[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Soertsz A.C.J. (President), Wijeyewardene S.P.J. and Jayetileke J.**

THE KING *v.* FONSEKA.

Appeal No. 33 of 1946.

S. C. 2—M. C. Panadure, 35,885.

Court of Criminal Appeal—Unreasonable verdict of Jury—Power of Court to interfere.

The Court of Criminal Appeal will quash a conviction if it is of opinion that the case was not proved with that certainty which is necessary to justify the verdict of guilty.

APPEAL, with leave obtained, against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, for the accused, appellant.—The verdict of the Jury cannot be supported on the evidence. The question when the Court of Criminal Appeal will set aside a verdict purely on a question of fact has been discussed in *R. V. Andris Silva* [1], *R. v. Pabilis* [2], *R. v. Appuhamy* [3], *R. v. Velupillai* [4].

H. A. Wijemanne, C.C., for the Crown.—The evidence for the prosecution was accepted by the Jury and a unanimous verdict was brought. This Court will not set aside a verdict on a question of fact except on the strongest grounds. See *R. v. Hancox* [5].

Cur. adv. vult.

September 23, 1946. SOERTSZ A.C.J.—

This is a case of some difficulty and we have given it our most anxious consideration. On the one hand, the appellant submits that he has been

[1] *(1940) 41 N. L. R. 433.*
[2] *(1944) 45 N. L. R. 541.*
[3] *(1944) 46 N. L. R. 324.*
[4] *(1944) 46 N. L. R. 424.*
[5] *(1913) 8 Cr. App. R 193.*

convicted on very meagre and doubtful evidence in regard to the alleged identification of him as the assailant of the deceased man; on the other hand the Crown contends that the verdict of the Jury was unanimous, and that it was reached after a charge which, we agree if we may say so with respect, was in every point unexceptionable. The question of identification was purely a question of fact for the Jury and we have had occasion repeatedly to declare that we do not retry cases and do not interfere with the verdict of the Jury on such a question even though we ourselves, in their places, might have come to a different conclusion. The Court of Criminal Appeal Ordinance enacts that, on questions of fact, the appeal shall be dismissed unless we find that the verdict of the Jury is unreasonable or cannot be supported having regard to the evidence in the case, or unless . . . . on any ground there was a miscarriage of justice.

In this case, the evidence incriminating the appellant consisted of the dying declaration and the dying deposition of the injured man, and of the testimony of his companion Eralis Alwis. Both of them said that there were two assailants, but that they identified only the appellant and that they indentified him while he was attacking the injured man in the shed and also when he was in flight after the attack. They said that they identified him by the aid of the light given by Eralis's electric torch when he flashed it first in the shed and then in the course of his pursuit of the fleeing assailant. Crown Counsel submitted that it was for the Jury to say whether they would accept that evidence or not, and that, once they accepted it, as their verdict shows they did, there could be no further question. In a sense, Crown Counsel was right. There was this evidence of both the injured man and of his companion both of whom professed to have identified the appellant. But our anxiety is occasioned by the fact that the Jury appears too readily to have accepted the face value of that evidence as being its real value. They appear to have been distracted from a careful examination of that evidence by what we cannot help saying was unfortunate cross-examination directed to the establishment of a conspiracy on the part of the injured man, of Eralis Alwis, of the Vel Vidane and also of the Inspector of Police to implicate the appellant in a false charge. There were grounds upon which it could have been urged with great force that Eralis had no torch at the time of the attack, and that a torch came into his hands only when the injured man and he were on their way to the Police Station accompanied by the Vel Vidane whose field they were working at the time having supplanted the appellant's father who had cultivated it continuously during the previous seven or eight years. But the cross-examination persistently adopted was directed to show that no torch was produced at the Police Station that day but that it was produced for the first time at the inquiry by the Magistrate. This point was pursued in a manner that might well have left the Jury with the impression that the crucial question was whether the torch was produced that morning at the Police Station or not, and that if they found that it was so produced Eralis's and the injured man's statements that the assailant was identified by the light of the torch must be true. But, the substantial question in the case was not whether Eralis produced a torch at the Police Station, but whether he

had one in the shed and in the course of his alleged pursuit of the fleeing assailant. This question did not receive the attention it deserved in the course of cross-examination.

