MANNAR MANNAN
v.
THE REPUBLIC OF SRI LANKA

SUPREME COURT.
TAMBIAH, A. C. J., H. A. G. DE SILVA, J., G. P. S. DE SILVA, J.,
BANDARANAYAKE, J. AND JAMEEL, J.
S.C. APPEAL No. 27/87—C.A. No. 42/85—H.C. BATTICALOA 186/80.
NOVEMBER, 28 AND 29, 1989.
DECEMBER, 1 AND 4, 1989.

Criminal Law—Murder—Non direction amounting to misdirection—Burden of proof—Applicability of proviso to section 334 (1) of the Code of Criminal Procedure Act—Burden of proof of denial by accused—Reasonable doubt—Dock statement.

In a trial on a charge of murder two eye-witnesses testified to seeing the accused-appellant fire one shot with a gun at the deceased at night. The accused in a statement from the dock denied he was anywhere in the vicinity of the shooting. The trial judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased.

Held:

1. The enacting part of sub-section (1) of section 334 ' mandates ' the Court to allow the appeal where—

(*a*) the verdict is unreasonable or cannot be supported having regards to the evidence; or

(*b*) there is a wrong decision on any question of law ; or

(*c*) there is a miscarriage of justice on any ground.

The proviso clearly vests a discretion in the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the court is precluded from applying the proviso in any particular category of " wrong decision" or misdirection on questions of law as for instance, burden of proof.

There is no hard and fast rule that the proviso is inapplicable where there is a non direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (*a*) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (*b*) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it.

2. The appellant had been identified by the widow and daughter of the deceased. There was bright moonlight at the time and the appellant was known to them. Their story that the

appellant shot the deceased from very close range after which the gun was re-loaded is corroborated by the burning, blackening, tattooing and singeing on the deceased's body and the Police recovering a spent cartridge at the scene. Further the accused and Dominic his son-in-law had gone to the Police Station and the accused had handed over a gun which was found to be smelling of burnt gun powder. Dominic had a boundary dispute with a brother of the deceased. Dominic who was also an accused in the case had died prior to the trial.

3. Despite the non direction in regard to the appellant's dock statement a reasonable jury properly directed would inevitably and without doubt have returned the same verdict.

De Alwis v. The Queen 75 NLR 337, 339 distinguished.

Cases referred to:

(1) *De Alwis v. The Queen 75 NLR 337, 339.*
(2) *Lafeer v. The Queen 74 NLR 246.*
(3) *Dionis v. The King 52 NLR 547.*
(4) *Don Henry v. The Queen 71 NLR 559.*
(5) *King v. Fernando 48 NLR 249.*
(6) *Karunaratne v. The State 77 NLR 527.*
(7) *Punchi Banda v. The State 76 NLR 293.*
(8) *Piyadasa v. The Queen 72 NLR 434..*
(9) *Wyman v. The Queen 72 NLR 6.*
(10) *Yahonis v. The Queen 67 NLR 8.*
(11) *Martin Singho v. The Queen 69 CLW 21.*
(12) *Kandakutty v. The Queen 75 NLR 457.*
(13) *Murtagh and Kennedy 39 Cr. App. Rep. 72.*
(14) *Weerasena v. The Queen 73 NLR 300.*
(15) *Gunapala v. The State CA 102/87 C.A. Minutes of 27.8.89.*
(16) *R. v. Landy, White and Key 72 Cr. App. Rep. 237.*
(17) *Nicholas Webb Edwards 77 Cr. App. Rep. 5.*
(18) *Bronlie David Oliva 46 Cr. App. Rep. 241.*
(19) *Slinger 46 Cr. App. Rep. 244.*
(20) *Sparrow 46 Cr. App. Rep. 288.*
(21) *Stirland v. D.P.P. 1944 AC 315, 321, 1944 30 Cr. App. Rep. 40, 47.*
(22) *Rex v. Wijedasa Perera 52 NLR 29, 37.*
(23) *Queen v. Kularatne 71 NLR 529, 552.*
(24) *King v. Dharmasena 51 NLR 481 (P.C.)*

APPEAL from judgment of the Court of Appeal.

Ranjith Abeysuriuya, P.C. with *L. Wickrematunga* and *Missly de Silva* for accused-appellant.

Tilak Marapona, P.C. Additional Soliciter-General with *C. R. de Silva, Senior State Counsel* and *K. Indatissa , State Counsel* for Attorney-General.

Cur. adv. vult.

January 30, 1990.

