

## [COURT OF CRIMINAL APPEAL.]

1941 Present: Howard C.J., Soertsz and Keuneman JJ.

## THE KING v. RAJAKARUNA.

15—M. C. Balapitiya, 39,829.

*Charge—Right of Judge to redirect Jury on facts and law—Jury not kept together till final charge—Validity of verdict—Criminal Procedure Code, s. 246 (1) and (2).*

Where a Judge is not disposed to accept the verdict of a Jury he is entitled to redirect them on the law as well as on the facts of the case.

The fact that the Jury left for their homes before the final charge does not invalidate the verdict.

**T**HIS was an application for leave to appeal from a conviction by a Judge and Jury before the Southern Circuit.

*Gilbert Perera*, for the applicant.—After the summing-up, Crown Counsel drew the attention of Court to a certain decision of the Court of Criminal Appeal. Thereupon the Judge recalled the Jury and charged them again. The Jury retired but came back and asked for further directions upon what was meant by self-defence and provocation. The Judge explained the law on those points. The jury retired and later brought a verdict of 4 to 3. The Judge then intimated that he could not accept that verdict and recharged the Jury on the following day. The accused was finally convicted on a verdict of 5 to 2.

The presiding Judge acted improperly in recharging the Jury after they had brought their verdict of 4 to 3. The powers of the Judge on that verdict were limited either to direct the Jury to reconsider their verdict under section 247 (2) and 248 (2) of the Criminal Procedure Code or to discharge the Jury and order a new trial under sections 250 and 252. While asking the Jury to reconsider their verdict, the Judge may give fresh directions on a point of law which the Jury has not fully understood. See for example, *12 Criminal Law Journal 140* and *1 Criminal Law Journal 265*. But there is not a single case where a recharge was made on the facts, as in the present case. It was not open to the Judge to recharge the Jury on the whole case. See *Mukerji on Trial by Jury*, p. 315 et seq. In the present case the Judge should have ordered a new trial.

*E. H. T. Gunasekera*, C.C., for the Crown.—The procedure followed by the Judge can be justified under section 247 (2) of the Code. The only question now is whether the Judge was not entitled to give the further directions which he gave. Counsel for the appellant admits that a Judge has the right to give further directions on matters of law. He has drawn a distinction between a fresh direction on matters of law and one on questions of fact, but has referred to no authority. *Rafat Sheikh v. King Emperor*<sup>1</sup>, however, is authority to the contrary. There is nothing in the Code to prevent the Judge from supplementing his original charge to the Jury.

[KEUNEMAN J.—Was not the adjournment till the following day prejudicial to the accused? See section 241 (1) of the Criminal Procedure Code.]

<sup>1</sup> (1933) A. I. R. Calcutta 640.

Under section 246, the Jury retire only after the summing-up. In the present case the summing-up was over only when the fresh directions were completed.

*Gilbert Perera*, in reply.—Redirection may be given only on certain specific points which the Jury have failed to understand. That was the position in *Rafat Sheikh v. King Emperor* (*supra*) too.

The Jury should not have been allowed to separate during the interval between the two verdicts.

*Cur. adv. vult.*

June 30, 1941. HOWARD C.J.—

In this case Mr. Perera has raised various grounds of appeal, but the only one with any substance is whether the verdict of the Jury is invalidated by the fact that after they had come into Court from their retiring room divided four to three the learned Judge recharged them on the whole case. In this connection I may say that the time for adjournment for the day had arrived and they went home and reassembled on the following day. It had been argued by Mr. Perera that a Judge has no power to recharge a Jury except on some matter of law. Cases have been cited from the Indian Courts in which Judges have been held entitled to give fresh directions to a Jury on a question of law. In this case the Judge recharged the Jury not only on questions of law but also on questions of fact. We are of opinion that the same principle applies to redirections of questions of fact as it does on questions of law. It is impossible to separate in this way the law from the facts. Any question of law must be considered and dealt with on directions given with reference to the facts. In coming to this conclusion we are fortified by a case which has been cited to us by Mr. Gunasekera. This was the case of *Rafat Sheikh v. King Emperor*<sup>1</sup>. In that case it was held that where a Judge is not minded to accept what is obviously and admittedly an inconsistent verdict of the Jury he can make a further charge to the Jury without referring the case to the High Court for consideration. In his judgment in that case Costello J. referred to an extract from the judgment of the Chief Justice in the case of *Hamid Ali v. King Emperor*. The passage was as follows:—"If he (the Judge trying the case) thought it fairer and clearer and simpler to re-charge the Jury on certain specific points and to tell them to go and get heads clear on the subject and give a proper verdict, there is nothing in the Code against that. The Judge put the matter in a much better position than it would have been if he had endeavoured to cross-examine the Jury, which, as a matter of fact, means cross-examination of the foreman". It is true that in this case the Judge if he felt so disposed could have discharged the Jury and summoned another Jury to try the case, but there is nothing in the Code to prevent him from redirecting the Jury and asking them to retire and see whether they could reach a verdict. There is nothing in the Code which prevented him from redirecting the Jury with regard to the facts and the law and there is no reason why the principle which was laid down in the Indian case which I cited should not apply to the facts of the present case. We therefore think that there is no real substance in this ground of appeal raised by Mr. Perera.

<sup>1</sup> (1933) *A. I. R. Calc.* 640.

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My brother Keuneman has also raised another point as to whether the verdict is not invalidated by the fact that the Jury were not kept together during the adjournment. Section 246 (1) provides that after the summing up the Jury may retire to consider their verdict. Sub-section (2) states that if the Jury retire they shall be committed to the charge of an officer of the Court who shall first take an oath in the prescribed form. The third sub-section provides that except with the leave of the Judge no person other than a member of the Jury shall speak to or hold communication with any member of such Jury. It is expressly provided that these provisions shall apply after the summing-up. It cannot be said, however, in this case that it was after the summing-up that the Jury went to their homes. It might possibly be argued that it was during or in the middle of the summing-up, but whatever it was it was not after the summing-up. The fact that the Jury were sent to their homes does not therefore in any way invalidate their verdict.

For the reasons I have given the application is dismissed.

*Application dismissed.*

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