Privy Council Appeal No. 69 *of* 1935

Alexander Kennedy - - - - - - *Appellant*

v.

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

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH FEBRUARY, 1937.

Present at the Hearing :

LORD ROCHE.
SIR JOHN WALLIS.
SIR GEORGE RANKIN.

[*Delivered by* LORD ROCHE.]

This is an appeal by special leave against the conviction of the appellant on 20th October, 1934, by the Supreme Court of Ceylon (Assize Court of Colombo) sitting with an English speaking jury of seven jurors. The indictment upon which the appellant was convicted contained two counts—the first under section 419 of the Penal Code for that on 29th September, 1933, he caused mischief by fire in respect of a building which contained his shop and the second under section 418 of the Code for the like offence in respect of the property in his shop. The appellant pleaded not guilty and the trial lasted from 3rd September to 20th October, 1934, when the appellant was found guilty by a unanimous verdict on both counts and was sentenced to a term of six years' imprisonment on each count, the sentences to run concurrently.

The circumstances out of which the proceedings arose were in outline as follows: The appellant, a native of the United Kingdom, had lived in Colombo since 1909 trading in boots and shoes. Since 1920 he had conducted the business which he was carrying on in 1933—a retail business under the style of Kennedy selling mainly ready made boots and shoes. He was the sole proprietor of that business. In connection with it he also traded in skins suitable for the manufacture of shoes. These skins he bought or acquired in Ceylon or elsewhere in the East, stored on premises of his own and consigned for sale in London. In the normal manner of traders he financed his purchases of boots and shoes made through agents in London and his consignments of skins to London by overdrafts with his bankers, the National Bank of India. On 29th September, 1933, he was and had been for some year or two conducting his business in a building known as the "Times Building" a structure of reinforced concrete. The shop was on the ground floor and the appellant also occupied

the basement. The appellant was in September, 1933, engaged in equipping a new shop and was about to remove from the Times Building to such new shop in a building known as the "Colombo Stores." Shortly after 11 p.m. on 29th September, 1933, at a time when the appellant was alone on the premises in the Times Building, an explosion took place followed by a fire which did great damage to the building and virtually caused a complete destruction of all the stock on the premises. It was common ground that the explosion occurred in the basement and that the fire originated there. The appellant escaped with some injuries. His wife who was talking to the night watchman outside the premises was uninjured. Fire assessors were called in and various investigations were made by them and by the police. In April, 1934, the proceedings now in question began in the Police Court of Colombo.

The main point raised for the appellant at the hearing of this appeal was that the learned Judge—Mr. Justice Drieberg—misdirected the jury in that he directed them that there was evidence upon which they might convict the appellant whereas he ought to have directed them that there was no evidence entitling them to take that course and that on the evidence as it stood they ought to acquit the appellant. Counsel for the appellant relied upon the decision of this Board in the case of *Seneviratne* v. *The King* (All England Law Reports, 1936, Vol. 3, p. 36) where their Lordships after an examination of the evidence held that it was such that a verdict of guilty could be no more than a guess and could not be justified by any principles of legal inference. There were also misdirections in the charge to the jury. The conviction was therefore set aside. The present case it was said fell into the same category and it was urged that the same result should follow. In particular it was said that the case for the prosecution rested upon the use of petrol by the appellant and that upon the expert evidence for the Crown it was not shown that any quantity of petrol available to the appellant could have caused the damage to the building which in fact resulted and that on the contrary the evidence as a whole and especially the expert evidence for the defence showed conclusively that it could not have caused such damage. In the most able and thorough arguments of leading and junior counsel for the appellant their Lordships' attention was directed to all the material features in the very voluminous evidence in this case and their Lordships have also had the assistance of the Solicitor-General for the Crown. In the result their Lordships are satisfied that the complaint made is not well founded and that the jury not only ought not to have been directed in the manner suggested but that had they been so directed the direction would have been wrong. Having arrived at this conclusion their Lordships conceive that it would be as improper as it is unnecessary to review and discuss the evidence and its weight in detail so as to pass or to appear to pass a judgment of their own upon it. They propose to indicate in

a form as compendious as possible why they have arrived at a clear conclusion that the directions of the learned Judge were proper and sufficient and that there was proper, nay ample, material upon which the jury could arrive at the verdict they did.

