[COURT OF CRIMINAL APPEAL]

1973 ***Present :*** **G. P. A. Silva, S.P.J. (President), Wijayatilake, J., and Pathirana, J.**

WALIMUNIGE JOHN and another, Appellants, *and*
THE STATE, Respondent

C. C. A. 118-119/72, with Applications 134 and 135

S. C. 164/72—M. C. Matara, 56669

Trial before Supreme Court—Witnesses whose names appear on the back of the indictment—Failure of prosecution to call one or more of them to give evidence—Whether it can be the subject of adverse comment by the defence—Whether the trial Judge should direct the jury that an adverse inference may be drawn—Evidence Ordinance, ss. 114 (f), 134.

The two appellants were convicted of the offence of murder by causing the death of a person by shooting. The main evidence was that of the deceased's widow. Although the names of two other alleged eye-witnesses, S and A, appeared on the back of the indictment, those witnesses were not called to support the prosecution case. But their statements to the Police and their depositions to the Magistrate entirely supported the chief witness.

It was submitted on behalf of the appellants that there was a non-direction by the trial Judge which amounted to misdirection in that he did not tell the jury at any stage that an adverse inference could be drawn by them from the failure of the prosecution to call the witnesses S and A to support the prosecution case.

Held, that the prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (*f*) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.

"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (*f*) of the Evidence Ordinance."

"Whenever the prosecutor is in doubt or errs in the exercise of this discretion (to place such evidence as he considers necessary), the depositions and statements made by the witnesses to the Police being available to the trial Judge, he can, and indeed should, intervene and either order the prosecutor to call such witness as the Court considers necessary in the interests of justice or call the witness *mero motu* in the exercise of its own powers under the Criminal Procedure Code and the Evidence Ordinance."

APPEALS against two convictions at a trial before the Supreme Court.

G. E. Chitty, with *Mousoofdeen* and *Asoka de Silva*, with *E. St .N. D. Tillekeratne* (assigned), for the accused-appellants.

Kenneth Seneviratne, Senior State Counsel, for the State.

Cur. adv. vult.

May 28, 1973. G. P. A. SILVA, S.P.J.—

The two appellants in this case were indicted on a charge of murder by causing the death of one Nammuni Aratchige David by firing two gunshots at him. The incident was alleged to have taken place on the 12th of April 1971 during the height of the insurgent movement and no complaint was made to any person in authority for over a month after the shooting of the deceased. The post-mortem examination itself was held on the 21st of May 1971 at a time when the body was in an advanced state of putrefaction and the only identification of the body was rendered possible by the clothing of the deceased and the grave where he was buried together with the evidence of the coffin maker who identified the coffin. The injuries deposed to by the doctor were consistent with gunshots having been received either from one or from two shots, both shots being fired from the front. The doctor was able to testify to the fact that the state of putrefaction was consistent with the man having died on the 12th of April.

The main evidence came from the deceased's widow who said she knew the two appellants, who, being brothers, were nephews of the deceased though the relationship itself was not very close. The 2nd appellant lived in the same village as the deceased at the time of the incident and the other in a neighbouring village. She said that one day prior to the Sinhalese New Year of 1971 her daughter Sirimawathie, her elder sister Alpina and herself were at her house about mid-day and the deceased husband was in a shed in front of the house seated on a bed when the two appellants came and called out to her husband by mentioning the relationship " Baappe Baappe ". She herself was near the entrance to her house and the two appellants were on the road about 30 to 35 fathoms away from the house as she stated. Having called out to the deceased they said "let us go to get goods without paying ". Her husband replied "I can't come; I can't die by trying to go and get goods without payment ". She was asked where they were going to get goods without payment and her reply was " at that time there were insurgent activities and they had forced open some boutiques and they wanted to bring

goods from those boutiques. That is what I understood". To the question "where were the boutiques looted by the insurgents like that" the answer was "the insurgents had looted boutiques at Katanwila and Bangama". When the husband refused to accompany them he had got on to the compound from the shed where he was and the next thing that she saw happening was that the 2nd appellant fired at the deceased followed by the 1st appellant who also fired a shot. Her evidence, for whatever it was worth, in regard to the site of the injury was that the first shot struck the deceased's chest. Her husband fell down and the two appellants went away and she saw them going in the direction of "their house on the other side of a tract of paddy fields" and she explained it further by saying that it was the 2nd accused's house. She added that she noticed gunshot injuries on the deceased's chest and abdomen and he died without uttering a word within a few minutes. At about 6 in the evening when darkness was gathering the appellants came with some others with six guns and were standing on the road, as she said, to prevent others coming into the house. She did not know the others who accompained the two appellants. She had by that time removed her husband inside the house with the help of her daughter and the elder sister whose names were mentioned earlier. She was asked whether she informed any person in authority on that day and her reply was that by that time she had come to know that the insurgents had harassed the Grama Sewake and that he had left the place. On the 14th or 15th April she walked to Akuressa by which time there was no Police Station in existence as it had been burnt down by the insurgents. She informed some Army personnel and went away. She also stated that she took about 4 hours to reach the Police Station. She had made about 7 or 8 subsequent visits to reach the Police without any success and ultimately made a complaint only on the 20th May 1971. It may be stated here that, according to the Police Inspector's evidence, some sort of Police Station had been re-established at the Rest House on the 20th April and complaints were entertained. He however added that most of the inquiries made between the 20th April and 20th of May concerned insurgents and that there was one case of murder inquired into on the 7th of May. There is, however, no evidence as to how she could have known of the re-establishment of the Police Station at the Rest House.

