MANNAR MANNAN

v.

THE REPUBLIC OF SRI LANKA

COURT OF APPEAL.
JAYALATH, J., RAMANATHAN, J. AND WIJETUNGA, J.
C.A. No. 42/85.
M.C. BATTICALOA No. 186/80.
JANUARY 13, 15, 16, 28 AND 29, 1987.

Criminal Law–Non-direction–Misdirection to the jury–Alibi–Intermediary position–Dock statement–Proviso to s.334(1) of the Code of Criminal Procedure Act–Divided verdict–s.8(2) of the Evidence Ordinance.

Failure by the trial Judge to give the direction to the jury that if they neither accepted the accused's defence of alibi as true nor rejected untrue the resulting position would be that a reasonable doubt arises of which the benefit should be given to the accused would be a non-direction on the intermediary positon amountng to a misdirection on the burden of proof. But despite this omission where the judge has given the jury the direction that ordinarily an accused person gives evidence to show either that the prosecution case is not true or to raise a reasonable doubt as to its truth thus in effect telling the jury that creating a reasonable doubt is sufficient for an acquittal the proviso to s.334(1) of the Code of Criminal Procedure Code Act can be applied.

The withdrawal by the Judge of a part of the dock statement of the accused which consisted of a repetition of what his son-in-law told him from the jury was not fatal to the summing up as the omitted part was not relevant to explain his conduct under s.8(1) of the Evidence Ordinance.

No prejudice was caused by the failure to send the accused's shirt for examination to the Government Analyst in view of the Police Sergeant's evidence regarding blood stains on accused's shirt because the Judge gave the direction that one did not know what the stains were thus stressing the uncertainty of the stains to the jury.

When the question of applying the proviso to section 334(1) of the Code of Criminal Procedure Act is being considered the Appeal Court will consider the facts of each particular case and the nature of the misdirection and non-directions. Irrespective of the number of non-directions and misdirections and whether the verdict of the jury was divided or not the appellate court will apply the proviso and dismiss the appeal if in its opinion the accused was not deprived of a fair trial and a reasonable jury properly directed would have reached the same conclusion on the same facts.

Cases referred to:

(1) *Yahonis Singho v. The Queen – (1964) 67 NLR 8.*

(2) *M. A. S. de Alwis v. The Queen – (1972) 75 NLR 337.*

(3) *Stirland v. D. P. P. – [1944] AC 315.*

(4) *Pauline de Croos v. The Queen – (1968) 71 NLR 169.*

(5) *Rex v. Mustafa – (1976) 65 Cr. App. Rep. 26.*

(6) *F. J. K. Slinger – (1962) 46 Cr. App. Rep. 244.*

(7) *Lafeer v. The Queen – (1968) 74 NLR 246.*

(8) *Alfred de Zoysa v. The Queen – (1971) 75 NLR 534.*

(9) *Rex v. Jenkins – (1980) 72 Cr. App. Rep. 354.*

(10) *Jones' Case – (1961) 46 Cr. App. Rep. 70.*

(11) *Gunawardene v. The King – (1950) 52 NLR 142.*

APPEAL from conviction and sentence entered by the High Court of Batticaloa.

Ranjith Abeysuriya with *G. Jayakumar, Ruwan Fernando* and *Kamal Gunasinghe* for the accused-appellant.

C. R. de Silva, Senior State Counsel for the State.

Cur. adv. vult.

March 10, 1987.

RAMANATHAN, J.

The accused-appellant Illan Set Seeni Mannar Mannan was indicted with one Anthonipillai Dominic for murder under section 296 of the Penal Code as follows:

> "That on or about the 27th of October 1977 at Valachchenai within the jurisdiction of this Court you did cause the death of Kandappu Kanapathipillai an offence punishable under section 296 of the Penal Code."

The 2nd accused died prior to the trial and the case proceeded to trial against the 1st accused. After trial the jury found the 1st accused guilty of murder by a divided verdict of 6 to 1. This is an appeal against this conviction and sentence. The case for the prosecution rested on the evidence of two eye-witnesses to the incident. They were the deceased's wife and daughter.