TAMBIAH, A.C.J.

I agree with the judgment of G. P. S. de Silva, J., and the order made dismissing the appeal.

The appellant made a dock statement and his defence, in its essence, was one of denial of the commission of the murder, and it is not denied that the learned trial Judge had failed to give a direction to the jury that it is sufficient for the accused to raise a reasonable doubt as to the truth of the prosecution case. The leaned trial Judge has failed to direct the Jury on the impact of the dock statement on the prosecution evidence. It is settled law that the Jury must be directed that if the dock statement raised a reasonable doubt in their minds about the case for the prosecution, the accused is entitled to an acquittal (*See Queen v. Kularatne, (23)*).

It is the submission of Mr. Abeysuriya, P.C., that this non-direction was on a "fundamental point" which went to the "heart or the core of the case" and that the Court of Appeal should not have applied the proviso to s. 334 (1) of the Code of Criminal Procedure Act and dismissed the appeal. He also submitted that in such a situation, the Court of Appeal should have ordered a re-trial in terms of the proviso to s. 334 (2) of the Code.

Mr. Abeysuriya, P. C., primarily relied on a passage in the judgment of G. P. A. Silva, S.P.J., in *De Alwis v. The Queen (1)* :

> "There has been no case where despite a clear misdirection on the burden of proof this Court has thought it fit to apply the proviso and dismiss the appeal and affirm the verdict of the Jury."

As was correctly pointed out by Mr. Marapone, A. S. G., the attention of that Court was not drawn to **Lafeer's case** (2) where despite a misdirection and also a non-direction on the standard of proof, the proviso was applied and the appeal was dismissed.

Mr. Abeysuriya, P. C., also relied on the judgments in the cases of *Dionis v. The King (3)* and of *Don Henry v. The Queen (4)*. In the former case, the Court did consider the proviso but determined that it was not "an appropriate case for the application of the proviso" though there was a

misdirection on the burden of proof. No doubt, the nature of the misdirection would have been relevant in this determination. In the latter case, the Court observed that "it is quite unnecessary to say here whether every case of misdirection in respect of the burden of proof precludes an application of the proviso." There is nothing in either of these cases to suggest that the Court was laying down an absolute and hard and fast rule that the proviso is not applicable where the misdirection relates to the burden of proof.

The corresponding provision in the English Law which was s. 4 (1) of the Court of Criminal Appeal Act of 1907 was in terms identical with s .334 (1) of our Code. In the case of *Bronlie David Oliva (18)*, the trial Judge failed to tell the Jury that the burden was on the prosecution to prove the prisoner's guilt. The Court of Criminal Appeal quashed the conviction. *Oliva* was not followed in *Slinger's case (19)* where too the trial Judge omitted to say that the burden was always on the prosecution and that the prisoner never had to prove his innocence. The appeal was dismissed by the Court of Criminal Appeal as there was no substantial miscarriage of justice. In *Sparrow's case (20)* the summing-up was defective with regard to the burden of proof. The Court of Criminal Appeal considered both the cases, ***Oliva and* Slinger,** and said that in an appropriate case, the proviso to s. 4 (1) of the 1907 Act can be applied. It dismissed the appeal as there was no substantial miscarriage of justice. In *Nicholas Webb Edwards* (17) the trial Judge failed to direct the Jury on the standard of proof which the Court of Appeal considered as a "serious defect in the summing-up." The Court considered the cases of *Oliva, Slinger* and *Sparrow* and concluded that there is no absolute rule excluding the operation of the proviso to s. 2 (1) of the Criminal Appeal Act of 1968. Though the grounds for allowing the appeal are not the same as in s. 4 (1) of the 1907 Act, the proviso is identical except that the word "substantial" has been dropped. The Court proceeded to say, "From those cases (*Slinger & Sparrow*) it appears that in such a case, as in any other, the Court must consider the operation of the proviso in the light of the particular facts of the case. There are various formulations in the cases of the principle uderlying the proviso. We shall adopt the words of Viscount Simon, L. C., in *Stirland v. Director of Public Prosecutions* (21) and ask ourselves whether on the evidence a reasonable jury, properly directed on the standard of proof, would without doubt have convicted the appellant." The Court then reviewed the evidence and came to the view that the evidence against the appellant was "overwhelming" and that

despite the serious omission of the Judge, this was a case where beyond all doubt a reasonable jury, if properly directed, would on the evidence have convicted the appellant, and dismissed the appeal.

