1976 *Present :* **Tennekoon, C.J., Thamotheram J.; Sirimane, J., Rajaratnam, J. and Sharvananda, J.**

D. K. LIONEL, Accused-Appellant

and

THE REPUBLIC OF SRI LANKA

S. C. 165/75—H. C. Galle 41/74

Criminal Procedure—Administration of Justice Law, sections 134, 138 168, 184, 213—Duty of Judge to inform accused of his right to give evidence—Judge must address the accused himself—The decision whether to give evidence or not must be that of the accused, though assisted by his legal adviser—Inferences to be drawn from failure of accused to give evidence.

The accused was indicted on a charge of attempted murder. At the close of the case for the prosecution, the court called upon the accused for his defence and proceeded to inform him (*a*) that he had a right to give evidence ; (*b*) that his failure to give evidence or make a statement from the dock does not mean that the case for the prosecution is true, nor does it mean that he is guilty of the offence nor does it corroborate the case for the prosecution ; (*c*) however, it is possible for Counsel for the prosecution to comment on his failure to do so, and for the jury to take into account that fact in considering the entire case.

The Court thereafter directed the Registrar to ask the accused what he proposes to do and the accused stated "I want to give evidence by entering the witness box." Counsel for the accused thereupon informed Court that he does not propose to call the accused to give evidence. On being questioned as to whether he is prepared to take Counsel's advice and not give evidence, the accused stated that he now does not wish to give evidence.

It was contended on behalf of the accused (i) that the words "if the Judge calls upon the accused for his defence, *the Judge shall before any evidence is called by the accused* inform him ....." in section 213 of the Administration of Justice Law indicate that the Judge must first ascertain whether the defence is calling any evidence and it is only if the defence proposes to call evidence that the Judge would be obliged to inform the accused of his rights ; (ii) that the Judge was wrong in having asked the accused *himself* what he (the accused) proposes to do, when he was being defended by an attorney ; (iii) that it is insufficient for the Judge to have told the accused in general terms of the effect of his failure to give evidence without reference to the particular facts of the case.

Held : (i) That the expression "before any evidence is called by the accused" is merely directed towards fixing the precise stage at which the Judge is called upon to act under section 213 (1), viz. immediately after he has called upon the accused for his defence ; this view is confirmed by the language of section 138 (1) which reads 'at every trial, *if and when the Court calls upon the accused for his defence it shall.....inform* him that he is entitled to give evidence....." (ii) That the duty of the Judge to inform the "accused" that he is entitled to give evidence must be addressed to the accused himself and the decision whether or not the accused is to give evidence must be that of the accused himself ; where,

however, the accused is defended by an Attorney, the decision must be taken by the accused in consultation with his Attorney and not in the presence of the Judge and Jury ; the decision as to the course to be followed must be announced by the Attorney for the accused.

(iii) What the Judge is required to tell the accused is the *effect in law* (independently of the facts of the particular case) of the failure to give evidence.

Obiter : Observations on the right of the prosecution and of the Judge to comment upon the failure of the accused to give evidence.

Cases referred to :

The Republic v. Gunawardena, 78 N.L.R. 209.

R. v. Sparrow, (1973) 2 All E.R. 129 ; (1973) 1 W.L.R. 488 ; 57 Cr. App. R. 52.

Rhodes Case, (1899) 1 Q.B. 77 ; 29 L.T. 360 ; 15 T.L.R. 37 ; 68 L.J.Q.B. 83.

APPEAL against a conviction in the High Court, Galle.

Colvin R. de Silva, with *Mrs. Manouri Muttettuwegama, Weerasinghe de Silva, S. L. Gunasekera* and *S. C. Chandrahasan,* for the accused-appellant.

Ranjith Abeysuriya, Director of Public Prosecutions, with *Tilak Marapana,* Senior State Counsel, and *P. Ramanathan,* State Counsel, for the Attorney-General.

Cur. adv. vult.

December 20, 1976. TENNEKOON, C.J.

This appeal was originally argued before a bench of three Judges consisting of Justice Thamotheram, Justice Sirimane and myself. After judgment was reserved, the three of us felt that some of the questions of criminal procedure that came up for consideration in this appeal were of sufficient public importance to warrant the case being placed before a bench of five Judges.

In this case, four persons were indicted on a charge of attempted murder of one Piyadasa. They were—

(1) D. K. Lionel,

(2) P. V. Sumanadasa,

(3) U. L. Karunapala, and

(4) D. K. Nandasena.

The 3rd acused died before trial. At the trial the Jury found the 2nd and 4th accused to be not guilty of any offence; the 1st accused was found guilty of attempted murder; it is his appeal that is now before us. The Judge sentenced him to a term of 15 years rigorous imprisonment.

