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injury. For these reasons I think the learned Judge was right, and that the question reserved should be answered in favour of the Crown.

[Attorneys for Accused, REITZ & DU PLESSIS.]

[Reported by ADOLF DAVIS, Esq., Advocate.]

DE VILLIERS, J.P., WESSELS & SMITH, JJ. August 26th, 1912.

R. vs. MORRIS KHAN.

Criminal Law.—Criminal Trial.—Evidence to go to Jury.—Decision of Judge.—Question of Law.—Point Reserved.—Ordinance 1 *of* 1903, *secs.* 170 *and* 270.

Sec. 170 *of Ordinance* 1 *of* 1903 *enacts that if at the close of the case for the prosecution in a criminal trial "the Court considers" that there is evidence to go to jury, the Court shall call upon the accused to enter on his defence.* Held, *that the ruling of the Judge as to whether there was evidence was not the exercise of a discretion but a decision on a point of law, and could, therefore, be made the subject of a question reserved under sec.* 270 *of the Ordinance for the consideration of the Supreme Court.*

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Argument on a point of law reserved by CURLEWIS, J., in the Criminal Sessions, Johannesburg.

The accused was charged with contravening sec. 8 of Act 16 of 1908 in wrongfully and unlawfully and maliciously setting fire to a certain building. He was found guilty and sentenced to 15 months' imprisonment with hard labour.

At the conclusion of the case for the Crown, counsel for the accused applied to have the case withdrawn from the jury, on the ground that there was not sufficient evidence to go to the jury in support of the charge. The learned Judge refused to withdraw the case, as he considered that there was evidence to go to the jury, who, after hearing the case for the defence, convicted the

accused. The question reserved for the decision of the Court was whether the learned Judge acted rightly in refusing to withdraw the case from the jury. The facts appear from the judgment of the JUDGE-PRESIDENT.

F. E. T. Krause, K.C. (with him *L. Pyemont*), for the accused: The case is based upon the wording of sec. 170 of Ord. 1 of 1903, which states that " if at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged in the indictment . . . it may then direct a verdict of not guilty." This section is the same as the English law; see *Taylor on Evidence*, Vol I, p. 25, sec, 23; *Halsbury's Laws of England*, Vol. 9, p. 367, secs. 715 and 716. According to English law, a prisoner is entitled to say that a judge has exercised his discretion wrongly in not refusing to withdraw the case from the jury. Sec. 170 is not intended to limit the Judge's discretion, but to extend it, but his discretion must be judicially exercised, and if the prosecution has not made out a case, the Judge must direct the jury accordingly. He referred to *R.* vs. *Smith* (1912, A.D., 15th August); *Rex* vs. *George* (25 T.L.R. 66); *Metropolitan Railway* vs. *Jackson* (3 A.C. 207); *Kenny's Outlines of Criminal Law*, pp. 343 and 381. He then argued on the merits to show that at the close of the Crown's case there was only a suspicion that the fire had been kindled by the accused. That was not enough to go to the jury.

F. W. Beyers, K.C., A.-G. (with him *J. G. van Soelen*), for the Crown, was only called upon to argue the first point, upon which he stated he agreed with *Krause's* contention. He referred to *R.* vs. *Brandfort* (7 S.C. 169); *Reg.* vs. *Brown* (61 L.T.R. 594). The question whether there is sufficient evidence to go to the jury or not is a question of law, and so cannot be in the Judge's discretion.

DE VILLIERS, J.P.: Under sec. 270 of our Criminal Procedure Code (Ordinance 1 of 1903), the presiding Judge at any criminal trial has the power to reserve for

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the decision of the Supreme Court any question of law which arises in the course of the trial. It is admitted by the *Attorney-General* that the particular question which arose in the course of the trial of the accused is a question of law—namely, whether there was evidence sufficient to go to the jury, or whether the Judge should have directed the jury to return a verdict of not guilty, on the ground that there was no evidence to go to them. Before considering the merits, a preliminary point has been suggested, namely, that our law, which it is said is laid down in sec. 170 of the Code, differs from the English law on the subject. The English law is perfectly clear. We have been referred by Dr. *Krause* to the case of *Metropolitan Railway Co.* vs. *Jackson* (3 App. Cas., p. 207), where the law was stated as follows:—That whereas formerly it had been the practice for a Judge to direct that a case should go to the jury when there was a mere scintilla of evidence, nowadays the practice was that there should be evidence before the Court upon which a reasonable man might fairly convict; and that has always been understood to be the law in this country. It has, however, been suggested that that is not the law, in view of the third and fourth paragraphs of sec. 170 of the Criminal Procedure Code, which read as follows: "If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged in the indictment, or any other offence of which he might be convicted on the indictment, it may then direct the jury to return a verdict of not guilty. If the Court considers that there is evidence that the accused committed the offence charged, or any other offence of which he might be convicted on the indictment, the Court shall call on the accused to enter on his defence." Now it would require clear language to take away what has hitherto been considered the undoubted right of an accused, namely, to have the question of law reserved if he has been convicted when there was no evidence against him, and the Court ought to have directed the jury that there was none. But to my mind sec. 170 does not purport to alter the substantive law in this respect. It only directs what the procedure should be. The