The evidence of Thambiah Nesaratnam, the wife of the deceased was that on the night of the incident at about 12 midnight she heard somebody calling out to her husband "Kanapathipillai come". The witness had got up and gone out followed by her daughter. The accused Mannan was at the gate which was about 5 feet from where she stood. The witness stated that she was able to identify the accused by moonlight. Then her husband had come out from the house to where she stood and asked "who are you"? Then the accused had shot her husband. The deceased touched his chest and fell down. When the witness raised cries, the accused had breached his gun and reloaded it with a cartridge which he took from his belt. The witness and her daughter ran into the house, locked the door and peeped out of the window. They saw Dominic, the accused's son-in-law come and take the accused away. The witness stated that the motive for the accused shooting the deceased was due to a boundary dispute pertaining to their land.

The evidence of the deceased's daughter Kanapathipillai Wijayaluxsmy corroborated the evidence of her mother. This witness has stated that at about 12 midnight she heard the voice of somebody calling out Kanapathipillai. Then her mother got up and opened the door and went out. The witness had followed her mother. The accused was standing holding a gun. Then her father had come out of the house and asked who it was. The accused shot her father, who touched his chest and fell down. Her mother had raised cries. The accused had breached his gun and loaded another cartridge. They had run back to the house and closed the door. They had looked out of the window and seen Dominic the accused's son-in-law coming and taking the accused away.

The prosecution called Dr. K. S. Ranchalingam, the JMO Batticaloa, to describe the injuries in the post-mortem report, as the medical officer who conducted the post-mortem was not available. The injuries are as follows:

"An entry wound with rugged edges, an inch vertically and one and one-fifth inches transversely with burning, blackening, tattooing and singeing over the front of the right 6th and 7th ribs and the intercostal spaces, 5th, 6th and 7th situated 1 1/4" to the right of mid external line.

Exit wounds 5 in number:

1–2 each 1/2" in diameter and an inch apart over the back of right 7th intercostal space–situated an inch to the right of the spine.

3–4 each 4/5 of an inch in diameter and 1/3" of an inch apart over the back of right 8th intercostal space–situated 3/4" to the right of spine.

5 half-an-inch in diameter over back of right 8th intercostal space 1/5th of an inch outer to injury No. 4."

The Doctor had stated that the assailant would have been five to six feet away from the deceased when the assailant shot the deceased. The medical evidence corroborated the eye witnesses evidence with regard to the range of fire on the basis of blackening, tattooing and singeing found on the deceased's body, establishing the proximity of the assailant to the deceased.

The prosecution next called P.S. 6929 Paramanathan who was on reserve duty at Valachchenai Police Station on the night of 27th October, 1977 when the accused and Dominic came and handed over the gun. The witness also stated that the accused had stains of blood on his shirt.

The other police officer was S. I., P. P D. Silva who was one of the investigating officers. He had on the night of 27th October, 1977 smelt the gun (P2) handed over by the accused and found that it was smelling of gun powder indicating that it had been recently fired. The Inspector had visited the scene of the incident and found the deceased lying on his back in the compound of the complainant and he had recovered (P4) waddings at the scene. The Inspector stated that it was a poya day and there was moonlight.

When the prosecution case was closed, the accused Mannar Mannan made a statement from the dock in which he stated that he was a retired army officer. His eldest daughter was marric ' to Dominic who resided in the adjoining land to that of the deceased, where there was a boundary dispute. He knew the deceased who was a forest guard. On the night of the incident when he was sleeping he heard a noise and the sound of women crying. He stepped out and went

towards his daughter's house. When he was passing the deceased's house, he met Dominic, his son-in-law going out of the gate of the deceased's house. He asked Dominic what happened. Then Dominic informed him that he had gone out to shoot wild boar and met the forest guard who was drunk. The deceased had brought him into the compound and started arguing with him regarding the land dispute. During the argument the deceased had tried to snatch the gun and assault him. In this scuffle the gun went off accidentally and struck the deceased who fell down.

The principal submissions of counsel for the appellant were as follows:

Firstly, that the accused had raised the defence of alibi, but the trial judge in his summing up had omitted to give the jury the direction as to what the jury ought to do if they neither accepted the accused's defence of alibi as true nor rejected it as untrue. It was submitted by counsel for the appellant that this was a non-direction on a necessary point and constituted a misdirection. In support of this contention, counsel cited *Yahonis Singho v. The Queen* (1) where Justice T. S. Fernando had observed that where the evidence was neither accepted nor rejected, the resulting position that a reasonable doubt would exist as to the truth of the prosecution evidence and that an accused is entitled to be acquitted.

