1975 *Present :* **Tennekoon, C. J., Walgampaya, J., and Rajaratnam, J.**

H. N. GUNAWARDENE, Accused-Appellant *and* THE REPUBLIC OF SRI LANKA

S. C. 136/75—*H. C. Kandy No.* 67/74—*M. C. Anuradhapura* 50580

Administration of Justice Law—S. 213—*Failure of the accused to give evidence.*

S. 213(2) of the Administration of Justice Law declares, "If upon the judge calling for the defence the accused does not give evidence, it shall be open to the prosecution to comment upon the failure of the accused to give evidence and the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from such failure as appear proper."

S. 213(3) states, "Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf."

Held: S. 213(2) only alters the law as it stood before the enactment of the Administration of Justice Law by giving a right to the prosecution to comment upon the failure of the accused to give evidence and by making a positive declaration of what was always implied in our law, viz. that the jury may draw such inferences as appear proper from the failure of the accused to give evidence. It has not altered the law as to the situations in which inferences may properly be drawn upon such failure. It has not made it obligatory on the accused in every case, on being called upon for his defence, to give evidence, if he wished to avoid being convicted. Failure to testify on the part of accused is not declared to be equivalent to an admission by the accused of the case against him

Appeal against a conviction at a trial before the High Court, Kandy.

Dr. Colvin R. de Silva with *A. C. de Zoysa, S. Muttetuwegama, (Mrs.) Manouri Muttetuwegama, P. D. W. de Silva, S. Mahenthiran,* and *J. Usuf* for the accused-appellant.

Tivanka Wickremasinghe, Senior State Counsel, for the Attorney-General.

December 19th, 1975. TENNEKOON, C. J.—

The appellant was indicted before the High Court of Anuradhapura on the charge of having on or about the 15th of May, 1973, at Galenbindunuwewa, committed the murder of one Soma Perera. The case was subsequently transferred to the High Court of Kandy, where he was tried before a Sinhala speaking jury. He was convicted by the unanimous verdict of the jury of the offence charged and sentenced to death on the 25th of October, 1974.

The case presented against the appellant was one based on circumstantial evidence. We do not think that, having regard to the order which we propose to make in this case, we should set out or make any comments on the case so presented.

Counsel for the appellant drew our attention to a number of misdirections in the trial Judge's charge which, though delivered in English, went to the jury as translated by the court interpreter. It has been submitted to us that the trial Judge's directions to the jury on the subject of circumstantial evidence were inadequate and in certain ways confusing and misleading. Our attention was drawn to the following passages in the summing-up, namely :

"වරදක් කර තිබෙනවා යයි පරිවේෂණ සාක්ෂි අනුව යුෂ්මතුන්ට අනුමැතියකට බහින්න පුළුවන් නම් විත්තිකරුගේ වරදට ගැලපෙන සාක්ෂි නැතැයි කියා විත්තිකරුගේ දෝෂත්වය පිළිබඳව සාධාරණ සැකයක් තිබෙනවා. ඒ සාධාරණ සැකයේ වාසිය විත්තියට තිබිය යුතුයි. කෙසේ වෙතත් දී තිබෙන පරිවේෂණ සාක්ෂි අනුව සාධාරණ සැකයෙන් තොරව අනුමතියකට බහින්න පුළුවන් නම්, විත්තිකරු සාධාරණ සැකයෙන් තොරව වැරදිකරුය කියා ඔහුගේ නිර්දෝෂත්වය පිළිබඳව වෙනත් නොගැලපෙන සාක්ෂි තිබෙනවා නම්' ඒ වෝදනාවලට විත්තිකරු වරදකරු හැටියට එලඹෙන්න පුළුවන්. තවද පරිවේෂණ සාක්ෂි ගැන සලකා බලන විට ඒ සියල්ලම එක්ව සලකා බලන්න පුළුවන්කම තිබෙනවා. පරිවේෂණ සාක්ෂි වලින් මදක් පමණක් සලකා බලා විත්තිකරු වරදකරුද, නිවැරදි කරුද කියා තීරණයකට බහින්න පුළුවන් කමක් නැහැ. සියළුම සාක්ෂි එක්ව බලා තමන්ගේ තීරණයට එළඹිය යුතුව තිබෙනවා.....

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.....මූලික් සඳහන් කළ පරිදි විත්තිකරු ඔහුගේ වරද ඔප්පු කළ යුතු නොවේ. මූලික නිගමනයක් තිබෙනවා විත්තිකරු පූර්ණ වශයෙන් නිවැරදිකරුය කියා. 1973 අංක : 44 දරණ යුක්තිය පසිඳලීමේ ආඥා පනතේ 213 වන වගන්තිය යටතේ චූදිත යම්කිසි විදියකින් ඔහුගේ නිර්දෝෂත්වය පිළිබඳව සාක්ෂි නොදුන්නා නම්, ඔහු සාක්ෂි නොදීම පිළිබඳව ඔහුට විරුද්ධව නිගමනයකට එලඹෙන්න යුෂ්මතුන්ට පුළුවන්කම තිබෙනවා."

