Privy Council Appeal No 79 of 1946

Thiagaraja Bhagavathar and another - - - - *Appellants*

v.

The King-Emperor - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MARCH, 1947

Present at the Hearing:

LORD THANKERTON
LORD UTHWATT
LORD DU PARCQ
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

These are consolidated appeals by special leave from a judgment of the High Court at Madras in its appellate criminal jurisdiction dated the 29th October, 1945, which affirmed a judgment of the same Court in its original criminal jurisdiction dated the 3rd May, 1945.

The appellants were tried by the said High Court, with certain other persons, for conspiracy under section 120B of the Indian Penal Code and abetment to commit murder under section 302 read with section 109, and were convicted on both charges, and sentenced to transportation for life. They appealed to the High Court, and by an Order dated the 12th July, 1945, the Appellate Court allowed them to appeal on matters of fact as well as of law under section 411A (1) (*b*) of the Code of Criminal Procedure.

The appeal raises an important question as to the scope of the powers of the court under section 411A of the said Code which was introduced into the Code by Act XXVI of 1943. In order to appreciate the effect of the new section, it is desirable to notice the provisions of the Code relating to trials by jury in the High Courts, and to appeals from the verdicts of juries in Sessions trials held in the Moffussil.

The High Courts in the old Presidency Towns of Madras, Calcutta and Bombay possess, under their letters patent, original criminal jurisdiction, and section 267 of the Code of Criminal Procedure directs that all criminal trials before a High Court shall be by jury. Section 274 provides that in trials before the High Court, the jury shall consist of nine persons, and section 299 imposes upon the jury the duty of deciding all questions of fact. Under section 305 the judge is bound by the unanimous opinion of the jury, but when the jury are divided and as many as six are of one opinion and the judge agrees with them, the judge shall give judgment in accordance with such opinion. Under the letters patent affecting such High Courts, there is no appeal from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, though a point of law may be reserved by the trial judge, or may be brought before the court on a certificate of the Advocate General.

In the case of trial by jury in a Court of Session in the Moffussil, there is a right of appeal against conviction under section 410 of the Code,

and against acquittal under section 417. But section 418 provides (1) that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. (2) Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law. This sub-section must be read with section 374 which requires any sentence of death passed by a Court of Session to be confirmed by the High Court. Section 423 (1) confers various powers upon the court of appeal but sub-section (2) provides " Nothing herein contained shall authorize the court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him." Section 449 allows an appeal from the verdict of a jury upon a matter of fact as well as upon a matter of law in cases tried under Chap. 33 of the Code which relates to cases in which European and British Indian subjects are concerned. It may be noticed also that it is provided under section 307 that if the judge disagrees with the verdict of the jurors or a majority of them and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit it accordingly, and on such reference the High Court may exercise any of the powers which it may exercise on an appeal, and shall dispose of the reference as provided in the section.

In that state of the law, Act XXVI of 1943 enacted as follows:—

" *Insertion of new section 411A in Act V of* 1898.—After section 411 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code), the following section shall be inserted, namely:—411A. *Appeal from sentence of High Court.*—(1) Without prejudice to the provisions of section 449 any person convicted on trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court—

(*a*) against the conviction on any ground of appeal which involves a matter of law only;

(*b*) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be sufficient ground of appeal; and

(*c*) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (*b*) and clause (*c*) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law."

The Act contains certain consequential amendments of the Code and of the Letters Patent to which it is not necessary to refer.

In the appeal of the appellants to the High Court at Madras, the leading judgment was given by the Learned Chief Justice. He considered the powers which the court possessed where leave to appeal on the facts

had been given. He noticed that clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 411A followed the language of clauses (*a*), (*b*) and (*c*) of section 3 of the English Criminal Appeal Act 1907. But he also noticed that there was omitted from the Indian Act any provision corresponding to section 4 (1) of the English Act which provides " The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal." The Learned Chief Justice then discussed various decisions of English courts upon the Criminal Appeal Act, 1907, and expressed the view that the powers of the High Courts in India were similar to those of the Court of Criminal Appeal in England notwithstanding the omission of any provision corresponding to section 4 (1) of the English Act, and that the court had power to set aside the verdict of a jury, if on consideration of the facts and of the circumstances of the case, it was convinced that the verdict was unreasonable. After considering the evidence against the appellants and the summing up by the trial judge, the court held that the jury had been properly directed and that there was material on which their decision could reasonably be based. Accordingly, without considering whether or not the court agreed with the verdict of the jury, the appeal of the appellants was dismissed.