It was further submitted by counsel for the appellant that where there has been a misdirection or non-direction on the burden of proof, the appellate court should not apply the proviso to section 334(1) of the Code of Criminal Procedure Act, in view of Justice G. P. A. Silva's (S.P.J.) judgment in *M. A. S. de Alwis v. The Queen* (2) which held that the proviso to section 5(1) permitting the dismissal of an appeal on the ground that no miscarriage of justice has actually occurred, even though the point raised on behalf of the appellant might be decided in his favour, is not applicable to a case where there has been a clear misdirection by the trial judge on the burden of proof. In this case a fresh trial was ordered.

Secondly, it was submitted that the trial judge had wrongly withdrawn from the jury a part of the accused's dock statement and thus the accused was unable to explain his conduct as to the reason why he went to the Police Station with the gun. The entirety of what the accused's son-in-law Dominic had told the accused, it was submitted had been excluded by the trial judge on an erroneous basis

it was further submitted by counsel that by virtue of section 8(2) of the Evidence Ordinance, where the conduct of any person is relevant, any statement made to him which affects such conduct was relevant. Therefore, the accused was entitled to have the totality of what his son-in-law had told him put to the jury, as this was the reason why the accused went to the Police Station with the gun.

The trial judge had only permitted a part of the accused's dock statement for the jury's consideration in his summing up and withdrawn the entirety of Dominic's statement to the accused namely–

> "Then I asked him as to what happened. He told me by mistake he had shot the Forest Guard. Then I held him by my hand and took him towards my house. When he told me that he had shot the Forest Guard by mistake he had a gun in his hand. When I was holding his hand and taking him to my house he told me what happened. He said that he went as usual to see whether there was any wild boar in his field and after that when he was coming through the land and entering the main road and while passing the house of the Forest Guard, Forest Guard Kanapathipillai was standing in his compound and called him. He had gone to him without knowing that he was drunk. Thereafter the Forest Guard had taken him into his compound some distance away from his house and started to argue with him regarding the land dispute that has arisen between Sundaramoorthy and Dominic. At one stage the argument went high and Kanapathipillai had tried to snatch the gun and with a reeper in his hand assaulted him. As the gun was already loaded, in the scuffle it got fired accidentally. When it got fired like that it alighted on Kanapathipillai and he fell down."

Thirdly, the shirt worn by the accused had not been sent to the Government Analyst, but at the trial evidence had been adduced that there were bloodstains, thereby causing prejudice to the accused.

Learned Senior State Counsel while conceding that the trial judge had failed to give the direction as to the intermediary position as stated in *Yahonis Singho's case (supra)* (1) nevertheless submitted that there had been a direction by the trial judge that ordinarily an accused person gives evidence to show either that the prosecution case is not true *or to raise a reasonable doubt as to its truth* and then had gone on to deal with the accused's dock statement. Therefore the trial judge had given a direction that creating a reasonable doubt was sufficient for an acquittal.

On the second question raised by counsel for the appellant, it was submitted by Senior State Counsel that the part of the dock statement which was withdrawn was not required to explain the conduct of the accused to the jury, as it does not fall within the ambit of explaining conduct.

As to the third submission made by counsel for the appellant in regard to the observation of the Police Sergeant regarding bloodstains on the accused's shirt, it was submitted by Senior State Counsel that the Judge had given a direction that one does not know what stains they were. Therefore he had stressed the uncertainty of the stains to the jury.

Let me now consider the proviso to section 334(1) of the Code of Criminal Procedure Act which states–

> "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

The purpose of the proviso is to prevent appeals being allowed on the basis of technicality, regardless of whether prejudice has been caused or not to an accused person.

The two matters which frequently come in appeals from jury/trials are:–

1. Whether the summing up to the jury by the Judge had misdirections or non-directions on questions of law.

2. Whether there has been misreception of evidence. The criteria with regard to the exercise of appellate jurisdiction involving misreception of evidence in criminal trials is settled law. The test to be applied is set out by the House of Lords in *Stirland v. D.P.P.* (3) and adopted by T. S. Fernando, J. in *Pauline de Croos v. The Queen* (4).

Furthermore, on the question of misreception of evidence, Scorman, L.J. in the Court of Appeal remarked in *Rex v. Mustafa* (5) emphasising that there is no rule of law or practice which prevents the operation of the proviso in cases where an appellate court has held that evidence was wrongly admitted, as each case must depend upon its particular facts and upon an assessment of the risk of prejudice created by the omission of inadmissible evidence.

