[COURT OF CRIMINAL APPEAL]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Weeramantry, J.**

J. M. CHANDRADASA, Appellant, and THE QUEEN, Respondent

C. C. A. 2 OF 1969, WITH APPLICATION 3

S. C. 50/68—M. C. Tissamaharama, 57742

Charge of attempted murder—Defence of alibi—Failure of accused to give evidence—Judge's adverse comments thereon—Effect—Evidence Ordinance, s. 114 (f).

In a prosecution for attempted murder by shooting with a gun, the accused-appellant did not give evidence but he called as his witness his sister who gave evidence of an alibi. The trial Judge, in his summing-up, made adverse comments on the failure of the accused to enter the witness-box and give explanation himself. He stated that the accused " sat dumb in the dock but has chosen to call a sister of his to give evidence " and that he " has not had the manly courage to come to the witness-box and say that he was elsewhere ".

Held, that the natural effect of the Judge's adverse comments was to create antipathy towards the accused in the minds of the Jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. It is the duty of a trial Judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the Jury.

[1] *A. I. R. (1915) Cal. 103.* [2] *A. I. R. (1928) Mad. 246.*

APPEAL against a conviction at a trial before the Supreme Court.

N. Balakrishnan (assigned), for the accused-appellant.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

March 28, 1969. SAMERAWICKRAME, J.—

The appellant appeals from a conviction of the offence of the attempted murder of one Charles by shooting him with a gun.

The prosecution relied on the evidence of Charles alone for proof of the facts. Charles stated that on the day in question he slept, as usual, on a bed in the verandah of his house. At about 3·45 a.m. he was awakened by the barking of his dog. He says, he looked around and saw the accused firing at him. Charles sustained no injuries but there were pellet marks on the bed and on a sheet used by him. He also gave evidence of the fact that there had been some unpleasantness between the appellant and himself over an association between the appellant and a son of Charles. This evidence was led by the prosecution to prove motive on the part of the appellant for the shooting but it also shows that there was animosity on the part of Charles towards the appellant.

The appellant did not give evidence but he called as his witness his sister Jane Nona who gave evidence of an alibi.

In a Charge, which was otherwise quite unexceptionable, the learned presiding judge made the following comments on the failure of the appellant to give evidence. He said :—

> " Now in this case the accused has not chosen to give evidence. He is perfectly entitled to remain in the dock and say not a word. But in this case you will find that the accused has sat dumb in the dock but has chosen to call a sister of his to give evidence. "

He further said :—

> " You will have to ask, as I said, the question, the prisoner himself has had not the manly courage to come to the witness-box and say that he was elsewhere ; he got his sister to substantiate, what is called an alibi defence. "

Towards the end of his Charge, he finally said :—

> " That is even on the assumption that this evidence of the woman is true when she says that the accused was with her these ten days. Did not the accused have an opportunity to go out in the night and do the shooting and go back ? That is where, gentlemen, you will ask yourselves the question. How is it that the accused did not enter the witness-box and give an explanation himself ? Because if

there is a matter for the accused to explain, if the evidence is of such a nature as to give cause for the accused to submit an explanation, to explain away certain factors which would operate against him, in such circumstances if the accused does not choose to make an explanation, you are rightly entitled to infer that he withholds evidence ; because if that evidence was led by him that evidence would be adverse to his case. "

There was not, in this case, a failure to call any evidence at all ; the accused's sister gave evidence of an alibi. But, even if we assume that, as the appellant was a person who could have given the best evidence in regard to the fact that he was at his sister's house at the time of the shooting, his failure to testify was a matter for consideration, the point could have been made without stating that he ' sat dumb in the dock but has chosen to call a sister of his to give evidence ' or that he ' has not had the manly courage to come to the witness-box and say that he was elsewhere.' The natural effect of such animadversions is to create antipathy towards the accused in the minds of the jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. An impartial and adequate consideration of his case by the judge of fact is the right of every accused. It is for that reason that this Court has laid it down that it is the duty of a trial judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the jury. We are unable to say that the learned trial judge has fulfilled this duty.

