

1933

Present : Akbar J.

SCHOKMAN v. MOHAMED.

177—M. C. Colombo, 66.

Contagious Disease—Failing to give notice—Lawful excuse—Burden of proof—Ordinance No. 3 of 1897, s. 6.

Where the accused was charged with failing to give information to the proper authority of the fact that a person was lying affected with smallpox in premises in which he was resident,—

Held, that under section 6 of Ordinance No. 3 of 1897 the burden of proving that he had a lawful excuse for failing to give the information was on the accused.

Where the accused gives an explanation which appears to be reasonable, although the Court may suspect it is not true, the accused is entitled to an acquittal unless the prosecution can prove beyond any reasonable doubt from other facts, whether in conjunction with the accused's explanation or not, that either the accused had the guilty knowledge or that the explanation of the accused is false.

A PPEAL from a conviction by the Municipal Magistrate of Colombo.

Rajapakse (with him *Ismail*), for accused, appellant.

Navaratnam, for complainant, respondent.

June 5, 1933. AKBAR J.—

The accused was charged with failing on December 30, 1932, forthwith to inform the proper authority of the fact that a person named Ravitha Umma was lying affected with smallpox in No. 85 (26), Siripina lane, of which the accused was a resident, in breach of Rule 46 of Rules made under the Ordinance No. 3 of 1897, and punishable under section 7 (1).

The Municipal Magistrate found him guilty and sentenced him to three months' rigorous imprisonment for the reason that he has set forth in his judgment and which I quote here:—"I take a serious view of these cases especially when the offenders are Muslims considering the number of cases that have been concealed by them; and especially in this part of the City."

As the case has not been proved against the accused, it is necessary that I should state my reasons in full. The prosecution called two witnesses, viz., Dr. Ranarajah, the Assistant Medical Officer of Health, and one Abdeen, the owner or rather the son-in-law of the owner of the garden. The Assistant Medical Officer of Health said that on December 31, 1932, he was informed, when he was occupied in a house to house inspection at Siripina lane, that there was a patient in this tenement, and it is clear that the informant was this accused as found by the Magistrate from the other evidence. He found this woman in this house suffering from smallpox, which was at least six days old. She was removed to the hospital where she died on January 3, 1933. In view of the defence, let me quote from the doctor's cross-examination: "There had been house to house inspection regularly from December 15; house No. 26 (i.e., this house) had also been visited. Very careful inspections were made by Inspectors

and Health Visitors. On December 30, too, visits were paid. No case was detected in this house till December 31. . . . I did not ask where the woman had been before." Abdeen, the next witness, stated that the accused was a permanent occupier of the house and that he knew that house to house searches had been made at Siripina lane from December 15. He also stated that accused worked on a steam launch. This was all the evidence led up to this stage for the prosecution, and it will be noticed that the prosecution did not trouble to find out if this woman was a permanent occupier of this house or not, and, if she was, how she escaped detection during the daily inspections. This gap the Magistrate tried to supply by calling Inspector Schokman of his own accord. He stated that very often when these inspections were going on patients were moved from house to house to escape detection. His evidence on this point was as follows:—"There are here parallel ranges of tenements with entrance facing each other. The Inspector and a Health Visitor generally start from the beginning of a range of tenements and when they get to the end of that range, they start from the end of the next range. We have on several occasions found that while the Health Visitor is searching the house and the Inspector is making his notes in the forms provided for the purpose, patients occupying tenements still to be inspected are moved into tenements that have already been inspected. The only way to avoid this is by having someone to watch every tenement that has been examined, but we haven't the staff."

He admitted in cross-examination as follows:—"I have no information to prove that Ravitha Umma was an inmate of the house prior to December 31."