Attorney-General, who agrees with the contention of Dr. *Krause* that the section does not alter the existing law, appears to consider, however, that the words "the Court considers that" are superfluous; but we cannot presume that. Sec. 170 lays down the procedure; it goes into detail, and prescribes what rights, respectively, the prosecuting counsel and the counsel for the accused shall have, and also what rights the accused shall have. Indeed the whole Statute is called the "Criminal Procedure Code." The *Attorney-General* says that the words "the Court considers that" are not essential, because they merely state what is the common law. But the same remark may be made with regard to most of the provisions of the section. In my opinion sec. 170 provides that if the Court, rightly or wrongly, considers that there is evidence that the accused committed an offence covered by the indictment it shall call upon him to make his defence, and give him an opportunity of being heard. That was done in the present case, and no question of discretion arises. The Court did consider that there was evidence against the accused, and accordingly the procedure prescribed in the paragraph was followed. But that does not touch the right of this Court to enter into the question *de novo*, and consider whether there was as a fact such evidence as entitled the Judge to allow the case to go to the jury. The paragraph, to my mind, is perfectly clear. The preceding paragraph is not so clear, but no point at present arises for decision in regard to it.

The only remaining question is whether there was evidence to go to the jury. It has been pointed out that the question whether there is sufficient evidence in any case is a matter for the jury. I have already alluded to the practice which obtained previously in the English Courts, that the Judges sent cases to the jury when there was only a scintilla of evidence. We must, however, guard ourselves against now going to the other extreme, and considering whether there is evidence upon which this Court would have convicted the accused, thereby trespassing upon the functions of the jury. That is not the question. The question is whether there is evidence upon which a reasonable man might have come to the conclusion to

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which the jury came. I do not wish to express any opinion as to what my view of the evidence might have been if I had sat at the trial; but there is certainly so much evidence that the Court cannot say that the jury were not entitled as reasonable men to come to the conclusion that the accused was the person who had committed the crime.

[His Lordship then discussed the evidence and came to the conclusion that there was sufficient evidence to go to the jury.]

The question reserved must, therefore, be answered in favour of the Crown.

WESSELS, J.: The only question upon which I have had any doubt is whether the Judge could reserve for determination by this Court, as a point of law, the question which he did reserve. My difficulty was this—whether the words in sec. 170, "if the Court considers that there is evidence that the accused committed the offence," import into the section the idea that the matter was left entirely to the discretion of the Judge; in other words, that the Legislature said to the Judge: "Satisfy yourself as to whether there is evidence to go to the jury; if you are of opinion that there is evidence to go to the jury, it will go to the jury, and the jury, and the jury alone, will be the judges of fact and there shall be no further interference by the Court with their finding." Notwithstanding the arguments I have heard, I am not yet sure what the Legislature meant by inserting in the section the words "the Court considers that." The *Attorney-General* suggests that they are mere surplusage and that the Legislature meant nothing at all by them. On the other hand, there is no doubt as to what the law was before the section was introduced into the Statute. By the law as it existed before, it was clear that if there was no evidence to go to the jury, there was no case for the jury to adjudicate upon. I think that as there is a doubt as to what the words "the Court considers that" may really mean, it will be wiser to leave the law as it was and to hold that the Legislature did not intend to alter the pre-existing law. Under these circumstances I think that the question was properly reserved.

SMITH, J.: The question whether there is or is not evidence to go to the jury, I have always understood to be a question of law. I still think that it is; and if it is a question of law, under sec. 173 of the Criminal Procedure Code, it is the duty of the presiding Judge to decide it. When in sec. 170 the Legislature has said that if the Court considers that there is no evidence it may withdraw the case from the jury, I think it means that the Judge should perform his duty and withdraw the case from the jury. I cannot conceive that any Judge, who was of opinion, at the close of the case for the prosecution, that there was no evidence as to the guilt of the accused would do otherwise than stop the case and direct the jury to return a verdict of not guilty. I do not think it was ever intended to be made a matter of discretion in the Judge whether he should or should not leave a case to the jury. He has to decide whether there is evidence or not, and, to my mind, in the true sense of the word it is no exercise of discretion at all to decide a point of law. Under these circumstances I think that the meaning of the section is only this—that if the Court is of opinion that there is no evidence to go to the jury, it shall direct the jury to return a verdict of not guilty—that "may" is equivalent to "must." For these reasons I think the question was rightly reserved by the learned Judge.

Krause, K.C., asked for suspension of the sentence for one month, subject to the existing bail, to enable the accused to apply to the Appellate Division for leave to appeal on the second point as to the insufficiency of the evidence.

Attorney-General: I do not oppose the application.

DE VILLIERS, J.P.: The sentence is suspended for one month, pending application to the Appellate Division for leave to appeal; the bail to remain as at present.

[Attorney for Accused, A. S BENSON.]

[Reported by ADOLF DAVIS, Esq., Advocate.]