[COURT OF CRIMINAL APPEAL]

1969 *Present:* H. N. G. Fernando, C.J. (President), Sirimane, J., and Weeramantry, J.

WALALLAWITA K. WYMAN, Appellant, *and*
THE QUEEN, Respondent

C. C. A. APPEAL NO. 73 OF 1968, WITH APPLICATION NO. 107

S. C. 89/68—M. C. Matugama, 7514

Evidence—Witness—Doubt as to his competency to understand nature of oath—Right of Counsel to question the witness—Unsworn evidence—Requirement of corroboration—Burden of proof—Misdirection.

Where there is doubt as to the question whether a witness was, by reason of his age or mental immaturity, able to understand the nature of the oath which was administered to him, Counsel should not be prevented by the Court from questioning the witness so as to clear the doubt. If the doubt is confirmed, the Jury should be directed that it is unsafe to act on unsworn evidence unless it is satisfactorily corroborated.

Where the defence calls no evidence and only suggests, by cross-examination of the prosecution witnesses, that it was not the accused, but some other person who committed the criminal act charged, the burden lies throughout on the prosecution to establish the guilt of the accused. In such a case, it would be a misdirection if the Court suggests to the Jury that some onus lies on the defence to disprove, by a balance of probabilities, facts averred by the prosecution.

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

E. R. S. R. Coomaraswamy, with *L. Athulathmudali*, *C. Chakradaran*, *N. T. S. Kularatne*, *Kosala Wijayatilleke*, *M. S. Aziz*, *S. C. B. Walgampaya* and *C. Ganesh* (assigned), for the accused-appellant.

N. Tittawella, Crown Counsel, for the Crown.

Cur. adv. vult.

November 28, 1968. H. N. G. FERNANDO, C.J.—

The appellant was indicted with the murder of one Gunadasa, and was on that charge convicted of the offence of culpable homicide not amounting to murder.

The only alleged eye-witness called by the prosecution was one Karunadasa, who was affirmed at the trial and stated his age to be 15 years. The learned Crown Counsel commenced his examination of this witness in a manner which quite obviously indicated Counsel's own doubts as to the question whether the witness was, by reason of age or mental immaturity, a competent witness.

When this examination had proceeded for a few minutes, Counsel for the defence submitted to the learned trial Judge that the witness appeared to be much younger than he claimed to be. This submission was based on grounds (*a*) that the witness was " very small in size ", and (*b*) that the witness could not repeat some words of the oath administered to him. In regard to these words, Counsel's submission was that the witness did not understand their meaning.

The learned Commissioner then ruled " I hold that he is competent to give evidence ". Despite this ruling, Crown Counsel put further questions designed to test the understanding of the witness, and asked the direct question "Do you know the difference between truth and falsehood?". There was no answer to this question, and the Commissioner remarked : " Is all this necessary, I am quite satisfied that the witness is competent

to give evidence." Crown Counsel then, with admirable persistence, showed the witness a book and asked the witness, "If I call this an elephant, is it right or wrong?", to which the witness replied, "That is correct". At this point, Counsel appearing for the defence again protested that the witness was incompetent, but he was again over-ruled by the Court. The evidence of the witness was thereafter led, and it is perfectly clear that the conviction of the appellant depended on that evidence.

We feel bound to say that the learned Commissioner was unduly impatient in his consideration of this matter, which a sufficiently experienced Crown Counsel thought worthy of investigation. If the prosecution itself was doubtful whether the witness understood the nature of the oath which had already been administered, further questioning, if permitted, might have confirmed that doubt. If so, the Jury would have had to be directed that it was unsafe to act on unsworn evidence unless it was satisfactorily corroborated. We are content however to let this matter rest there, since the conviction was vitiated on more certain grounds.

The defence called no evidence, except to prove some minor contradictions, and made no attempt, in cross-examination of prosecution witnesses, to prove facts which might have established an alibi or founded an exculpatory or mitigatory plea of self-defence, nor did the existence of any such facts arise upon the prosecution evidence. Thus the defence only challenged the prosecution to prove that it was this accused, and no other person, who had stabbed the deceased, and the burden lay throughout on the prosecution to establish the guilt of the accused.

