1975 *Present :* **Sirimane, J., Malcolm Perera, J. and Weeraratne, J.**

KARUNARATNE and another *v.* THE STATE

S. C. 79-80/74—M. C. Kurunegala—39

Burden of proof—Misdirection by trial judge—Propriety of the conviction.

The two accused—appellants were found guilty by the unanimous verdict of the jury of the murder of A, and were sentenced to death. The case for the prosecution rested entirely on the evidence of N who testified that he was a witness to the killing. The two accused who gave evidence denied the charge.

The trial judge directed the jury thus :—" So you have now to decide whether you are deciding to accept the 1st accused's evidence or the 2nd accused's evidence or Norman's evidence....The defence has a lesser burden to discharge. It need not prove beyond reasonable doubt. It is sufficient if the defence proves on a balance of probability that the defence version is true. The defence has not told us how the girl came by her death. Both accused have stated that the girl was alive at the time they left."

Held : The summing up above, wrongly placed a burden on the accused as it would have led the jury to think that :

(i) there was a burden on the accused to prove on a balance of probability their denial ;

(ii) there was a burden on the accused to show how the deceased came by her death.

" This is clearly a misdirection on so fundamental a matter as the burden of proof that the conviction cannot be allowed to stand "

Obiter—" Whenever the question of 'common intention' arises, it must be clearly explained to the jury and distinguished from 'similar intention'.

APPEAL against conviction.

M. Mousoof Deen with *P. B. T. B. Bullumulla* (Assigned) for 1st accused appellant.

P. B. T. B. Bullumulla, (Assigned) for 2nd accused—appellant.

Ranjit Gunatilleke, Senior State Counsel for Attorney-General.

April 17, 1975. SIRIMANE, J.—

The two appellants were found guilty by the unanimous verdict of the jury of the murder of one Amarangani and were sentenced to death. The case for the State rested on the evidence of one Norman. The facts according to this witness (shorn of details) was that the 2nd accused brought a message for the 1st accused from the deceased saying that she was willing to elope with the 1st accused. Thereafter Norman and the two accused left by car and picked up the deceased from the house of the 2nd accused and took her some distance, alighted from the car and walked further to some spot where the two accused had sexual intercourse with the deceased. The 1st accused then suddenly said that the deceased must be killed and in spite of Norman's protests stabbed the deceased twice on her chest with a knife having first ordered the 2nd accused to gag the deceased with her saree to stop her cries. The 1st accused gave evidence and admitted that they took the deceased as stated by Norman but stated that after they had sexual intercourse and wanted to go away Norman said he was not satisfied and wanted to have more sex. The two accused then came away leaving Norman and the deceased. The 2nd accused also gave evidence and admitted having gone with the deceased as stated by Norman but stated that after the 1st accused had sex with the deceased he too wanted to have sex, but the deceased struggled and protested. He then left the deceased, Norman and the 1st accused and went away.

The learned Trial Judge in his summing-up to the Jury summarised the evidence of Norman and the two accused and said :—

> " Now you have three versions. It is up to you to decide which version is true. "

He then proceeded to address the Jury on the question as to whether Norman was an accomplice and thereafter stated :

> " So you have now to decide whether you are deciding to accept 1st accused's evidence or 2nd accused's evidence or Norman's evidence .... The defence has a lesser burden to discharge. It need not prove beyond reasonable doubt. It is sufficient if the defence proves on a balance of probability that the defence version is true. The defence has not told us how the girl came by her death. Both accused have stated that the girl was alive at the time they left. "

The two accused by their evidence denied the killing of the deceased and the learned Trial Judge's summing-up above quoted has wrongly placed a burden on the accused as it would have led the Jury to think that,

(1) there was a burden on the accused to prove on a balance of probability their denial.

(2) there was a burden on the accused to show how the deceased came by her death.

This is clearly a misdirection on so fundamental a matter as the burden of proof that the conviction cannot be allowed to stand.

The learned Trial Judge later in his summing-up addressed the Jury on the question of intoxication though this plea was not taken by the defence and (rightly) stated that the burden was on the accused to show on a balance of probability that they had reached that degree of intoxication which made them incapable of forming a murderous intention. In view of this and the earlier passage cited from the learned Trial Judge's summing-up the Jury may well have thought that there is always a burden of proof (though a lesser one) on the accused either on the mitigatory plea of intoxication or on the exculpatory plea of denial. When such defences arose on the evidence it was the duty of the learned Trial Judge to clearly explain to the Jury that the lesser burden of proof on the accused is only in respect of the mitigatory plea and that there is no burden whatever on the accused to " prove " their denial.

Learned senior State Counsel whilst conceding that the passage quoted earlier is a misdirection has pointed out to another passage which follows the passage cited.

> " If you hold that what they (accused) say is true then you will acquit the accused because the girl had not been killed by the 1st and 2nd accused and they have left the place ; or if you hold that the evidence of the 1st and 2nd accused has created a reasonable doubt in your mind you will acquit the accused. But if you hold the defence version is neither true nor has it raised sufficient doubts in your mind *then you will accept Norman's evidence.* "

Here too though the earlier part is a correct direction the words underlined are misleading as the rejection of the defence version does not necessarily mean that Norman's evidence is true. However that may be when there is a clear misdirection on a matter such as the burden or proof followed by a correct direction, it would be wrong to assume that the Jury ignored the misdirection and acted on the correct direction. In a case such as this where the only evidence against the accused was that of Norman, placing a wrong burden on the accused may well have tiltel the scales against them.

We would also wish to state that whenever the question of " common intention " arises it must be clearly explained to the Jury and distinguished from " similar intention. "

For these reasons we quash the conviction and sentence and order a re-trial.

MALCOLM PERERA, J.—I agree.

WEERARATNE, J.—I agree.

Convictions quashed and case remitted for re-trial.