[COURT OF CRIMINAL APPEAL]

1945 *Present:* **Wijeyewardene, Cannon and Rose JJ.**

THE KING *v.* SATHASIVAM *et al.*

38—41—M.C. Jaffna, 6,291.

Court of Criminal Appeal—No presumption of innocence in favour of witnesses when allegations are made against them—A rider brought by Jury should be spontaneous—Offence of causing death by doing an act with the knowledge that death is likely to result—Failure of Judge to give proper directions—Effect of misdirections in summing-up—Penal Code, ss. 33, 293.

Five persons were charged with murder. The first accused was acquitted and the second, third, fourth and fifth accused were convicted of culpable homicide not amounting to murder.

The deceased died of gun-shot injuries. There were no eye-witnesses as to the actual shooting, but shortly before and after four shots were heard and he deceased fell the second, third, fourth and fifth accused were seen in the vicinity. On the day following the night of the incident the police found four empty cartridge cases at a distance of over 80 yards from the spot where the deceased fell. These empty cartridges were, according to the opinion of an expert witness called by the Crown, fired from the gun which the police found in the house of the second accused.

The suggestion on the part of the Crown was that the accused were incensed by the cremation of a member of the Nalavar caste in a Vellala crematorium and went to the scene actuated by a common purpose to fire at the mourners with a murderous intention. By their verdict the Jury negatived the murderous intention but found that all four accused had the knowledge that by the shooting death was likely to result.

The second accused gave evidence on his own behalf in which he denied his presence at the scene. It was not disputed by the defence that the empty cartridges were similar to the cartridges which the second accused kept in his own house but it was suggested that in all probability the police had effected a substitution of the cartridges in question. The third, fourth and fifth accused gave no evidence and called none on their behalf.

On the question of the alleged substitution of the cartridges, in a passage towards the end of his charge to the Jury, the trial Judge directed that there was a presumption of innocence in favour of the accused and that presumption was part of a larger presumption, namely, that there was always a presumption of innocence whenever an allegation of criminality was made against anybody, and when the defence made suggestions against the police officers a presumption of innocence also arose in their favour which made it necessary for them to furnish some proof that the allegations they made were justified. Further, the Jury were invited, if they so wished, to bring in a rider that the allegations against the police were not substantiated:—

Held, (i) that the direction to the Jury was open to objection, for there was no such presumption of innocence in favour of a witness for the prosecution;

(ii) that a rider of the Jury brought on the invitation of the Judge would lack that spontaneity in which its value lies;

(iii) that, having regard to the Jury's verdict, it was important to see whether the Jury had been adequately directed not only as to common intention but also as to the matters which they should have considered before they could properly have returned a verdict that the three persons who did not fire had the knowledge that the shooting by the fourth was done in such circumstances as was likely to cause death;

(iv) that, where in a summing-up there are substantial misdirections as to the Law, it is not safe to adopt the line of reasoning that because in other parts of the summing-up the Judge has adequately, although only in general terms, directed the Jury, the misdirections should be disregarded;

(v) that the misdirections in the summing-up made it impossible for the verdict against the third, fourth and fifth accused to stand but were not sufficiently serious to vitiate the verdict as regards the second accused.

APPEAL from a conviction by Judge and Jury before the Western Circuit.

R. L. Pereira, K.C. (with him *H. V. Perera, K.C., H. W. Thambiah, S. N. Rajaratnam* and *M. M. Kumarakulasingham*), for the first, second and third appellants, submitted that the Judge misdirected the Jury on the facts, that the verdict was unreasonable, and that, therefore, the convictions of the accused could not stand.

H. V. Perera, K.C.—The summing-up also contains misdirections on the law which must vitiate the convictions. Firstly, it was a misdirection on the part of the Judge when he told the Jury that there was a presumption of innocence in favour of the Police who were alleged by the second accused to have fabricated evidence by the substitution of cartridges. This portion of the Judge's summing-up seems to suggest that the officers of the Police were on trial in the same case for fabricating evidence, and that there were two presumptions of innocence, one in favour of the accused and the other in favour of the Police. The Judge also invited the Jury, if they so wished, to bring in a rider that the allegations against the Police have not been substantiated. That was most improper—*Rex v. Larkin* [1]. There is no presumption of innocence in favour of a witness for the prosecution, whether he be a Police Officer or not.

Secondly, the case for the second accused was an *alibi*. The Judge has taken the erroneous view that an *alibi* was a general exception which required proof by a preponderance of probability. His direction to the Jury on the onus of proof was clearly wrong.

