[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* Basnayake, C.J. (President), Herat, J., and G. P. A. Silva, J.

THE QUEEN *v.* K. A. SANTIN SINGHO

APPEAL NO. 57 OF 1962, WITH APPLICATION NO. 61

S. C. 250/61—M. C. Colombo, 44489/B

Circumstantial evidence—Burden of proof—Summing-up—Misdirection.

In a case of circumstantial evidence, a direction given by the trial Judge, in his summing-up, that the accused person must explain each and every circumstance established by the prosecution is wrong and would completely negative a direction given earlier by him that the circumstances must not only be consistent with the accused person's guilt but should also be inconsistent with his innocence.

The direction that if a *prima facie* case is made out the accused is bound to explain is wrong and misleading.

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *S. S. Basnayake*, *R. Weerakoon* and *R. Rajasingham* (assigned), for Accused-Appellant.

P. Colin-Thome, Crown Counsel, for Attorney-General.

October 16, 1962. BASNAYAKE, C.J.—

The appellant was by a unanimous verdict of the jury found guilty of the murder of Heenmulle Arachchige Yasawathie and sentenced to death. The case against the appellant rested on circumstantial evidence. The appeal is from that verdict. The grounds urged in the notice of appeal fall under the broad heads of misdirection and illegal reception of evidence.

Shortly the facts are as follows :—The appellant and the deceased were servants employed under George Wijesinghe, proprietory planter of Cotta Road, Borella. The former was his motor car driver and the latter was his cook. The appellant had been two years in his service and the latter had been two months. Before her, the appellant's mistress Alice had been the cook. The other servants in the house were an old man called Agoris and a thirteen year old girl called Magilin. Agoris was a trusted servant who had been about 5 years in the household. The deceased had complained to her mistress about the unseemly behaviour of the accused in trying to enter the bath-room one morning when she was in it, but no action was taken on that complaint.

There is also the evidence of two employees—Jamis and Siyadoris—of the Wijesinghe household in which the appellant and the deceased were both employed. To each of them the appellant had mentioned the bath room incident ; and to one of them he had said that Yasawathie was a proud girl and to the other he had said that she was not a person to whom one should speak and that he would not allow her to remain there for long. To one of them he had also mentioned an incident in which the deceased was seen speaking to a man over the parapet wall, and to the other he had mentioned an incident in which she was seen speaking to a man near the bath room. All these circumstances, if established, would point to ill-will on the part of the appellant towards the deceased.

Agoris shared the room at the back of the garage with the appellant. After his noon meal on the day in question when Agoris wanted to have a chew of betel, to slice an arecanut, he looked for his knife which he had concealed under the bench, but it was missing. He stated in his evidence that only the appellant knew where it was kept and that the appellant also used that knife whenever he needed it. On the day of the murder the appellant had returned after two days' leave and had driven his master's car to Colpetty and returned home about 9.30 a.m. He had brought with him a lunch packet and had his noon-day meal there. After the members of the household had had their lunch, they rested. The servants finished their meals that day about 12.30 p.m. The deceased went to the bath room to bathe and Magilin, the other servant, heard the splashing of water and inferred that she was bathing. When she went to the front compound at about 12.30 p.m. the accused was seen going past her towards the gate and within five minutes Magilin discovered that Yasawathie had been stabbed to death. Mr. and Mrs. Wijesinghe were informed. The first reaction of the former was to send for the driver not because he suspected him but because he wanted hi

assistance in finding out what had happened to the deceased. When he was informed by Magilin that the appellant had just gone out he asked Agoris to fetch a taxi cab, but before he could do so the appellant returned. He then instructed Agoris and the appellant to see what had happened to the deceased and whether she was alive. They went into the bath room and attempted to bring out the body, the appellant holding her legs and Agoris holding the neck. They brought it as far as the entrance and discovered that she was dead. Mr. Wijesinghe sent the appellant to fetch the doctor from the Fatima Clinic which was near by. He went to the clinic and returned to say that the doctor was not there. He was asked to inform the police. He drove to the Police Station in his master's car and stated—" I am the driver employed at this house. The cook woman of this house has fallen down in the bath room with bleeding injuries. She is unable to speak. I am not aware what has happened." The Borella Police commenced their investigations on this complaint and in the course of the investigations the appellant was arrested.