In English this would seem to mean the following :—

"If you can come to a conclusion on the circumstantial evidence that an offence has been committed (and) there is no evidence compatible with the guilt of the accused, there is a reasonable doubt about the guilt of the accused. The benefit of a reasonable doubt must be given to the accused. However, if an inference could be drawn beyond a reasonable doubt that the accused is guilty beyond reasonable doubt he can be found guilty, if there is evidence incompatible with his innocence. Further, when you consider circumstantial evidence you have to consider all the evidence together. You cannot decide whether the accused is guilty or not by considering only a part of the circumstantial

evidence. All the evidence must be considered together for you to arrive at a decision,..... ..... As I mentioned earlier, the accused need not prove his offence (guilt). There is a presumption that he is completely innocent. Under Section 213 of the Administration of Justice Law No. 44 of 1973, if the accused did not give evidence regarding his innocence, having regard to his failure to give evidence you can come to a decision against him."

Counsel for the appellant has submitted that this passage contains, in the first place, a misdirection in that the Judge told the jury that if there is no evidence compatible with the guilt of the accused there is a reasonable doubt about the guilt of the accused. We agree with Counsel, for when there is no evidence compatible with the guilt of the accused it is a situation of there being no case whatever against the accused and not a question of there being a reasonable doubt. However, the middle portion of the passage quoted from the charge puts the matter correctly and we cannot see that the passage complained of could have misled the jury.

It is further submitted that the learned trial Judge's direction under Section 213 of the Administration of Justice Law is totally incorrect.

Section 213 reads as follows:—

"213.(1) : If the Judge calls upon the accused for his defence, the Judge shall, before any evidence is called by the accused, inform him that he is entitled to give evidence in his own defence and shall tell him in ordinary language what the effect in law will be if he does not give evidence.

(2) If upon the Judge calling for the defence, the accused does not give evidence, it shall be open to the prosecution to comment upon the failure of the accused to give evidence and the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from such failure as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf."

On reference to the original English version of the charge, it would appear that what the Judge actually said was:

"Now, as I said earlier, the accused need not prove his innocence. There is a presumption of innocence in his favour. But, under the Administration of Justice Law No. 44 of 1973, Section 213(2), you gentlemen of the jury can

draw such inference from such failure of the accused to give evidence as you think proper when you consider whether the accused is guilty of the charge, or not."

What went to the jury, however, through the interpreter was calculated to suggest that it is the law that if the accused does not give evidence regarding his innocence, the jury *can come to a conclusion against the accused for not giving evidence.*

In a case such as the present one, we think that this statement of the effect of Section 213(2) would have caused the jury to think that under Section 213 of the Administration of Justice Law, the failure on the part of the accused person to give evidence is sufficient in itself to justify a conclusion that the accused is guilty. This is not the effect of Section 213(2) and this is certainly not what the Judge intended to say, judging from the English version.

We think it would be useful to make a few comments on Section 213 of the Administration of Justice Law. Section 213 (2) only alters the law as it stood before the enactment of the Administration of Justice Law by giving a right to the prosecution to comment upon the failure of the accused to give evidence and by making a positive declaration of what was always implied in our law, viz: that the jury *may* draw such inferences as appear proper from the failure of the accused to give evidence. It has not altered the law as to the situations in which inferences may properly be drawn upon such failure. It has not made it obligatory on the accused in every case, on being called upon for his defence, to give evidence, if he wished to avoid being convicted. Failure to testify on the part of the accused is not declared to be equivalent to an admission by the accused of the case against him. In a case such as this, the interpreter's rendering of what the trial Judge said could have seriously misled the jury.

We must not be taken as saying that on the evidence placed before the jury in this case the trial Judge would have been wrong if he told the jury that from the failure of the accused to give evidence they may draw such inferences as appear proper. But while those were in substance the words he used, what went to the jury in Sinhala was something quite different.

Counsel for the appellant has drawn our attention to another passage in the charge which reads:

"ඊළඟට චිත්තිකරු ගැන හිතා බලමු. චිත්තිකරුට චේතනාවක් තිබිල තිබෙනවා මියගිය තැනැත්තියව නැති කිරීමට."

This means:

"Then let us think about the accused. The accused has had an intention to kill the deceased woman."

The learned Judge's exact words in English were :

> " Then we come to the accused. Would the accused have had any motive to do away with the accused ? "

The Sinhala version, which is what went to the jury is a complete mistranslation. The interpreter had earlier been using the word: 'චේතනාව' to translate 'intention' sometimes alternating it with 'අදහස'. The words used by the interpreter would have left the jury with the impression that the Judge was giving them a direction to the effect that the accused had an intention to kill the deceased.

These two misdirections (for which the Judge himself cannot be blamed) we consider, warrant our setting aside the conviction of the appellant and the sentence passed on him. Learned Senior State Counsel did not ask for an application of the proviso to Section 350 (1) of the Administration of Justice Law. We think he was right in not so doing ; we are, however, of the opinion that there was material before the jury upon which the accused might reasonably have been convicted, but for the misdirections referred to earlier. We would accordingly order a new trial.

WALGAMPAYA, *J.*—

I agree.

RAJARATNAM, J—

I agree.

A new trial ordered.