[COURT OF CRIMINAL APPEAL.]

1945 *Present :* **Howard C.J., Keuneman and Jayetileke, JJ.**

THE KING *v.* GEEKIYANAGE JOHN SILVA

84—M. C. Panadure 27,675.

Accused's failure to give evidence—Charge of murder—Judge's direction that failure to give evidence is an element that may be considered—Proof of case beyond reasonable doubt—Principle to be applied.

Where in a charge of murder the presiding Judge directed the jury " that the failure of the accused to give evidence was an element that they may take into consideration in discussing whether the Crown has proved the case beyond all reasonable doubt— ",

Held, that there was no misdirection in law.

The *King v. Duraisamy* (43 N. L. R. 241) distinguished.

It is within the discretion of a Judge to comment on the failure of an accused person to give evidence and the Court of Criminal Appeal will not generally interfere with that discretion.

The comments of the Judge on an accused's failure to give evidence should be confined to those cases in which there are special circumstances which an accused only can explain and which therefore call for an explanation by him. The failure of an accused to give evidence, though not amounting in law to corroboration of the story of the prosecution, may enable a jury to act where they would not otherwise have done so.

APPEAL against a conviction by a Judge and jury before the 4th Western Circuit 1944.

G. E. Chitty (with him *S. E. J. Fernando* and *T. Paramsothy*) for the appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

February 12, 1945. HOWARD C.J.—

The only substantial point in this appeal which is from a conviction on a charge of murder is whether the learned Judge has misdirected the jury in the following passage that occurs on pages 26-27 of his charge :—

" Let us see what evidence, is called for the defence. The prisoner does not give evidence. I have told you and Counsel, both for the defence and the Crown, have told you that the burden of proving the guilt of the accused rests upon the Crown, and I have told you that there is no obligation upon the prisoner to establish his innocence. Then you ask yourselves, " Has the Crown proved the case ? ". Have they satisfied you beyond reasonable doubt, first of all, that the prisoner was the man who caused the fatal wound, and secondly, that he had the specific intention, or in the alternative, the knowledge about which I have addressed you ? If you ask yourselves that question naturally you will say to yourselves, " Here is the evidence of two eye-witnesses. What is the evidence for the defence ? ".

Whereas the accused need not give evidence or say anything at all, the fact that he has not given evidence and contradicted the evidence of the two eye-witnesses is an element which you will be entitled to take into consideration when you are discussing the question, " Has the Crown proved the case ? Has the Crown satisfied us beyond reasonable doubt."

Mr. Chitty, on behalf of the appellant, has contended that the direction to the jury that the fact of the appellant not having given evidence and contradicted the evidence of the two eye-witnesses is an element which they will take into consideration when they are discussing the question " Has the Crown proved the case ? Has the Crown satisfied us beyond reasonable doubt " amounted to a misdirection. In support of this contention Mr. Chitty cited the case of *The King v. Duraisamy* [1]. In that case also the accused failed to give evidence and in commenting on that fact the learned Judge told the jury that on evidence being adduced, which implicated the accused, the fact that he had not given evidence entitled them to draw an inference against him. The Judge did not explain the nature of the inference. He also said that in deciding the Crown case, whether it had been established beyond reasonable doubt, the jury were to take notice that the accused had not given evidence at all without pointing out to them that the existence of a reasonable doubt enured to the benefit of the accused whether he gave evidence or not. It was held that the principle, that the standard of proof required in criminal cases remains constant, irrespective of the fact that the accused has not given evidence, may not have been properly appreciated by the jury and that there had been a misdirection with regard to the burden of proof.

The words used by the learned Judge in this case were that the failure of the accused to give evidence was " an element that they may take into consideration " in discussing whether the case has been proved beyond all reasonable doubt whereas in *The King v. Duraisamy* (*supra*) the words used were that " they were entitled to draw an inference against him ". The discretion vested in a Judge to comment on the failure of an accused to give evidence cannot be questioned *vide the Queen v. Rhodes* [2] where Lord Russell of Killowen states as follows:—

" The third and last question is whether the presiding Judge has a right under the Criminal Evidence Act, 1898, to comment on the failure of the prisoner to give evidence on his own behalf. In this case the prisoner was not called; and the only question that we have to consider is whether the chairman of quarter sessions had a right to comment on his absence from the witness-box. It seems to me that he undoubtedly had that right. There is nothing in the Act that takes away or even purports to take away the right of the Court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the Judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner

[1] *43 N. L. R. 241.* [2] *(1899) 1 QB. at p. 83.*

to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge; and it is only necessary now to say that that discretion is in no way affected by the provisions of the Criminal Evidence Act, 1898."

I would also refer to *R. v. Voisin* [1]

At page 93 Lawrence J. in his judgment states as follows:—

"The Judge's comments on the appellant's not going into the witness-box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this Court to review. It was a case demanding explanation by the only persons who could know the facts if ever one could be."

Again in *Kops v. The Queen* [2] the Lord Chancellor at page 653 stated as follows:—

"The majority of the learned Judges of the Full Court have held that the comments made by the learned Judge at the trial in this case were made according to law, and that there was no reason to interfere with the verdict which followed.

Their Lordships see no reason to doubt the correctness of the conclusion at which the majority of the Court arrived. The learned Judges did not lay down—it was not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."

In *R. v. Jane Blatherwick* [3] it was held that, though the fact that the appellant was not called is not of itself corroboration, it entitled a jury to act where perhaps they would not otherwise have done so. In *R. v. Bernard* [4] Darling J. stated in the judgment that it is right that juries should know and if necessary, be told, to draw their own conclusions from the absence of explanations by the prisoner.

From the cases I have cited the following principles may be deduced:—

(*a*) It is within the discretion of a Judge to comment on the failure of an accused person to give evidence and the Court of Criminal Appeal will not generally interfere with the exercise of that discretion.

(*b*) The comments of the Judge on an accused's failure to give evidence should be confined to those cases in which there are special circumstances which the accused can only explain and which therefore call for explanation by him.

[1] *13 Cr. App. Reps. 89.*
[2] *(1894) A. C. 650.*
[3] *6 Cr. App. Reps. 281.*
[4] *1 Cr. App. Reps. 218.*

(*c*) The failure of the accused to give evidence though not amounting in law to corroboration of the story of the prosecution may enable a jury to act where perhaps they would not otherwise have done so.

In the present case we do not think that the evidence elicited any special circumstances that called for an explanation from the appellant. On the other hand the learned Judge did not in his charge state that any particular circumstance or fact called for such an explanation. Nor did he say that from the failure to give evidence the jury might draw an adverse inference. He merely said it was an element they might take into consideration. He was inviting their attention to the fact that the appellant had failed to give evidence and so contradict the testimony of the two eye-witnesses. This fact might be taken into consideration and entitled them to convict whereas if the accused had given evidence and denied the story of the eye-witnesses, they might not have felt themselves justified in so doing. The charge makes it clear that the jury are not to convict if they have a reasonable doubt. In these circumstances we think there was no misdirection and the appeal is dismissed.

Appeal dismissed.