Thus it would seem from a consideration of the English cases that in considering whether the proviso should be applied or not where there is a nondirection is regard to the burden of proof, no absolute and hard and fast rule can be laid down ; the Court must consider the operation of the proviso in the light of the particular facts of the case. I see no reason why the test formulated in the English cases in deciding whether the proviso should be followed or not, should not be followed in this country. In fact, the test formulated by Viscount Simon L. C., in **Stirland's** case has been adopted in the cases of *King v. Dharmasena (24)* and *Rex v. Wijedasa Perera* (22).

The facts have been discussed by G. P. S. de Silva, J., and I agree with his conclusion that the case against the appellant was a "formidable" and "everwhelming" one. It is significant that it is not the contention of the appellant that the verdict of the Jury was "unreasonable" or that it "cannot be supported having regard to the evidence". So, I ask myself the question : "Whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant ?", and my answer is "Yes".

G. P. S. DE SILVA, J.

The appellant along with one Dominic was indicted on the charge of having committed the murder of K. Kanapathipillai on 27th October, 1977. Dominic had died prior to the trial and the case proceeded only against the appellant. After trial, the jury found the appellant guilty of murder by a divided verdict of 6 to 1. The appellant preferred an appeal against his conviction to the Court of Appeal. The Court of Appeal dismissed the appeal. The appellant obtained leave to appeal to this Court from the Court of Appeal on the question whether the proviso to section 334(1) of the Code of Criminal Procedure Act, No. 15 of 1979 is applicable where there is a non direction amounting to a misdirection in regard to the burden of proof. When the appeal came up for hearing before a Bench of three judges of this Court, His Lordship the Chief Justice directed in terms of Article 132 (3) (i) of the Constitution that this appeal be heard before a Bench of five Judges.

I shall deal with the facts more fully later, but for the present it would be sufficient to state that this was a case of shooting by night. The prosecution relied on two eye-witnesses who testified that they saw the appellant fire one shot with a gun at the deceased who immediately died of the injuries. On the other hand, the appellant made a statement from the dock and took up the position that he did not shoot the deceased and that he was not even in the immediate vicinity of the scene at the time of the shooting. Thus the essence of the appellant's defence was one of denial and further, that at the time of the shooting he was not at the scene.

In this state of the evidence, Mr. Abeysuriya for the appellant quite rightly submitted that it was sufficient for the appellant to have raised a reasonable doubt as to the truth of the case for the prosecution, namely that it was the appellant who shot and caused the death of the deceased; that there was no burden whatsoever on the appellant to prove his " denial " or to prove that he was elsewhere at the time of the shooting. Admittedly, the trial Judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased. This non direction, Mr. Abeysuriya argued, was on the burden of proof which is a matter, to use Counsel's own words, " that goes to the core of the case and the root of the ultimate decision of the jury ". Mr. Abeysuriya further contended that once it is shown that there is a non direction on so fundamental a matter as the burden of proof, it was not open to the Court of Appeal to have had recourse to the proviso to sub-section 1 of section 334 of the Code of Criminal Procedure Act, No. 15 of 1979, and to have dismissed the appeal. In other words, Counsel maintained that where there is non direction relating to the burden of proof in a charge to the jury, there is a bar to the Court of Appeal applying the proviso to section 334(1) of the Act. It was urged that the only matter which remains for the Court to consider in such a situation is whether a re-trial should be ordered in terms of the proviso to sub-section (2) of section 334 of the Act.

Section 334 (1) reads as follows :—

" 334(1). The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the

court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal :

Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred ".

Section 334 (2) reads as follows :—

" 334(2). Subject to the special provisions of this Code the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered :

Provided that the Court of Appeal may order a new trial if it is of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed "

As submitted by Mr. Marapone, Additional Soliciter-General, the enacting part of sub-section (1) of section 334 " mandates " the Court to allow the appeal where (*a*) the verdict is unreasonable or cannot be supported having regard to the evidence, or (*b*) there is a wrong decision on any question of law, or (*c*) there is a miscarriage of justice on any ground. We are here concerned only with ground (*b*) set out above. As regards the proviso, it is relevant to note, first, that it clearly vests a discretion in the Court and, secondly, that recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. Moreover, it seems clear that on a plain reading of the sub-section there is no warrant for the view that the Court is precluded from applying the proviso in any particular category of " wrong decision " or misdirection on question of law as, for instance, burden of proof.

