[COURT OF CRIMINAL APPEAL.]

1942 *Present* : **Howard C.J., de Kretser and Cannon JJ.**

THE KING *v.* DON NIKULAS BUIYA.

10—M. C. Tangalla, 14,522.

Insanity—Proof to satisfaction of Jury—Degree of proof—Balance of probability as in civil case.

Where in a charge of murder a plea of insanity is set up, insanity must be clearly proved to the satisfaction of the Jury.

The burden is discharged by an accused person who tenders a preponderance or balance of evidence in support of such a plea.

APPEAL from a conviction by a Judge and Jury before the 1st Southern Circuit.

O. L. de Kretser (Jnr.), for accused, applicant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

July 20, 1942. HOWARD C.J.—

The accused in this case begs leave to appeal from his conviction on a charge of murder on the grounds that the learned Judge's failure to direct the Jury (*a*) on the extent of the burden placed on the defence in establishing a plea of insanity, (*b*) on the weight to be attached to the expert evidence in the case, amounts to misdirections. With regard to (*a*), scrutiny of the learned Judge's charge to the Jury indicates that on page 1 thereof he stated as follows :—

> "Assuming you are satisfied and you must be as I have had occasion to tell you so often, beyond all reasonable doubt, that the accused was responsible for the death of the deceased, the question of his intention, of which you must also be satisfied beyond all reasonable doubt, must be considered by you on the footing that the accused was, at the time he is alleged to have killed the deceased, a sane man. If you find he was insane, totally different considerations, which I shall have to explain to you, would apply."

On the last page of the charge the learned Judge summed up the position, both with regard to the case submitted by the Crown and the plea of insanity put forward by the applicant, in the following words :—

> "To sum up, Gentlemen, the position, assuming you are satisfied the accused caused the deceased's death and intended to cause it, or to cause an injury sufficient in the ordinary course of nature to cause death, then he is guilty of murder, unless on the evidence adduced you are satisfied that he was at the time, by reason of unsoundness of mind, incapable of knowing the nature of his act, or that that particular act which he did was wrong or contrary to law. In the latter event you will find that he committed the act with which he is charged, assuming that it is established beyond all reasonable doubt, and that he is not guilty by reason of the fact that he was of unsound mind and so unable to differentiate between right and wrong.

> There are, as it appears to me, just two possible verdicts in this case. It is for you to decide which of them you will bring in. On the one hand you may find the accused not guilty of any offence because he was of unsound mind for the reasons which I have already given you, or on the other hand if you think the defence has not been established, if you are not satisfied that the accused's Counsel, on the evidence, has established the defence he set out to establish, then the accused may be found guilty of murder."

Counsel for the applicant maintains that this paragraph amounts in law to a misdirection inasmuch as the Jury would draw the inference therefrom that the burden placed on the applicant to establish his plea of insanity was the same as that cast upon the Crown of proving that he was *prima facie* guilty of murder. In other words, the Jury would come to the conclusion that the plea of insanity had to be established beyond all reasonable doubt, whereas the burden cast on an accused person was not higher than the burden which rested upon a plaintiff or defendant in civil proceedings. In support of this contention, Mr. de Kretser cited the case of *Sodeman v. Rex*[1]. This was a petition by the petitioner to the Judicial Committee of the Privy Council for leave to appeal from an order of the High Court of Australia dismissing his application for leave to appeal. In delivering the judgment of Their Lordships, Viscount Hailsham stated as follows :—

> "The Canadian case of *R. v. Clark*[2] was referred to, but even there the Judges were not able to find a very satisfactory definition, but it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings."

The point was taken by Counsel for the petitioner that the Jury may have been misled by the Judge's language into the impression that the burden of proof resting upon an accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. The only question for Their Lordships' decision was whether the distinction with regard to the burden of proof was sufficiently brought home to the minds of the Jury by the language used in the summing-up. The opinion of the two Appeal Courts in Australia was that there was no misdirection. Their Lordships advised His Majesty to dismiss the petition as they did not think that the question whether or not the language used was enough clearly to bring the matter home to the Jury in the particular case can, except in a very clear case, be a ground for exercising the very exceptional jurisdiction reserved to the Board in criminal cases.

The principle formulated in *Sodeman v. Rex* (*supra*) was accepted by a Bench constituted by three Judges in the *King v. Vidanalage Abraham Appu*[3]. In referring to Viscount Hailsham's judgment, Soertsz A.C.J. stated as follows :—

> "It is, I think, clear that the Lord Chancellor said what was said in the earlier cases but in a circumlocutory manner. If Counsel's suggestion was that this case is authority for saying that it is sufficient for a prisoner to throw doubt on his sanity, I cannot entertain that

[1] *(1936) 2 All England Rep. 1138.* [2] *(1921) 61 S. C. R. 608.* [3] *40 N. L. R. 505.*

suggestion. In the case before him the Lord Chancellor was face to face with M'Naughton's case, for an attempt was made to obtain a reconsideration of the rules laid down there by pleading that 'uncontrollable impulse' was a good ground for exculpation. He unhesitatingly rejected that contention, upheld the prevalent view, and went on to consider 'the other point' that is the burden of proof. On that point, the Judges in M'Naughton's case had laid down, as I have already pointed out, that insanity *must be proved to the Jury's satisfaction, that it must be clearly proved,* and it cannot, in my view, be supposed that Lord Hailsham meant to depart from that interpretation when he expressed himself as he did."

We are in agreement with the view expressed by Soertsz A.C.J. that Viscount Hailsham did not intend any departure from the opinions of the Judges, as expressed in M'Naughton's case, that insanity must be clearly proved to the Jury's satisfaction. That burden, however, is no higher than that resting on the plaintiff or defendant in a civil case or in other words is discharged by an accused person who tenders a preponderance or balance of evidence in support of such a plea. In our opinion there is nothing inconsistent in this dictum with regard to the burden of proof with the principle formulated by the Judges in M'Naughton's case that insanity must be clearly proved. The Judges in M'Naughton's case did not express any opinion as to the weight of evidence that would constitute clear proof.

Adverting to the present case, we do not consider that the distinction between the burden resting on the Crown to prove its case and that resting on the appellant to prove insanity was sufficiently brought home to the minds of the Jury by the language used by the learned Judge in the summing-up. Moreover, there was a considerable volume of evidence to support the plea of insanity put forward by the applicant. It is, therefore, impossible to say that the verdict of the Jury would have been the same if the distinction to which I have referred was brought home to them. In these circumstances the application is allowed and the conviction is set aside. Under the proviso to sub-section (2) of section 5 of the Criminal Appeal Ordinance we order a new trial, pending which the applicant will remain in custody.

Set aside.