a *nolle prosequi*. He also does not appear to have given sufficient consideration to the fact that to the appellants the opportunity of establishing their innocence at a second trial before another jury was far more precious than all the money they would have to spend. The considerations the learned Commissioner invited the jury to take into account in arriving at a verdict by the required majority are clearly irrelevant. In effect he invited one or more of the jurymen, who were sworn to give a true verdict according to the evidence, and who had, before the commencement of the trial, been admonished by the Clerk of Assize thus, ‘Your duty now is to listen to the evidence and upon that evidence to find by your verdict whether or not the accused is guilty of the charge or charges laid against him in the indictment’, to change a decision arrived at after mature deliberation, on grounds entirely unconnected with the evidence in the case. The Code does not provide for such a course. And what is more, it would appear that one juror, influenced by those irrelevant considerations, placed before them by the learned Commissioner, reversed, in the short space of ten minutes, the decision he had arrived at after over an hour’s deliberation on the evidence in the case, for, though invited to do so, the jury did not indicate to him any point or points in the case itself on which they had any difficulty, nor did they ask for further directions on any matter arising on the evidence. The procedure adopted by the Commissioner is not warranted by the Criminal Procedure Code and the complaint of the appellants that they have been gravely prejudiced by it is not unjustified. In our view the course adopted by the learned Commissioner has resulted in a miscarriage of justice. We therefore allow the appeal and quash the convictions of the appellants.

The next question for decision is, whether a retrial should be ordered, or whether we should direct a judgment of acquittal to be entered. To decide that question it is necessary to consider the material facts. [The Court then considered the facts and reached the conclusion that the accused should be acquitted.]

*Accused acquitted.*