We now quote certain passages from the summing-up :

"The defence takes up the position that the Crown has not satisfactorily proved that it was this accused who committed this offence. The defence has suggested that it could be anybody else. Now, where the defence is concerned, you need not be satisfied beyond reasonable doubt. If you are satisfied that the defence position is established on a balance of probabilities, as they say, then you will accept the defence position. Unlike the prosecution which has to prove its case beyond reasonable doubt, no such high degree of proof is required as far as the defence is concerned. All that the defence need show is that their position is more probable."

"In this case the defence has also taken up the position that this incident did not take place at the spot described by Karunadasa. They say, for one thing, from where Karunadasa was, that is according to them, as he got out of the boutique, he could not have seen an incident where this incident is supposed to have taken place."

"Whereas the prosecution has to prove its case, every aspect of its case, beyond reasonable doubt, the defence has only to show by a balance of probabilities that the position taken up by the accused is probably true. The defence has stated that Baby Nona and her husband were angry with this accused, and therefore the accused was falsely implicated."

"The defence is that this accused has been falsely implicated in this case."

The passage quoted at (1) above can fairly mean that there was an onus on the defence to prove, on the standard of the balance of probabilities, *that someone other than the accused committed the offence*; the second passage can mean, in the light of several references to that standard, that the defence position, *that the offence may have been committed at some other place*, must be rejected unless some alternative place of commission is proved by that standard of proof; the third and fourth passages can mean that the *possibility of the accused having been falsely implicated* must be rejected unless proved by the same standard. We must say with respect that the same error is disclosed in each of these passages, namely, the error of suggesting that some onus lay on the defence to disprove facts averred by the prosecution. It will suffice to note the precise consequences of this error in the case of the first of the quoted passages.

In every criminal case, the burden lies throughout on the prosecution to prove convincingly that the person charged is the person who actually committed the criminal act charged. This the prosecution can do, only if it succeeds in excluding beyond reasonable doubt the possibility that some other person committed that act, and no burden lies on the defence to establish the existence of that possibility. But the direction now under consideration quite clearly informed the Jury that they need not consider the existence of that possibility, unless the defence proved that it was probable that "anybody else" committed the act of stabbing. These passages thus contained serious mis-directions as to the burden of proof.

We have now to quote another passage in the summing-up, which was criticised at the appeal :—

"You will next ask yourselves, is there corroboration of this evidence ? Has the evidence of Karunadasa and Baby Nona been corroborated ? They have stated that they followed a trail of blood and went up to the body. The sub-Inspector of Police has told you that there was a very long trail of blood. I will deal with this aspect of the trail of blood a little earlier (*sic*). For the moment, Karunadasa

and Baby Nona say that a trail of blood led down to the body of the deceased and there is evidence that there has been a trail of blood up to the body of the deceased."

The proved existence of a trail of blood did confirm the truth of the testimony of the two witnesses that they found the body of the deceased man lying at the place where the trail ended. But the defence did not dispute this part of the testimony. What was actively in dispute was the truth and the accuracy of Karunadasa's evidence that he saw the accused stabbing the deceased, and the trail of blood afforded no corroboration of this evidence. The matter which was here referred to was not true corroboration, because it was not "evidence tending to show that the accused committed the offence charged". We hold that the learned Commissioner should either have refrained from referring to the trail of blood as being corroboration, or should else have directed the Jury that the existence of the trail of blood did not corroborate the vital and disputed part of Karunadasa's testimony. There was thus misdirection on a matter of mixed law and fact.

For the reasons now stated we set aside the verdict and sentence and ordered a verdict of acquittal to be entered. Having regard to the fact that the prosecution depended almost entirely on the evidence of a single witness, whose understanding was seriously doubted by Crown Counsel, we did not consider this a fit case for the exercise of our discretion to order a fresh trial.

Accused acquitted.