The main witness for the prosecution was the injured Piyadasa. He was a taxi driver who was accustomed to park his car at the Hapugala junction. Piyadasa testified that some time before this incident, an assistant of the appellant (1st accused) had suggested that Piyadasa should keep some arrack in his boutique; he refused and, thereafter, the appellant was displeased with him. Sometime after that the 1st accused and another were alleged to have set fire to a cadjan building which Piyadasa was putting up; he made a complaint to the Conciliation Board which held an inquiry on the morning of the very day of this incident. The Conciliation Board was able to bring about a reconciliation between the parties. Piyadasa then says that after having taken his midday meal he was having a siesta in the rear seat of his car which he had parked near the Hapugala junction; he had the doors of the car open. Then he heard a sound and saw the 1st accused coming up to the open door and trying to stab him saying, "I must kill you and eat you". He managed to catch hold of the assailant's hands and was propelled out of the car when the 4th accused gave him a blow on the neck; then Piyadasa ran to the boutique of one Jayasundera, which was almost in front, about 52 feet away. The 1st accused who was chasing him stabbed him twice at the steps of the boutique. Thereafter, the 2nd accused and Karunapala (now dead) came from the direction of the post office. He and the four accused had a struggle in the boutique. Inside the boutique, the 1st accused again stabbed him on the chest. The other three accused who were unarmed assaulted him with hands. After that he got away from the place and went to a laundryman's place close by, bandaged himself and driving his own car set out for the hospital, but feeling weak through loss of blood, he got into a vehicle transporting sand, the driver of which kindly took him to hospital.

Piyadasa's evidence in regard to what happened inside the boutique was corroborated by the evidence of one Jayasundera, son of the owner of the boutique. Jayasundera did not witness the start of the quarrel, nor did he see anyone stabbing Piyadasa. He, however, did see Piyadasa running into the boutique chased by the 1st accused. He says he saw a struggle in which Piyadasa and the four accused were involved. In the course of

that struggle, a showcase in the boutique was upset as a result of the 1st accused tumbling against it. Jayasundera also says that after the incident the four accused departed. Piyadasa had serious injuries; the 1st accused also had an incised injury on his left cheek which required suturing. He saw a blood stained knife in the hands of the 1st accused. The injured man Piyadasa left and had his wound dressed at the laundryman's place. During the course of the cross-examination of Piyadasa, counsel for the 1st accused suggested to him that he was angry that he had been compelled to settle his complaint at the Conciliation Board, and that in that state of mind, he with another companion by the name of Martin Anthony waited for the 1st accused to pass that way on his way back from the Conciliation Board office to get back to his boutique, and that Piyadasa and Anthony set upon the 1st accused and that this was the start of the incident. Piyadasa denied this suggestion. He was, however, contradicted on one point by the evidence he had given in the Magistrate's Court where contrary to what he said in evidence that he was satisfied with the settlement, he had said :

> "I do not like the Conciliation Board's order. We compounded the case on the instructions of the Chairman of the Conciliation Board".

Piyadasa denied having said so in the Magistrate's Court. The suggestion that Piyadasa and Martin Anthony had lain in wait for the 1st accused and that the incident started with their attacking the 1st accused, was put also to Jayasundera. The witness denied that such a thing happened.

The medical evidence was to the effect that apart from some incised wounds, Piyadasa had a serious injury on the chest which endangered life. There were also two penetrating injuries on the back, one of which had apparently perforated the left lung. The 1st accused had a cut injury on his cheek which had to be sutured. Martin Anthony, whose name was on the indictment as a prosecution witness and in attendance, was not called by the State.

The 1st accused has not given evidence or made a statement from the dock. In the result, the suggestions that were put to witness Piyadasa were not supported by any evidence and they remained mere suggestions and the learned trial Judge did not feel himself obliged quite rightly to give any detailed directions of defences such as the right of private defence, or grave and sudden provocation, or of sudden fight. While the counsel for

the appellant makes no complaint about the Judge's summing-up in that regard, a complaint of a different nature is made whch relates not to the Judge's summing-up, but to an incident which it has been submitted may well have had the result of depriving the 1st accused of a fair trial.

When the prosecution closed its case, the Court called upon each accused for his defence and proceeded to inform each of the *accused, inter alia,* that he had a right to give evidence under oath and subject to cross-examination; the accused was also told that if he does not make a statement from the dock or give evidence from the witness box "it is possible for counsel for the prosecution to comment on your failure to do so". The learned Judge also added:

> "But your failure to give evidence or make a statement from the dock does not mean that the case for the prosecution is true. Nor does it mean that you are guilty of the offence, nor does it mean that it corroborates the case for the prosecution. But it is possible for the Gentlemen of the Jury to take your failure to give evidence or make a statement from the dock in considering the entire case. You can also call evidence on your behalf."

The learned trial Judge then directed the Registrar to ask the 1st accused what he proposes to do, and on being questioned by the Registrar the 1st accused said:

> "I want to give evidence by entering the witness box."

The 2nd accused, who was ultimately acquitted, said: 'සාක්ෂියක් දෙන්න දෙයක් නැත' which has been interpreted in Court as: "I have no evidence to give" but manifestly means "there is nothing to give evidence about". The 2nd accused said that he was prepared to make a statement from the dock. The 4th accused said that he was not making a statement from the dock or giving evidence from the witness box.