Mr. Abeysuriya, however, strenuously contended before us that there is a " cursus curiae " in Sri Lanka which shows that when there is a misdirection on the burden of proof the proviso to section 334(1) is never applied and that the Court of Appeal was in error in applying the "proviso

" in the instant case. The principal authority upon which he relied was *De Alwis v. The Queen, (1)* and the passage in the judgment upon which he placed the utmost reliance reads as follows :—

> " There has been no case where despite a clear misdirection on the burden of proof this court has thought it fit to apply the proviso and dismiss the appeal and affirm the verdict of the jury and that is what it should be for a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned for the reason that the jury in addressing themselves to the task of returning a verdict in the case may set about it with a complete misconception as to the burden of proof ".

The statement that there has been no previous case where the proviso has been applied despite a clear misdirection on the burden of proof is incorrect, as pointed out by the Court of Appeal. Moreover, the judgment itself cites no authority for such a broad proposition. Further, a close reading of the judgment suggests that the court was influenced by "concessions " made by counsel for the Crown.

There was the important decision in *Lafeer v. Queen (2)* (not referred to in *De Alwis v. The Queen*, (supra) where the only matters which arose for consideration were, firstly, the standard of proof required of the prosecution and secondly, " the standard applicable for the proof of facts which might establish that the accused had acted under grave and sudden provocation ". It was held that there was a misdirection in regard to the first matter and a nondirection in regard to the second matter. In the concluding paragraph of the judgment, H. N. G. Fernando, C.J. stated : " **There was thus both misdirection and non-direction on matters concerning the standard of proof**. Nevertheless, we are of opinion **having regard to the cogent and uncontradicted evidence** that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal. " (The emphasis is mine) This, therefore, is a case where the Court of Criminal Appeal applied the proviso despite misdirection and nondirection in regard to the standard of proof.

The next case heavily relied on by Mr. Abeysuriya was *Dionis v. King, (3).* That too was a case where there was a clear misdirection on the burden of proof by the trial Judge. Counsel appearing for the Crown

invited the Court to dismiss the appeal, acting under the proviso to section 5(1) of the Court of Criminal Appeal Ordinance (which is in the same terms as the present proviso to section 334 (1)). Gunasekera, J. delivering the judgment of the Court of Criminal Appeal stated : " We have considered this submission but we are unable to agree with the view that **this is an appropriate case for the application of the proviso** notwithstanding that there has been a misdirection on such a fundamental point as the burden of proof ". (The emphasis is mine) As rightly submitted by Mr. Marapone, this decision is not an authority for the proposition that where there is a misdirection on the burden of proof, the court is precluded from applying the " proviso ". There is nothing in the judgment to suggest that the Court was laying down any such rule.

Another case cited by Mr. Abeysuriya in support of his contention is *Don Henry v. Queen* (4). Here too there was a misdirection on the burden of proof and Crown Counsel invited the court to apply the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. Pursuant to this invitation T. S. Fernando, J. expressed himself thus : "It is **unusual** to apply the proviso where the ground upheld is one of misdirection on the burden of proof..... it is quite unnecessary to say here whether every case of misdirection in respect of the burden of proof precludes an application of the proviso. It is sufficent to say that in our opinion we are unable to say that granting a misdirection, the prosecution has satisfied us that no substantial miscarriage of justice has actually occurred." The above dicta, in my view, tends to negative the proposition contended for by Mr. Abeysuriya, rather than to establish it.

Mr. Abeysuriya also referred us to the following cases : *King vs. Fernando (5) Karunaratne v. State (6) Punchi Banda v. State (7) Piyadasa v. The Queen (8) Wyman v. The Queen , (9) Yahonis Singho v. The Queen (10) Martin Singho v. The Queen (11) Kandakutty v. The Queen (12), Murtagh and Kennedy (13)* and *Weerasena v.* Queen *(14).* In all these cases, however, the court had no occasion to address its mind to the question of the applicability of the "Proviso" and hence they are of little assistance in deciding the point in issue in the appeal before us. The decision in *Gunapala v. The State (15)* has followed the case of *De Alwis v. The Queen* (supra). Moreover, *Lafeer v. Queen* (supra) has not been cited before the Court of Appeal.

In the subsequent written submissions Mr. Abeysuriya has drawn our attention to yet another case which he submits supports him, vis. *R. v. Landy, White and Key, (16).* However, I find that there was no clear ruling in this case that the proviso is inapplicable where there has been a "fundamental" misdirection. Dealing with the submission of Mr. Hazan (on behalf of Landy) "that where there has been a fundamental misdirection ..... the proviso should never be applied", Lawton L. J. stated : "we do not intend in this judgment to express any opinion as to when the proviso can be applied and when it cannot. We are concerned with the facts of this case and nothing more".