The two other witnesses who, according to the widow of the deceased, had been present with her at the time of the shooting, namely, Sirimawathie and Alpina, were not called and counsel for the prosecution was content to rely for direct evidence only on the testimony of the widow.

A number of submissions was raised by counsel for the appellants regarding several errors in the summing up each of which, he argued, was fatal. The first of these was that the learned Commissioner repeatedly told the jury that they could disregard the opinions of the Judge or submissions of counsel in regard to questions of fact. He supplemented this argument by the further submission that nowhere in the charge had the learned Commissioner directed the jury that they should consider the submissions of counsel and that a mere direction that they were entitled to consider such submissions and the opinions expressed by him—which, I must say, he has repeatedly told the jury in the course of his summing up—was not a correct statement of their rights. Secondly, he submitted that the Commissioner directed the jury that they could not be corrected by any other Court on a question of fact, the effect of this being to vest the jury with a power which they did not have and to give them the choice of acting arbitrarily. It was also his submission that when the jury were told that there was no other Court which had power to correct them on a question of fact it was a misdirection, as wrong findings of fact by a jury may well be corrected by this Court. This direction, in Mr. Chitty's submission, was tantamount to an invitation to the jury to act in an arbitrary manner and when such a wrong direction was given to the jury it must be presumed that they may well have acted arbitrarily and that prejudice may have been caused to the appellants.

It is correct that the learned trial Judge has categorically told the jury that they can disregard his opinions as well as any submissions made by counsel on questions of fact. When the charge is considered as a whole, however, we have no doubt that what the learned Commissioner conveyed to the jury and what the jury would have understood by the direction was that they were free to consider and disregard the opinions expressed by the Judge or the submissions made by counsel on questions of fact. While different trial Judges may express this idea in different language we cannot help thinking that a trial Judge would be acting quite properly in giving a direction, however emphatically it may be expressed, that the jury are the sole Judges on questions of fact and would indeed be guilty of a serious omission if he failed to do so. This seems to us to be the substance of this direction which has been criticised by counsel. Regarding the next submission while, strictly legally, it may be inaccurate to tell a jury that they cannot be corrected anywhere on a question of fact, we are not disposed to hold either that it is such a misdirection as would vitiate a charge or that it is tantamount to an invitation to a jury to act arbitrarily because they cannot be corrected anywhere else. Nor can we agree with learned counsel that seven reasonable jurors

would, in deciding a capital case where two accused are involved, either necessarily or even probably be inclined to take a perverse view against the accused because of such a direction.

Another submission on which counsel for the appellants strongly relied was that there was a non-direction by the trial Judge which amounted to misdirection in that he did not tell the jury at any stage that an adverse inference could be drawn by them from the failure of the prosecution to call the other two alleged eye-witnesses to support the prosecution case. His argument was that *Rex v. Chalo Singho*[1] 42 N. L. R. 269 had been wrongly decided. He cited certain cases where a contrary view had been taken to show that the withholding of evidence by the prosecution is a matter from which a presumption under section 114 (*f*) of the Evidence Ordinance can be drawn, namely, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. As this point was argued at length by both counsel for the appellants as well as counsel for the State we consider it desirable to state our views on this matter.

