

[IN THE PRIVY COUNCIL.]

1936 Present : Lord Chancellor (Viscount Hailsham), Lord Maugham,  
and Sir Sidney Rowlatt.

KING *v.* ATTYGALLE *et al.*

In the Matter of a Petition for Special Leave to appeal.

6—*P. C. Kandy, 44,762.*

*Privy Council—Special leave to appeal from conviction—Misdirection of law not a ground for leave—Deprivation of substance of fair trial and protection of law must be shown—Burden of proof—Evidence Ordinance, No. 14 of 1895, s. 106.*

Misdirection with regard to the law does not afford sufficient ground of itself for granting special leave to appeal to the Privy Council from a conviction.

There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law or which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in the future.

It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed.

PETITION for special leave to appeal to the Privy Council from a conviction after trial before a Judge and Jury at the Midland Assize at Kandy\*.

*Hallet, K.C., L. M. de Silva, K.C. (with S. Chapman), for petitioners.*

*Kenelm Preedy, for the Crown.*

March 26, 1936. Delivered by the LORD CHANCELLOR.—

This is a case which has given their Lordships considerable trouble. The prosecution was against the first accused for performing an illegal operation, and against the second accused for abetting him in that crime.

At the trial the learned Judge gave a direction to the jury, to which exception has been taken by Mr. de Silva in a very clear and helpful argument, and in which the learned Judge explained to the jury his view as to the burden of proof based upon his construction of section 106 of Ordinance No. 14 of 1895 in the Ceylon Code. That section enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. With reference to that section the learned Judge told the jury that :

“There is a section which is really the basis of circumstantial evidence so far as it occurs in Ceylon; that section says when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him; Miss Maye”—that is the person upon whom the operation was alleged to have been performed—“was unconscious and what took place in that room that three-quarters of an hour that she was under chloroform is a fact specially within the knowledge of these two accused who were there. The burden of proving that fact, the law says is upon him, namely, that no criminal operation took place but what took place was this and this speculum examination.”

\* 37 N. L. R. 60.

Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge.

The summing-up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there.

If their Lordships thought that the refusal of leave to appeal in this case could be construed as an acceptance of that doctrine, they would be very slow to reject the petition which has been brought before them. But, in fact, the circumstances of the case have been explained to their Lordships, and they are satisfied that on the facts that were explained here, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.

It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Lord Sumner in a well known passage in the case of *Ibrahim v. The King*<sup>1</sup> pointed out that "misdirection as such, even irregularity as such, will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future".

The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva that the judgment in the recent case of *Lawrence v. The King*<sup>2</sup>, in some way modified or altered that statement of the law. *Lawrence v. The King* is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held that sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principles which have been laid down in previous authorities and cannot be allowed to be construed so as to depart from those principles.

In all the circumstances of this case their Lordships do not feel justified in humbly advising His Majesty to grant special leave to appeal, because they are satisfied that there has been no such substantial injustice, no such deprivation of the substance of fair trial as the cases show to be necessary in order to justify the granting of such leave. At the same time their Lordships want to make it clear that that refusal does not imply an endorsement of some of the language of the summing-up, language which perhaps would not seem quite so unfavourable to the accused if it is taken as a whole and not divorced from the context in

<sup>1</sup> (1914) A. C. 599.

<sup>2</sup> (1933) A. C. 699.

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which it appears. But as stated in the passages to which attention has been called the statement of the law is incorrect, and nothing that has happened on this petition must be understood as affording any approval of its language.

Their Lordships will accordingly humbly advise His Majesty that the petition be refused.

*Petition refused.*

