1976 *Present :* **Tennekoon, C.J., Thamotheram, J. and Sirimane, J.**

N. PALANIANDY and TWO OTHERS, Accused-Appellant *and* THE REPUBLIC OF SRI LANKA, Respondent.

S. C. 147—149/75—*M. C., Kandy Case No.* 5474, *M. C. Gampola, Case No.* 25204

Administration of Justice Law—Duty of Judge when he does not approve of Jury's verdict Section 223 (2).

Sections 223(2) of the Administration of Justice Law reads :—

'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'.

In the present case the learned trial Judge after the Jury returned a divided verdict finding the accused not guilty of the various counts in the indictment informed them that he did not agree with their verdict and asked them to reconsider their decision.

Held : That there was a clear non-direction inasmuch as the learned trial Judge after requesting the Jury to reconsider the verdict had failed to impress upon them that they were still sole Judges of fact, and that their verdict after reconsideration would be binding on him even if it was the same as the one already returned.

APPEAL against a conviction from the High Court, Kandy.

M. M. Deen for the accused-appellants.

I. F. B. Wickramanayake, Acting Attorney-General, with *D. S. Wijesinghe* for the State

Cur. adv. vult.

June 2, 1976. TENNEKOON, C. J.—

In this case there were 6 accused indicted before the High Court of Kandy. The indictment contained 11 charges.

Count 1 was a charge of unlawful assembly against all the accused. (Section 140 of the Penal Code).

Count 2 was against all the accused for robbery committed in the prosecution of the common object of the unlawful assembly. (Section 146 read with Section 380 of the Penal Code).

Count 3 was against all the accused for murder of one Murugan committed in the prosecution of the cummon object of the unlawful assembly (Section 146 read with section 296 of the Penal Code).

Count 4 was against all the accused for murder of one Subramaniam committed in the prosecution of the common object of the unlawful assembly. (Section 146 read with section 296 of the Penal Code).

Count 5 was against all the accused for the offence of grievous hurt caused to one Selvaratnam by the 2nd accused. (Section 146 read with section 316 of the Penal Code).

Count 6 was against all the accused for the voluntary causing of hurt to one Muthuratu by the 2nd, 3rd, and 4th accused. (Section 146 read with section 282 of the Penal Code).

Count 7 was for robbery against all the accused. (Section 380 read with Section 32 of the Penal Code).

Count 8 was for murder of Murugan, against all the accused. Section 296 read with section 32 of the Penal Code).

Count 9 was for murder of Subramaniam against all the accused. (Section 296 read with section 32 of the Penal Code).

Count 10 Was against 2nd, 3rd and 4th accused for voluntarily causing hurt in committing robbery. (Section 382 read with section 32 of the Penal Code).

Count 11 was against the 2nd accused for voluntarily causing grievous hurt to one Selvaratnam. (Section 316 of the Penal Code).

After a lengthy trial the learned trial Judge summend-up to the Jury. The Jury returned within 1½ hours. The record then reads as follows :—

"Jury returns at 2.05 p.m.
Court resumes.

The Jury is asked as to whether their verdict is unanimous or divided. The Foreman of the Jury states. "Our verdict is a 5 to 2 divided verdict."

"By our 5 to 2 verdict we find these accused *not guilty* on count 1 of the indictment.

"By our 5 to 2 verdict we find these accused *not guilty* on count 2 of the indictment.

"By our 5 to 2 verdict we find these accused *not guilty* on count 3 of the indictment.

"By our 5 to 2 verdict we find these accused *not guilty* on count 4 of the indictment.

"By our 5 to 2 verdict we find the 2nd accused *not guilty* on count 5 of the indictment.

"By our 5 to 2 verdict we find the 2nd, 3rd and 4th accused *not guilty* on count 6 of the indictment.

"By our 5 to 2 verdict we find that all these accused are *not guilty* on count 7 of the indictment.

"By our 5 to 2 verdict we find that all these accused are *not guilty* on count 8 of the indictment.

"By our 5 to 2 verdict we find that all these accused are not *guilty* on count 9 of the indictment.

"By our 5 to 2 verdict we find the 2nd, 3rd and 4th accused *not guilty* on count 10 of the indicmtent.

"By our 5 to 2 verdict we find the 2nd accused *not guilty* on count 11 of the indictment.

The Jurors are told that I do not agree with their verdict and they are asked to reconsider their decision.

The Jury retires to the Jury Room at 2.11 p.m. to reconsider their decision.

Court adjourned till then.

E. F. DE ZILVA,
High Court Judge,
Kandy.

2.11.p.m.
10.3.75

Jury returns at 3.30 p.m.
Court resumed.

