1977 *Present :* **Thamotheram, J., Ismail, J. and Gunasekera, J.**

W. A. SUGATHADASA, Accused-Appellant *and* THE REPUBLIC OF SRI LANKA

S. C. 83/76—Walasmulla—473897—H. C. 344/73

Evidence Ordinance—Failure of the accused to give evidence—Statement from the Dock—Misdirection by the Trial Judge—Administration of Justice Law, S. 213 (2).

The accused appellant who was charged with murder did not give evidence in his own defence from the witness box. Instead the accused made an unsworn statement from the dock. The trial judge in his charge to the jury stated that "it is your duty to consider what the accused has stated in that statement from the dock and consider whether you can believe what the accused stated in that unsworn statement. If you believe what the accused said in his statement from the dock, then you have no alternative but to acquit the accused, but you will bear in mind the submissions made by the State Counsel in his address to you on that matter which was that in considering whether you can believe what the accused said from the dock when he had a right to give evidence he chose not to give evidence from the witness box on affirmation and the State Counsel asked you to consider why it is that the accused when he had such a right to give evidence chose not to give evidence but chose to make an unsworn statement".

Held, (1) Under S. 213 (2) of the Administration of Justice Law the prosecution may 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. Before the A.J.L. it was settled law that an unsworn statement from the dock was evidence in the case. It was of course not of the same cogency as evidence given from the witness box as the accused was not under an oath or affirmation and as he was not subject to cross-examination. But it has been pointed out that the A.J.L. has not shown any intention to abolish the right of the accused to make an unsworn statement from the dock. Hence there has been no change in the law relating to a statement from the dock.

(ii) The word "Evidence" in S. 213 (2) must be read as including a statement from the dock. There was therefore no failure to give evidence and it was wrong for the State Counsel to have commented on this basis. It was wrong for the judge to have left it open to the jury to draw an inference against the accused for his failure to get into the witness box and to give evidence on oath or affirmation.

Appeal against conviction.

Colvin R. de Silva with *Mrs. Manouri Muttetuwegama* and *S. J. Gunasekera* for the Accused—Appellant.

D. P. S. Gunasekera Senior State Counsel for the Attorney-General.

Cur. adv. vult.

March 1, 1977. THAMOTHERAM, J.—

There were originally two accused in the case. The 2nd accused died before the date of trial.

After all the evidence for the prosecution was led counsel for the State moved to amend the indictment so as to make it possible for the jury to convict the 1st accused on the basis of common intention as well. The defence counsel did not object.

There were three people injured by the shooting. They were W. A. Julius, G. L. A. Jamis and a little child who was too young to give evidence. They were shot at, little after 8.15 p.m. on 21.8.71. At that time, the only light was the light from a bottle lamp made out of a Marmite bottle. The light did not spread beyond the verandah. Neither Julius nor Jamis were able to identify the person or persons who were responsible for the one act of shooting in the case— no doubt due to insufficient light.

> The witness Julius said—" Then I suddenly heard the report of a gun. I did not see as to who fired that shot. I do not know from which direction the gun shot came. Until the time I was taken to hospital I did not know as to who fired this shot. No one told me that. Karunadasa did not tell me that he saw the person who fired the shot. Nor did David tell me who fired the shot before I was taken to the hospital.
>
> I heard only one gun shot that night. At the time I got into the car to go to hospital I did not know as to who had fired this shot ..... I did not hear either David or Karunadasa saying " Somebody is running away " at the time I was in the verandah. To my knowledge this accused has no displeasure with me.....Karunadasa, David and my wife Somawathie came to see me in hospital. Later I came to know who fired this shot. The following day James told me." This witness has told the Magistrate " Even up to the time I gave evidence in the Magistrate's court neither my father-in law nor my brother-in-law nor any one else had told me as to who had fired the shot. I did not come to know either from Karunadasa or David as to who had fired this shot. " This passage was marked as a contradiction by the defence.
>
> This witness said further at the trial—" When I was in hospital I came to know from what I was told by others as to who had shot me. I did not ask Karunadasa whether he saw the person who shot me nor did he tell me at any time the person who shot me. David also came to see me when I was in hospital. David did not tell me the person who shot me. I wanted to know as to who had shot me, as I was told I came to know that but these two people did not tell me."

The other injured person who gave evidence was Aratchige Jamis—He said—

> " I made my statement to the police on the day after the shooting. I made that statement at about 2 O'Clock on the following day. Up to the time I made the statement I had not met either Karunadasa or David in hospital ..... The doctor asked me whether I saw the person who shot me and I told him that I did not see. I did not ask David at any time

as to whether he saw me being shot. David told me how he came to know the person who shot me."

This witness was contradicted with a statement he made to the Magistrate where he said—

"I did not ask David nor did he tell me how he came to know the accused had fired the shot."

The evidence of these two witnesses—the persons who were actually injured show, not only, that they did not see who fired but that atleast even the next day they did not know who had fired. We must now examine the claim of the two witnesses, David and Karunadasa, that they identified these two accused running away.

David is the father of Karunadasa. These are the only witnesses who claimed to have seen the 1st accused run with a gun in hand and the 2nd accused with some weapon, soon after the shooting. Both said that they had flashed the electric torches each had and gave chase to them until they jumped over a fence into the compound in which the 1st accused lived. The 1st accused and the injured were living on adjoining lands. Both these witnesses returned to the house where the injured were shot at. All the evidence in the case show that the others in the house that night did not know who were responsible for the shooting.

