

## [COURT OF CRIMINAL APPEAL.]

1941

*Present* : Howard C.J., Soertsz and de Kretser JJ.THE KING *v.* HEEN BANDA.60—*M. C. Kurunegala, 359.*

*Misdirection of law and fact—Burden of proof—Duty of accused to prove his innocence—Charge of rape—Corroboration of evidence—Material misstatement in the charge.*

Where, in a charge of rape, the only corroboration of the complainant's evidence was supplied by her eight-year old daughter and there was a material misstatement in the charge to the Jury as to the effect of her evidence,—

*Held*, that the misdirection of fact was fatal to the conviction.

The Judge in the course of his charge used the following words :—“ If you accept the evidence of the accused and of his wife as to the truth, then he must be acquitted. The onus of proving his case is not as heavy on the accused as it is on the prosecution. If you think that the accused has established by a preponderance of probability that he is not guilty of any offence at all, then he is entitled to be acquitted ”.

*Held*, that the words seemed to indicate that the onus of proving his innocence rested in some manner on the accused and there was a misdirection of law.

**A** PPEAL from a conviction by a Judge and Jury before the Midland Circuit.

*T. K. Curtis*, for accused, appellant.

*E. H. T. Gunasekera, C.C.*, for the Crown.

*Cur. adv. vult.*

July 31, 1941. HOWARD C.J.—

In this case the appellant was convicted of rape and sentenced to a term of seven years' rigorous imprisonment. Counsel on behalf of the appellant has put forward several grounds of appeal, most of which are without substance. Two of these grounds, however, merit serious consideration. The only corroboration of the evidence of the complainant was supplied by the witness *Laisa alias Rosa*, her daughter, a child of about eight years old. In his charge the learned Judge on two occasions told the Jury that *Rosa* had heard her mother cry out. This was a misstatement inasmuch as *Rosa*, although stating in her evidence that she herself raised cries, does not state that her mother did. In considering whether this misdirection as to the facts was so material as to cause a miscarriage of justice, it must be borne in mind that, in order to establish the offence of rape, the Crown had to prove that sexual intercourse had taken place without the consent of the complainant. The medical evidence did not in any manner prove that she had been raped. In her statement to the headman the complainant stated that the appellant came to the house with a table knife in his waist and when he was about to rape her he kept the knife aside. No such testimony with regard to the knife was, however, tendered by the complainant at the trial. It is true that *Rosa* stated that the appellant came inside the house, seized her mother and blew out the light. On the other hand if the Jury had had any doubts as to whether the sexual intercourse took place without the consent of the complainant

those doubts could not have failed to have been removed if they thought that Rosa was a witness on whom reliance was to be placed and who had stated that her mother cried out. In these circumstances, this misdirection as to the effect of the evidence was such as to make it reasonably possible that the Jury would not have returned their verdict of guilty if there had been no such misdirection.

There is, moreover, a passage in the learned Judge's charge which may possibly have caused some confusion in the minds of the Jury. This passage is worded as follows :—

“ Well, gentlemen, if you accept the evidence of the accused and his wife as the truth, then he must be acquitted. The onus of proving his case is not as heavy on the accused as it is on the prosecution. If you think that the accused has established by a preponderance of probability that he is not guilty of any offence at all, then he is entitled to be acquitted. If on the other hand you discredit the accused's defence altogether and you feel that the prosecution has beyond reasonable doubt established his guilt, then it will be your duty to find him guilty of the offence with which he is charged.”

Although it is obvious from the whole of the charge that the learned Judge did not in any way intend to throw the burden of proof on the accused, this passage is open to this interpretation. The words “ if you accept the evidence of the accused and his wife as the truth, then he must be acquitted ” seem to indicate that, if the Jury do not accept the evidence of the accused and his wife, the accused must be convicted. Whereas the onus still rests on the Crown to prove that intercourse took place without the consent of the complainant. The position is not improved by the use of the words, “ The onus of proving his case is not as heavy on the accused as it is on the prosecution. If you think that the accused has established by a preponderance of probability that he is not guilty of any offence at all then he is entitled to be acquitted ”. These words seem to indicate that the onus of proving his innocence in some manner rested on the accused. This is not the law.

For the reasons I have given, the appeal is allowed and the conviction and sentence quashed. In accordance with section 5 (2) of the Court of Criminal Appeal Ordinance, we direct that there shall be a new trial.

*Conviction quashed.*

---