The accused's evidence which shows his defence was as follows:—"Hadjie Mohamed, son of Mohideen, Affirmed, 35, employed in steam launch owned by Bastian Fernando & Co., Accused.— My wife, my child, and I live in this house. According to my work I am away from home for 2 or 3 days. I returned on 31st morning. I found the woman Ravitha Umma in my house. She was ill. I suspected she had smallpox. I left for work on 30th morning and returned on 31st morning. When I left for work on 30th morning Ravitha Umma was not in the house. She is a relation of my wife's. She is not a regular occupant of my house. As soon as I saw this was smallpox I informed the landlord. Landlord said Inspectors would be coming and he would inform. I was going back home when I met the Inspector and the Doctor. I told them and took them to my house." He called three witnesses, one of them being a Moorman Ismail, and the other two Sinhalese, Singhohamy, who lives opposite the accused's house, and Podisingho, next door to the accused. Ismail said that the only inmates of the house were the accused, his wife and child, and that Ravitha Umma was a woman from Galle. "I had seen Ravitha Umma at Galle; not seen her in accused's house. I cannot say whether Ravitha Umma stays in that house or whether that woman came from outside." Singhohamy said that the regular occupants of the house were accused, his wife and child: "I live almost opposite the accused's house. The regular occupant of this house are accused, his wife and child. On December 31 I saw the accused going with the Inspector toward his house. If there was a patient in accused's house

in an advanced state of smallpox, I should have known it. If the patient was locked in I would not know. I am not on visiting terms with accused. I have never been inside accused's house."

Podisingho's evidence is as follows:—"I live in the house adjoining accused's house. Regular occupants of accused's house are accused's wife and child and himself; nobody else. I know a woman with smallpox was found in that house. I would have known it if there was a patient in the next house. I leave for work at 6 in the morning and return late at night." On this evidence the Magistrate held as follows:—"It is admitted that accused did not give any information to the authorities till the morning of December 31, when the Assistant Medical Officer of Health was about to make a house to house inspection, and had actually entered the garden to do so. Now, on the face of it, presuming that Ravitha Umma had been sick in that house for some days which I think one is entitled to do in view of the medical evidence, it is obvious that the information the accused gave was not given forthwith and it would certainly appear that he did so only because he found the case was so bad that he could not conceal it any longer. If the facts are otherwise it is for the accused to establish such facts. The prosecution has done all that it can do in a case like this and I think a strong case has been made out against the accused. He has, in my opinion, entirely failed to establish the extenuating facts on which he relies; these are that, so he alleges, the patient was only brought to the house or came to the house on the night of December 30 and that he was away at his work from the morning of the 30th to the morning of December 31. The evidence of the witnesses that the accused has called hardly helps his case on those points. The first of them Ismail is obviously a very close friend if not a relation of the family; to judge from his own evidence. The other two are Sinhalese men who would know very little of what is happening in a Muslim household. Neither of them claims to have ever visited the accused's house. What difficulty would there be in the accused and his wife concealing this case for several days as I am inclined to believe they did? None whatever, especially when one realizes how reluctant people of the type of these witnesses, especially the Muslims, to give any information of the prevalence of smallpox in their neighbourhood for fear of being transported to the Segregation Camp. The Muslim witness would certainly never have given the accused away and the Sinhalese neighbours might very well have been entirely ignorant of the existence of this case in a closed Muslim household. The only way that accused could have established the facts that he relied on in his defence would have been by definitely proving when Ravitha Umma came to the house, if, as he contends, she only came on December 30 and by proving, through his employers, that he was engaged in work during the 24 hours preceding the discovery of the case. In the absence of such evidence and in the light of the medical evidence the only conclusion one can come to is that the patient had been in the accused's house several days before she was discovered."

It will be seen from his judgment that he started with the presumption, that the woman had been sick *in the house for some days*, on the doctor's evidence, and that the only way the accused could have established his defence was to prove that Ravitha Umma came to the house on December

30, and also by proving through his employers that he was engaged in work during the 24 hours preceding the discovery of the case. Because accused did not lead this evidence "he has" says the Magistrate "entirely failed to establish the extenuating facts on which he relies." In his laudable anxiety to correct the faults of the Muslim community the Magistrate has failed to appreciate the fact that this is a criminal case and that there is an overriding presumption of innocence in favour of an accused and that it is for the prosecution to prove its case beyond all reasonable doubt.

