[COURT OF CRIMINAL APPEAL]

1953 *Present:* **Nagalingam A.C.J., Gratiaen J. and K. D. de Silva J.**

W. JAYASENA *et al.*, Appellants, *and* THE QUEEN, Respondent

Appeals 35–39, with Applications 52–56/S. C. 25—M. C. Chilaw, 52,857

Trial before Supreme Court—Failure of accused to give evidence—Adverse comment by Court—Scope of inference against accused—Misdirection.

In a trial before the Supreme Court, the case for the prosecution rested principally upon the evidence of one witness, K. B. In the course of the Judge's summing-up the Jury were told that they could legitimately draw the inference that K. B.'s evidence, which, taken by itself, might not be regarded as trustworthy, could, in view of the failure of the accused persons to give evidence on their own behalf and contradict that evidence, be deemed to be true.

Held, that the Judge's comment on the failure of the accused to give evidence was in the circumstances a misdirection.

APPEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *S. Saravanamuttu* and *S. B. Lekamge*, for the accused appellants.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 19, 1953. NAGALINGAM A.C.J.—

The prisoners in this case were convicted of offences of being members of an unlawful assembly, rioting and attempt to commit murder, and were sentenced to three years' rigorous imprisonment each. The nature of the evidence against the prisoners was summarised by the learned trial Judge as follows :—

> " Of course, in a case which rests on the testimony principally of one witness, as in this case, you would have to be very circumspect before you decide to act on that evidence, and you would have to be specially so, having regard to the previous record of the witness Kiri Bandiya,"

and the learned trial Judge proceeded to assess the value to be placed on the evidence of this witness :

> " Although there is no evidence to hold that he is an interested witness, still if you come to the conclusion that he had spoken a falsehood on a material point, then there is sufficient ground for you to hold that he is an interested witness, and taking into consideration his previous record I think it is unsafe to act on his evidence."

Thereafter the learned Judge, after directing the Jury quite properly that it was for the prosecution to establish its case beyond reasonable doubt, commented on the absence of the accused from the witness-box as follows :—

" The other matter relied upon by the prosecution is that no evidence has been adduced to show where the accused were. The accused are not obliged to lead that evidence, *but they are in a position to adduce evidence to show that they were not at the scene of this incident, and thereby contradict the evidence of Kiri Bandiya.* As I said, the accused are not obliged to lead evidence or call witnesses. None of the accused needs get into the witness-box to give evidence. One witness has been called by the defence to show that Somida and Kiri Bandiya did not go to Tileke's house that night. When you are considering the evidence such as this, what are the reasonable inferences to be drawn on matters again within your province as judges of fact ? *But in drawing these inferences you must bear in mind that the accused are at liberty to adduce evidence to disprove that they have been absconding. When it is open for them to give evidence, although they cannot be compelled to give evidence, and if they refrain from giving evidence, then they must suffer the consequences. On a careful consideration of the matter, on the question that they were absconding, if you hold that from the failure of the accused to give evidence that what Kiri Bandiya says is the truth,* then you can act on his evidence, of course, bearing in mind what I already told you that the accused cannot be compelled to give evidence. However, you must not regard these matters as reasons which may enable you to overlook the deficiencies in the prosecution case."

This passage taken as a whole cannot be said to be above the reasonable criticism made by counsel for the appellants that the effect of it was that the Jury were told that they could legitimately draw the inference that Kiri Bandiya's evidence, which taken by itself may not be regarded as trustworthy could, in view of the failure of the prisoners to give evidence on their own behalf and contradict that evidence, be deemed to be true.

This direction, there can be little doubt, proceeds on a wrong basis. The weakness in the prosecution case is never made good by a deficiency in the defence set up by the accused. It is axiomatic to say that the absence of the accused from the witness-box does not make a case more onerous against him, or that a prosecution case otherwise not established is proved thereby. Lord Oaksey in delivering the judgment of the Judicial Board of the Privy Council in the case of *Cyril Waugh v. The King* [1] said :

" It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence ; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment

[1] *(1950) L. R. A. C. 203 at 211.*

Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. *In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the Jury to think that no innocent man could have taken such a course.*"

And the conviction for murder in that case was for that reason quashed. In this case, however, the charge to the Jury went further than mere comment on the prisoner's failure to give evidence, as in the case cited. Here, to put it at the lowest, the suggestion is made to the Jury that " from the failure of the accused to give evidence " they may hold that " what Kiri Bandiya says is the truth " for " they must suffer the consequences " " if they refrain from giving evidence ".

In *Doraisamy's case* [1], in regard to a statement in the charge :

" So, where there is evidence adduced by the Crown which implicates the prisoner, and the prisoner does not give evidence, you are entitled to draw an inference against him from that fact ",

Hearne J., who delivered the judgment of the Court, remarked :

" The standard of proof required in criminal cases remains constant irrespective of the fact that the accused has not given evidence."

In the *case of Chelliah* [2], I had occasion to observe :—

" If an inference that the accused person is guilty be permitted to be drawn from the fact that he has not chosen to get into the witness-box and deny the case set up against him by the prosecution, whatever the infirmities of that case may be, it would be easy to see that far from the burden of proof remaining from start to finish on the prosecution it gets shifted to the accused on the close of the case for the prosecution, whatever the case established against the accused may be, a proposition which under our law at any rate carries with it its own condemnation."

And this observation is of equal applicability to the circumstances of the present case.

Having regard to these considerations, we allowed the appeal and acquitted the accused.

Appeal allowed.

[1] *(1942) 43 N. L. R. 241.*

[2] *(1952) 54 N. L. R. 465.*