Thereafter the Court asked the 1st accused whether he was calling any witnesses. The record reads—

> "The 1st accused says he is not calling any witnesses. The 2nd accused says that he is not calling any witnesses. The 4th accused says that he is not calling any witnesses."

The record thereafter reads as follows :—

"Mr. Mendis says that as counsel for the 1st accused he does not propose to call the 1st accused to give evidence. He says he will call only the Registrar of the Court and a police officer to prove the contradictions.

COURT : When the 1st accused expressed his willingness to enter the witness box and to give evidence after I had addressed him in terms of section 213 of the Administration of Justice Law, No. 44 of 1973, I informed the 1st accused of what Mr. Mendis has submitted to Court. I informed the 1st accused that Mr. Mendis has submitted to Court in his opinion it is not necessary for the 1st accused to give evidence. Mr. Registrar, ask him what he has got to say now ? The 1st accused is asked whether he still wants to give evidence or whether he is prepared to take his Counsel's advice and not give evidence from the witness box.

The 1st accused now states that he does not wish to give evidence."

After the Jury had been kept out of Court while another matter was being disposed of, the Jury returned and the following further proceedings are recorded—

"*Mr. Jayasinghe* : I wish to make an application with Your Lordship's permission, namely to tell the 2nd accused not to make a statement even from the dock as it is not necessary.

COURT : Mr. Registrar, tell him what Counsel has said.

The 2nd accused says that I have nothing to say.

COURT : That is, you have taken your Counsel's advice ?

Yes, Sir.

COURT : And you now withdraw your willingness to make a statement from the dock ?

Yes, Sir."

In the summing-up, the learned trial Judge recounted the entire episode ; he went on to say as follows :—

> " In this case, Gentlemen, Counsel for the 1st accused Mr. Harischandra Mendis is not on trial. His decision, Gentlemen, whether to call the accused or over-rule the accused is not before you as an issue in the case. You heard everything that took place. Nor is Counsel for the 2nd accused's decision to prevent the 2nd accused making a statement from the dock in question. But, you, Gentlemen, must as reasonable men, take into account the effect of the failure of the accused to give evidence in law. I told you, Gentlemen, if they are relying on a general or special exception, the burden is on them. I told you how that burden can be discharged. Now, in this case the question arises if the defence is relying on a general or special exception which I referred you to, has that burden been discharged ? That is a matter for you Gentlemen. "

At the outset of the case, the learned trial Judge told the Jury as follows :—

> " There is no burden on any one of them to prove anything, certainly not their innocence unless they rely on some general or special exception. At a later stage of the case if such an occasion were to arise I will give you the necessary direction in law."

The learned trial Judge subsequently said :

> " Now Gentlemen, as I told you, there is no burden on an accused to prove anything, certainly not his innocence. No clear-cut defence has been taken in this case apart from saying that the prosecution has not proved its case beyond reasonable doubt ; but, certain suggestions have been made.
>
> Now, I am going to deal with these suggestions. You remember Piyadasa ; it was suggested to Piyadasa that he was aggrieved by the Conciliation Board settlement and, therefore, he was hiding in the garden behind those two concrete pillars under the coconut trees waiting for the 1st accused who had to pass that way to his boutique and that Piyadasa was in the company of a strong man called Anthony Martin and it was suggested that this happend there. That was all that was suggested to Piyadasa. As to who stabbed Piyadasa, whether the stabbing took place entirely there, or how it came to Jayasundera's boutique, was not suggested to

Piyadasa, but it was suggested to Jayasundera by counsel for the first accused. It was suggested to Jayasundera that the fight started near the concrete pillars and ended in his boutique. You see Gentlemen, that part was not put to Piyadasa; it was only put to Jayasundera. But the suggestions made to Piyadasa and Jayasundera were both denied by them. Gentlemen, I told you at the commencement that sort of defence raised is likely a defence of self-defence. That is the suggestion made by the defence, and I told you that where an accused person raises a defence of general exception or special exception, the burden is on him to prove by a balance of probability. The defence can discharge that burden by calling evidence or by relying on the prosecution story itself if it gives rise to such a defence. But in this case, Gentlemen, the prosecution has denied these suggestions. Suggestions can never take the place of evidence. You can make the wildest allegation against anybody or suggestions against anybody, but you as reasonable men must consider whether they reasonably arise on the evidence".

The Judge went on further to give the jury a brief direction on the defences of private defence, sudden fight and provocation. He finally said in regard to his defence:

"If you believe the suggestion made by the defence that he was set upon and this happened when he was defending himself, although he did not raise it specifically, then you must acquit him".

The trial Judge himself was of the view that appellant's Counsel had over-ruled the desire of the accused to give evidence, for at one stage the Judge said:

"His (1st accused's Counsel's) decision whether to call the accused *or over-rule* the accused is not before you as an issue in the case, nor is Counsel for the 2nd accused's decision to *prevent* the 2nd accused making a statement from the dock in question".

It has been submitted that the episode which occurred just after the close of the prosecution case caused grave prejudice to the applicant.