The Jury is asked whether their verdict is a unanimous verdict or a divided verdict.

The Foreman states. "Our verdict is a unanimous verdict".

"By our unanimous verdict we find all these accused *not guilty* on count 1 of the indictment.

"By our unanimous verdict we find all these accused *not* guilty on count 2 of the indictment.

"By our unanimous verdict we find all these accused *not* guilty on count 3 of the indictment.

"By our unanimous verdict we find all these accused *not* guilty on count 4 of the indictment.

"By our unanimous verdict we find that the 2nd accused not guilty on count 5 of the indictment.

"By our unanimous verdict we find the *2nd, 3rd* and *4th accused not guilty* on count 6 of the indictment.

"By our unanimous verdict we find the *2nd, 3rd* and *4th accused guilty* on count 7 of the indictment.

"By our unanimous verdict we find the *2nd, 3rd* and *4th accused guilty* on count 8 of the indictment.

"By our unanimous verdict we find the *2nd, 3rd* and *4th accused guilty* on count 9 of the indictment.

"By our unanimous verdict we find the *2nd, 3rd* and *4th accused guilty* on count 10 of the indictment.

"By our unanimous verdict we find 2nd *accused guilty on count* 11 of the indictment.

Verdict signed by Foreman of Jury.

Accused informed of the verdict.

State Counsel states that the 2nd, 3rd and 4th accused have no previous convictions."

I have added emphasis to those parts of the above as are relevant to what follows.

The court sentenced the 2nd, 3rd and 4th accused on count 7 to 8 years rigorous imprisonment, and in respect of count 11 the 2nd accused was sentenced 3 years rigorous imprisonment. The sentences to run concurrently with the sentence on count 10. The 2nd, 3rd and 4th accused were also sentenced to death in respect of the verdicts on counts 8 and 9.

The 2nd, 3rd and 4th accused have taken an appeal to this Court. However, although the appeal was not ready for hearing, the learned Acting Attorney-General appeared before us in person and mentioned that this case is one in which a miscarriage of justice had occured, as there had been a misuse or improper attention to the case of *Appuhamy vs. The Queen*, 74 N.L.R. 536 in which the Supreme Court considered a similar situation which arose under section 248 (2) of the old Criminal Procedure Code. In that case upon the Jury returing a verdict of 'not guilty', the trial Judge said: "I do not approve of the verdict, will you please go and consider it again." The Jury retired and come back with a verdict of 'guilty'. Sirimane J. in the course of his judgment in that case said:

> "Section 248 undoubtedly gives the judge very wide powers but without in any way suggesting that there should be any limitations or fetters placed on the powers granted to the judge by the plain words in the section, yet, having regard to the context in which the section appears, we would like to observe, that the section should be very sparingly used generally in those cases where there is some ambiguity in

the verdict or an apparent misunderstanding of the summingup (*see* Henry Crisp, 7 Criminal Appeal Reports, 273) or where the verdict on the face of it shows that the jury has misapplied the law to the fact proved, or again where the verdict is incomplete or uncertain. When the verdict is based on a pure finding of fact a reconsideration by the Jury should be ordered only when it is quite clear that it is unreasonable or perverse. When two views on the facts are possible, and the view taken by the Jury is different from that taken by the judge, it would be improper to use the section in such a manner as to subsitute the judge's view of the facts for that of the jury. That would be an encroachment on the duties of the jury set out in section 245, and would render meaningless the familiar direction given to juries in all cases (and this one was no exception) to remember that they and they alone are the sole judges of fact."

Later in the judgment he added :

"When a trial Judge uses section 248(2) we think it is very desirable that he should give further directions to the jury and specifically inform them that they are still the judges of fact and perfectly free to bring the same verdict after reconsideration if they remained of the same view, and further that the second verdict will be deemed to be the true verdict which would be binding on the Judge as well."

In the present case the learned Acting Attorney-General pointed out that the trial Judge after requesting the jury to reconsider the verdict failed, as did the Judge in the *Appuhamy's case* to impress upon the Jury that they were still the sole Judges of fact and that their verdict after reconsideration whatever it was and even if it was the same as one already returned would be binding on him. This was a clear non-direction and we do not think that the convictions and sentences can be permitted to stand in this case.

The learned Acting Attorney-General indicated to us that the case was at all times a week one and the position has not been improved by this abortive trial ; he further submitted that no useful purpose would be served by sending the case back for retrial. In the face of this personal statement from the Acting Attorney-General himself, we do not think that an order for retrial should be made in this case. The convictions are quashed, and the appellants are acquitted.

THAMOTHERAM, J.—I agree

SIRIMANE, J.—I agree.

Convictions quashed.