The charge was most careful and studiously fair to the accused. It was also entirely free from any error of law as to the onus of proof or otherwise. The first topic dealt with was motive—the case for the prosecution being that the appellant was financially embarrassed if not insolvent. The learned judge dealt with the facts as to financial pressure upon the appellant and gave due weight to the appellant's good character in this connection and generally and to the fact that certain financial pressure was common to all traders at the material time which was one of acute and world-wide depression. The jury was expressly directed that motive was of secondary importance and was for reasons which were correctly explained to the jury not to be used to supplement deficiency of evidence direct or circumstantial warranting a conclusion adverse to an accused.

The charge next proceeded to deal with the actual evidence adduced as to acts of the appellant tending to show that he prepared for and did the thing he was charged with doing. The sequence of events proximate to the material date was as follows: In July and August, 1933, there was undoubtedly pressure on the appellant by the Bank to reduce his overdrafts, and a certain anxiety expressed in letters by his London agents, who ultimately by letter dated London, 5th September, 1933, declined to indent further. The Bank had during this period by interview and letter asked for lists of stocks and copies of the appellant's balance sheet which had not at that time been made up for the preceding year ending 31st December, 1932. It was not until 28th September —the day before the fire—that the balance sheet was completed. Stocks of skins in Colombo at the date of 31st December, 1932, appeared in the balance sheet at rather more than 12,000 rupees in value, whilst boots and shoes and outfitting stock appeared at nearly 4½ lacs of rupees. Such stock was adequately covered by existing insurances. But on 18th July, 1933, the appellant caused himself to be insured in a further 125,000 rupees " on stock of reptile skins whilst stored in the basement of the Times Buildings." After the fire the appellant put forward to Mr. Ross the fire assessor a claim for a total loss of skins to the full amount of the policy and loose stock sheets (exhibit P39) were produced to vouch the claim. These sheets must be further referred to later. Mr. Ross was satisfied as to the boot and shoe stock. No question or criticism seems ever to have been raised as to the quantity of this part of the stock. What was said about it was that owing to the depression sales had been slow and the stock was overburdened with goods not in fashion. The appellant said this was not so and that in any case he proposed after removal to his new shop to have a removal sale there. As to the skins

the position was very different. Mr. Ross was satisfied that the stock of skins in the basement as appeared from the debris was a small one and in no way approaching the amount shown in the stock sheets. The appellant as he said in his evidence to facilitate the passing of his larger claim for boot and shoe stock gave way and put in a formal claim for skins at some 14,000 rupees—based on the 1932 balance sheet figure and certain subsequent purchases. But at the hearing the evidence for the appellant was that the larger stock of skins to a value of over 125,000 rupees was in fact in the basement having been moved there for storage from his bungalow in the month of July, 1933. This stock he alleged had been gradually accumulated in his bungalow during a period of years and was his own though it had never appeared in any balance sheet of the business of which he was sole proprietor and had never been insured prior to 18th July, 1933, and had never been mentioned in connection with any valuations or with any requests for security prior to 5th September, 1933. At that date a stock of 98,000 rupees worth of skins was mentioned in a letter to the Chartered Bank with whom he was then arranging for some accommodation in addition to that previously granted by his bankers—the National Bank. The evidence as to the financial resources from which this large hidden asset in stocks of skins was built up was such as may not have satisfied the jury. Moreover there was also discovered during the investigations a document (exhibit P32) also having its origin in the middle of July, 1933, containing a list of skins largely but not altogether the same in its contents as the stock sheets (P39) but describing the skins as the property of the Wewelduwa Tanneries consigned to Kennedy & Co. for sale. Wewelduwa Tanneries were owned by one S. A. Perera. The document was in his handwriting and the ascription of any such property to him was admittedly untrue. The explanations of the form and purpose of this document, which was naturally not put forward to Mr. Ross in support of the claim, given by the appellant and Mr. Perera, were divergent and it was open to the jury to reject them and to feel assisted to a conclusion that the evidence as to the existence of such a stock was no more to be relied upon than the evidence as to the property in it. In the month of August the National Bank (Colombo) under date of the 18th wrote to the appellant asking "where the skins relating to No. 2 Account are and their approximate value". The appellant replied by letter of the 19th that the bulk of the stocks referred to were in the tannery. He did not then mention the larger stocks said to have been at this time in the basement. On 23rd August the appellant purchased two tins of petrol each containing two gallons. His evidence was that he intended to clean skins with this petrol but being advised against this course by Mr. Perera (the tanner who wrote out the list (exhibit P32)) he gave the tins unopened as a present to Mr. Perera. Apparently purchases of petrol in tins in Colombo are extremely uncommon—cars taking their petrol from pumps. Mr. Perera put the gift of petrol