If one now looks at the relevant provisions of the Administration of Justice Law relating to procedure at criminal trials one comes first of all upon section 138(1) which appears

under the general heading "Of Trials Generally" and is obviously intended to apply to every trial under the Administraiton of Justice Law, whether it be in the Magistrate's Court, the District Court or the High Court.

Section "138(1) At every trial if and when the court calls upon the accused for his defence it shall, if he is not represented by an attorney-at-law, inform him that he is entitled to give evidence on his own behalf and of the legal consequences of his failure to do so, and shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

(2) The failure at any trial of the spouse of the accused to give evidence shall not be made the subject of adverse criticism by the prosecution".

Upon a reading of this section one is left with the impression that by affirming a duty on the part of the Judge to inform the accused of his right to give evidence and the legal consequences of his failure to do so, only in one eventuality, viz., *if the accused is undefended,* the Legislature was denying the existence of such a duty where the accused was in fact defended by an Attorney ; and since an accused person, who in the exercise of the right given to him under section 136 of the same law, has elected to be defended by an Attorney of his own choice does not stand in need of legal advice from the Judge, one is inclined to think that the Legislature could not have intended to require the Judge to give advice on the law to an accused who has an Attorney as his own legal adviser.

However, when one comes to subsequent provisions in the Administration of Justice Law dealing separately with trials in Magistrate's Courts, District Courts and High Courts one finds these respective provisions :

Magistrate's Courts—

"168(2) At the close of the case for the prosecution, if the Magistrate calls upon the accused for his defence, the Magistrate shall, before any evidence is called by the accused, inform him that he is entitled to give evidence in his own defence and shall tell him in ordinary language what the effect in law will be, if he does not give evidence.

(3) If upon the Magistrate calling for the defence, the accused does not give evidence, the Magistrate, in determin-

ing whether the accused is guilty of the offence charged, may draw such inference from such failure as appear proper.

(4) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf ".

District Courts—

" 184 (1) If the Court calls upon the accused for his defence, the Court shall, before any evidence is called by the accused, inform him that he is entitled to give evidence in his own defence and shall tell him in ordinary language what the effect in law will be if he does not give evidence.

(2) If upon the Judge calling for the defence, the accused does not give evidence, it shall be open to the prosecution to comment upon the failure of the accused to give evidence and the Court, in determining whether the accused is guilty of the charge, may draw such inferences from such failure as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf ".

High Courts—

" 213 (1) If the Judge calls upon the accused for his defence, the Judge shall, before any evidence is called by the accused, inform him that he is entitled to give evidence in his own defence and shall tell him in ordinary language what the effect in law will be if he does not give evidence.

(2) If upon the Judge calling for the defence, the accused does not give evidence, it shall be open to the prosecution to comment upon the failure of the accused to give evidence and the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from such failure as appear proper.

(3) Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf ".

In each of the sections 168(2), 184 (1), and 213(1) the plain meaning is that the duty of the Judge to inform the accused of his right to give evidence and of the consequences of the failure to do so, arises in every case where an accused is called upon for his defence *irrespective of whether or not he* is defended by an

Attorney ; and to that extent there is an apparent conflict with the necessary implication contained in section 138 (1). If these provisions when given full effect remain irreconcilable one must have recourse to that rule of construction which I find best stated in an extract from a judgment quoted at page 670 of Crawford's book on Construction of Statutes :

> " It is said that the Code was adopted by the legislature *uno flato,* and speaks with a simultaneous voice in all of its provisions. That is true in the same sense and to the same extent of any ordinary statute consisting of several sections enacting the law on a particular subject. The Act as a whole is put to the vote of the Legislature ; if it receives a majority of the voices, it has passed (as we say) ; and when that fact is certified.... it becomes law. And yet if we find a later section in such Act repugnant to a former one the later must be accepted as repealing the former.
>
> A statute is the will of the law making power, in the same sense that a testament is the will of a testator. The latest declaration must be accepted as the final intention and purpose ",

unless of course there is something peculiar or exceptional in the law which would require a departure from this general rule. On this approach I would give section 168 (2), 184 (1), and 213 (1) their plain meaning, disregarding any implications arising from section 138 (1).

Since we are concerned with a High Court case in which the accused-appellant was defended by an Attorney, section 213 of the Administration of Justice Law must be the provisions to be looked at for the procedure to be followed.

In the 1960's as was pointed out by the Director of Public Prosecutions, there appears to have been a body of opinion in England that the effect of the law relating to procedure at criminal trials was to load the scales heavily against the prosecution. Indeed a Committee appointed by the Home Secretary in 1964 under the Chairmanship of Lord Edmund Davies, after eight years of investigation, hearing evidence and obtaining representations from persons and bodies concerned in the administration or teaching of law did come to the conclusion that certain of the old and existing rules of Criminal Procedure had ceased to be appropriate in modern conditions in England.

In the Lord Davies report, presented to the Home Secretary in 1972 (Comnd. Paper 4991 of 1972) many radical alterations in Criminal Procedure were recommended and a draft Bill submitted to give effect to those recommendations.

The British Government, however, does not appear to have accepted any of the recommendations of this Committee, for the Procedure in criminal trials in England still remains what it was prior to 1972.

