[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present :* **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

HE QUEEN *v.* M. G. SUMANASENA

Appeal No. 74 of 1963, with Application No. 76

S. C. 86—M. C. Kegalle, 41,188

Evidence—Proof of suspicious circumstances against accused—Inference of guilt cannot thereby be justified—Burden of proof.

In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence.

[1] *(1858) 1 F. & F. 344.*

APPEAL, with application, against a conviction in a trial before the Supreme Court.

M. Kanakaratnam (assigned), for Accused-Appellant.

R. Abeysuriya, Crown Counsel, for Attorney-General.

October 15, 1963. BASNAYAKE, C.J.—

The only point that arises for decision in this case is whether the following direction of the learned Judge is wrong in law and if so whether it influenced the verdict—

> " I told you that I agree with Counsel for the defence that the accused is presumed to be innocent. It is for the prosecution to establish his guilt. The accused does not have to give evidence. He need not even call evidence, but at the same time I must tell you, if you are satisfied that there are many suspicious circumstances proved against the accused and those suspicious circumstances when taken together, that is taken cumulatively, make up a sort of a strong case against the accused and if you believe that if he is innocent of the offence it is in his power to offer an explanation of those suspicious circumstances and he refuses to explain those suspicious circumstances, it is a reasonable and justifiable conclusion that he is refraining from explaining those circumstances because those circumstances cannot be innocently explained. I have tried to put in my own words what was said by a learned Judge a long time ago. This is what the Judge said, I will repeat it to you because I find you are taking a keen interest in what I am saying and you are taking notes of what I am saying. In effect there is no difference from what I have said. I will quote to you the words of the Judge : ' The accused has made no attempt to explain away these suspicious circumstances nor indeed was he bound to do so. Nevertheless, if he refused to do so where a strong prima facie case has been made out and when it is in his own power to offer evidence, if such exists, in explanation if such suspicious appearances (*sic*), which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest. ' "

In our opinion the learned Judge's direction is wrong. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We are unable to reconcile what the learned Judge said earlier in his summing-up with what he said in the passage to which exception is taken. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial.

and is the same in a case of circumstantial evidence as in a case of direct evidence. The words quoted by the learned Judge appear to us to be the words attributed to Lord Ellenborough in the case of *Rex v. Lord Cochrane and others* [1]. The report of the trial in which he expressed those observations is not available in any of the libraries in Hultsdorf and it is therefore not possible to ascertain the context in which it was stated. In view of the fact that this opinion was expressed by Lord Ellenborough in 1814 before the Criminal Evidence Act and at a time when an accused person had no right to give evidence on his own behalf, it is unthinkable that he thereby intended to impose on the accused a burden which the law did not permit him to discharge. It would appear from the fact that *Rex v. Cochrane and others* is not referred to in the recent editions of such authoritative text books on evidence as Taylor and Phipson that the dictum of Lord Ellenborough is no longer good law even in England. In our opinion the doctrine of Lord Ellenborough has no place in the scheme of our criminal law. What the learned Judge stated at the conclusion of his summing-up negatives the effect of what he correctly said earlier, and it would appear that the jury retired to their room carrying with them typescripts of the erroneous dictum of Lord Ellenborough.

We are unable to say that the verdict of the jury was not influenced by the passage in the summing-up which they had before them in writing at the time of their deliberations. The conviction must therefore be quashed. We have carefully considered the question whether we should direct that a judgment of acquittal be entered or order a new trial. Having regard to the facts on which the prosecution relied and to the fact that the offence was committed as far back as September, 1961, we do not think that this is a case in which we should put the accused in jeopardy once more.

We therefore quash the conviction and direct that a judgment of acquittal be entered in his favour.

Accused acquitted.