[COURT OF CRIMINAL APPEAL]

1967 *Present:* **T. S. Fernando, J. (President), Silva, J., and Siva Supramaniam, J.**

S. M. DON HENRY, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 40 OF 1967, WITH APPLICATION No. 54

S. C. 118—M. C. Gampaha, 95379/A.

Summing-up—Burden of proof—Misdirection—Court of Criminal Appeal Ordinance, proviso to s. 5 (1).

In a prosecution for attempt to murder, one of the witnesses for the defence gave evidence that it was he, and not the accused, who stabbed the injured person. The trial Judge, at the final stage of his summing-up, said: "Where the accused brings in matters before this Court, he need only show that his evidence is probable; he need not prove any matter beyond reasonable doubt....."

Held, that there was misdirection. A higher burden was placed on the accused than he was obliged in law to carry. The accused was entitled to be acquitted even if he succeeded, in raising in the way he attempted, only a reasonable doubt in the mind of the jury as to whether he was the man who stabbed the injured person.

Held further, that the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, assuming that it is applicable in a case of misdirection on the question of burden of proof, is not applicable in the present case.

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

G. E. Chitty, Q.C., with *S. Kanakaratnam*, *Miss M. Barr-Kumarakulasinghe* and *Miss A. P. Abeyratne*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

June 16, 1967. T. S. FERNANDO, J.—

The appellant who stood his trial on a charge of attempt to murder a man named Peter was convicted after a 6 to 1 verdict of the jury of the lesser offence of attempt to commit culpable homicide not amounting to murder. He was sentenced to undergo a term of 18 months' rigorous imprisonment.

The ground urged against the maintenance of the conviction was that the trial judge misdirected the jury in respect of the burden of proof that lay on the defence. To appreciate the circumstances in which the alleged misdirection arises it is necessary to state very briefly the nature of the cases for the prosecution and for the defence respectively.

According to the prosecution, when the injured man Peter saw his brother Emmanuel being subjected to an assault by the appellant, his brother Michael and another man of the name of Albert, he (Peter) went up armed with an iron rod to the assistance of his brother and was then stabbed on the back of his shoulder by the appellant.

Michael referred to in the above paragraph, the brother of the appellant, was called as a witness for the defence, and he stated that, when he was sleeping in his house, Peter, Emmanuel and a man named Cyril came into the house and the last-named of them, Cyril began, using offensive language. He (Michael) then came out of the house armed with a knife. Cyril directed a pistol at him, and Peter came towards him with arms upraised and he then stabbed Peter. The defence therefore was that the appellant had nothing to do with the offence and further that the injury received by Peter was one inflicted by Michael and not by the appellant.

At an early stage of his charge to the jury, the learned trial judge stated :—

> " The prosecution must prove its case beyond reasonable doubt. There is no burden on the defence to lead any evidence at all. They can of course do so, if they choose to do so, as in this case, and on such matters that the defence has put forward, if you find them more

probable than not, that that evidence is correct, that the things happened as the defence witnesses said, then you will immediately acquit the accused because if you think that the defence version is more probable than not, then it clearly shows that there is a grave doubt in your minds in regard to the prosecution case. So if you think it more probable than not that Peter received the stab injury in the way deposed to by Michael and supported by Selestina, then you will acquit the accused."

In the above passage, the learned judge was directing the jury as if the appellant had himself pleaded the defence of private defence. The appellant, of course, had done no such thing. He had led the evidence of his brother Michael who took upon himself responsibility for the infliction of the injury and was hoping that Michael's evidence and other evidence to a like effect would either be believed by the jury or that such evidence would create in the mind of the jury a reasonable doubt as to the truth of the version deposed to on behalf of the prosecution. This passage was doubtless a misdirection on the part of the learned judge in regard to the burden of proof or extent thereof that lay on the defence.