The draftsman of our Adminsitration of Justice Law appears to have been thinking on the same lines as members of the Lord Davies Committee for as pointed out by the Director of Public Prosecutions there is at least in patches a remarkable identity of concept and remarkably enough, even of language in some places between the Draft Bill proposed by the Lord Davies Committee and the Administration of Justice Law.

The Director of Public Prosecutions has pointed out to an incident in the National State Assembly when the Administration of Justice Law was before that House.

When the Administration of Justice Law was brought before the National State Assembly in Bill form, section 138 (1)—then numbered section 83(1)—provided that "at every trial, if and when the Court called upon the accused for his defence, the Court shall, if the accused is not represented by an attorney, inform him of his *obligation* to give evidence on his own behalf and of the consequences of his failure to do so ....." The rest of the section read as it does now.

Upon protest by a member of the House at this proposal to place an obligation upon an accused person to give evidence—and that too only if he happens to be undefended—the Legislature ultimately decided to substitute for the words 'inform him of his obligation to give evidence on his own behalf' the words 'inform him that he is entitled to give evidence on his own behalf'

Apart from this proposal from the draftsman of the Bill to introduce a very radical departure from the law relating to the criminal procedure—which was dropped—there was another change in the law which, though not as radical, is also of importance and was adopted by the Legislature ; that was the provision now contained in each of the sections 168(2), 184(2) and 213(2), viz. that—

> "it shall be open to the prosecution to comment upon the failure of the accused to give evidence".

This was a departure from the old law which denied to the prosecution any right to comment on the failure of the accused to give evidence.

In England it was not until the Criminal Evidence Act of 1898 (c. 36) that an accused and his spouse were able in all criminal cases to give evidence on oath ; during the previous sixty years or so the accused had been allowed to make an unsworn statement about the facts ; but this could not be tested by cross-examination. Although a right to give evidence under oath was given to the accused in 1898, the right to make, instead, an unsworn statement was also expressly reserved ; but while giving a right to give evidence under oath the prosecution was expressly prohibited from making any comment on the failure of the accused to give evidence. However, the 1898 Act did not prohibit *the Judge* from commenting on the failure of the accused to give evidence ; and in the *Rhodes Case,* (1899) 1 Q.B. 77, Lord Russel, C.J. said : "it was a question entirely for the discretion of the Judge" whether to comment ; but an unjustified or excessive comment can be the subject of appeal.

Broadly, the position that prevailed in Sri Lanka was the same as that which prevailed in England after the introduction of the Criminal Evidence Act of 1898.

The Lord Edmund Davies Committee among other things recommended :

(i) the express abolition of the right to make an unsworn statement.

(ii) that if the defence is calling the evidence of the accused and others, the accused should be called first (unless for specified reasons the Court orders otherwise).

(iii) that if at the close of the prosecution case the court holds that there is 'a case to answer', the court shall before any evidence is called for the defence inform the accused that he will be called upon to give evidence and also tell him in ordinary language what the effect of the provisions of the new law will be if when so called upon he refuses to be sworn or to answer questions ; the court shall then (if the court has not granted permission for other evidence to be called first) *call upon the accused to give evidence.*

(iv) that if the accused on being *called upon to give evidence* by the Court refuses to be sworn or to answer questions, the prosecution may comment upon the refusal of the accused to give evidence.

(v) that the Court shall inform the accused in ordinary language what the effect of the new law will be if he, when so called upon to give evidence, refuses to be sworn or to answer questions.

(vi) that the Court or Jury in determining whether the accused is guilty of the offences charged, may draw from the refusal of the accused to give evidence when called upon to do so by the court, such inferences as appear proper ; and the refusal may, on the basis of such inferences, be treated as or as capable of amounting to, corroboration of any evidence given against the accused.

(vii) none of the foregoing was to render the accused compellable to give evidence and he was not to be regarded as guilty of contempt of Court by reason of refusal to give evidence.

As stated before, none of these recommendations have been accepted and implemented in England.

One question that arises is whether our Legislature has borrowed and incorporated any of the views of the Lord Davies Report.

Certainly in the Administration of Justice Law—

(i) there is no indication of any intention to abolish the right of the accused person to make an unsworn statement from the dock.

(ii) there is no provision in the Administration of Justice Law which makes it incumbent on the accused to give evidence first in the event of the accused proposing to adduce the evidence of others as well as of himself. It must be noted however that in such a situation our Courts will insist on the accused being called first except perhaps in extraordinary circumstances.

(iii) there is no provision in the Administration of Justice Law which requires the judge at any stage to *call upon the accused to give evidence*. It only provides for the judge if he is not directing the jury to return a verdict of not guilty under section 212(2) "to call upon the accused for his defence" an expression which cannot in any way be equated to "call upon the accused to give evidence".

