[COURT OF CRIMINAL APPEAL]

1951 *Present* : **Jayetileke C. J. (President), Gratiaen J. and Gunasekara J.**

DIONIS, Appellant, *and* THE KING, Respondent

Application 68 of 1951

S. C. 29—M. C. Tangalla, 4,630

Court of Criminal Appeal—Accident—Burden of proof—Misdirection—Penal Code, ss. 73, 99—Evidence Ordinance, s. 105—Court of Criminal Appeal Ordinance, No. 23 of 1938, proviso to s. 5 (1).

The appellant was convicted of murder by shooting. He admitted at the trial that the death was caused by the discharge of a gun that was in his hands but he stated that the gun went off in consequence of an attempt made by another man to wrest it from him. The trial Judge directed the jury that the question whether the gun was discharged by the appellant deliberately or whether it went off accidentally must be decided upon a balance of probability and that the burden of proof on that issue lay on the appellant.

Held, that there was no burden on the appellant to prove any of the facts alleged by him. The burden lay throughout on the Crown to prove beyond reasonable doubt that the death in question was caused by an act done by the appellant with the intention or knowledge requisite for the constitution of the offence of murder.

Held further, that where there was a misdirection on such a fundamental point as the burden of proof the Court would not dismiss the appeal acting under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

Mahesa Ratnam, for the accused appellant.

T. S. Fernando, Crown Counsel, with *F. B. P. Jayasuriya*, Crown Counsel, for the Crown.

Cur. adv. vult.

August 1, 1951. GUNASEKERA J.—

The only ground on which this appeal was pressed was that the jury had been misdirected on the burden of proof.

The appellant was convicted of murder by shooting. He admitted in evidence given by him at the trial that the death was caused by the discharge of a gun that was in his hands but he stated that it went off in consequence of an attempt made by another man to wrest it from him. That is to say, he denied that the death was caused by any act done by him with the intention or knowledge requisite for the constitution of the offence charged or any other offence.

The learned Judge charged the Jury upon the footing that the circumstances alleged by the appellant were circumstances bringing the case within one of the general exceptions in the Penal Code, namely that of accident, and he directed them that there was burden on the appellant to prove the truth of his version by a balance of probability and that " he must not leave the matter in doubt ". He said:

" The defence in this case, Gentlemen of the Jury, is that this was an accident. The accused does not deny that the deceased died as a result of his act but he tells you that that act was not a deliberate act, not a voluntary act, but an accident. *In other words he wants to bring himself within one of the exceptions to criminal liability.* If I read to you that exception from our Code and also the illustration given, you will realise what the defence of an accident is and when it amounts to a complete defence.

Section 73 of the Penal Code says ' Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution '. And the illustration given is as follows: ' A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A his act is excusable and not an offence '.

In this case, gentlemen, *if the accused has satisfied you upon a balance of evidence or a preponderance of probability that this was not a deliberate act but that it was while trying to wrench the gun from that man's hands that the gun went off and killed the deceased, then you must acquit him.*

When an accused person seeks to bring himself within a general or special exception to criminal liability *the burden imposed on him by law* is a much lighter burden than the burden imposed on the prosecution. The Crown has to satisfy you beyond reasonable doubt. An accused person has merely *to satisfy you that his version is probably true.* That is what is meant by a balance of evidence or a preponderance of probability. *But remember, he must not leave the matter in doubt. He must at least throw so much weight in the balance of evidence to turn the scales, however small, in his favour. He cannot leave the scales hovering in the balance, so to speak.....*

.....

Even to the extent, that very small extent which *the law requires him to prove his defence,* namely that it was probably an accident, even to that extent *has he satisfied you ?* "

In other parts of his summing-up too the learned Judge repeated the direction that the question whether the gun was discharged by the

appellant deliberately or whether it went off accidently must be decided upon a balance of probability and that the burden of proof on that issue lay on the appellant. Thus, referring to the appellant's version, he said

> " In asking yourselves whether you can accept his version, *if you think it probably true*, you must accept his story. *That is the degree of proof required of an accused person.*"

Again he said

> " Of course if you reject that story, and that is *the picture that is revealed on a balance of evidence, on a preponderance of probability*, you will ask yourselves two questions, was this a deliberate act or was it an accident?"