Under section 6 of Ordinance No. 3 of 1897 the burden of proving that he had a lawful excuse for failing forthwith to give information of a case of smallpox is on the accused just as in the case of an accused who is charged with retaining or receiving with guilty knowledge stolen property soon after the theft the burden of accounting for the possession is on the accused. But in this latter type of cases, which is exactly analogous on this question of burden of proof to the case now before me, it has been held in a series of cases in England and here that if the explanation given by the accused is a reasonable one, even though the Court suspects it may not be true, yet owing to this presumption of innocence in favour of the accused, the explanation, being reasonable on the face of it, would have the effect of causing a doubt in the mind of the trial Judge which must be reckoned in favour of the accused.

The accused in such cases is under no liability to prove the truth of his defence; if the explanation is reasonable and may be true that would be sufficient to entitle him to an acquittal.

It will be seen from the Magistrate's judgment in this case, that he does not hold that the accused's defence is not a reasonable one or that it is false. All that he says is that because he has not led the evidence on the two points in the manner indicated by him he has failed to establish his defence in the only way that he could have done.

It will be seen that there are several points which indicate that the accused's defence may be true. There is no evidence for the prosecution to prove that Ravitha Umma was a regular occupant of the house or that she was there before December 30, or that she was seen being removed during the house to house inspection. The fact that Ravitha Umma was not detected till December 31 is a point corroborating the defence even though there was a possibility of her removal during the hours of inspection. The prosecution led no evidence on this point and in a criminal case every link must be proved. The two Sinhalese witnesses did not testify to having seen Ravitha Umma before in the accused's house. Why did the prosecution not endeavour to lead evidence to prove that Ravitha Umma was an occupant of the house prior to December 30, 1932? If such evidence had been led even in rebuttal, as the prosecution was entitled to do, the case would have been clear against the accused.

The legal position in this case is exactly analogous, as I have said, to that in a charge for retention of stolen property.

It only remains now for me to quote the authorities on the legal position in such cases. There is a series of cases in Ceylon and Great Britain, but

I need only refer to *Attorney-General v. Rawther*¹ and my judgment in *King v. Thomas Appu*². In the latter case I have reviewed all the authorities, and the following is an extract showing the principles that should govern these cases :—

“When the Court decides to presume the guilty knowledge the burden is cast on the accused to account for his possession. If the accused gives an explanation which appears to be reasonable, although the Court may suspect that it is not true, in such an event the accused is entitled to an acquittal unless the prosecution can prove beyond any reasonable doubt from other facts whether in conjunction with the accused’s explanation or not either the accused had the guilty knowledge or that the explanation of the accused is false. (See *R. v. Norris*³, and the remarks of Bertram C.J. at page 392 in *Attorney-General v. Rawther (supra)*.) So that an accused may be convicted in spite of his explanation if the Court is of opinion that his explanation is not a reasonable one in the circumstances, or even when it is *prima facie* reasonable if the prosecution proves other circumstances which, whether in conjunction with the accused’s explanation or not, prove beyond any reasonable doubt that the accused had the guilty knowledge.”

The following is an extract from Bertram C.J. in the former case :—

“It is a recognized presumption that the possessor of property recently stolen who can give no explanation, or no reasonable explanation, of his possession, is either the thief or the receiver. This presumption is not a presumption of law, but a disputable presumption of fact. The principle may quite justly be put in this way that the possession of property recently stolen casts upon the possessor the necessity or onus of giving an account of that possession. It was, no doubt, in this sense that Lord Alverstone C.J. in *R. v. Powell* said: ‘The possession of recently stolen property throws on the possessor the *onus* of showing that he got it honestly.’