The question whether the failure of the prosecution to call a witness on the back of the indictment could be made the subject of adverse comment by the defence and whether a trial Judge should direct the jury that they are free to draw an adverse inference from the failure to call such a witness are allied questions which are also inextricably bound up with the discretion exercisable by a prosecutor to decide which of the available witnesses he should call for a proper presentation of the case. These two identical questions came up for consideration during the very formative years, as it were, of this Court before Soertsz, J. associated with Keuneman, J. and de Kretser, J. in the case of *King v. Chalo Singho*, 42 N. L. R. 269, already referred to. In a characteristically illuminating judgment Soertsz J. has examined section 114 (*f*) of the Evidence Ordinance as well as a large number of Indian and English commentaries and decisions on the question and has laid down with clarity and precision the answers to these questions. This decision has indeed facilitated our task in deciding on the correct approach to this question. It would appear that different judges had, prior to the establishment of the Court of Criminal Appeal, taken somewhat divergent views as to whether a prosecutor should call every witness on the back of the indictment or at least tender for cross-examination those whom he did not call. Consequently, an appropriate occasion arose in this case to review the entire position. On the question whether a prosecutor is obliged to call all the witnesses on the back of the indictment or at least to tender those not called for cross-examination, that Court decided to follow the

[1] *(1941) 42 N. L. R. 269.*

principle enunciated in the case of the *King v. Seneviratne*,[1] 38 N. L. R. 221 and summed up its decision as follows :—

> "It must, therefore, be regarded as well-established now, that a prosecutor is not bound to call all the witnesses on the indictment, or to tender them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a Judge might interfere to ask him to call a witness, or to call a witness as a witness of the Court. It must, however, be said to the credit of prosecuting counsel today, that if they err at all in this matter, they err on the side of fairness."

We are in respectful agreement with the answer provided by Soertsz, J. in this case as regards the discretion of the prosecutor to place such evidence as he considers necessary in the interests of justice for the proof of his case. Whenever the prosecutor is in doubt or errs in the exercise of this discretion, the depositions and statements made by the witnesses to the Police being available to the trial Judge, he can, and indeed should, intervene and either order the prosecutor to call such witness as the Court considers necessary in the interests of justice or call the witness *mero motu* in the exercise of its own powers under the Criminal Procedure Code and the Evidence Ordinance.

A necessary corollary to the acceptance of this principle is that it would be wrong for a trial Judge to direct the jury at the same time in regard to the presumption arising under section 114 (*f*) of the Evidence Ordinance. It would, we think, be wrong to enunciate the principle that the prosecutor should call all the witnesses on the back of the indictment who are both favourable and unfavourable to the prosecution case. Such a course would only lead to confusion of the jury and result in a miscarriage of justice. If the witnesses are all favourable such a course would only result in a waste of time and unnecessary expense to the State. There may of course be marginal cases where even the trial Judge may not consider it appropriate in the interests of a just decision to order the prosecutor or call the witness in the exercise of its own powers, even though such witness, if called, would go counter to the prosecution case. In such a case, the jury being the judges of fact, the trial Judge may consider it proper to give a direction explaining the presumption arising from section 114 (*f*) in order that they may, if they feel inclined, draw a presumption against the prosecution for its failure to call such a witness. This would of course be in a very exceptional case having regard to all the circumstances. This, however, is very far from agreeing with the contention of counsel for the appellants that the trial Judge

[1] *(1936) 38 N. L. R. 221.*

is under a duty to address such a direction in every case where the prosecutor fails to call some of the witnesses on the back of the indictment. His position was that section 114 (*f*) being not repealed, the jury being the judges of fact, they must be told by the trial Judge that there is such a rule of evidence which permits them to draw a presumption against the prosecution from its failure to call a witness and that it is for the jury to consider whether they will or will not draw the presumption in any particular case. For the reasons stated above, we think this is too general a proposition with which we cannot at all agree. A concession of such a principle will, far from promoting a just decision, invariably result in a grave miscarriage of justice.

The instant case itself affords a very good example where such a direction, if it was given and taken seriously by the Jury and acted upon to the prejudice of the prosecution case, would most certainly have resulted in such a miscarriage of justice. The facts are that the two witnesses Sirimawathie, the chief witness' daughter, and Alpina, the sister, both of whom were not called by the prosecution at the trial entirely supported the chief witness when they made their statements to the Police and in their depositions to the Magistrate. The prosecuting counsel, being apparently satisfied with the performance of the chief eye-witness in the box, the widow of the deceased, for establishing the prosecution case, decided not to call any of the other two witnesses. In these circumstances, no trial Judge having seen the depositions of these two witnesses could have given the direction that Mr. Chitty complained against as a non-direction without perpetrating the unpardonable sin of deliberately misleading the jury. For such a direction would have been tantamount to a suggestion to the jury that they could infer that the witnesses not called were unfavourable to the prosecution when in truth and in fact they were altogether favourable. We feel sure, despite the apparent earnestness with which Mr. Chitty pressed this argument, that the function of a trial Judge is to give such directions as would assist in the administration of justice and not such directions as are calculated to defeat justice—which indeed would have been the result if the direction contended for by counsel was in fact given to the jury.