to him in July about a fortnight after he had written out exhibit P.32. In any case, as the vendors' books fix the date of purchase beyond dispute as 23rd August, the date at least was wrong. To complete the story as to petrol tins the evidence showed that after the fire two petrol tins, of precisely the same type as those purchased which, of course, was not an uncommon type, were found in the appellant's shop, that is to say, on the ground floor. They were empty save that one contained a small quantity of petrol and the other some other liquid and solid material which was not analysed but was not petrol. Near them was a suit case which was not identified as a suit case belonging to or used by the appellant. There was evidence relied upon for the defence that in July a customer had asked permission to leave a suit case at the shop and that it had been left and put in a cupboard but it was not known what it contained or how long it had remained there or on the premises. The whole of the evidence and particularly the evidence of the appellant and Perera as to the tins of petrol purchased by the appellant and said to have been given to Perera was left with extreme accuracy and fairness to the jury for them to decide what credence they gave to it.

To return to the night of the fire, as has been stated the appellant was alone inside the premises when the explosion occurred. It was said that he generally was the last to leave and to shut up. The time he was alone there, shortly before 11 p.m. on 29th September, was estimated at about 10 minutes. An employé, Hossan, had been absent to get some soda water for the appellant and on his return left for home. Mrs. Kennedy and the watchman were together outside. The appellant's account was that as he was operating a switch to turn out the electric lights, which switch was on the ground floor, there was a flash and an explosion. The theory advanced to explain it was that there was a short circuit and a sparking when the switch was operated which caused an explosion of gas, presumably coal gas, and that this was the cause of the fire. Marsh gas was mentioned in evidence as a possibility but no real point was made of this. As to coal gas, some evidence was given of smells in the past which might have been gas but on the night in question the meter readings showed no leakage. A leakage to cause such an explosion must have been considerable and the gas pipes even after the explosion and fire were found to be absolutely tight and unleaking. It was truly said by counsel for the appellant that it was not for the defence to prove that there was some cause for the explosion other than petrol and their Lordships entirely agree with this proposition. But they are also satisfied that there was evidence before the jury which entitled them to come to the conclusion that the explosion could not be and was not due either to gas or some high explosive which was the other theory advanced. This evidence did not come from the prosecution alone. One leading expert for the defence gave reasons for suggesting coal gas as a cause but another leading expert for the defence rejected any such theory with some emphasis. He preferred the theory of a high explosive which does not seem to have been favoured by

anyone else and there were reasons against this theory which the jury were entitled to regard as conclusive. In this state of the evidence if they arrived at a conclusion that petrol was the only possible cause of the mischief then having regard to the evidence as to its method of evaporation they were, in their Lordships' opinion, also entitled to conclude that it could have been applied and used by no one but the appellant. It should be added in this connection that there was also before the jury very definite evidence from a skilled electrician of position, who examined the material switch boards after the explosion, to the effect that no short circuit had occurred there and that the seat and origin of the explosion was not in the vicinity of the switches.

There remains to consider in somewhat more detail the point made for the appellant that the extent of the damage was such that it could not have been caused by two gallons or even four gallons of petrol. The evidence on this point stood thus: According to the evidence for the Crown the nature of the explosive mixture of petrol and air in operation would depend so largely on an unknown factor as to be uncertain. The unknown factor was how much of the basement area, which was of course known, was available for and was filled by petrol gas. A large quantity of the stock of boots and shoes was said to have been stored there so as to almost fill the basement. According to the expert evidence for the Crown in such a part or pocket of the basement as was left an explosion could result even from the use of two gallons of petrol capable of causing the immediate damage in the vicinity where it plainly occurred and certain other damage which was spoken of as admitting of calculation in respect of the force required to cause it. Other damage, according to these witnesses, was not similarly calculable for reasons which they gave. In particular it was said that the steel girders of the structure having sagged and bent under the influence of the fire which followed upon the explosion, it was impossible to say how much of such other damage was due to the original explosion and how much to the shifting of weight in the whole building caused by the fire and consequent girder damage. No doubt evidence was given ably and forcibly by witnesses for the defence that it could be calculated that the explosion was of such force that it could not have originated from two or four gallons of petrol but required a much larger quantity. But it is to be observed that the results arrived at by these witnesses to a large extent depended upon factors which were unknown or in dispute—such as the fire effects which have been already referred to and such as the question whether the stresses in operation should be calculated on the basis that the damage showed the effect of actual sheering and not merely rupture by tension for which a much less force would be required. These matters were debated fully and amply at the hearing and the jury viewed the premises twice at different stages of the hearing. Although the jury was not made up of experts their Lordships do not doubt that they were capable of deciding and entitled to decide on the materials afforded

by the evidence and the views on such questions as the question whether the damage showed sheering as opposed to rupture upon tension and such as the question whether this or that part of the damage resulted from the explosion or from the consequential fire.