Learned Counsel for the Crown contended before us that the effect of the above-quoted passage was erased by what the trial judge told the jury at a later stage of his charge. He pointed to the following words :—

" If you consider that the defence is probable, that it is more probable than not that Mr. Peter received the injury in the manner spoken to by the defence, you will acquit the accused. If you do not consider that evidence probable, you are not prepared to consider that it is more probable or that it is likely, nevertheless that is not the end of the matter. You must consider whether the prosecution has proved its case beyond reasonable doubt and in regard to the question as to the person who stabbed, you must consider whether on the prosecution evidence, in the light of such facts as have been adduced by the defence, it has been proved beyond reasonable doubt that it was this accused who stabbed Peter."

While the last of the sentences in the passage I have reproduced immediately above contains an unexceptionable direction in regard to the nature of the burden, if any, on the defence in this case, can it be said that the jury would have understood clearly enough that all the appellant had to do in this case was to create a reasonable doubt as to the truthfulness of the version of the facts contended for by the prosecution and spoken to by the witnesses called for the prosecution ? We are unable to answer this question in the affirmative, and there is ground for observing that Crown Counsel who prosecuted at the trial also felt somewhat uneasy in regard to the directions given because we find that no sooner the trial judge concluded his charge and called upon the jury to retire and consider what verdict they should return, Crown Counsel referred to two matters,

one of them being the matter of the burden on the defence. To use his own words, " will Your Lordship be pleased to refer to two matters : (i).....and (ii) that there is no burden on the accused to prove anything." Thereafter, the learned judge, after referring to matter (i), directed the jury thus in regard to matter (ii) :—

> " There is no burden on him (the accused) to prove his innocence. It is open to an accused person to fold his arms and challenge the prosecution to prove the case against him beyond reasonable doubt. If he does so, the prosecution must prove its case beyond reasonable doubt. Whether he does that or whether he gives evidence, still the burden is on the prosecution to prove its case beyond reasonable doubt ; *where the accused brings in matters before this Court, he need only show that his evidence is probable ; he need not prove any matter beyond reasonable doubt.....*"

The words underlined by me above were almost the last words addressed to the jury by the learned judge. The matter brought before the Court by the accused was that it was Michael who stabbed. In directing the jury that the accused must show that Michael's evidence and/or other evidence on the point was probable, we are of opinion that the trial judge was asking the jury to place a higher burden on the appellant than he was obliged in law to carry. The appellant was entitled to be acquitted even if he succeeded in raising in the way he attempted only a reasonable doubt in the mind of the jury as to whether he was the man who stabbed Peter. Indeed, the direction of which complaint has been made was not relevant unless the appellant had raised the issue that he himself acted in the exercise of private defence.

Crown Counsel urged before us that, even if the ground relied on by the appellant is decided in his favour, this is a case where the Court might well apply the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. It is unusual to apply the proviso where the ground upheld is one of misdirection on the question of burden of proof. He referred us to two fairly recent cases, *Slinger* [1] ; and *Sparrow and Friend* [2], in which the English Court of Criminal Appeal applied the proviso where the trial judge had omitted to tell the jury that the burden of proof was on the prosecution. But that is not quite the situation we are faced with here. The question here is not mere non-direction, but one of mis-direction. In the latter of the two cases cited, the Court refused to interfere because it was (in the Court's view) " quite plain that the jury can have been under no misapprehension as to the proper approach to the problem before them ". In the case we have here it is reasonable to presume that the jury must at least have been as uncertain as Crown Counsel who invited the judge to make a further direction. The direction given in pursuance of that invitation, as I have already pointed out, contained a repetition of the earlier misdirection. In these circumstances it is quite unnecessary

[1] *(1961) 46 Cr. A. R. 241.* [2] *(1962) 46 Cr. A. R. 268.*

to say here whether every case of misdirection in respect of the burden of proof precludes an application of the proviso. It is sufficient to say that in our opinion we are unable to say that, granting a misdirection, the prosecution has satisfied us that no substantial miscarriage of justice has actually occurred.

For these reasons we have quashed the conviction and sentence.

Conviction quashed.