(iv) as stated above there is no provision in the Administration of Justice Law which gives any right to the judge or makes it his duty to *call upon the accused to give evidence*. It is important to take note of this fact because in section 213(1) and 213(2) our draftsman has borrowed from the Lord Davies Report language appropriate to a refusal to take the Court's direction to give evidence, and latched them on to the failure to exercise the right of giving evidence; it is my firm conviction that one cannot from some phrases occuring in section 213(1) and (2) inferentially hold that when the Judge calls upon the accused for his defence there is a legal duty or obligation on the accused to give evidence. That which the Legislature expressly rejected, as would appear from what I have set out of the legislative history of the bill, cannot be regarded as having been inadvertently and quite contrary to its intention enacted by the Legislature in the provisions of sections 168, 184 and 213.

(v) The Administration of Justice Law has brought in a provision requiring the judge, if he calls upon the accused for his defence, before any evidence is called by the accused, " to inform the accused that he is entitled to give evidence and tell him in ordinary language what the effect in law will be if he does not give evidence."

(vi) The Administration of Justice Law then goes on to provide in section 213(2) .....

> " 213(2) if upon the Judge calling for the defence, the accused does not give evidence, it shall be open to the prosecution to comment upon the failure of the accused to give evidence and the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from such failure as appear proper.

To be noted here is that unlike in the Lord Davies Report where comments could be made on and inference drawn from *a refusal to follow a direction of Court to give evidence,* the Administration of Justice Law only contemplates comments being made upon and inferences being drawn from the failure of the accused to give evidence. The expression " inferences from such failure to give evidence " used in this context in section 213(2) and in sections 138(2) and 168(3) does not carry any implication of inferences from a failure to discharge an obligation cast upon the accused by law.

The resulting position can be described then in the language I used on a previous occasion when this court was called upon to consider the effect of section 213 of the Administration of Justice Law. In the case of *The Republic v. Gunawardena,* S.C. Appeal 136/75 ; S.C. Minutes of 19.12.75 (78 N.L.R. 209) I had occasion to say :

> " We think it would be useful to make a few comments on section 213 of the Administration of Justice Law. Section 213(2) only alters the law as it stood before the enactment of the Administration of Justice Law by giving a right to the prosecution to comment upon the failure of the accused to give evidence and by making a positive declaration of what was always implied in our law, viz., that the jury *may* draw such inferences as appear proper

from the failure of the accused to give evidence. It has not altered the law as to the situations in which inferences may properly be drawn upon such failure. It has not made it obligatory on the accused in every case, on being called upon for his defence, to give evidence, if he wished to avoid being convicted. Failure to testify on the part of the accused is not declared to be equivalent to an admission by the accused of the case against him."

I might add to this also that the fact of the accused not giving evidence when he is called upon for his defence does not amount to and cannot be treated as corroboration of the evidence given against the accused. Further, failure on the part of the accused to give evidence cannot be treated as an item of evidence against him. It cannot be treated as an evidential fact. *Sparrow's Case,* (1973) 2 A.E.R. 129.

I have thought it fit to set down something of what the Director of Public Prosecutions has submitted was the source of some of the phraseology contained in section 213 of the Administration of Justice Law because it has helped me considerably in trying to ascertain to what extent the Administration of Justice Law has altered the procedural law in relation to criminal trials.

Hitherto I have set down the extent to which the law remains unchanged from what it was prior to the enactment of the Administration of Justice Law.

The facts and the submissions that have been made in this case make it necessary to look more closely at the positive changes that have been brought about by the Administration of Justice Law.

Section 213 (1) uses the expression "if the Judge calls upon the accused for his defence, *the Judge shall before any evidence is called by the accused* inform him...." It was submitted by counsel for the appellant that the underlined words indicate that the Judge must first ascertain whether the defence is calling any evidence and that it is only if the defence proposes to call any evidence that the Judge would be obliged to inform the accused of his right to give evidence etc. While admitting the possibility of such a construction upon a purely grammatical approach I do not think the legislature intended such a result. For one thing these words do not occur in section 138 (1) and the legislature could not have contemplated so great a difference

in procedure between trials of defended and undefended accused. For another I think the expression "before any evidence is called by the accused" is capable of being given a much simpler signification—that is that it is merely directed towards fixing the precise stage at which the Judge is called upon to act under section 213 (1), viz. immediately after he has called upon the accused for his defence. This view is confirmed by the language of section 138 (1), which in its pertinent parts read "at every trial, *if and when the court calls upon the accused* for his defence *it shall* ..... inform him that he is entitled to give evidence, etc." I should also think that this duty of the Judge of informing the accused of his right to give evidence must necessarily be done as soon as he calls upon the accused for his defence, for it is now almost an invariable rule of practice that in the exercise of its discretion under section 135 of the Evidence Ordinance, if the defence announces its intention to call the accused and other witnesses, the court will insist on the accused being called first. Finally the view contended for by counsel seems to me illogical having regard to the fact that the content of what the Judge has to tell the accused is obviously meant to help the accused to decide wheher he at least should give evidence.

The next question that arises is in regard to the words "inform him that he is entitled to give evidence in his own defence and tell him in ordinary language what the effect in law would be if he does not give evidence."