We therefore find no difficulty in following the principles laid down by this Court in *The King v. Chalo Singho* in respect of both the matters under consideration. These principles have indeed been acted upon for over thirty years in this country and have not been departed from even in England where similar principles of law apply even though not governed by a similar Evidence Act. The cases cited by Mr. Chitty where there has

been such a direction in exceptional circumstances do not persuade us to depart from this principle. We do not propose to dwell on each of them here although we have considered them before we arrived at our decision.

One of the English cases on which Mr. Chitty relied for his submission was *Regina v. Oliva*[1] (1965) 3 A. E. R. 116. A close examination of the judgment of Lord Parker, C.J., however, shows that he was generally inclined to follow the view expressed in *Regina v. Cassidy*[2] (1858) 1 F. & F. 77 that a prosecutor had an unfettered discretion to call what witnesses he thought proper and that the other witnesses whose names appeared on the back of the indictment were summoned in order to be made available for the defence if the accused should choose to examine them as his witnesses. He also cited with approval the dictum in *R. v. Seneviratne* (supra) to the effect that the prosecution need not call all the witnesses on the back of the indictment, "irrespective of considerations of number and of reliability, or that a prosecutor ought to discharge the functions both of prosecution and defence". The only qualification in regard to this discretion of the prosecution as stated by Lord Parker in this judgment appears to be that this discretion must be exercised in a manner which is calculated to further the interests of justice, and at the same time to be fair to the defence, and, if it is not properly exercised, that the Court should invite the prosecution to do so and finally apply the sanction of calling the witness of its own motion if the prosecutor refrains from doing so. The question of a direction in terms of section 114 (*f*) would hardly seem to arise in these circumstances once this principle is observed.

It is to us unthinkable that section 114 (*f*) was ever intended to be applied in a case where three or four or more witnesses have all seen an incident and have deposed to the same fact in substance at the inquiry by the Magistrate or during the investigation by the Police and the prosecutor decides to rely on the testimony of only one or more of them at the trial without calling all. I use the words "in substance" as Mr. Chitty's contention was that, even though several witnesses will depose to the main incident in the same way, they may differ as to surrounding facts and it is from those latter facts that their veracity can be tested and that the failure to call them deprived the defence of testing their truthfulness. If counsel's contention is sound, there is no escape from the conclusion that every such witness must be called at the trial and the prosecutor can refrain from calling any one of them at his own peril as he will necessarily have to contend with a direction from the trial judge to the jury that, however much the witnesses called at the trial

[1] *(1965) 3 A. E. R. 116.* [2] *(1858) 1 F. & F. 77.*

may have supported each other, they were free to presume that one witness was left out because, if called he would have contradicted all the others. This seems to us to be a proposition which is wholly devoid of merit. If this proposition is correct, it would be infinitely easier for the prosecution to prove a case which has been seen by only one eye-witness than one in which the offence was committed in a public place within sight of many. For the latter case will always have to face the risk of a direction in terms of section 114 (*f*) while there can be no such direction in the former. If this is correct, we cannot also help thinking that section 134 of the Evidence Ordinance will be rendered nugatory, for it says that no particular number of witnesses shall be required for the proof of any fact. The adequacy of one witness to prove a fact in terms of this section will equally hold good in a case where only one witness is available to the party desiring to establish a fact and where only one witness is called even though others are also available. Mr. Chitty's contention does not stand up to any of these tests, quite apart from its unsoundness which has been shown on the positive approach to the question which I have dealt with earlier.

Our attention was also drawn to the case of *Francis Appuhamy v. The Queen* [1] 68 N. L. R. 437, in which this same question arose as one of the grounds of appeal. Here too T. S. Fernando, J., the President of the Court, having considered both the cases referred to above, namely *King v. Chalo Singho* and *R. v. Oliva,* found no reason to depart from the principles laid down therein which, he observed, had been followed for over a quarter of a century in this country.

The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness' evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (*f*) of the Evidence Ordinance.

Counsel for the appellants raised several other points on the questions of the absence of a motive for the accused to commit the offence alleged, the delay in making the complaint to the Police and such other matters. Most of them related to matters which fell within the province of the jury. We are of the view that, even though more could have been said, the learned Commissioner has given directions which are adequate for the purpose.

[1] *(1966) 68 N. L. R. 437.*

For the above reasons we are compelled to confirm our agreement with the principles laid down in the case of *King v. Chalo Singho,* namely, that the prosecution is not bound to call all the witnesses on the back of the indictment or tender them for cross-examination and, secondly, that there is no duty on the trial judge to direct the jury that they may draw a presumption adverse to the prosecution from its failure to call any witness. We have examined the other cases cited by counsel including some that are unreported. We mean no discourtesy to counsel in not dealing with each of them individually. Suffice it to say that these decisions do not persuade us to take a view contrary to the broad principles set out above.

The appeals are dismissed and the applications refused.

Appeals dismissed.