In the present case we have to consider non-directions by the trial judge. Counsel for the accused-appellant complains that on the question of the defence of alibi the intermediary position had not been stated. Counsel submitted that this was a non-direction on the burden of proof which vitiated the trial and the proviso could not be applied where there has been a misdirection on the burden of proof. In support of this contention he cited *M. A. S. de Alwis v. The Queen (supra)* (2) where the appellate court did not apply the proviso.

Firstly I am of the view, that there is a difference between a misdirection and a non-direction. The English Court of Appeal has applied the proviso where the trial judge has omitted to tell the jury that the burden of proof is on the prosecution as seen in *F. T. K. Slinger* (6) where the court was of the opinion, that where a non-direction or misdirection is not material to have deprived the accused-appellant of the substance of a fair trial, the appellate court should apply the proviso and dismiss the appeal.

In *Lafeer v. The Queen* (7) the trial judge had misdirected the jury on the burden of proof by directing them that the prosecution has to prove its case to the satisfaction of the jury. It was held that although this was a misdirection and non-direction on matters concerning the standard of proof, nevertheless the court was of the opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. The conviction and sentence were affirmed and the appeal dismissed.

The other important case is that of *Alfred de Zoysa v. The Queen* (8). In this case H. N. G. Fernando, C.J. has stated – if we confidently think the jury did accept as true the prosecution evidence on material points, then further wrong instructions would have contributed little to the jury's ultimate verdict. In this case the trial judge has stated over and over again to the jury – if you believe the prosecution witnesses beyond reasonable doubt on certain material points, then the deliberate falsehoods of the 1st accused on these points would strengthen the prosecution case. This was a clear misdirection on the burden of proof. But nevertheless as these misdirections and non-directions were not so material as to justify an opinion that the appellants were deprived of the substance of a fair trial, the appeal was dismissed.

The English Appellate Court's approach to the applicability of the proviso where there has been a misdirection of law by the trial judge to the jury is best exemplified by *Rex. v. Jenkins* (9). This was a case

where the trial judge had given no warning about the danger of acting upon certain uncorroborated evidence. The view taken was that the Court of Appeal has to have regard to the facts of each particular case and not to questions of the normal approach. If there was sufficient other convincing evidence to make the conviction safe and satisfactory then the proviso can be applied.

In the case of *F. J. K. Slinger (supra)* (6) the trial judge in his summing up had not referred to the burden of proof being on the prosecution. The Court of Appeal applied the proviso to section 4(1) of the Criminal Appeal Act, 1907, which is similar to the proviso to section 334(1) of the Code of Criminal Procedure. The proviso was applied although the summing up was defective, because in the circumstances of this case the appellate court was satisfied that there was no substantial miscarriage of justice and accordingly the appeal was dismissed.

I am not in agreement with the view expressed by G. P. A. Silva, S.P.J. in *M. A. S. de Alwis (supra)* (2) where he had stated that there had been no cases where despite a clear misdirection on the burden of proof the Court has thought it fit to dismiss the appeal and affirm the verdict of the jury.

In my view, this is an overstatement of the law and unduly restricts the application of the proviso which was not the intention of the legislature. I am fortified in my view as neither the Appellate Courts in England nor the Appellate Courts in this country have automatically excluded applying the proviso merely on the ground that there has been misdirection by the trial judge on questions of law.

It is also my view that an appellate court has to consider the facts of each particular case and then decide in view of the non-directions and misdirections made by the trial judge whether the appellant was deprived of a fair trial or not. If on the other hand the appellate court is of the opinion that they are unable to exclude that a reasonable jury properly directed would have reached the same conclusion on the same evidence, then in my view an appellate court had the discretion to apply the proviso and dismiss the appeal.

Thus, in my view where there have been non-directions which have not caused a miscarriage of justice, the proviso can be applied where the appellate court is of the opinion that a reasonable jury would not

have acquitted on the prosecution evidence placed therein, regardless of the non-direction. The other question is where there has been more than one non-direction by the trial judge, can the proviso be applied? It appears that this would depend on the facts of each case and the nature of the non-directions rather than the number of non-directions as seen in *Jones' Case* (10).

The next question to consider is whether the proviso can be applied in cases of divided verdicts. In *Gunawardene v. The King* (11) Gratiaen, J. in a majority judgment was of the opinion that the proviso cannot be properly applied in cases of divided verdicts. But *Pauline de Croos's case (supra)* (4) has differed from this view. I see no reason why the proviso should not be applied merely because one member of the jury has been in disagreement of the evidence against the accused which is so cogent that the only conclusion possible in my opinion is that the dissenting juror was manifestly perverse in arriving at his verdict in the circumstances of this case.

