[COURT OF CRIMINAL APPEAL]

1950 *Present :* **Jayetileke S.P.J. (President), Gunasekara J. and Pulle J.**

MENDIS, Appellant, *and* THE KING, Respondent

Application No. 1 of 1950

S. C. 47—M. C. Colombo, 42,583

Court of Criminal Appeal—Evidence—Production of X'ray photograph—Nature of proof necessary—Summing-up—Defence not adequately put to jury—Misdirection.

The appellant was charged with having committed rape on a girl who was alleged to be under 12 years of age. The prosecution called the Judicial Medical Officer to prove that the girl was under 12 years of age. The Judicial Medical Officer relied, for his opinion, on an X'ray photograph (P 6) which he " got taken ". There was, however, no evidence whether the Judicial Medical Officer was present when the X'ray photograph was taken and whether P 6 was the X'ray photograph of the girl.

Held, that the X'ray photograph should not have been admitted in evidence.

Held further, that non-direction amounts to misdirection only when the omission is such that it is reasonably probable that the jury were misled.

APPLICATION, with leave allowed, against a conviction in a trial before a Judge and Jury.

M. M. Kumarakulasingham, for the accused appellant.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

February 27, 1950. JAYETILEKE S.P.J.—

The appellant was charged with having committed rape on a girl called Asilin who was alleged to be under 12 years of age. He was convicted on the charge and sentenced to seven years' rigorous imprisonment.

Asilin said that on June 11, 1948, she was attending to an infant in her house when the appellant, who lived close by, came into the house and had intercourse with her, with her consent. The evidence of Asilin that the appellant had intercourse with her was corroborated by the evidence of Alice who said that she went into Asilin's house hearing that the appellant had gone there, and she saw the appellant lying on Asilin's body and having intercourse with her. The Crown called Dr. Amarasingham, the Acting Judicial Medical Officer, and Agnes, the mother of Asilin, to prove that Asilin was under 12 years of age on June 11, 1948.

Dr. Amarasingham's evidence reads:—

To Court.

" *Q.*—Can you on oath say definitely that she was under the age of 12 ?

A.—I cannot say that she was under the age of 12. Only what I can say is that she was about 11 years of age at the time I examined her. She may have been 12.

Q.—Is it a reasonable possibility or fantastic possibility ?

A.—It is not an unreasonable possibility that on 11.6.48 she was 12.

Q.—So you can definitely say that she was under 12 ?

A.—I am definite that she was under 12. It is my honest medical opinion. I may sometimes go wrong by a few months. As a result of my examination I am of opinion that she was under 12. I have been practising for 24 years as a Doctor. I got an X'ray taken (marked P6). Epiphysis are in the pelvic region and when a child is born the ends of the bone are not joined to the rest of the bone. The act of growing means that the epiphysis also grow and join. A child growing bigger means that the ends of the bones are growing bigger. They are useful to estimate the age. When a child is 12 the ends of the ulna bones join the bones. They join the bones after 12. Observations are found to be true. At the age of 12 the olecranon joins the ulna. In this case the X'ray discloses that the olecranon has not joined. (At this stage the jury examined P6 and the doctor explains to them.)

Q.—That helps your view that this girl is under 12 ?

A.—That is so. There may be exceptions. According to P6 I say that the girl is under 12. Her general development when I saw her did not suggest that she was 12. She is not 20. She is much younger. She had no hair either in the pubic regions or axilla. You get hair when puberty starts. Some people sometimes pass blood but that is not puberty. At the time I examined her, her breasts had not developed at all. As far as medical science goes, I can say that she was under 12. ''

Agnes said that Asilin was under 12 years of age at the time of the incident and added that she must have been about 11 years of age.

The Crown called two other witnesses, Paulis Perera and Inspector Abeyesekera, to prove that the appellant absconded on June 11, 1948, and was in concealment for about 13 months.

The appellant went into the witness-box and gave evidence on his own behalf. He said that Agnes and Alice were not on good terms with him, that on the day in question Asilin uprooted some plants that were in his compound and he gave her a slap, whereupon Asilin abused him, and fell on the ground and cried out. Then Agnes, Alice and others rushed up to attack him, whereupon, he ran away and concealed himself in the bakery. About ten persons followed him to the bakery and threatened to kill him. He thought that Asilin had sustained injuries, and through fear he absconded.

