[COURT OF CRIMINAL APPEAL]

1968 *Present:* **H. N. G. Fernando, C.J. (President), Weeramantry, J. and de Kretser, J.**

M. H. M. LAFEER, Appellant, *and* THE QUEEN, Respondent

C. C. A. 72 OF 1968, WITH APPLICATION 106

S. C. 159/68—M. C. Colombo, 47972/A

Trial before Supreme Court—Summing-up—Matters concerning standard of proof—Misdirection—Non-direction.

Where, at a trial before the Supreme Court, the Judge directed the jury that the burden was on the prosecution to prove its case to the "satisfaction" of the jury—

Held, that the direction should be regarded as inadequate.

Held further, that, in regard to the proof of mitigating circumstances disclosed in the case, it was the duty of the Judge to have explained to the jury the standard of proof based on balance of probabilities.

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

Colvin R. de Silva, with *M. L. de Silva* and *I. S. de Silva*, for the accused-appellant.

N. Tittawella, Crown Counsel, for the Crown.

Cur. adv. vult.

[1] *(1966) 52 D. L. R., Vol. 2, p. 506.*

December 12, 1968. H. N. G. FERNANDO, C.J.—

The appellant in this case was charged with the attempted murder of one Grero, and was convicted of the offence of causing grievous hurt.

The only matters which call for consideration in appeal are the directions of the learned trial Judge regarding the standard of proof required of the prosecution. The directions were :

> " .....it has always been said, rightly, that in every criminal case the onus is on the prosecution to prove the case convincingly to the satisfaction of the jury."
>
> "It is not incumbent on the accused to give evidence ; but you will naturally ask the question : 'it is suggested that there was provocation, but the accused has not told us what this was from his own lips.' That would not obviate the necessity for you to consider whether in the prosecution case itself there was provocation, because as I said, there is no obligation on the part of the accused to give evidence because the law says the accused is presumed to be innocent, and, therefore, the duty is cast on the prosecution to prove its case to your satisfaction."

We note firstly that the burden lying on the prosecution was in these directions described as the onus " to prove the case convincingly to the satisfaction of the jury " and " to prove its case to your satisfaction ".

Directions couched in similar language were favoured by Lord Goddard, C.J., in the case of *Summers*[1], but the same eminent Judge subsequently acknowledged in *Hepworth v. Fearnley*[2] that "one would be on safe ground if one said in a criminal case to a jury : 'you must be satisfied beyond reasonable doubt'. "

This Court has never approved as adequate a direction that the burden is to "satisfy" the jury that an accused person is guilty, and rarely or ever have trial Judges in this country been content with such a direction. The reason why such a direction must be regarded as inadequate is well stated in *Gaunt*[3]. It was there pointed out that "satisfied" can mean one of two things :—

> " satisfied because we think the probabilities are that the accused is guilty ",
>
> *or*
>
> " satisfied in the sense of having no doubt at all.....or of being quite sure that the accused is guilty ".

The former is the proper explanation of the standard of proof lying upon an accused person when the onus of proving facts which might set up a defence in law lies on him. Because the latter is a different and higher standard of proof, it is essential that the Judge should direct the jury that the second is the true meaning of " satisfy " when the onus is on the prosecution.

[1] *36 C. A. R. 14.* [2] *(1955) 2 Q. B. 600.*
[3] *1964, Cr. Law Review 781.*

We note also that the second direction quoted above from the summing-up in the instant case contains no reference to the standard applicable for the proof of facts which might establish that the accused had acted under grave and sudden provocation. If, as the learned Judge himself appears to have thought, it was open to the jury to find that the prosecution evidence did disclose the existence of such facts, then it was his duty to explain the standard (of the balance of probabilities) which is applicable in relation to the proof of mitigating circumstances.

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.

Appeal dismissed.