David said that when he came back his wife asked him who ran and he gave the names of the accused. He was contradicted with his evidence given before the Magistrate. He said there—

"Having come home I did not inform the two injured or any one else as to what I saw." (D5) This witness said further at the trial—"I did not at any time shout out from the compound that Gamini and Sugathadasa are running. At no time did Karunadasa shout out saying that Gamini and Sugathadasa are running. I went to see Julius when he was in hospital. I did not tell Julius at any time that I saw these two nor did I tell Jamis."

Karunadasa said in evidence that when he returned having chased the accused he did not tell his mother the fact that he saw the accused because he was excited.

It is therefore clear that these witnesses who claimed to have seen these accused running did not immediately disclose the fact to those who were in the house.

The next question is, did they tell the police ? Strangely the complaint of Karunadasa made that night was not produced. We only know that, on Karunadasa's statement the Inspector of Police went to the scene of the shooting.

The Inspector of Police said in his evidence that on a complaint made by M. A. Karunadasa he went for inquiry to Pallattara. He went to the place of the alleged murder—*Thereafter* he ordered police sgt. Ratnayake to go in search of the accused. In consequence of an order made by him the accused was produced before him. We do not know what Karunadasa told the police. We cannot infer—even if it were legally permitted, that the police went to the house of the 1st accused because Karunadasa had mentioned his name. Karunadasa is not corroborated by his statement to the police in any way.

Indeed we scan the whole of the material available for the prosecution, but find no support at all for their evidence in any other evidence—oral or circumstancial. It is in this situation that we must examine what was claimed to be motive for the crime.

The evidence of motive was given by the witness Aratchige Karunadasa. According to him two days before the shooting Sugathadasa struck him with a club when he was going on the road. He did not know why the accused should have struck him as he was quite friendly with him. He made a statement to the Beliatta Police Station. Dr. de Silva quite rightly pointed out that this really constituted a motive for the witness to implicate the accused. There was no evidence that the accused had aimed at the witness Karunadasa who happened to be present at the scene of shooting. We have to hold that the prosecution had failed to establish motive.

Dr. de Silva made three other points — he said that the learned Judge's reference to "proof beyond reasonable doubt" at the commencement of the trial did not bring out the difference between proving beyond reasonable doubt and proving on a balance of probability. He further urged that the learned judge charged on the basis that the accused's statement from the dock could found a defence of alibi. This was prejudicial to the accused as his statement was a mere denial. We need not consider these grounds as the third ground is fatal to the conviction especially in view of the slender evidence on which the prosecution based its case.

The judge said in his charge as follows :—

> 'Thereafter you will remember, the accused was informed of his right to give evidence. The accused is not bound to give evidence because there is no requirement in our law the accused must establish his innocence, but the accused has a right to give evidence and in this case the accused chose not to give evidence. The accused instead made an unsworn statement from the dock. You will remember what

the accused stated from the dock in that unsworn statement. It was a short statement. The accused stated " I know nothing about this matter. I was sleeping at home. The Police went to my house and brought me. I am not a man who does things of this nature. I have six children. This is all. "

Now you are entitled to take into consideration in arriving at your verdict the fact that when the accused had a right to give evidence he chose not to exercise that right bearing in mind however that the burden of proving the charge lies on the prosecution whether the accused gives evidence or not.

As you know the accused made this unsworn statement from the dock and it is your duty to consider what the accused has stated in that statement from the dock and consider whether you can believe what the accused stated in that unsworn statement. If you believe what the accused said in his statement from the dock, then you have no alternative but to acquit the accused, but you will bear in mind the submissions made by the State counsel in his address to you on that matter which was that in considering whether you can believe what the accused said from the dock when he had a right to give evidence he chose not to give evidence from the witness box on affirmation and the State counsel asked you to consider why it is that the accused when he had such a right to give evidence chose not to give evidence but chose to make an unsworn statement. The question as to whether you believe what the accused said in his unsworn statement from the dock is entirely a matter for you to decide. '

Under section 213(2) of the Administration of Justice Law the prosecution may comment upon the failure of the accused to give evidence and the jury in determing whether the accused is guilty of the offence charged may draw such inferences from such failure as appear proper.

Before the A. J. L. it was settled law that an unsworn statement from the dock was evidence in the case. It was not of the same cogency as evidence given from the witness box as the accused was not under an oath or affirmation and as he was not subject to cross-examination.

Tennekoon CJ has pointed out in a recent case—vide *Republic of Sri Lanka Vs. D. K. Lionel* SC 165/75 H.C. Galle 42/74 M.C. Galle 678/72—that the A. J. L. had not shown any intention to abolish the right of an accused to make an unsworn statement from the dock. We have to go on the basis that there has been no change in the law relating to a statement from the dock.

The word 'Evidence' in section 213 (2) must therefore be read as including a statement from the dock. There was therefore no failure to give evidence and it was wrong for the State counsel to have commented on that basis. It was wrong for the judge to have left it open to the jury to draw an inference against the accused for his failure to get into the witness box and giving his evidence on oath or affirmation.

In the circumstances of this case we think it was fatal to the conviction for the judge to have directed the jury as he did.

We quash the conviction and sentence passed in this case and acquit the accused.

ISMAIL J.—I agree.

GUNASEKERA J.—I agree.

Appeal allowed.