Before considering the correctness of the judgment under appeal their Lordships will notice certain decisions upon section 411A which have been given by the High Court of Judicature at Bombay. In the case of *Ganpat Jivaji* v. *The King-Emperor*, which is reported in a foot-note in 47 Bombay Law Reporter, page 365, leave to appeal on the facts had been granted *ex parte* by the Court of Appeal. The leading judgment was given by Chagla J., Lokur and Weston J.J. concurring. Mr. Justice Chagla expressed the view that it was impossible on the construction of section 411A to hold that the powers of the court were limited as were those of the Court of Criminal Appeal in England; that where an appeal on facts was before the court, the court was bound to dispose of it like any other appeal on facts, and that if the court came to the conclusion that the verdict of the jury was wrong they could not uphold it on the ground that it was not perverse or unreasonable. But the learned Judge expressed the fear that the introduction of section 411A, construed in the manner in which he felt bound to construe it, would reduce trial by jury in the High Court to a mockery, and he expressed some surprise that the legislature should have treated the verdict of a High Court jury based on the summing-up of a High Court judge as of less consequence than a verdict of a Moffussil jury. The question as to the construction of section 411A was considered by another Full Bench of the Bombay High Court in the case of *Government of Bombay* v. *Inchya Fernandez* 47 Bombay Law Reporter, 363. In that case the jury had returned a unanimous verdict of not guilty and the trial judge, Mr. Justice Chagla, had given a certificate authorizing an appeal on the facts. The leading judgment was given by Divatia J. Lokur and Weston J.J. the other members of the court delivered separate but concurring judgments. Mr. Justice Divatia expressed the view that although the powers of the court hearing an appeal on the facts under section 411A were unfettered, the court was not bound to exercise its powers in full, and that it was entitled to deal with the appeal on grounds analogous to those upon which the High Court acted when hearing a reference made under section 307 of the Code and to interfere with the verdict of the jury only if satisfied that such verdict was perverse and unreasonable. The court held that there had been no failure in the summing-up, and that the verdict of the jury

could not be regarded as either opposed to the evidence or manifestly wrong or unreasonable, and accordingly dismissed the appeal. The views of Chagla J. in the earlier case were treated as dicta only. That case has been followed in other cases in the High Court of Bombay and appears to be regarded as having settled the law on the subject.

Their Lordships have not been referred to any decision of the High Court at Calcutta, which is the other High Court possessing original criminal jurisdiction.

It will be observed that the High Court at Madras and the High Court at Bombay have both reached the conclusion that in an appeal upon the facts under section 411A, the court should only interfere with the verdict of the jury if it considers such verdict perverse or clearly unreasonable, but they have reached such conclusion on quite different grounds. Their Lordships think that both courts, in their anxiety to prevent the introduction of a right of appeal under section 411A from destroying the effective operation of trial by jury in the High Courts, have over-looked the important safe-guard provided by the legislature against such risk. An appeal on a matter of fact can only be brought on a certificate of the trial judge or with the leave of the Court of Appeal. In view of the importance obviously attached throughout the Code to the verdict of juries, to the difficulty which always faces a Court of Appeal when called upon to appreciate the evidence of witnesses whom it has not seen, to the risk of undermining the sense of responsibility of juries if their verdicts are subject to frequent appeal, and to the danger of depriving those tried in the High Court of the effective enjoyment of the right to trial by jury conferred upon them by the Code, their Lordships think that the Indian Legislature may well have assumed that leave to appeal upon the facts from the verdict of a jury would not be given so long as such verdict appeared to be reasonable and supported by the evidence, and not to have been induced by an error in the summing-up. A judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. He is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court. Leave once having been granted, however, the matter is at large, and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. Those principles were summarized by Lord Russell of Killowen delivering the opinion of the Board in the case of *Sheo Swarup* v. *The King-Emperor* L.R. 61 I.A. 398 where the Board was considering the powers which the High Courts possess in hearing an appeal against acquittal, in the following passage: —