It is obvious that the duty of the Judge to inform "the accused" that he is entitled to give evidence must be addressed to the accused himself; the expression 'the accused' in some sub-sections can refer to the accused himself or if he is represented by an Attorney, to his Attorney; here I have no doubt the reference is to the accused and the accused alone.

The law requires the Judge to inform the accused that he is entitled to give evidence in his own defence. Obviously the legislature could not have intended the Judge to inform the

accused *of only this one right.* What the legislature has intended is that the existence of his right should be announced in the hearing of the accused and the jury ; at the same time lest the accused—particularly an undefended one—be misled into the belief that that it is his only right, it would be necessary for the Judge at the same time to inform the accused of his other rights. In the instant case the trial Judge did so and I might reproduce that part of his instruction to the accused :

> " *Court :* I call upon each accused for his defence. You have a right to enter this witness box and give evidence. If you enter the witness box and give evidence, learned Counsel for the State, Gentlemen of the Jury and I can put questions to you. You also have a right to make a statement from the dock in which case no one can question you, but that is subject to the infirmity that it is not tested by cross-examination. It is possible that such comment will be made. You can also wait without giving evidence from the witness box or making a statement from the dock because no one can compel you to give evidence or make a statement. But if you do not make a statement from the dock or give evidence from the witness box it is possible for Counsel for the prosecution to comment on your failure to do so. But your failure to give evidence or make a statement from the dock does not mean that the case for the presecution is true. Nor does it mean that you are guilty of the offence, nor does it mean that it corroborates the case for the prosecution. But it is possible for the Gentlemen of the Jury to take your failure to give evidence or make a statement from the dock in considering the entire case. You can also call evidence on your behalf. Now ask the 1st accused what he proposes to do."

Three submissions were made in regard to the way in which the trial Judge acted under this section.

(1) That the learned trial Judge was wrong in having asked the accused *himself* " what he (the accused) proposed

to do", when he was being defended by an Attorney. A decision as to whether, having regard to the progress of the case, the accused should or should not give evidence can give rise to moments of grave anxiety to the accused and it seems contrary to principles of a fair trial that he should at that moment be deprived of any assistance from his Attorney. From section 34(1) of the Administration of Justice Law one can gather that the rights and duties of an Attorney-at-Law include those of assisting and advising his client and of appearing pleading and acting in court on his behalf. The main purpose of the provision in section 213(1), it seems to me, is to inform the jury and in section 168(2) and 184(1) to remind the Judge himself as trier of fact that there is nothing in the law which debars or disentitles the accused himself from giving evidence, apart from calling other witnesses, and that the accused and the jury should not be left under the impression that it is the invariable practice or the done thing in all criminal cases for the accused not to give evidence whatever may be the demands of the particular case. There is nothing in the section to suggest that when the accused is defended by an Attorney, the handling of the defence should suddenly be taken out of his hands and that the accused should give an answer independently of his attorney.

At the same time it is necessary to remind defending counsel that the decision whether or not the accused is to give evidence must always be that of the accused himself, though assisted by his legal adviser. The fact that the decision is announced by the Attorney can in no circumstances be the basis of the submission that the decision was that of the Attorney and not that of the accused. It should be borne in mind that if an accused does not give evidence, whether he is defended or undefended, it is in either case a "failure of the accused to give evidence" within the meaning of section 213.

(2) A further submission made by counsel for the appellant is to the following effect :—

In the case of trials under the old Code of Criminal Procedure it was the general practice of defending counsel —and it is confirmed by counsel for the appellant whose experience in that field has been very extensive—that the accused would in consultation with his counsel take the decision whether or not to give evidence or to make an unsworn statement if a defence is called, long before the close of the prosecution case. The present provision in the Administration of Justice Law would seem to require—and I agree—that, if an application in that behalf were made either by the accused or by his attorney, the court should have a short adjournment to enable the defence to give thought to and decide upon its course of action. In any event any consultation between client and Attorney should not be enacted in front of and in the hearing of the Jury.

(3) A further submission of counsel for the appellant relates to that portion of section 213(1) which requires the Judge " to tell the accused in ordinary language what the effect in law will be if he does not give evidence ". Counsel for the appellant submits that this duty can only be discharged by the Judge regard being had to the requirements and demands of the particular case before him ; it is submitted that it was insufficient for the Judge merely to have told the accused " if you do not give evidence prosecuting counsel may comment on your failure to give evidence and that it is possible for the gentlemen of the jury to take in account your failure to give evidence or to make a statement from the dock in considering the entire case ". I am not inclined to agree with this submission. What the Judge is required to tell the jury at this stage is the *effect in law* of the failure to give evidence. I think what the legislature is here speaking of is the abstract legal effect independently of the facts of the particular case.

I do not think the learned trial Judge can be faulted for the manner in which he discharged his duty under section 213(1)—except in one regard to which I have already referred to and to which I shall return later.

No complaint has been made in this case in regard to any direction by the learned trial Judge in his final summing-up to the jury on the ground that he commented unfairly on the failure of the appellant to give evidence or that he told them

of any unwarranted inferences that may be drawn from that fact. It is, therefore, unnecessary to consider in detail the meaning and effect of sub-section (2) of section 213.

