[COURT OF CRIMINAL APPEAL]

1964 *Present:* **T. S. Fernando, J. (President), Sri Skanda Rajah, J., and G. P. A. Silva, J.**

K. D. YAHONIS SINGHO, Appellant, *and* THE QUEEN, Respondent

C. C. A. 99 OF 1964, WITH APPLICATION 103

S. C. 41.—M. C. Panadura, 81251

Trial before Supreme Court—Defence of alibi—*Burden of proof—Misdirection.*

The accused-appellant was charged with murder, and his defence was that of *alibi*. The prosecution relied on the evidence of a witness who stated that he saw the accused stabbing the deceased. The accused called as his witness a man, S, who stated that, at the time of the offence, the accused was seen at a boutique which was about one-eighth of a mile away from the scene of the offence. When the trial Judge, in his summing-up, dealt with S's evidence, he omitted altogether to give the jury any direction as to what they were to do if they neither accepted S's evidence as true nor rejected it as untrue.

Held, that the omission to direct the jury on the intermediate position where there was neither an acceptance nor a rejection of the *alibi* was a non-direction on a necessary point and constituted a misdirection.

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *L. V. P. Wettesinghe*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

October 26, 1964. T. S. FERNANDO, J.—

The appellant appealed against his conviction by a 6 to 1 majority verdict of the jury on a charge of murder of one Panditharatne and the sentence of death pronounced on him as a consequence of that verdict.

The point raised on his behalf at the hearing of his appeal was that in respect of the burden of proof in the case there was an inadequate direction of the jury by the trial judge. The defence relied on being that of an *alibi*, the point specifically urged on behalf of the appellant was that there was a failure on the part of the trial judge to direct the jury in regard to the impact of the evidence of the *alibi* on the case for the prosecution.

The prosecution led evidence of a direct nature, that of a son of the deceased, the witness Amaradasa, in an effort to establish that the appellant stabbed the deceased. The appellant, who has a tea boutique about one-eighth of a mile from the place where the deceased was alleged to

have been stabbed, called as his witness a man of the name of Sirimane who testified that the appellant was serving tea to his customers (including Sirimane himself) at the time cries were heard from the direction in which the stabbing of the deceased must have taken place. Sirimane went on to say that on hearing those cries he went in that direction and saw the deceased lying fallen on the edge of the road, and that he waited at that spot for about ten minutes before leaving for his home.

In regard to this evidence of an *alibi*, the learned trial judge directed the jury at two different stages of his charge. At the earlier of these two stages he stated :—

> " I would like you at this stage to consider the evidence of Sirimane. Sirimane's evidence is that at the time he heard the cries of " ammo "—I believe in answer to you he said that the distance between the accused's boutique and the scene was about 1/8 of a mile—the accused was in his boutique serving customers. If you accept that evidence, it must straightaway throw doubt on the prosecution case and the accused is entitled to be acquitted. "

At the later stage, he addressed the jury thus :—

> " As I told you a while ago, if you accept his (Sirimane's) evidence it throws doubt at once on the prosecution story and the accused is entitled to an acquittal ; but, if you reject his story, it does not follow that the accused should be found guilty, because the burden is always on the Crown to prove beyond reasonable doubt that it was this accused who caused the fatal injury on the deceased. That burden is fully on the Crown, and you should ask yourself " are we convinced, are we quite certain in our minds that the evidence of Amaradasa points to this accused having stabbed the deceased. "

While these directions to the jury were correct so far as they went, it was submitted on behalf of the appellant that they were inadequate and that the impact of an acceptance of Sirimane's evidence was even more favourable to the appellant than indicated by the learned judge. We thought the submission was well-founded. If the evidence of an *alibi* is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane's evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting

position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the *alibi* was a non-direction of the jury on a necessary point and thus constituted a misdirection.

Learned Counsel for the Crown submitted that in the circumstances of this particular case the directions to the jury were adequate to cover the case where they were both unable to accept and unable to reject the evidence of the *alibi*, and that no special direction on the lines we have indicated above was called for. He relied for this submission, in addition to the passages from the charge already reproduced above by me, on the following directions given by the learned judge. At the outset of his charge, he stated :—

> " From that it follows that the Crown has got to prove its case beyond reasonable doubt. You must be convinced on the evidence which you have heard that this accused inflicted the injury which resulted in the death of Panditharatne. You must be quite sure of that in your mind, certain of it, to enable you to take the view that this accused had caused that injury. That is what is meant by proof beyond reasonable doubt. If you are not sure, if you are assailed by any reasonable doubt, then you will give the benefit of that doubt to the accused."

Next, he stated :—

> " The Crown case is that it was this accused who stabbed Panditharatne and they have put before you the evidence of an eye-witness, namely, Amaradasa, a son of the deceased. He says he was present and saw this accused stab his father. You will have to ask yourselves whether you accept the evidence of Amaradasa or reject it, or whether his evidence is of such doubtful value that you must give the benefit of the doubt to the accused."

Then, finally, towards the close of his charge, he addresses the jury thus :—

> " Has the Crown established beyond reasonable doubt that it was this accused who inflicted the vital injury on the deceased ? If, as I told you more than once today, you have any reasonable doubt in regard to that, he is entitled to go out a free man ; but, if you are satisfied, having regard to the principles I have enunciated to you, that Amaradasa is a witness to truth, that you can accept his evidence with confidence, with certainty and sureness, then you will have to decide that other question (also a question of fact) ; What was the intention of the accused when he inflicted those injuries ? "

We felt unable to agree with the submission of Crown Counsel. While the passages he pointed to laid down the position correctly so far as it depended on Amaradasa's evidence, they did not relate specifically to the

evidence relied on by the defence. If the evidence called by the defence, be it of the nature of an *alibi* or otherwise, was not capable of acceptance or rejection, the impact of the uncertainty on that point must surely be to raise a reasonable doubt as to the identity of the assailant, and we were therefore of opinion that it was imperative for a trial judge to give a jury a specific direction thereon.

For the reason we have expressed above, we allowed the appeal and quashed the conviction of the appellant. We did not think it fit to order a new trial in this case as the evidence of the only witness, Amaradasa, was of an unsatisfactory nature. He had to admit that while he waited by his injured father for about a quarter of an hour till a car was brought to take the latter to hospital he refrained from telling the witness Nomis who had come up to the spot the name of his father's assailant. He could give no satisfactory reason—to use the learned trial judge's own words—for this self-imposed silence. Amaradasa was proved to have stated at the Magisterial proceedings that his father had other enemies like Suwaris and Thepanis, although he stated at the trial that these two persons had died before the day his father was killed. We observed also that certain inadmissible evidence had been elicited at the trial through the witness Ellen that she heard people going past her house shouting that Panditharatne had been stabbed by Yahonis, which latter is the name of the appellant. These were by no means shouts of bystanders and therefore did not come within the category of relevant facts admissible under section 6 or any other section of the Evidence Ordinance.

Conviction quashed.