> " But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

Only slight modifications in that passage are necessary to adapt it to an appeal against the verdict of a jury. It is of course true that the Court of Appeal does not know what view the jury took of the evidence of any particular witness, but it knows the view which the jury took of the evidence as a whole. In the passage above quoted for the words " the views of the trial judge as to the credibility of the witnesses " must be substituted the words " the views of the jury implicit in their verdict as to the credibility of the witnesses ". If, attaching

due weight to those matters, the court hearing an appeal on the facts under section 411A comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable. So to do would be to deprive the appellant of the right of appeal which the Statute gives to him.

In their Lordships' opinion the High Court of Madras in the judgment under appeal approached the case from the wrong angle. It is always dangerous to construe an Indian Act by reference to an English Act however closely the language of the two Acts may approximate, and this is particularly true of Acts dealing with such a matter as trial by jury in which, as pointed out by the Board in the case of *Abdul Rahim v. The King-Emperor* L.R. 73, I.A. 77, the attitude of the legislatures in the two countries has been dissimilar in many respects. The elision in section 411A of section 418 and section 423 (2), which would have prevented an appeal on facts, and the omission of any limitations on the powers of the court similar to those contained in section 4 (1) of the English Act, make it clear, their Lordships think, that the Indian legislature was not minded to impose on the powers of the Court of Appeal in India any fetter similar to that imposed on the English Court of Criminal Appeal in dealing with the verdicts of juries.

Referring to the Bombay cases, their Lordships are in agreement generally with the view of the law expressed by Mr. Justice Chagla in *Ganpat Jivaji's* case. Whether the fear expressed by the Learned Judge that the right of appeal given by section 411A will reduce trial by jury in the High Courts to a mockery must depend on the manner in which the judges of the High Courts exercise the powers conferred upon them by the section. If judges make a practice of giving leave to appeal on facts from the verdict of a jury which is not perverse or unreasonable on the ground that the judge himself does not agree with the verdict, or that he thinks that the Court of Appeal might take a different view of the evidence from that which appealed to the jury (as Mr. Justice Chagla himself seems to have done in *Inchya Fernandez's* case) the result no doubt will be to deprive people tried in the High Court of the effective enjoyment of their right to trial by jury; but the remedy lies in the hands of the judges.

Their Lordships are not in agreement with the views expressed in the case of *Inchya Fernandez*. There is no analogy between the hearing of an appeal under section 411A and the hearing of a reference under section 307. As held by this Board in the case of *Ramanugrah Singh v. The King-Emperor* L.R. 73 I.A. 174 the powers of the court on such a reference are conditioned by the terms of the section, which imposes a special Code and is not concerned with appeals. The court hearing an appeal on the facts under section 411A is in a similar position to a court hearing an appeal from the verdict of a jury under section 449, or an appeal from the verdict of a jury which has resulted in the passing of a death sentence under sections 374 and 418 (2), in both of which cases an appeal lies on the facts. In the latter class of case it could hardly be suggested that the court would be justified in dismissing an appeal and confirming a sentence of death based on the verdict of a jury which the Court thought wrong, though not perverse.

As the High Court at Madras did not apply its mind to the question whether the verdict of the jury finding the appellants guilty was right or wrong but considered only whether it was reasonable, their Lordships will humbly advise His Majesty that this appeal be allowed and the appeal of the appellants against their conviction on the 3rd May, 1945, by the trial Judge to the High Court of Judicature at Madras be remitted to that Court to be disposed of according to law.

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In the Privy Council

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AND ANOTHER

v.

THE KING-EMPEROR

DELIVERED BY SIR JOHN BEAUMONT

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