In the opinion of the Court there was no burden on the appellant to prove any of the facts alleged by him. The burden lay throughout on the Crown to prove beyond reasonable doubt that the death in question was caused by an act done by the appellant and done by him with the intention or knowledge requisite for the constitution of the offence of murder. If his version of the circumstances created a reasonable doubt either as to the *factum* or as to the *mens rea* he was entitled to be acquitted of the offence charged. It was a misdirection to tell the Jury that there was a burden on the appellant to satisfy them that his version was probably true and that " he must not leave the matter in doubt ".

It is possible to conceive a case in which an issue of accident arises in circumstances that do not raise a question as to whether the prosecution has proved beyond reasonable doubt the ingredients of the offence charged. For example, in a trial for murder the defence may, without disputing the allegations that the accused caused death by doing an act with the intention of causing death, claim an acquittal nevertheless on the ground that he did the act in the lawful exercise of the right of private defence but accidentally wounded and killed a person other than his assailant. In such a case the burden of proving the existence of circumstances bringing the case within section 73 (and also section 99) of the Penal Code would in terms of section 105 of the Evidence Ordinance clearly be upon the defence.

> " The position is however different in case in which, by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law in the *Woolmington* case [1] if, on the charge of murder, on all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary course of nature to cause death, existed or not. In such a case the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt,

[1] *(1935) A. C. 462.*

he has produced the result that the prosecution has not established a necessary part of its case."—*Per* Soertsz J. in *R. v. Chandrasekera.*[1]

We would also adopt, with all respect, the following passage in a judgment of Munir, A.C.J., in a Lahore case, that was cited by Mr. Mahesa Ratnam, as being entirely apposite to the case that is before us:

> " If considering every relevant fact the theory of accidental explosion remains as likely as that of intentional firing or even reasonably possible the accused must be acquitted on the ground that the prosecution has failed to prove one of the essential ingredients of the offence of murder. In such a case, it is wholly incorrect to say that the burden of proof that the firing was accidental is, by reason of s. 105, Evidence Act, or on some general principle, on the accused, and that the accused must take a special plea to that effect and prove it in the same manner as the prosecution is required to prove a fact. It is not and has never been the law in this country that if the Crown satisfies the Judge that the deceased died at the prisoner's hands then the prisoner has to show that there are circumstances to be found in the evidence produced by the prosecution or by the prisoner which alleviate the crime so that it is only culpable homicide not amounting to murder or which excuse the homicide altogether by showing that it was a pure accident ". *Mohammed Saddia v. The Crown.*[2]

Before the learned Judge gave the Jury the directions in question he did give them a correct direction on the burden of proof that lay on the Crown, in the course of which he said:

> " But if there is a reasonable doubt on any matter that is required to be proved, in this case whether or not this act was accidental or whether or not this man had the murderous intention, if you have a reasonable doubt on either of those matters you are required as a matter of law—that is my direction to you—to resolve that doubt in favour of the accused because that naturally follows from the presumption of innocence."

We are of opinion, however, that this direction was insufficient to prevent the Jury from being misled by the later directions to a contrary effect that were given to them.

It was submitted to us on behalf of the Crown that if the point raised in the appeal were decided in favour of the appellant we should nevertheless dismiss the appeal, acting under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance. We have considered this submission but we are unable to agree with the view that this is an appropriate case for the application of the proviso notwithstanding that there has been a misdirection on such a fundamental point as the burden of proof. We are, however, of opinion that there should be a new trial. We, therefore, quash the conviction and order a new trial upon the indictment.

New trial ordered.

[1] *(1942) 44 N. L. R. 97 at 125.* [2] *A. I. R. (56) 1949 Lahore 85 at 87.*