Thirdly, the Jury were not properly directed on the question whether the third, fourth and fifth accused knew that the act of firing by the second accused was likely to cause death. Section 32 of the Penal Code deals with common intention. The Jury acquitted the accused of the charge of murder and this negatives intention. There remained the question of knowledge. Section 33 does not impute knowledge. The knowledge of each individual accused has to be taken into account—*Emperor v. Mujjaffar Sheikh et al.* [2]; *Barendra Kumar Ghosh v. Emperor* [3]; *Rex v. de Silva et al.* [4]

G. E. Chitty (with him *H. Wanigatunge* and *Sivagurunathan*), for the fourth appellant.

H. H. Basnayake, Acting Solicitor-General (with him *H. W. R. Weerasooriya, C.C.*), for the respondent.—In regard to the submission that the reference to a presumption of innocence of the Police confused the Jury it is submitted that the Judge has made it quite clear that the onus

[1] *(1943) 1 All. Eng. Reps. 217.*
[2] *(1941) A. I .R. Calcutta 106 at p. 109.*
[3] *(1924) I. L. R. 52 Calcutta 197.*
[4] *(1940) 41 N. L. R. 483.*
[5] *(1940) 41 N. L. R, 433.*

of proving guilt of the accused lies on the prosecution—*The King v. Andris Silva* [5].

No evidence has been given to show that four empty cartridges were taken from second accused's house by the Police. The second accused only said that he had empty cartridges in his house. The evidence that no empty cartridges were taken from the house of the second accused stands uncontradicted. The contradictions of the Police officers who gave evidence negative the story of fabricating evidence.

The existence of a wrong direction in a summing-up, which also contains correct directions, will not vitiate a conviction unless there is a miscarriage of justice. Looked at as a whole the Judge in his summing-up asked the Jury to approach the case in the proper manner. The total weight of the charge is correct. The Judge did not leave the Jury with the impression that if accused were acquitted the Police officers would be convicted of fabricating evidence.

Common intention in section 32 of the Penal Code means intention to do the act the party intended to do. Section 33 deals with offences involving knowledge, where a criminal act is done by a number of people engaged in doing a particular act involving knowledge.

[WIJEYEWARDENE J.:—What is there to connect the other accused with the act of shooting by the second accused?]

The question is whether they joined in the act.

[WIJEYEWARDENE J. referred to *The King v. K. W. Jayanhamy* [1] and *The King v. M. H. Arnolis* [2].]

Common intention is a question of fact. Our section 32 corresponds to section 34 of the Indian Penal Code. What is referred to is common intention to do a criminal act—*Ibra Akanda et al. v. Emperor* [3].

[CANNON J. referred to *R. v. Salmon* [4].]

That case is cited in *Ibra Akanda v. Emperor (supra)*. See also *Barendra Kumar Ghosh v. Emperor (supra)* and *Mahadeo Nath Ketri et al. v. Emperor* [5].

The occurrence of an objectionable passage in a summing-up does not vitiate the correctness of the summing-up as a whole, and the convictions will not be interfered with where no substantial injustice has been done—*R. v. Stoddart* [6]; *R. v. Totterdell* [7]; *R. v. Leoni Sharra* [8]; *R. v. John Thomas* [9]; *R. v. Robert Edward Chew* [10].

H. V. Perera, K.C., in reply.—Misdirections as to the law, as distinguished from misdirections as to the facts, can affect the verdict—*The King v. Babanis* [11]. The test is, would the Jury have returned the same verdict if they were properly directed.

October 15, 1945. ROSE J.— *Cur. adv. vult.*

In this case five persons were charged with the murder of one Sinnathamby on September 26, 1944. After a long trial the first accused was acquitted and the remaining four were convicted of culpable homicide not amounting to murder.

