[COURT OF CRIMINAL APPEAL]

1972 *Present:* G. P. A. Silva (President), Deheragoda, J., and Pathirana, J.

M. A. S. DE ALWIS, Appellant, *and* THE QUEEN, Respondent

C. C. A. 119 OF 1971, WITH APPLICATION 164

S. C. 271/71—M. C. Gampaha, 26072/B

Summing-up—Burden of proof—Misdirection thereon—Inapplicability then of proviso to s. 5 (1) of Court of Criminal Appeal Ordinance.

The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance permitting the dismissal of an appeal on the ground that no miscarriage of justice has actually occurred even though the point raised on behalf of the appellant might be decided in his favour is not applicable to a case where there has been a clear misdirection by the trial Judge on the burden of proof.

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

Raja Gunaratne (assigned), for the accused-appellant.

Ian Wikramanayake, Senior Crown Counsel, with *D. Halangoda*, Crown Counsel, for the Crown.

March 7, 1972. G. P. A. SILVA, S.P.J.—

The accused-appellant in this case was indicted on two counts, namely, of the murder of Madurapperuma Arachchige Karunasena de Alwis and of the attempted murder of Madurapperuma Arachchige Peiris de Alwis.

The incident in which the offences were committed is said to have taken place at about mid-night on the day in question. The principal witness for the prosecution was Peiris de Alwis who was living in the same house as the deceased and who also had received in the course of the same transaction no less than 15 injuries with a sword. One fact which emerges from the injuries on Peiris de Alwis is that, whoever the assailant was, Alwis would have been able to identify him. There were six witnesses called for the prosecution and five for the defence. The deceased and the accused would appear to be close relations, living not far from each other, and on the prosecution evidence no motive was established as to why the accused should have cut the deceased and the other man that day, although an effort was made by the defence to show some sort of motive for the false implication of the accused by the prosecution witnesses. The deceased himself had a number of injuries caused, according to the Doctor, either by one weapon or two of the same kind but the Doctor was not certain whether one or two weapons were used although the injuries were consistent with either one or two weapons having been used.

Several complaints were made by counsel for the appellant in regard to the summing-up of the learned Commissioner. It was generally submitted that the summing-up would have left a lay jury so confused that they would not have been aware when they proceeded to decide this case as to what exactly was meant by " the burden of proof ". The most offending passages which have been referred to by counsel are found at pages 289, 291 and 292. It would appear according to the evidence that the question of establishing any circumstances of mitigation did not arise in this case. The accused's position was a total denial of his association with these offences, while the prosecution evidence was that it was this accused and no one else who inflicted the injuries on the deceased and the other injured man. In the circumstances, there would be no purpose in a trial Judge directing a jury on the burden that lies on an accused to establish any circumstances which would mitigate the offence from murder to a lesser offence. It would appear however that the learned trial Judge has devoted a considerable portion of the summing up to set out the defences that are available to an accused charged with murder and the extent of the burden, namely, that the accused must discharge that burden by a balance of probability while the prosecution had to prove the case beyond reasonable doubt.

Having referred to the burden that lies on an accused person to establish any circumstances in mitigation at page 290 he said :—

> " With regard to lesser offences the burden of proof falls on the accused. He has to lead evidence which falls under anyone of those exceptions that I have enumerated to you. In this case, there is no such defence taken, therefore anyone of those exceptions may not be relevant as far as the evidence goes. "

If the learned trial Judge had stopped there and proceeded to give the correct directions only in relation to the case before them one may even have excused what he stated earlier on the ground that he had inadvertently or otherwise given the jury certain directions on the proof of criminal cases in general, but at the end of it asked them to dismiss from their minds what he said because they have no relevancy in the instant case. But unfortunately he did not stop there, he proceeded again to address the following directions which would be applicable to a case where certain defences arose and the burden would be upon the accused to establish them. I would refer to the following directions :—

> " Now what is proof beyond reasonable doubt ? That is the degree of proof which the prosecution has to discharge. A reasonable doubt is not a fanciful doubt. That is to say, sometimes a person may have doubts verging on hallucinations or of some fantasia or of some extreme form like a doubting Thomas. The standard is how you act in the ordinary course of your business over your own affairs or general affairs relating to society. That is the degree of proof that is required when the prosecution has to prove something, but at the same time you do not go to the other extreme requiring the prosecution to prove to

mathematical accuracy. That is impossible to be achieved. You have to take the middle path of how a reasonable man would behave, or as a prudent man in society would behave. It is only after you accept that there is no reasonable doubt in your minds, you will accept a piece of evidence which you are considering. It is where you find that you have to consider the case from the angle of the accused where the burden shifts to the accused, till then no burden shifts to the accused. He is not obliged to make any statement or give evidence. The fact that he does not give evidence should not prejudice him, and the degree of proof where he is concerned is not proof beyond reasonable doubt. He has only to show that what he says is probable. The burden on the accused is not so heavy once the prosecution has discharged its burden, and once it shifts to the accused he has only merely to show that a certain fact is probable or not, in other words, to create doubts in your minds. If he succeeds in that, certainly gentlemen you must give that benefit to the accused. So, therefore I would like to warn you not to judge with the same degree of strictness that you judge the prosecution in the case of the accused. That is a basic principle consistent with that basic principle of the presumption of innocence. So, therefore gentlemen you have to consider the facts of the case from such a legal background. Let us take the facts of the case."

When one considers these directions it is impossible to say that the jury in considering the present case may not have thought at some stage that there was a burden on the accused to discharge by establishing some circumstances. It is unusual for a trial Judge to give a number of directions to the jury which have no bearing on the case under consideration. Unfortunately the learned Commissioner has fallen into that error in this case by giving a number of directions which have no relevancy to the case as his own statement which we have quoted above would show. The most offending passage of what has been quoted would appear to be:—

> "The burden on the accused is not so heavy once the prosecution has discharged its burden, and once it shifts to the accused he has only merely to show that a certain fact is probable or not, in other words, to create doubts in your minds."

We feel that this direction is altogether uncalled for on the facts of this case. Learned Senior Crown Counsel has drawn our attention to a number of decisions of this Court, where despite a non-direction or misdirection in regard to a matter of law this Court has applied the proviso and not interfered with the verdict of the jury. He has cited also the cases reported in 48 N. L. R. page 259, 52 N. L. R. page 547 and 71 N. L. R. page 559 in which there were clear and unequivocal misdirections on the burden of proof. In all these cases it would appear that this Court has set aside the verdict of the jury. 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.

Learned Senior Crown Counsel also concedes that after these offending directions that were referred to, at no stage has the learned Commissioner told the jury in clear and unambiguous terms that there is no burden on the accused to establish his innocence. It is quite correct, as Senior Crown Counsel points out, that the learned Commissioner has given a number of directions which might have taken away the effect of the misdirections which he gave earlier but his admitted failure to give the direction that we have just referred to leaves this Court with the feeling that the jury may well have been confused in regard to the burden of proof and that they may have decided the case without knowing how they should approach a criminal case of this nature. In the circumstances, the safe course appears to us to be to set aside the verdict of the jury and, in view of the fact that there was strong evidence before the jury upon which the accused might reasonably have been convicted, we order a new trial.

Case sent back for a new trial.