As the case thus stood and as it was thus presented to the jury by the learned Judge in his charge their Lordships are clearly of opinion that it was properly left to the jury to decide the case upon the whole evidence and that a direction in the sense contended for on behalf of the appellant was neither imperative nor proper. Upon the argument of the appeal another point was made with regard to the summing up, namely, that altogether undue stress was laid by the learned Judge in his summing up on a conflict of evidence as to how and where the appellant emerged from the building after the explosion. It is true that stress was laid on such conflict between the appellant's evidence and that of a witness for the Crown and apparently in this respect the learned Judge was following and dealing with strenuous arguments on the point by counsel on both sides. The matter was, of course, a test of credibility but at the trial one point of emergence was supposed to show and the other to negative presence in the basement at the time of the explosion. At the hearing of the appeal it was common ground that whether the appellant came from the basement or not was largely irrelevant since plainly having regard to apertures in the ground floor (such as a staircase and a chute) a fire in the basement could quite well have been ignited by someone present at the moment of such ignition on the ground floor. But their Lordships are unable to find that the learned Judge was at fault when he dealt with an issue fought strenuously before him in the manner in which he did deal with it—particularly as the topic was relevant on the question of credibility. Still less are their Lordships able to find in this or in any part of a summing up, which, read as a whole was unexceptional, any ground for exercising the well understood jurisdiction of their Lordships in criminal matters.

It follows that after a charge which their Lordships have held to be proper and upon evidence which in their Lordships' opinion was clearly sufficient the jury arrived at conclusions upon the evidence and the guilt of the appellant which are not subject to any review before this Board.

There remains for consideration an independent point arising out of the composition of the jury which it was urged was such as to require that the conviction should be quashed leaving it to the Crown if the law in Ceylon permitted to embark on another trial. The complaint was that there was presumed or actual partiality to be found in the foreman and three other members of the jury. It was said that such partiality would under section 225 of the Criminal Procedure Code of Ceylon be a ground upon which if objection had been made to the jurors in question it must have been allowed: that objection was not made because the appellant and his advisers were ignorant of the facts at the material time; but that nevertheless on the authority of the decision of this Board in *Ras Behari Lal* v. *The King Emperor* (1933)

60 I.A. 354 if a conviction resulted to which a juror open to objection was a party the conviction would be quashed. In that case a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability is a good ground for objection under the law of India and was unknown to the accused until after the event. Their Lordships held that there was on those facts a grave injustice or in the words of an analogous case in the English Courts "a scandal and perversion of justice." Accordingly on principles frequently laid down by this Board the conviction was set aside and the Crown was left to take such course as to a new trial as the law of India would allow it to take. Their Lordships see nothing in that decision to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside. Their Lordships as at present advised are of opinion that such a proposition is ill-founded and is contrary to the well settled principles laid down by this Board with regard to its intervention in criminal matters.

But on the facts of this case their Lordships are of opinion that no such question arises at all. In their view there was no partiality presumed or actual shown in regard to any of the jurors and therefore no ground upon which a challenge as of right and for cause could have been sustained. The facts as disclosed in the affidavits and documents were as follows: The appellant had in accordance with his rights under the Code elected to be tried by jurors on the list or panel which contained only English-speaking persons. It appears that a very large number probably most of the important British mercantile houses in Colombo, of whose members or employés such a list would inevitably be largely composed, were agents or sub-agents for insurance companies. It was said that the members of the jury complained of were employed by firms or companies who were such agents and that in some cases the insurers for whom such agency subsisted were at risk on policies effected by the appellant. The allegations are true in this sense only that employers of the jurors in question—three limited companies and one partnership firm—were agents for insurance companies in the sense that many persons are agents in this country, that is to say, not general agents doing or conversant with the insurance business but receiving commission or discount on insurances placed by them with insurance companies for themselves or their business connections. Agency business even of this description was not conducted by any of the jurors in question. They were in departments of their respective businesses quite other than and distinct from any insurance agency and had no knowledge of or concern with any matter of insurance. To presume partiality from such facts would in the opinion of their Lordships be both fanciful and unjust.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

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In the Privy Council

ALEXANDER KENNEDY

v.

THE KING

DELIVERED BY LORD ROCHE.

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