[1] *(1944) 45 N. L. R. 510.*
[2] *(1943) 44 N. L. R. 370.*
[3] *(1944) A. I. R. Calcutta 339.*
[4] *(1880) 6 Q. B. D. 79.*
[5] *(1941) A. I. R. Patna 550.*
[6] *(1909) 2 C. A. R. 217.*
[7] *(1910) 5 C. A. R. 274 at p. 276.*
[8] *(1918) 13 C. A. R. 119 at p. 120.*
[9] *(1922) 17 C. A. R. 34.*
[10] *(1926) 19 C. A. R. 73 at. p. 74.*
[11] *(1944) 45 N. L. R. 119.*

For the sake of convenience we propose to refer to the various appellants by the numbers which they bore during the trial as accused persons. Although the case lasted for some 14 days and the learned Judge's charge to the Jury occupied no less than 107 typewritten pages we feel that so far as this Court is concerned the matter is susceptible of comparatively brief treatment. It appears that on the night in question a number of persons among whom was the deceased were engaged in cremating the body of a member of the Nalavar caste in a Vellala crematorium at Villundi, Jaffna. The pyre was apparently lit in dayight on September 26 and it was soon after night fall, before the completion of the funeral ceremony, that the incident occurred which resulted in the death of the deceased. The case for the prosecution, which by their verdict the Jury must be assumed, as far as the facts relating to the second, third, fourth and fifth accused were concerned, to have accepted was in short as follows. The second, third, fourth and fifth accused were seen conferring sometime during the afternoon of the day in question; after dark, by the light of the moon, they were observed entering a field adjoining the cemetery; the second and fifth accused were carrying shot guns. It is uncertain whether the third accused was also carrying a gun, although one witness stated that he was; the fourth accused was not carrying a gun or indeed any weapon; the fourth accused was seen to make a sign with his hand to the party which suggested to the eye witnesses that he was directing them to be silent; from this fact and because the fourth accused was walking in front of the party the eye witnesses appear to have assumed that he was their leader. All four persons disappeared from sight in the direction of the cemetery; a short time afterwards three or four shots were heard and shortly thereafter the second, third, fourth and fifth accused returned the way they had come and went away, " walking quickly "; as a result of this shooting, the deceased who, as we have already said, was one of the mourners at the cremation ceremony, fell dead, a pellet having penetrated his brain and two other mourners received minor gun shot injuries. On the following day the police found four empty cartridge cases at a distance of over 80 yards from the spot where the deceased fell and two days after that they obtained information from the two principal eye witnesses for the Crown to the effect that the second, third, fourth and fifth accused had been seen in the vicinity in the circumstances described above. The second accused was arrested on September 30 at his house where the police found a single choke-barrelled 12-bore breech-loading gun fitted with an automatic ejector. Tests were subsequently carried out and after examination of the empty cartridges and experiments with this gun the expert witness called by the Crown stated that in his opinion the empty cartridges were fired from that gun which (with the particular kind of cartridge employed) had an effective range considerably in excess of the 40 yards or so which the witness from his general experience of shot guns would have expected.

The suggestion on the part of the Crown was that the 2nd, 3rd, 4th and 5th accused were incensed by the cremation of a Nalavar in a Vellala crematorium and went to the scene actuated by a common purpose to fire at the mourners with a murderous intention. By their verdict the Jury negatived the murderous intention but found that a

fourth accused had the knowledge that by the shooting death was likely to result.

The second accused gave evidence on his own behalf in which he denied his presence at the scene. It was not disputed by the defence that these empty cartridges were similar to the cartridges which the second accused kept in his own house but it was suggested that in all probability the police had effected a substitution of the cartridges in question. The 3rd, 4th and 5th accused gave no evidence themselves and called none on their behalf.

On the question of the alleged substitution of the cartridges, Counsel for the 2nd accused contends that there was a serious misdirection. In a passage towards the end of his charge the learned Judge says:—

> " I told you, gentlemen, that there was a presumption of innocence in favour of an accused. The burden is upon the Crown of proving their guilt beyond any reasonable doubt. That presumption is part of a larger presumption, namely, that there is always a presumption of innocence whenever an allegation of criminality is made against anybody, and when the Defence suggests circumstances such as this against those police officers a presumption of innocence also arises in their favour which makes it necessary for them to prove at least to raise some substitution of thought in their minds that the allegations they make are justified. Gentlemen, in this connection I wish to draw your attention to a ruling of the Court of Criminal Appeal. In that case this very point which I am now dealing with was referred to and in another connection and I will give it to you in the very words of the Court of Criminal Appeal [1] In this case, Gentlemen, the learned Judge who was trying a criminal case told the Jury that they ' should not pay the slightest attention to any suggestion put to the witnesses when cross-examined unless those suggestions were supported by proof. We need say no more than that in our view that is a proper direction '.
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> Therefore, Gentlemen, fortified by the ruling of the Court of Criminal Appeal that you should not pay any attention to suggestions unless they are supported by some proof. What are these allegations against these police officers? Are they supported by any proof? Are they or are they not merely suggestions made by the defence. What proof is there that cartridges were substituted at the spot? What proof is there that empty cartridges were fired through the gun? What evidence is there that the productions which were put into the box were taken out and new ones substituted? What evidence is there? These are suggestions, and there is a presumption of innocence, just as much as is present in favour of the accused, arising in favour of the police officers when any allegation is made against them, to say nothing of the language of the Court of Criminal Appeal which says that where suggestions are made of this kind they should not be accepted unless there is some proof in support of that ".