On the other hand Mr. Marapone cited the case of *Nicholas Webb Edwards (17)* which has considered some of the earlier English cases touching on the applicability of the "proviso". This was a case where the appellant was convicted of rape and the sole ground of appeal was that there was a failure to direct the jury on the standard of proof. Goff L. J., in the course of his judgment stated : "It is plain that the failure of the Judge to direct the jury on the standard of proof was a serious defect in the summing up ..... That being so, we have to consider whether we should exercise our powers under the proviso to section 2 (1) of the Criminal Appeal Act of 1968 to dismiss the appeal if we consider that no miscarriage of justice has actually occurred. ***We consider this question on the basis that there is no absolute rule excluding the operation of the proviso in a case of this kind. Counsel for the appellant did not submit that there was any such absolute rule. With this we agree".*** (The emphasis is mine) Having referred to the cases of *Oliva, (18), Slinger, (19)* and *Sparrow, (20)* the learned Judge proceeded to state, "From those cases it appears that in such a case, as in any other case, the court must consider the operation of the proviso **in the light of the particular facts of the case.** There are various formulations in the cases of the principle underlying the proviso. We shall, adopting the words of Viscount Simon L. C. in *Stirland v. D. P. P., (21)* ask ourselves whether on the evidence, a reasonable jury properly directed on the standard of proof, would without doubt have convicted the appellant". Thus it is seen that this judgment delivered in 1983 is an authority for the proposition that there is no absolute bar to the application of the "proviso" where there is a nondirection on the standard of proof. The case of *Oliva, (18)* was not followed.

It is to be noted that our Court of Criminal Appeal in *Rex v. Wijedasa Perera,* (22) has adopted as the proper test to determine whether the "proviso" should be applied, the following test formulated by Viscount Simon L. C. in *Stirland v. D. P. P., :* "A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict" (*1944 A.C. 315 at 321*).

On a consideration of the cases cited before us, I am of the view that there is no hard and fast rule that the "proviso" is inapplicable where there is a nondirection amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (*a*) the nature and extent of the nondirection amounting to a misdirecton on the burden of proof, (*b*) all facts and circumstances of the case, the quality of the evidence adduced, and the weight to be attached to it.

This brings me to a consideration of the evidence in the instant case. The case for the prosecution rested upon the testimony of Nesaratnam, the widow, and Wijayaluksamy, the daughter of the deceased. According to Nesaratnam, they had dinner at about 8.45 p.m. and had retired to bed at 9 p.m. Around mid-night she heard a voice calling out the name of her husband. She opened the door and came out to the compound. She identified the appellant who was armed with a gun. There was moonlight that night. She had asked "who it is ?" and the appellant had replied "is it you ?". Shortly thereafter the deceased who was also sleeping inside the house, had come up to the spot where she was standing. The deceased too had asked "who are you" whereupon the appellant had shot the deceased. The deceased had touched his chest and fallen on the ground. At the time the shot was fired, the deceased was about 6 feet away from the appellant. She and her daughter Wijayaluksamy started raising cries. The appellant had then breached the gun and had taken a cartridge from the belt around his waist and re-loaded the gun. Then she and the daughter had run into the house. She kew that the appellant had a licensed gun. Under cross-examinaton she stated that there was a land dispute between her brother and the son-in-law of the appellant, namely, Dominic. It was her position that Dominic was standing inside the compound, a little away from the appellant at the time of the shooting. she further stated that the deceased had not consumed liquor that day.

The daugher Wijayaluksamy was also an eye-witness to the shooting by the appellant. Her evidence provided strong corroboration of the evidence of her mother. Apart from the evidence of the two eye-witnesses who had made prompt statements to the Police, there was the medical evidence which corroborated the version of the prosecution witnesses that the shooting was at very close range. The post mortem report revealed that there was one entry wound with "burnig, blackening, tatooing and singeing". The doctor stated that the assailant would have been 5 to 6 feet away from the deceased and that one shot could have caused all the injuries.

The evidence of Police Sergeant Paramanandan was that the appellant along with Dominic had come to the police station at 1.20 a.m. on 28.10.77. The appellant had handed over a gun which was found to be smelling of burnt gun powder. The Inspector of Police had visited the scene in the early hours of the morning and had seen the body of the deceased lying in the front compound of his house. Near the body he found a spent cartridge which supports the evidence of the eye-witnesses that the appellant breached the gun. The Inspector further stated that it was a poya day and "at that time there was moonlight like sunlight".