However, I think there are some general comments that ought to be made.

Firstly in regard to the right given to the prosecution to comment on the failure of the accused to give evidence : this is the idea borrowed from the Lord Davies' report. Our legislature appears to have adopted the view that the prohibition of comment is wrong in principle and entirely illogical. To quote from the Lord Davies' Report :

> "Assuming that the point which might be made in commenting is valid, it must seem strange to the jury that the prosecution should not make it in their final speech ; and if the Judge then makes the point, he may seem like an extra prosecutor. Moreover, now that the final speech for the defence always comes after that for the prosecution, the defence will be in a position to make such reply as they can to comment by the prosecution. A few suggestions have been put to us that only the Judge should be able to comment because the prosecution may not use enough discretion in doing so ; but we do not think that this is a strong enough argument, especially when both the defence and the court will be able to put the matter in perspective ".

Secondly, in regard to the Judge's comments to the jury, I would like to reproduce and adopt part of what was said by Lawton, L.J. in his judgement in *Sparrow's case,* (1973) 2 A. E. R. 129 at 135. This was a case where a prima facie case had been made out against the appellant ; he gave no evidence ; the trial Judge made certain comments on the failure of the appellant to give evidence which Lawton, L.J. criticised as misdirections ; however in the course of the judgement he said :

> "In the judgement of this court, if the trial Judge had not commented in strong terms on the appellant's absence from the witness box, he would have been failing in his duty. The object of a summing-up is to help the jury and in our experience a jury is not helped by a colourless reading out of the evidence as recorded by the Judge in his notebook. The Judge is more than a mere referee who takes no part in the trial save to intervene when a rule of procedure or evidence is broken. He and the jury try the case together and it is his duty to give them the benefit of his knowledge of the law and to advise them in the light of his

experience as to the significance of the evidence and when an accused person elects not to give evidence in most cases but not all, the judge should explain to the jury what the consequence of his absence from the witness box are and if, in his discretion he thinks that he should do so more than once, he may ; but he must keep in mind always his duty to be fair ".

I would only add this ; that the duty to be fair is not one that is owed to the defence only. Judges must bear in mind the need to ensure that justice is done both to the community and to the accused while still acting within the limits determined by law.

I can now get back to what I have referred to earlier as an error in the procedure adopted by the learned trial Judge in acting under section 213 (1).

It seems to me that the present case is an illustration of the danger of asking an accused person who is defended by an Attorney-at-law what course he, the accused, proposes to adopt. Decisions of this kind must be taken by the accused in consultation with his Attorney and not in the presence of Judge and jury, and the decision as to the course to be followed must be announced by the Attorney-at-law for the accused.

When the 1st accused in the present case announced his intention to give evidence on his own behalf, it is unfortunate that his Attorney-at-law, who presumably had had no previous consultation with his client on this question was virtually compelled to announce without any reference to his client, that in his view the 1st accused should not testify from the box. Indeed there was no opportunity for any consultation, or even time enough for the Attorney-at-Law to give sufficient consideration to the question whether the accused should be called into the box. It seems to me that the Attorney-at-law, at one stage when he put certain suggestions to the witnesss Piyadasa and to the witness Jayasundera, was intending to raise certain defences such as self defence, provocation, or sudden fight. These suggestions, it is safe to assume, were based on instructions the Attorney-at-law had already received from his client. Having got no affirmative response from the prosecution witnesses which would have helped to put forward such defences in his submissions to the jury, counsel seems to have misjudged the situation and in the hope of obtaining an acquittal over-ruled his client's desire to place his version of the facts before the jury. Maturer consideration might have led the Attorney-at-law to his client's way of thinking. Thus there is in this case the possibility that the appellant was through no

fault of his own, deprived of the opportunity of having the defences of self-defence, provocation, and sudden fight, adequately considered by the jury.

In regard to self-defence, it can safely be assumed that whatever evidence the appellant could have placed before the jury, could not have been of such a character as to entitle him to a complete acquittal on that ground, for if such material were available I cannot belive that any counsel, or the accused himself, would have refrained from placing that material before the jury. One can therefore, proceed in this case on the basis that if the appellant did testify he might have obtained a lesser verdict of attempted homicide on one or other of the grounds, namely, exceeding the right of private defence, grave and sudden provocation or sudden fight.

In these circumstances, I do not think the verdict of attempted murder which the jury returned should be allowed to stand. I also do not think this is a case where a retrial should be ordered. I would rather give the appellant the benefit of the most advantageous verdict he could have got if he gave evidence. I would accordingly quash the conviction for attempted murder and substitute therefor the verdict of attempted culpable homicide. On this basis the sentence pronounced upon the appellant based on the verdict of attempted murder must also be quashed. I would substitute a sentence of five years' imprisonment.

THAMOTHERAM, J.—I agree.

SIRIMANE, J.—I agree

RAJARATNAM, J.—I agree.

SHARVANANDA, J.—I agree.

Conviction for attempted murder quashed. Verdict of attempted culpable homicide substituted.

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