[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Moseley S.P.J., Hearne and Cannon JJ.**

The King v. Don Robert alias Beera.

53—M. C. Colombo, 2,969.

Failure to disclose defence in lower Court—Comment by Judge in summing up Comment permissible with care and fairness to the accused—No misdirection.

Comment by a Judge in his summing-up to the jury on the failure of the accused to disclose his defence in the lower Court, when addressed by the Magistrate in terms of section 160 of the Criminal Procedure Code, may be made in a proper case provided the observations are made with care and fairness to the accused.

Where a Judge, while pointing out to the jury that the accused had failed to disclose his defence before the Magistrate, proceeded to state that it was not obligatory upon the accused to say anything and that his failure to do so did not mean that the defence put forward at the trial was false,—

***Held*, that there was no misdirection.**

THIS was an appeal from a conviction by a Judge and jury before the 3rd Western Circuit.

S. Sabapathipillai, for the accused, appellant.—The trial Judge's adverse comment on the failure of the accused to disclose his defence in the Magistrate's Court was a serious misdirection. In the Criminal Procedure Code, prior to 1938, section 295 (2) provided that an inference could be drawn from the silence of the accused. Sections 295 and 155 have been replaced by section 160 of the amended Criminal Procedure Code (Cap. 16) which is silent about any inference to be drawn.

"The cardinal principle of English criminal practice is that an accused person is entitled to maintain a sullen silence." The interrogation of the accused is not an ordeal through which the accused must pass, but a privilege to which he is entitled. (Vide *R. v Maybrick*[1], *R. v. Sittambaram*[2], Dias' *Commentary on the Criminal Procedure Code.*) The reason for repealing section 295 (2) was because it was felt that the section was used to the disadvantage of accused and also to bring the law into conformity with English practice. Section 160 confers a clear and unqualified right on the accused to reserve his defence for the trial. The English law on the point can be seen from *Naylor*[3], *Littleboy*[4], *Parker*[5], *Smith and Smith*[6].

[MOSELEY J.—It seems to me that the general principle is that it is not improper for the Judge to comment, provided he does so carefully and fairly.]

That would appear to be the rule as laid down in *Littleboy.* It cannot be said that the comment in this case was fair. It was all the more damaging because it was expressed in the form of an innuendo. Furthermore, the relaxation, in *Littleboy,* of the principle laid down in *Naylor* should be restricted to a case where the defence of alibi is put forward ;

[1] *(1889) Not Brit. Trials 334.*
[2] *(1918) 20 N. L. R. 257.*
[3] *23 Cr. App. R. 177.*
[4] *24 Cr. App. R. 192.*
[5] *24 Cr. App. R. 2.*
[6] *25 Cr. App. R. 119.*

in a defence of alibi it is necessary that the Police should be given an opportunity, before trial, of verifying the truth of it. *Naylor* and *Smith*, however, uphold the cardinal principle laid down in *Maybrick*.

E. H. T. Gunasekera, C.C., for the Crown.—All that *Naylor* decided was that no adverse comment should be made *improperly* about the failure of an accused to disclose his defence before trial. Legitimate comment can, however, be made. *Littleboy* provides a good illustration of adverse comment made properly. Distinction should be drawn between using the silence of the accused as evidence to support the prosecution and as evidence to test the truth of the defence.

It is significant that under section 233 of the Criminal Procedure Code it is imperative that any statement of the accused recorded by the Magistrate shall be put in at the trial. There is no reason, therefore, why the jury should not be told that no statement was made by the accused.

S. Sabapathipillai, in reply.

Cur. adv. vult.

November 8, 1940. MOSELEY J.—

The appellant, who also applies for leave to appeal on the facts, was convicted on October 7, of murder and sentenced to death. The main ground of appeal is that in the summing-up the learned trial Judge commented adversely upon the fact that the accused had not disclosed his defence in the lower Court when addressed by the Magistrate in the terms set out in section 160 of the Criminal Procedure Code. The remaining grounds of appeal, and the grounds upon which the appellant asked for leave to appeal on the facts, appeared to us to be without substance and we invited Counsel for the Crown to address us only on the above-mentioned point. The application for leave to appeal on the facts was refused.