This is a simple case where the jury have heard and seen the witnesses. The prosecution case rested on the testimony of the two eye witnesses Thambiah Nesaratnam, the deceased's wife and the deceased's daughter Vijayaluxmy. Vijayaluxmy has corroborated her mother's evidence as to the material points. Their evidence stands strong and clear as to the identity of the accused, which was aided by moonlight and from a distance where they stood which was about 6 feet away from the accused, who was well known to them. The accused had called out for the deceased Kanapathipillai to come. When the deceased had come out of the house to where the witnesses were, the accused had shot him at very close range. The deceased had touched his chest and had fallen down. The witnesses have also testified to evidence of motive which is a boundary dispute.

The medical evidence has corroborated the evidence of the eye witnesses as to the distance between the assailant and the deceased.

The ocular evidence is cogent and uncontradicted and is supported by medical evidence.

On the question of the accused's statement from the dock, although the trial judge had put only a part of the dock statement for the jury's consideration, the withdrawal of what Dominic is alleged to have told the accused has in my view not caused any prejudice to the accused as the entirety of the dock statement is not required for explaining the accused's conduct of going to the Police Station. The

portion admitted clearly shows the reason why the accused went to the Police Station as the gun used belonged to him. The entirety of the dock statement was not necessary to explain the accused's conduct.

What Dominic told the accused is not relevant to explain the accused's conduct. What was relevant for explaining the accused's conduct as to why he went to the Police Station had been told to the jury. I am satisfied that the jury has been given an explanation why the accused went to the Police Station with the gun. There has been no breach of section 8(2) of the Evidence Ordinance and no prejudice caused to the accused.

On the question raised that the trial judge has failed to give a direction as to the intermediary position, the trial judge had given a direction to the jury stating that ordinarily an accused person gives evidence to show either that the prosecution case is not true or to raise a reasonable doubt as to the truth and had then gone on to deal with the accused's dock statement. He has also stated that the burden is always on the prosecution to prove the case against the accused beyond reasonable doubt.

The situation in *Yahonis Singho's case* (1) was where the accused was charged with murder and the defence was one of alibi. The accused called a witness who stated that the accused was at the time of the incident in a boutique a mile away. The trial judge had not given a direction as to what they were to do if they neither accepted the evidence nor rejected it. The resulting position was that a doubt existed as to the truth of the prosecution case. The Court of Appeal held that if the evidence was neither accepted nor rejected, the resulting position would have been that a reasonable doubt existed as to the prosecution case. In the instant case the accused lived only a few houses away from the place of the incident and the question may also arise as to what extent the defence of alibi will arise in this case.

I am of the opinion that the failure by the Judge to explain the intermediary position in the defence of alibi would not have deprived the accused-appellant the substance of a fair trial in view of the strong

and cogent evidence of the two eye witnesses. A jury properly directed would not have returned a more favourable verdict. I am satisfied that the jury has rightly accepted the evidence on material points and the failure of the trial judge to explain the intermediary position to the jury is not sufficient to justify any opinion that the accused-appellant was deprived of the substance of a fair trial.

I have considered the submission made by counsel for the appellant as to the observation made by the Police Sergeant regarding stains of blood on the accused's shirt. I see no prejudice caused to the accused-appellant as the trial judge has given an adequate direction when he said "you do not know what stains they were". This warning would have negatived any risk of prejudice which would have been caused.

I am of the view that on the facts and circumstances of this case a reasonable jury if properly directed would inevitably and without any doubt have reached the same conclusion that it was this accused who fired the shot on the night of the 27th of October, 1977 and was thus guilty of murder.

I would therefore exclude any possibility that a reasonable jury properly directed on this evidence placed before the jury by the prosecution and defence would have come to a different conclusion and if they did so it would be in my view a perverse verdict. Justice must not only be fair to the accused but also to the state and the public for whose protection the laws are made and administered.

In the circumstances of this case, I am quite satisfied that there was no substantial miscarriage of justice notwithstanding the non-direction to the jury. I am of the view that this is a fit case where the proviso to section 334(1) of the Code of Criminal Procedure Act should be applied and I affirm the conviction and sentence and dismiss the appeal.

JAYALATH, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.