[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Hearne, Keuneman, and de Kretser JJ.**

THE KING *v.* DURAISAMY.

3—M. C. Jaffna, 17,071.

Burden of proof—Comment by Judge on failure of accused to give evidence—Evidence implicating accused—Reasonable doubt—Accused entitled to the benefit of it whether he gave evidence or not—Failure of Judge to point it out to Jury—Misdirection.

Where, in the course of the summing up, the Judge told the Jury that "on evidence being adduced, which implicated the accused, the fact that he had not given evidence entitled them to draw an inference against him "without explaining to them the nature of the inference; and where the Judge also told them "that in deciding the Crown case, whether it had been established beyond reasonable doubt, they were to take notice that the prisoner had not given evidence at all" without pointing out to them that the existence of a reasonable doubt enured to the benefit of the accused, whether he gave evidence or not,—

Held, that the principle, that the standard of proof required in criminal cases remains constant, irrespective of the fact that the accused has not given evidence, may not have been properly appreciated by the Jury and that there had been a misdirection with regard to the burden of proof.

APPEAL from a conviction by a Judge and Jury before the third Northern Circuit.

A. H. C. de Silva (with him *P. Ragupathy*), for the appellant.—The adverse comments made by the presiding Judge on the fact that the accused had not given evidence were improper. Before any adverse comment can be made under section 296 of the Criminal Procedure Code it should be made clear to the Jury that the prosecution has made out a case. See the *dictum* of Lord Ellenborough cited in *R. v. Seeder de Silva*[1]. Deficiencies in the case for the prosecution cannot be supplemented by the failure of the accused to give evidence. The summing-up should make it clear that the onus is on the prosecution—*R. v. Amelia Hayton*[2]; *R. v. Heen Banda*[3].

E. H. T. Gunasekera, C.C., for the Crown.—There was no misdirection. The presiding Judge was entited to comment on the failure of the accused to give evidence on his own behalf. The nature and degree of such comment must rest entirely in the discretion of the Judge—*Ex parte Kops*[4]; *Reg. v. Rhodes*[5]; *R. v. Voisin*[6]. The failure of accused to give evidence may even approximate to corroboration—*Jane Blatherwick*[7].

The summing-up was unexceptionable. It could not have given any impression to the Jury that the burden of proof was on the accused.

A. H. C. de Silva replied.

Cur. adv. vult.

[1] *(1940) 41 N. L. R. 337 at 344.*
[2] *18 Cr. App. R. 169.*
[3] *(1941) 42 N. L. R. 538.*
[4] *(1894) A.C. 650.*
[5] *L. R. (1899) 1 Q.B. 77 at 83.*
[6] *13 Cr. App. R. 89.*
[7] *6 Cr. App. R. 281.*

March 31, 1942. HEARNE J.—

This is an appeal on questions of law.

The case for the prosecution was that the accused went to the house of the deceased about 11 o'clock one night and assaulted him with a stick while he was lying down in the hall of his house. One of the injuries sustained by the deceased, who died about three weeks later, was an extensive fracture of the skull 6 in. in length. The accused was found guilty of murder.

The only point of substance argued before us is in regard to that portion of the summing-up in which the presiding Judge dealt with the fact that the accused had not given evidence.

"I have told you", he said, "that it is not for the prisoner to prove his innocence. But in deciding the Crown case, whether it has been established beyond reasonable doubt, you will take notice of the fact that the prisoner has not given evidence at all". The learned Judge pointed out to the Jury that the prisoner was entitled to go into the witness box and asked "What is the answer?" adding "There is no answer by the prisoner . . . . ." He referred to the evidence of Marimuttu, called by the defence, and pointed out that, while it touched the evidence of Selliah, it did not challenge the evidence of Klyn, an alleged eye-witness. He then went on "So, where there is evidence adduced by the Crown which implicates the prisoner and the prisoner does not give evidence, you are entitled to draw an inference against him from that fact". Once again he reminded the Jury that it was not "for the prisoner to prove his innocence", and added "no doubt, however, you will take into account that the prisoner has not given evidence". "In fact", he concluded. "Mr. Ragupathy has taken considerable time in adducing evidence that it was somebody else who did it, but he did not call the prisoner to say that he did not".

It was argued that when the Judge said "there is no answer by the prisoner . . . ." he should have pointed out that the accused had pleaded not guilty. This, we think, would have been superfluous. The Jury were well aware that the accused had pleaded not guilty and what was indicated to them was that he had not attempted to answer, by sworn evidence which he was entitled to give, the facts which the prosecution had sought to prove against him.

But the Judge did more than merely comment on the absence of the accused from the witness box. He told the Jury that, on evidence being adduced which implicated the accused, the fact that he had not given evidence entitled them to draw an inference against him. He did not explain to them the nature of the inference they could draw. He also told them that "in deciding the Crown case, whether it has been established beyond reasonable doubt", they were to take notice that "the prisoner has not given evidence at all". He did not point out that the existence of a reasonable doubt enured to the benefit of the accused whether he gave evidence or not.

We have already said that it was well within the discretion of the Judge to comment on the fact that the accused had not attempted, by giving evidence himself, to meet or "answer" the case against him

that had been built up by the prosecution. It seems to us, however, that in the absence of an explanation of the nature of the inference the Jury were "entitled to draw" against the accused as he had not given evidence, they may have felt entitled to draw the inference that the prosecution evidence was true : while the other passage in the summing-up to which reference has been made suggests to us, and may have suggested to the Jury, that if a reasonable doubt existed in regard to the credibility of the prosecution case it might be resolved against the accused by reason of the fact that he had not given evidence. At the least we feel that the principle that the standard of proof required in criminal cases remains constant, irrespective of the fact that the accused has not given evidence, may not have been fully appreciated by the Jury. It is true that the learned Judge gave a clear direction of law when he said "it is not for the prisoner to prove his innocence" but we think that this direction was probably obscured by the other directions he gave.

In our opinion the appeal should be allowed and a fresh trial ordered before another Jury.

Appeal allowed.