[COURT OF CRIMINAL APPEAL]

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

N. L. DAMAYANU and another, Appellants, *and*
THE QUEEN, Respondent

APPEALS NOS. 101 AND 102 OF 1968, WITH APPLICATIONS NOS. 150 AND 151

*S. C. 14/68—M. C. Gampaha, 14757/A*

*Trial before Supreme Court—Defence of alibi—Quantum of evidence—Summing-up.*

**The principle which governs the consideration of evidence relating to the defence of an alibi applies also in a case where the defence leads evidence to the effect that some person or persons, other than the accused, committed the act or offence charged. In such a case, a statement in the summing-up that the accused must be acquitted if the defence evidence raises a reasonable doubt in the minds of the Jury as to the guilt of the accused does not constitute a misdirection.**

[1] *62 T. L. R. 445 at 446.*

APPEALS against two convictions at a trial before the Supreme Court.

*E. R. S. R. Coomaraswamy*, with *C. Chakradaran*, *V. Shanmuganathan*, *Kosala Wijayatilake* and *S. C. B. Walgampaya*, for the 1st accused-appellant.

*Colvin R. de Silva*, with *Nihal Jayawickrama*, *I. S. de Silva* and *C. Sandrasagara*, for the 2nd accused-appellant.

*J. N. David* (assigned Counsel).

*T. A. de S. Wijesundera*, Senior Crown Counsel, for the Crown.

*Cur. adv. vult.*

June 23, 1969. H. N. G. FERNANDO, C.J.—

Four accused, the first and third of whom are sons of the second, and the fourth his daughter, were charged with the attempted murder of the brother of the second accused. The injured man himself was not a witness of the trial, because he was stated to be suffering from amnesia resulting from his injuries. The prosecution therefore relied on the evidence of his wife and daughter, according to whom the four accused came to the house of the injured man, and assaulted the latter on the verandah, and having dragged him out of the house assaulted him again on the road. The Jury by a verdict of 6 to 1 found all four accused guilty of the charge. The 1st and 2nd accused were each sentenced to a term of 4 years imprisonment, and the other two accused were released on probation.

The wife of the 2nd accused gave evidence for the Defence. According to her, she had on the day of the incident gone to pick cadju fruit on a land owned in common by her husband and the injured man, which land is situated just across the road opposite the residing land of the injured man. Because, she said, of some previous displeasure, the injured man came up and attempted to assault her with a club, but she warded off these blows by picking up a chair which happened to be at the scene. At this stage, her two daughters (one of them the 4th accused), who were cutting firewood at the time with a katty and a manna knife, came up and defended her by assaulting the injured man with those weapons. She denied that her husband and sons participated in any assault.

The learned Commissioner, as also Counsel who argued the appeal of the accused, were of the view that the defence was that of an alibi. With respect, this is not strictly correct. Evidence that an accused person was not present at the scene of a crime is by itself only a denial of presence and therefore of the commission of the offence. The defence

becomes one of alibi only when there is direct evidence that the accused person was at a different place at or about the relevant time ; in such a situation the defence adds to its denial of presence by the attempt to prove that the accused was probably at a different place.

Nevertheless, we agree that the principle which governs the consideration of alibi evidence applies also in a case where the defence leads evidence to the effect that some person or persons, other than the accused, committed the act or offence charged. In this instance, the version for the defence was that the act charged was committed by the 4th accused and her sister, and that the other accused did not participate in the assault on the deceased.

In several passages in the summing-up, the learned Commissioner directed the Jury that, if the defence evidence created any reasonable doubt in their minds as to the participation of the 1st, 2nd and 3rd accused in the assault, all these accused must be acquitted, and in so directing he refrained from stating that there was any burden on the defence to establish the truth of the defence version, whether on a balance of probabilities or otherwise.

Counsel has relied on the judgment of this Court in the case of *Yahonis Singho* [1]. The defence in that case, where the accused was charged with murder, relied on the evidence of a witness Sirimane that the accused was in a boutique about a quarter of a mile away from the scene of the murder at the relevant time. The trial Judge, at two separate stages of his charge, directed the Jury substantially to this effect " if you accept Sirimane's evidence, it immediately throws doubt on the prosecution evidence."

The conviction in the case of *Yahonis Singho* was set aside by this Court on a ground succinctly stated in the judgment :—

> " 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 mis-direction."

[1] (1961) 67 N. L. R. 8.

It will be seen that the mis-direction or non-direction in that case consisted in the omission of the trial Judge to direct the Jury to consider whether the defence evidence may create a reasonable doubt as to the guilt of an accused person or as to the truth of the prosecution case, even if the Jury were unable to accept the defence evidence as being probably true. In the instant case, however, the Jury were told quite clearly that they must acquit the first three of the accused if the evidence of the 2nd accused's wife raised a reasonable doubt as to the participation of those accused in the assault. That being so, there was not here the same omission as in the case of *Yahonis Singho*. A direction that the accused must be acquitted if defence evidence raises a reasonable doubt must surely result in an acquittal if the defence succeeds in the more difficult task of persuading the Jury that its version is probably true.

We see no reason to interfere with the verdict and sentences in this case. The appeals are dismissed.

*Appeals dismissed.*