The inference which the learned trial judge suggested might be drawn from the failure of the accused to explain was that the evidence was withheld because it would be adverse to his case. The evidence the learned judge referred to was the evidence of the accused himself. It is not an appropriate inference to suggest in regard to the accused's own evidence, but this may be a matter of form. What the learned judge had in mind may be expressed thus, namely, that it might be inferred that the accused did not give evidence because he could not truthfully have given evidence that he was at his sister's house at the time of the shooting. The drawing of such an inference is however precluded by the circumstances of the case. The accused has, through his sister, led evidence of an alibi and it would be inapt to infer that he kept out of the witness-box because the assertion of an alibi was inconsistent with the truth. It may be that the effect, if any, that could be given to his failure to testify, would be that a court should be less ready to consider that the evidence of alibi raised a reasonable doubt in regard to the prosecution case because the accused, who was the person who was in the best position to give evidence in regard to it, has failed to testify.

An inference that the evidence which a party is able to place before court, but chooses to withhold must be unfavourable to that party is one referred to at Section 114 (*f*) of the Evidence Ordinance. It is a presumption of fact. One should have thought that such a presumption would

not arise in a criminal case because of the fundamental rule that an accused is free to elect whether he will, or will not call evidence. It has been held that the presumption in s. 114 (*f*) is not one which may be drawn against an accused person because he is free to elect whether he will, or will not, call evidence, and an inference cannot be drawn against him by reason of his electing to take the one course rather than the other—vide *Hurry Churn Chuckerbutty and Another v. the Empress.*[1] It has been suggested that it is not a principle of evidence but a rule of logic that such an inference might be drawn. This rule was first set out in the dictum of Lord Ellenborough in *Rex v. Cochrane* :—

> " No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests. "

This dictum has been applied in cases of circumstantial evidence as well as where the evidence is direct. In many cases, however, while it has been held that in the circumstances the failure of an accused to offer evidence was a matter to be taken into account, the inference to be drawn or the effect to be given to that fact has been set out in terms other than that contained in the dictum of Ellenborough J. In a recent case, in *Seetin and others v. the Queen*[2], in which this Court by a majority decision held that the failure of an accused was in the circumstances a matter that the judge had correctly directed the jury to consider, T. S. Fernando J., who delivered the order of the Court considered the effect to be given to that fact and referred to a passage from Cross on Evidence which sets out the possible effect that may be given. Cross states :—

> " While a party's failure to testify is not to be treated as equivalent to an admission of the case against him, it may add considerable weight to the latter. "

Later, he states :—

> " As a general rule a party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. "

The inference that evidence which an accused might have called but has withheld was unfavourable to him is so incompatible with the fundamental rule that an accused is free to elect whether he will, or will not, call evidence that it may be necessary to consider, in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence

[1] *10 Calcutta 140.* [2] *(1965) 68 N. L. R. 316.*

when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation appears to have been better set out in the dictum of Abbott J. in *Rex v. Burdett*[1]:—

> "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

In the present case, as indicated earlier, the circumstances of the case precluded the inference that the evidence which the accused withheld would have been adverse to his case.

It has been said that though it is a matter for the judge's discretion whether he should comment on the fact that an accused has not given evidence, yet the very fact that the prosecution is not permitted to comment on that fact shows how careful a judge should be in making such a comment—vide *Waugh v. Rex.*[2] Where a direction in a Charge on this point may have had the effect of misleading the jury this Court has interfered—vide *King v. Duraisamy*[3], *Chelliah v. the Queen*[4] and *Jayasena v. The Queen.*[5] In the present case, the terms in which the direction of the learned judge on this point were made and the faulty formulation of the inference that might be drawn from the failure of the accused to testify may well have prevented the jury from giving due consideration to the evidence of alibi led by the defence and from giving its proper effect to it. We are, therefore, of the view that this conviction cannot be allowed to stand. It appears to us, however, that there was, in this case, evidence upon which, a jury properly directed, might reasonably have convicted. We accordingly set aside the conviction and sentence passed on the appellant and direct a new trial upon the same indictment.

Case sent back for a new trial.