

[COURT OF CRIMINAL APPEAL.]

1945 Present: Howard C.J., Keuneman and Jayatilleke JJ.

THE KING v. BALAKIRIYA alias WADU BALAYA.

26—M. C. Ratnapura, 39,325.

*Rape—Consent of complainant—Burden of proof—Misdirection.*

Where in a charge of rape the presiding Judge directed the jury as follows:—

“ You must be satisfied by the balance of evidence with his story that he had intercourse with the consent of the complainant.”

*Held*, that there was a misdirection of law as it places the burden of proving that he had intercourse with the consent of the complainant on the accused.

**A** PPEAL against a conviction by a Judge and jury before the Western Circuit.

*A. H. C. de Silva* for the appellant.

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

*Cur adv. vult.*

January 29, 1945, HOWARD C.J.—

In a case of rape the burden on the prosecution is to prove first of all that the accused has had sexual intercourse with the complainant, and, secondly, when the complainant is over the age of consent, that such intercourse took place without her consent. On page 6 of the charge the learned Judge has told the jury as follows: "You must be satisfied by the balance of evidence with his story that he had intercourse with the consent of the complainant". This passage places the burden of proving that he had intercourse with the consent of the complainant on the accused. That is clearly a misdirection. We have been referred by Mr. Gunasekera to various passages in the summing-up which go to show that the burden is correctly placed on the prosecution. Those passages, in our opinion, are not specific enough to minimize the effect possibly on the minds of the jury of the passage on page six. One of the passages referred to by Mr. Gunasekera is on page 24 and is as follows: "The question is, do you believe the version of the incident as deposed to by the girl in the witness-box? After making due allowance for the contradictions pointed out to you by Counsel for the defence, do you accept her story or not? If you do not accept her story, then you will acquit the accused". That passage does not make it clear to the jury that the burden was on the prosecution to prove beyond all reasonable doubt that the intercourse took place without her consent. On page 25 Mr. Gunasekera has invited our attention to this passage: "Now it is admitted that the accused went to the house on the day in question and had connection with this girl; the only question is whether it was forcible or not". There again there is no statement that the onus of proving that it was forcible rests on the prosecution. Then again, on page 27 of the charge Mr. Gunasekera has invited our attention to the following passage: "If, on the other hand, you do not accept the story of the girl, or, if you find that there is a reasonable doubt about the truth of the prosecution case, then you will acquit the accused". With regard to this passage, we think that the direction with regard to the onus of proof was not specific on this question of whether intercourse took place with the consent of the complainant.

In these circumstances we are of opinion that the conviction cannot stand. The only question that remains is whether there should be a fresh trial. The corroboration adduced by the Crown was extremely slender. Moreover, the conduct of the complainant after intercourse had taken place is open to such criticism as throws some doubt on her veracity. We therefore make no order with regard to a new trial.

*Set aside.*