The passage in the charge to which the appellant takes exception is as follows :—

> "I may say that an accused person is first of all charged in the Magistrate's Court. Evidence is taken against the accused, and at the close of the case the Magistrate tells him that he could, if he desires, say anything he has got to say by way of defence. He is not obliged to say, but he could if he wanted. Well, the accused then made this statement, I believe : "I am not guilty"—in those four words. Now he comes into this Court and makes this defence. It does not mean that you should reject the defence because he had not put forward the defence in the lower Court. That does not follow, but it is a point which you must consider. But if after giving your minds to the question that the accused simply said "I am not guilty" you feel that you should accept the defence put forward by the defence now, you will, of course, accept it. It does not mean that the defence now put forward is false."

Counsel contended that section 160 of the Criminal Procedure Code confers a privilege upon an accused person and does not impose a duty. He invited us to compare the language with that employed in the old section 295 (2), now repealed. In the latter the Magistrate was expressly

authorised to draw such inference as he thought just from a refusal by an accused person to answer or from such answers as he made. According to Dias' *Commentary on the Ceylon Criminal Procedure Code* (page 776, note 2) the provisions of this section had been greatly criticised in the past. The section was repealed in 1938 and Counsel for the appellant invited us to conclude that the repeal thereof and the substitution therefor of the procedure prescribed in the present section 160 impliedly takes away from the Court the right to draw any inference, particularly one adverse to the accused, from the latter's failure to disclose his defence. It seems to us, however, that the amendment was made with the intention, and with the effect, of bringing the local procedure into line with the English practice. We propose, therefore, to consider this appeal in the light of such decisions of the Court of Criminal Appeal in England as have been made available to us.

In *Naylor*[1] the trial Judge commented in no uncertain terms upon the failure of the accused to disclose his defence when before the Magistrate. In reply to the usual formula he had said: "I don't wish to say anything except that I am innocent." The learned Recorder in referring to these words expressed strongly his own views as to what might be expected of an innocent man in these circumstances. One of the witnesses for the prosecution in that case was a man who had been indicted together with the appellant and had pleaded "Guilty." Although it is not clearly stated in the report, it appears from the later judgment in *Littleboy*[2] that Naylor's failure to disclose his defence was employed as being evidence against him in corroboration of the alleged accomplice. As was observed in the later case "it is one thing to make an observation with regard to the force of an alibi, and to say that it was unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice". In *Naylor* (*supra*) the Recorder's summing-up appears from the report to be an unequivocal adverse criticism of the silence on the part of the accused, and in that respect the offending words can, in our opinion, be clearly distinguished from those occurring in the charge in the case before us.

Counsel for the appellant also referred us to *Parker*[3] in which it was held that adverse comment on the conduct of one of three accused persons in not disclosing his defence was not improper since, though it might be unfavourable to him, it was necessary in fairness to his co-accused who had disclosed their defence. The case is therefore hardly in point.

In *Littleboy* (*supra*), *Naylor* (*supra*) was fully discussed, and it was the opinion of the Court that it was not "intended to lay down the proposition that a Judge may not, in a proper case, comment on the fact that the defence has not been disclosed on an earlier occasion". Again, it was observed that "observations upon the failure to disclose a defence

[1] *23 Cr. App. R 177.* [2] *24 Cr. App. R. 192.*

[3] *24 Cr. App. R. 2.*

at some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case . . . . "

Smith and Smith[1] can clearly be distinguished from the present case in that in the former, while the prisoners had maintained silence before the Magistrate, each had previously given his answer to the police and that answer was before the Court. It could not therefore be said that their defence was belated.

Counsel for the appellant was inclined to treat the decision in *Littleboy* (*supra*), in which the appeal was dismissed, as creating an exception only in the case of the defence of *alibi*. There is, in our view, nothing in the language of the judgment to suggest such a limitation any more than it appeared to the learned Judges who constituted the Court that the decision in *Naylor* (*supra*) was intended to lay down the proposition that, in a proper case, a Judge may not comment on the silence of the accused. The Court declined to assent to a general proposition that in no circumstances should comment be made, but insisted that any comment that may be made should be made " with care and fairness to the accused ".

Crown Counsel submitted that the silence of the accused in the Magistrate's Court may be employed as a test of the truth of the defence which he puts forward at his trial and it seems to us that comment for such a purpose may properly be made, provided that it is made with care and fairness to the accused.

An examination of the language used by the learned Judge in this case satisfies us that the matter was put carefully and fairly to the jury. He clearly informed then that it was not obligatory upon the accused to say anything, and that this failure to do so did not mean that the defence put forward at the trial was false.

We therefore dismiss the appeal.

Appeal dismissed.