The appellant made a statement from the dock. According to him, the deceased was a good neighbour and a friend of his whom he had always helped. There was a dispute between his son-in-law Dominic and a brother of Nesaratnam over a boundary fence. The essence of his position was that it was not he who shot the deceased, and at the time of the alleged shooting he was sleeping at home. Dominic had told him that the decassed who was drunk that night had called him into his compound and had an "argument" with him over the boundary dispute. Dominic had a gun with him as he had gone shooting "wild boar" that night. Dominic had further told the appellant that he (Dominic) got involved in a "scuffle" with the deceased and the deceased got shot accidentally.

On a consideration of the totality of the evidence it seems to me that the case against the appellant was a formidable one. The firing was at very close range and the incident took place within the compound of the deceased. There was bright moonlight that night. The appellant was a neighbour and well known to both Nesaratnam and the daughter. Thus there was ample opportunity for the two eye-witnesses to accurately and properly identify the assailant. According to the appellant, the deceased was on very cordial terms with him. Why then should the widow and the

daughter falsely implicate the appellant, if in truth he was not even at the scene ? There is nothing in the evidence to suggest a reason for the prosecution witnesses to falsely implicate the appellant. If the gun which Dominic had with him went off accidentally, why should the appellant be implicated and not Dominic ? On a scrutiny of the evidence, I am satisfied that there was an overwhelming case against the appellant. The appellant's story, as set out in the statement from the dock, is altogether unworthy of credit.

While the general directions in the summing up on the burden of proof and the standard of proof were adequate, yet, as rightly submitted by Mr. Abeysuriya, there was a total failure to direct the jury on the impact of the dock statement on the evidence led on behalf of the prosecution. Nevertheless, I am of the view that a reasonable jury properly directed would inevitably and without doubt have returned the same verdict. The judgment of the Court of Appeal is accordingly affirmed and the appeal is dismissed.

I wish to place on record my deep appreciation of the full assistance given by Mr. Abeysuriya and Mr. Marapone, the Additional Solicitor-General.

H. A. G. de SILVA, J.—I agree.

JAMEEL, J.—I agree.

BANDARANAYAKE, J.

I have had the advantage of reading the judgments of my Lord the Acting Chief Justice Tambiah, J. and my brother G. P. S. de Silva, J. and I agree with their conclusions. As the facts have been dealt with in the judgment of my brother de Silva, J. and the law and authorities cited have been exhaustively considered in both judgments suffice it to say that in the course of submissions learned President's Counsel for the accused-appellant sought to argue that wherever there has been a wrong decision on a question of law in the course of a criminal trial and that question of law related to the burden of proof, then, the proviso to section 334(1) of the Criminal Procedure Code, Act 15 of 1979 ought never to be applied. In effect Counsel sought to compartmentalise the area of law relating to " burden of proof ", as being an area so fundamental and vital to a proper and fair trial that an error made therein must have the effect of vitiating any verdict of conviction ; which conviction must then of necessity be struck

down regardless of whether a substantial miscarriage of justice has not actually occurred. I see nothing in the text of section 334(1) aforesaid or in the objects of the Procedure Code to warrant such a view. Nor am I able to agree with appellant's Counsel that upon the authorities cited by him there exists in Sri Lanka a cursus curiae supporting such a proposition.

Learned President's Counsel for the respondent has demonstrated that even in the United Kingdom the correctness of the decision in *B. D. Olivia's case (18)* which is a decision favouring the appellant's arguments, has been doubted in *Slinger's case* (19), *Sparrow's case* (20) and *Edward's case (17)* and not followed. The case of *Rex v. Landy, White and Key (16)* does not help the appellant. In my view the proposition of law as formulated on behalf of the appellant in this appeal is too sweeping in nature and if adopted might actually introduce an undesirable element of rigidity into the law besides resulting in mischief.

The judgment of the House of Lords in *Stirland v. D.P.P.* (21) has been received and adopted in Sri Lanka for many years, and the tests suggested there have influenced the development of the law in this area in this country. It provides for a flexible and sensible approach to the facts and circumstances of each case which must be the underlying criteria of decision and is consonant with the language of section 334(1) of the Criminal Procedure Code. I am satisfied that this is an appropriate case where the exception could be applied. For these reasons I dismiss this appeal.

Appeal dismissed.