Further the learned Judge adverts to the matter again a little later in his summing-up when he invites the Jury, if they so wish, to bring in a rider

[1] *41 N. L. R. 433 at 438.*

that the allegations against the police have not been substantiated. In the event the Jury declined this invitation; but had they accepted it their rider would have lacked that spontaneity in which its value lies. Quite apart from this invitation to the Jury, which in the circumstances seems to us to be unfortunate, we consider that the passage in queston is open to objection. There is, of course, no such presumption of innocence in favour of a witness for the prosecution, whether he be a police officer or not, and the authority of the Court of Criminal Appeal which was cited to the Jury seems to us to have no application to the present case where the defence of the second accused was in effect: " I was not present at the scene. I admit that these four empty cartridges are similar to the cartridges which I myself possess and may very well be mine. As I was not present myself at the scene I can only explain their being found there on the basis that some substitution had been effected by the police ".

It is to be borne in mind that according to the evidence which was adduced at the trial not more than four shots were fired. If that evidence is to be accepted and also the evidence of the police as to the finding of the four empty cartridges when those four cartridges would seem fully to account for all the shots that were fired. As they were all fired from the same gun it is, in the absence of evidence to the contrary, a reasonable inference that only one man fired. Having regard to the Jury's verdict it is important to see whether they were adequately directed not only as to common intention but also as to the matters which they should consider before they could properly return a verdict that the three persons who did not fire had the knowledge that the shooting by the fourth was done in such circumstances as was likely to cause death. It would seem to be a fundamental matter in this case for the Jury to make up their minds as to what it was that the three accused persons who did not fire intended to be done. Was it their intention that the fourth man, whoever he was, should aim at the party of mourners and (to quote a phrase from the learned Judge's charge) " Send a hail of pellets among them "? Or was it merely that he should make a demonstration by letting off his gun with the object, no doubt, of frightening away the mourners from the crematorium? To this important aspect of the case it is disconcerting to find that in so long a summing-up there are such slight references. In one passage, dealing, be it noted, not with this aspect of the case at all but with the question as to the rapidity with which the four shots could have been fired from a single gun, the learned Judge says:—

> " May it or may it not be the case that the Vellalas who wanted to teach the Nalavars a lesson fired at the people without taking aim and even without taking a gun to the shoulders? That would have a bearing on the question of intention and knowledge. If the intention was not so much to kill or wound the people who had the temerity to use this crematorium could not the gun have been loaded, ejected and fired quickly? "

In another passage which would seem to be intended as a summary of what had gone before the learned Judge says:—

> " In my opinion there are three verdicts open to you according to the knowledge or intention assuming of course that these accused or

anyone of them took part in the transaction. Murder, if they had the intention or those essential forms of knowledge in the third definition of murder which I gave. Culpable homicide, if you think they did not intend to kill but merely in order to intimidate or frighten the Nalavars or not guilty. I do not think there is a possibility of a fourth verdict of grievous hurt ".

In the immediately succeeding sentence the learned Judge says:—

" I am sorry I have taken so much of your time in defining these forms but it is a matter of vital importance and it is my duty to detail them to you ".

We agree as to the importance of the matter and it is therefore unfortunate that the learned Judge's summary contains a palpable misdirection on the question of culpable homicide not amounting to murder. The only other reference which can be said to have any bearing upon the point which we are now considering is contained almost at the conclusion of the charge and reads as follows:—

" If a *prima facie* case has been made out against the accused then the burden of proof would be shifted. For instance in the case of the second accused if you are satisfied that the case for the prosecution is established *prima facie*, then the onus shifts to the second accused, and it is my duty to tell you that the burden of proving an exception to criminal liability or some circumstance which exempts him from criminal liability is on the accused, but it is the practice of learned Judges to tell you that the burden of proof which lies on the defence is not so strong as the burden which rests on the prosecution. It is sufficient for an accused by a preponderance of probability or on a balance of evidence to raise reasonable doubts in your minds with regard to the case for the prosecution ".