At the argument before us Counsel for the appellant raised the following points:—

(1) That there was no evidence that P6 was the X'ray photograph that was taken of Asilin and it should not therefore have been admitted in evidence.

(2) That if P6 was not admitted in evidence Dr. Amarasingham would not have been able to say that Asilin was under 12 years of age.

(3) That the learned Judge had omitted to put the defence adequately to the jury.

(4) That the learned Judge had failed to place before the jury the reason given by the appellant for absconding.

The only evidence relating to P6 is a passage in Dr. Amarasingham's evidence which reads:—

'' I got an X'ray taken (shown P6) ''.

On this evidence we are unable to say whether Dr. Amarasingham was present when the X'ray photograph was taken and whether P6 is the X'ray photograph of Asilin. We are therefore of opinion that P6 should not have been admitted in evidence. A perusal of Dr. Amarasingham's evidence shows that his opinion that Asilin was under 12 years of age on June 11, 1948, was based largely on P6, and that it is probable

that he would have adhered to the answers given by him to the first two questions put by the Court if P6 had not been admitted in evidence. In his summing-up the learned Judge said:—

(1) The prosecution takes its stand on the footing that the medical evidence has proved, as far as it can be proved, that the girl on June 11, 1948, was under the age of 12.

(2) The age of the girl is not proved by a birth certificate but we have the evidence of the Doctor. He told us that he has no doubt that the girl was under the age of 12 and he has given his reasons.

The learned Judge did not refer to the evidence of Agnes at all. We do not know what view the jury took of the evidence of Agnes but it is possible that they may have thought that the learned Judge did not refer to it because it was vague and it was therefore not safe to act upon it. We are of opinion that the admission of P6 has caused serious prejudice to the appellant and that it vitiates the conviction.

With regard to the third and the fourth points that were taken it is clear from the summing-up of the learned Judge that there is substance in them. After dealing with the evidence for the Crown the learned Judge said:—

"As against that you have the sworn evidence of the accused that he did not do anything."

It is an elementary principle that a defence made by an accused should be fairly presented to the jury. In *Bray v. Ford* [1] Lord Watson said:—

"Every party to a trial by jury has a legal and constitutional right to have his case which he has made either in pursuit or in defence fairly submitted to the consideration of that tribunal."

Having regard to the evidence given by the appellant we are of opinion that the learned Judge's summing-up was insufficient as regards the defence. Again the learned Judge said:—

"The Crown submits to you that the accused's story leaves many points unexplained. Is there any reason why Alice, a respectable woman, should come into the witness-box and give false evidence against the accused? If the evidence is false why did the accused ran away if he is an innocent man?"

This passage may have left the impression in the minds of the jury that the appellant had failed to assign any reason why Alice should give false evidence against him and why he absconded and also that he absconded because he was guilty. His evidence referred to earlier on that point is very clear. We are of opinion that it was the duty of the learned Judge to have invited the attention of the jury to that evidence.

The question whether there has been misdirection by reason of non-direction is not an abstract question of law. In *R. v. Stoddart* [2] Lord Alverstone C.J. said that mere non-direction is not necessarily misdirection and that those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Again in *R. v. Wann* [3]

[1] *(1896) A. C. 44.*

[2] *(1909) 2 C.A.R. 217.*

[3] *(1912) 7 C.A.R. 146.*

Lord Alverstone C.J. said " That to have any effect in itself the mis-statement of the evidence, or the misdirection as to the effect of the evidence must be such as to make it reasonably probable that the jury could not have returned their verdict of guilty if there had been no mis-statements ".

With regard to the first passage from the summing-up quoted above we are unable to say that it is reasonably probable that the verdict of the jury was affected by the failure on the part of the learned Judge to place before them the whole of the appellant's defence and we are therefore of opinion there was no misdirection. But with regard to the second passage quoted above we are satisfied that the omission is such that it is reasonable and probable that the jury were misled. We are therefore of the opinion that the non-direction amounts to a misdirection which vitiates the conviction.

We would accordingly quash the conviction.

Conviction quashed.