The prosecution relied on the following circumstances :—The incident in the bath-room two weeks earlier and the threat uttered by the appellant; the fact that he had gone to the hotel at a time which was not the usual time at which he went there for his noon meal ; the fact that he washed his hands up to the elbows in the water tank at the back of the hotel near the kitchen with his wrist watch on ; the fact that he had blood stains on his outer sarong ; the fact that Magilin discovered the deceased stabbed to death shortly after the appellant had passed her on his way out ; the fact that he used the name Yasawathie as the *nom de plume* for the Gymkhana sweep ticket he had purchased ; the fact that Agoris's knife was missing and that to Agoris's knowledge the appellant was the only person who knew where he placed it ; the disparaging remarks about the deceased uttered by the appellant to Siyadoris such as, " Yasawathie is not a woman whom anyone should speak to. She abused me in the bath-room. She does not deserve to be spoken to. I will not let her stay here " ; the complaints made to Jamis that Yasawathie spoke to a man over the parapet wall ; that the deceased abused and chased him away when he went to the bath-room ; that she was a proud girl.

It is fundamental that the burden of proof is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances. The main complaint of the appellant is against the summing-up of the learned Commissioner. There are many passages in the summing-up which are capable of giving the jury a wrong impression of the law. In dealing with the burden of proof the learned Commissioner said—

> " Now, I shall tell you about the burden of proof in a criminal case. There is always the presumption of innocence of an accused person. An accused person is presumed to be innocent unless and until his guilt is proved beyond reasonable doubt. So that, when an indictment is presented against an accused, and he has pleaded not guilty of the

offence, it is open to him to do one of three things, namely, to stay there as he has done in this case and say in effect, ' you prove my guilt beyond reasonable doubt '. Then, there is another course open to him and that would be to make a statement from the dock. But then, in that event, his statement cannot be tested by cross-examination. And, you are not bound to take that statement at its face value. A third course is also open to him. That is, namely, that he can give evidence on his own behalf. In that event he would be subject to cross-examination and his evidence would be tested by cross-examination ; whether he is speaking the truth or not. That of course the accused has not done in this case. You will see that the law allows him the right to give evidence, but he is not compelled to give evidence or to even make a statement."

The learned Commissioner after having discussed certain judicial dicta on circumstantial evidence stated—

" To repeat myself on this matter about the principle that is applicable. This case, as I see, is a case of circumstantial evidence and, I give you this direction which I think will be of assistance to you : You must not convict the prisoner because the circumstances of the case are consistent with his guilt. That is not enough. You will only convict the prisoner if in your opinion the circumstances of the case are inconsistent with any real or rational conclusion other than that he is the man who killed."

Then after discussing the evidence in detail he went on to say—

" Now, I have told you about the principles that are applicable to circumstantial evidence. I told you that you must come to the irresistible conclusion that it was this accused who did it and that it is inconsistent with any reasonable hypothesis other than that of his innocence. In certain cases in circumstantial evidence there is another principle also which is applicable. I think the learned counsel for the defence read a passage to you—a statement of Lord Ellenborough and he stopped half way. Well, I am going to read to you the entire passage. That is the principle that is also applicable in certain cases of circumstantial evidence. That principle has not only been recognised in England, but also that has been recognised in Ceylon and has been adopted by our Courts. That case that I read to you earlier that is the submissions made by two learned counsel, I told you, in the Court of Criminal Appeal, and how their Lordships dealt with those submissions. It was also held there : " The jury are entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution which, without such explanation, tells for his guilt.