If it had been properly stressed and the Jury's attention called to the fact that to the men Monis and Baby Singho who were the first to come up in response to the cries of the injured man and Eralis it was not said that one of the assailants had been identified, we cannot help feeling that the verdict might have been different. Eralis admits that he did not tell them that he had identified the appellant nor is there anything to show that the injured man told them that the appellant had been identified. There is not a word to say or to suggest that Monis and Baby Singho saw the torch that Eralis is supposed to have been carrying at the time. Neither Monis nor Baby Singho was called by the Crown and from that omission we may reasonably presume that they were not called because they could not advance the case for the Crown. Eralis's explanation that he did not tell them that he had identified the appellant because he was not asked is not at all satisfactory. Another fact that involves Eralis's torch in doubt and suspicion is that, at the trial, he disowned the torch produced in Court. He said that his torch was a black-painted torch, not electroplated as the one produced was. The Inspector of Police, however, said that the torch produced at the Police Station was a torch similar to the one in the Assize Court and that he had no recollections of a black-painted torch in the case. This seems to bear out the suggestion that Eralis owned no torch and that the torch produced at the Station was not Eralis's torch but that of the Vel Vidane and so Eralis got confused, in the lapse of time, in regard to its identity. When the Vel Vidane protested that he did not own a torch he appeared to protest too much. There are other disturbing facts in this case. The injured man said that there was a lantern hanging in the shed at the time of the attack. Eralis says there was no hanging lantern, that there had been a cigarette-tin lamp but that it had been put out when they retired to sleep. This is a contradiction of some importance when one is considering the important question in the case, the identification of the assailant and the illumination available for the purpose. One is left with a strong impression that the assailant was not identified, but that the appellant was suspected as the man with a motive and so came to be implicated. Again the statement that the appellant jumped into the ela and crossed it is not satisfactory. In the declaration P 4 the deceased said that Eralis, on his return from the pursuit of the assailants, told him that both men jumped into the canal, but Eralis in his evidence says he did not see the other assailant at all and that only the appellant waded across the ela. It seems to us that this fact of the appellant wading across the ela was probably insisted upon by way of supporting the identity of the appellant as one of the assailants. His house was beyond the ela and he is, therefore, made to wade across it. On the sketch the ela is marked as a deep ela and if the appellant had jumped into it and gone across he could hardly have failed to get his clothes wet, but when the Police called at his house at dawn he was asleep. There were no marks or indications on him to show that he had, a few hours earlier, been engaged in such an enterprise, and there

were no wet clothes. Each of these facts by itself may not be decisive, but when they are put together and weighed with the fact that to the first arrivals, namely, Monis and Baby Singho, the name of the appellant was not mentioned and that nothing was said to them about a torch, the conclusion is almost irresistible that the injured man's assailant had not been identified but that in thinking over the matter the Vel Vidane, Eralis, and the injured man suspected the appellant to have been the assailant and thought of a torch as the best thing to adduce in support of their story of identification. On a careful consideration of the whole case and particularly of the matters to which we have referred, the majority of us find that " the case was not proved with that certainty which is necessary to justify the verdict of guilty " (see *R. v. Wallace*[1]). We think that the Jury would, in all probability, have taken that view, if Counsel had not confused them in the course of lengthy cross-examination. The learned Judge in opening his charge to the Jury drew their attention to the kind of cross-examination there had been with this comment—

> " You have just heard a very sustaining, concise, suasive and able address. If the cross-examination had been of the same kind we should have ended this case much earlier."

To that comment we would, if we may, add that the case would, in all probability, have ended differently. The majority of us have, therefore, come to the conclusion that we ought to allow the appeal and acquit the appellant acting on the principles enunciated in *Rex v. Schrager*[2], *Rex v. Parker*[3] and similar cases.

Appeal allowed.