“But this does not conclude the matter. There is a counter presumption of so fundamental a character as to override the presumption already explained. And it is in the light of this counter presumption that the former must be considered. This counter presumption, as I have indicated, is one of the most fundamental presumptions of the English criminal law though nowhere mentioned in the Evidence Ordinance—a circumstance which must be remembered when it is suggested, as it was originally suggested by the Acting Solicitor-General, that our Evidence Ordinance is intended to be a complete and exhaustive code. That presumption is the ‘presumption of innocence’ and it is thus formulated in *Taylor on Evidence, 10th ed., p. 113* :—

‘One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, ‘gives the benefit of a doubt to the accused,’ and is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard

¹ 25 N. L. R. 385.

² 30 N. L. R. 431.

³ (1917) L. J. K. B. 810.

being had to the burthen of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a high degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt.'

"This is what is meant when it is said that the burden of proof notwithstanding any presumption which may arise from the facts, lies upon the prosecution throughout, and it is this principle that the decision of the Court of Criminal Appeal in *R. v. Ambramovitch* (*supra*) was intended to recall and to re-emphasize.

"It will thus be seen that this decision did not, as the learned Magistrate suggests, introduce new law, but re-affirmed the old. The principle of that decision is, moreover, of general application. It is not confined to cases of stolen property, but it applies to all cases in which a *prima facie* case has been established against the prisoner, and he is called upon to answer it. Nor, properly considered, is there any inconsistency between that principle and the dictum of Lord Alverstone C.J. in *R. v. Powell* above quoted. If further assurance of this fact is needed it may be found in a statement of that principle by Lord Alverstone himself in *R. v. Stoddart*. That was not a case of receiving stolen property but of obtaining money by false pretence, but the words are of general application.

"On page 242 he says :—

'The question, however, in this case is as to the direction which ought to be given where, as in this case, the defendant gave and called evidence in answer to that *prima facie* case. It seems to us that the jury should have been told that if they accepted the explanation given by and on behalf of Stoddart, or if that explanation raised in their minds a reasonable doubt as to his guilt, they should acquit him, as the *onus* of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt, the prosecution has failed to satisfy the *onus* of proof which lies upon them.'

As regards the Magistrate's remarks that the only way in which the accused could establish his defence was by proving that Ravitha Umma came to the house on 30th December, some allowance must be made for the reluctance of the accused to call witnesses who will have to incriminate themselves if they were going to help the accused by their evidence. On a similar point, Bertram C.J. in the 25 N. L. R. case said as follows:— "It is perhaps best to say that whether it is reasonable for the prisoner or for the prosecution to cite the witnesses must depend on the circumstances of the case. The case of *Kandiah v. Podisingho* (*supra*) decided by my brother de Sampayo was a case in which it was not reasonable that the accused should be called upon to cite the witnesses. But in all these cases it should be borne in mind that if the property really was stolen, the witness referred to as the person from whom the prisoner received it is almost certain to be directly or indirectly connected with the crime. It is not likely that such a witness will give a frank account of the circumstances, and allowance must be made for any reluctance on the part of the accused to call him".

These, I think, are the principles which should be applied in this case and in my opinion the conviction is wrong and the accused must be acquitted. I have set forth my reasons in full, so that they may be of some use to the Health Department in future prosecutions. In the event of the prosecution being taken by surprise by the defence of the accused it can always move to lead evidence in rebuttal under section 190 of the Criminal Procedure Code. In the view that I have taken it is not necessary to consider the further point taken by Mr. Rajapakse that the burden of giving a lawful excuse did not shift to the accused in this case, as the prosecution did not prove that the accused failed to give information "forthwith" or in other words as the prosecution led no evidence to prove that accused knew of Ravitha Umma's condition before December 31, 1932. The conviction is set aside and the accused is acquitted.

Set aside.