The rule regarding circumstantial evidence and its effect, if not explained by the accused, is admirably stated in the judgment of Chief Justice Shaw in an American case—*Commonwealth v. Webster*—quoted in *Ameer Ali's ' Law of Evidence '*. ' Where probable proof

is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstance is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstance can be accounted for consistently with his innocence and he fails to offe · such proof, the natural conclusion is such that the proof, if produced, instead of rebutting, would tend to sustain the charge . . . . .

Another passage in Willis on Circumstantial Evidence also has been quoted here. Lord Chief Justice Abbott said this : ' It follows from the very nature of circumstantial evidence, that in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction.'

Lord Ellenborough said, ' No person accused of a crime is bound to offer any explanation of his conduct, or of circumstance of suspicion which attach to him ; but, nevertheless, if he refuses 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 exist, in explanation of such suspicious appearance 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 adduced would operate adversely to his interest.

What is meant by ' prima facie ' ? Prime facie is arising at first sight or based on the first impression. That is, if arising from the first sight or based on the first impression a strong case has been made out, then it was within his power to make a certain explanation, and if he refrains from doing so this dictum of Lord Ellenborough would apply.

. . . . . .

One of the circumstances which the Crown wants you to consider and ask yourselves is this : Why the accused refrained from going for lunch at the usual hour, between 12 and 1, to the hotel where he used to take his rice and curry. If you consider that proved only an explanation would be necessary. You may ask yourselves, is it not in the power of the accused to offer an explanation ? If so, why does he refrain from doing so ? Similar questions you will ask yourselves with regard to other points. Or, may be, there are other circumstances which strike you as calling for explanations. That is entirely a matter for you. You are the sole judges of every fact."

The learned Commissioner next proceeded to refer to the loss of Agoris's knife ; the appellant's leaving the premises at the time he left ; his going to the rear of the hotel and going to the lavatory of the hotel, his not using the lavatory of the bungalow ; his washing his hands up to the elbow with the wrist watch on ; his running to fetch the doctor and his returning even without attempting to fetch another doctor ; his wearing two sarongs. He then proceeded as follows :—

> " Now, it is not in every case that an explanation is called for. I have explained to you that in cases of circumstantial evidence if you find certain circumstances have been established, the circumstances which require explanation are only those circumstances. If they are not established, then you do not take them into consideration at all. Then, you are entitled to take that fact also into consideration in arriving at your finding, that you should not run away with the idea that it is conclusive against the accused."

The directions of the learned Commissioner in regard to an accused person's obligation to explain each and every circumstance relied on by the prosecution is wrong and completely negatives the direction he had given earlier that the circumstances must not only be consistent with his guilt but should also be inconsistent with his innocence.

The direction that if a *prima facie* case was made out the accused was bound to explain is wrong and misleading.

The judicial dicta cited to the jury introduce the concept of a *prima facie* case which finds no place in our Evidence Ordinance. It is now well settled that the burden on the prosecution is to prove the case against the accused beyond reasonable doubt. That burden is not lessened by the fact that the accused does not give evidence. It remains the same throughout the trial. We cannot be certain that what was said in the passages cited above did not lead the jury to think that the standard of proof required of the prosecution was something less than proof beyond reasonable doubt. The concept of a "*prima facie*" case is well known in the field of preliminary inquiry prior to committal for trial where the question is one of sufficiency of evidence. For instance under section 156 of the Criminal Procedure Code, before its amendment in 1938, a Magistrate holding an inquiry under Chapter XVI into an offence not triable summarily was empowered to discharge the accused if the evidence did not establish a *prima facie* case of guilt and if the evidence did establish a *prima facie* case of guilt the Magistrate was empowered to take the further steps prescribed in that Chapter. The expression when used in a direction to the jury in a criminal trial is out of place and is likely to confuse the jury as to the burden that lies on the prosecution. The view expressed above is fortified by the discussion of the expressions "*prima facie* evidence" and "*prima facie* case" in section 2494 of Wigmore on Evidence and the cases referred to therein. For the reasons herein expressed we think that the appeal should be allowed, that the conviction should be quashed and a judgment of acquittal entered. We accordingly do so.

Accused acquitted.