With great respect to the learned Judge this seems to us to be a most confused and misleading passage. As far as the Jury is concerned there is, of course, no question of considering at any stage of the trial whether a *prima facie* case has been established. That is solely a matter for the consideration of the trial Judge at the close of the case for the Crown. The fact that the third, fourth and fifth accused did not give evidence on their own behalf is, of course, an element with the Jury are entitled to take into consideration in regard to the case as a whole but the obligation on the Crown is not to prove a *prima facie* case but to prove the guilt of the accused beyond all reasonable doubt, irrespective of whether the accused have given evidence. Further, the learned Judge seems to have formed an impression that this was a case in which an exception (such as sudden fight, self-defence or grave and sudden provocation) was being raised by the defence. That is not the position with regard to any of the accused persons and his reference therefore to the onus on the defence being less than onus on the Crown has no relevance and in our opinion can only have served to confuse the Jury.

At no stage in this lengthy charge is there any passage which brings to the attention of the Jury the fact that they must consider carefully whether

having regard to the actual circumstances of the shooting the only reasonable inference is that, in the absence of explanation by the accused themselves, the three accused who did not fire must have known that the act of firing by the other accused was likely to cause death. Having regard to the fact that the four shots were fired (and according to the evidence, only four shots were fired) in quick succession and at a range which normally would be far beyond the effective or dangerous range of a shot gun it seems to the majority of the Court that it is at least a possible and not unreasonable inference that the other three men merely intended that a demonstration should be made either by firing in the air or at random, and not in the direction of the mourners. It is true that there is no evidence that any protest was made against the direction in which the man who fired was pointing his gun, but as the incident took place at night time and there is no evidence as to how close the other three men were to the man who fired at the actual moment of firing it is in the opinion of the majority of the Court impossible for us to hold that the Jury if properly directed would inevitably have come to the conclusion that the three men who did not fire had the knowledge that the firing was likely to cause death.

There is no doubt that at various stages in this very lengthy charge the learned Judge has in general terms correctly stated the provisions of the Law which arise for consideration in this case. But it seems to us that there is great force in Mr. H. V. Perera's contention that where in a summing-up there are substantial misdirections as to the Law (as distinct from mistakes as to the facts which may or may not be vital) it is not safe to adopt the line of reasoning that because in other parts of the summing-up the Judge has adequately, although only in general terms, directed the Jury, the misdirections should be disregarded. The matter is, of course, one of degree but in the present case, at least as regards the third, fourth and fifth accused, it seems to the majority of the Court that the directions, where they are not actually misleading, are so inadequate as to make it impossible for the verdict to stand.

It would seem to follow from what we have said that if the Jury were in doubt as to which of the four accused fired then the appeals of all four should be allowed.

As regards the second accused, however, we are of opinion that on the facts presented by the Crown and which as we have already stated must be presumed to have been accepted by the Jury there is an irresistible inference that it was the second accused who fired the four shots. He was seen in the vicinity both immediately before and immediately after the shooting; he was carrying a shot gun; when he was arrested a shot gun was found in his house which it is not disputed was in fact his gun; four empty cartridges which were proved to have been fired from his gun were found at the scene of the crime; not more than four shots were fired and they were fired in rapid succession. From those facts it seems to us that the Jury must reasonably have come to the conclusion that it was the second accused who actually fired those four shots, one of which proved fatal to the deceased. In his case it seems to us that the deficient direction as to knowledge is not fatal because, as he himself was in control

of the shot gun at the time of the firing; as the event proved, was pointing the shot gun in the direction of the party of mourners; and must presumably have known the effective range of his own gun, he must reasonably be presumed to have known that such firing was dangerous and likely to cause death. In his case therefore we have to consider whether the misdirections in the passages relating to the presumption of innocence of the police witnesses and the shifting of the onus of proof are in themselves sufficiently serious to vitiate the verdict of the Jury. After the most anxious consideration we are of opinion that even in the absence of these misdirections the Jury would have come to the same conclusion in his case. We are not therefore disposed to regard these misdirections, unfortunate as they are, as fatal to the conviction. No argument was adduced to us on the question of sentence with which we see no reason to interfere.

As regards the second accused therefore his application for leave to appeal is refused and his conviction and sentence are confirmed. As regards the third, fourth and fifth accused, the majority of the Court is of opinion that their appeals must be allowed. They are therefore acquitted.

Conviction of 2nd accused confirmed.

Conviction of 3rd, 4th and 5th accused set aside.