[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Fernando, J.**

REGINA v. D. D. W. WAIDYASEKERA

Appeal No. 46 of 1955, with Application No. 75

S. C. 36—M. C. Colombo South, 60,406

Causing death of woman by act done to cause miscarriage—Elements of the offence—Burden of proof—Right of accused to plead consent of deceased—Evidence of similar acts—Relevancy—Evidence Ordinance, s. 15—Penal Code, ss. 81, 303, 304, 305.

Summing-up—" Reasonable doubt "—Quantum of direction.

(1) In a prosecution under section 305 of the Penal Code for causing the death of a woman by an act done with intent to cause miscarriage, it is not necessary that the Crown should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman. The accused, however, is entitled to the benefit of any general exception within the ambit of which he could bring himself.

If the accused relies on the exception in section 81 of the Penal Code the burden is on him to show that the deceased expressly or impliedly gave her consent to suffer, or take the risk of, no less harm than death.

(2) In a prosecution under section 305 of the Penal Code the prosecution may, under section 15 of the Evidence Ordinance, lead evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal.

A nurse who was employed under the accused gave evidence for the prosecution stating that during the ten months of her service under the accused there were 150 to 175 cases in which the accused had caused miscarriage and that in each of those cases the accused used the same instruments and resorted to the same procedure.

Held, that the names of the persons on whom the operations were performed were not necessary to make the evidence relevant.

(3) Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt.

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *Malcolm Pereira* and *U. B. Weerasinghe,* for the accused-appellant.

Douglas Jansze, Acting Solicitor-General, with *A. C. M. Ameer,* Crown Counsel, and *V. S. A. Pullenayegum,* Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 31, 1955. BASNAYAKE, A.C.J.—

At the conclusion of the hearing of this appeal we made order dismissing it and reserved our reasons to be delivered on a later date. We accordingly do so now.

The appellant was indicted on the following charge :—

> "That on or about the 2nd day of June 1954 at Bambalapitiya in the district of Colombo within the jurisdiction of this Court you with intent to cause the miscarriage of one Mrs. Gladys Nugera of Moratuwa, a woman with child, did insert certain instruments into her vagina, which act caused the death of the said Mrs. Gladys Nugera, and that you have thereby committed an offence punishable under section 305 of the Penal Code."

After a trial which lasted 14 days he was found guilty by a unanimous verdict of the jury and sentenced to 10 years' rigorous imprisonment.

The appellant is a registered medical practitioner, a licentiate of the Royal College of Physicians and Surgeons (Edinburgh) and a licentiate of the Royal Faculty of Physicians and Surgeons (Glasgow). He is 60 years of age and has practised his profession for 26 years. He ran a Nursing Home in Bambalapitiya in Colombo under the business name of "Ascot Nursing Home". The deceased Mrs. Gladys Nugera, a widow with five children (hereinafter referred to as the deceased), entered the appellant's Nursing Home on 29th May 1954. A few days earlier she had consulted the appellant as she had missed her periods for about four months. On being asked by the appellant whether she desired to be treated as an indoor patient she expressed a desire to take such medicines as may be prescribed and take treatment as an outdoor patient. The appellant gave her a mixture and some capsules. It was after taking that treatment that she sought admission to the Nursing Home. On the 29th she came accompanied by one Terrence B. Fernando who falsely represented to the appellant that his name was C. Silva and that the deceased was his wife. After having entered the deceased to the Nursing Home, Fernando left the place, and except for two telephone conversations took no interest in the deceased and did not visit her till 2nd June 1954 on which day the deceased died.

Between the date of the deceased's admission to the Nursing Home and the date of her death the appellant almost daily subjected her to the following treatment. She was removed to the consultation room and made to lie on a bed. All the doors and windows were closed. Then the appellant performed the operations which are thus described by Nurse Kariyawasam.

> "Then he took the speculum and inserted it into her vagina. (Speculum P1 shown to witness). After inserting that into the vagina it was withdrawn. Thereafter the doctor took the volsellum (shown P4) into his hand. After cutting the hair the doctor applied some dettol cream on his fingers and inserted his fingers into the vagina. He took the dettol cream from a jar similar to P2. I cannot remember how many fingers were inserted into the vagina. After

introducing his fingers he withdrew them. Then he inserted the speculum. He removed the speculum and then inserted the volsellum into the vagina. There is a sort of a tube in the vagina and he held that with the volsellum. Having held at some part of the vagina with the volsellum he inserted a dilator. He used two or three dilators.

"After the accused held some part or portion inside the vagina with this instrument, the volsellum, he introduced these three dilators. They were each introduced in turn. The smallest one, that is P18, was introduced first. Then P3 was introduced—he introduced them according to their sizes—and then the last one he introduced was P19. Each time these introductions were taking place, he was holding some part of the vagina with this volsellum. At the time of these introductions I was by the patient as one had to hold her because she was struggling. I held her hands with one hand and her legs with the other. This was according to the manner in which the patient struggled. She screamed fairly at the time these instruments were introduced. One by one they were introduced and withdrawn. I noticed blood on each of them. The patient was not anaesthetized during this operation.

"After the last of the dilators was used and was withdrawn I noticed blood on it. After that, she was given a douche with condys water. It was washed inside. The condys water was poured into a can and there is a tube with a nozzle fixed on to that can and the end of the tube, that is, the nozzle is inserted into the vagina and water flowed into it. After that, some cotton wool was taken and condys water was taken into the kidney tray. I prepared that. The accused took the cotton wool and soaked it in the condys water and squeezed the water out. That was done on this occasion. Then he held this cotton wool with the volsellum and introduced it through the speculum into the vagina. After the douche, the speculum was introduced into the vagina and through the speculum the cotton wool was introduced with the aid of the volsellum. Then plugs were put in. About 5 or 6 such pieces of cotton was used for this plugging. Then the patient was taken back to the ward, to her room. She walked on this occasion. Then medicine was given to her."

On 2nd June the appellant removed from the deceased the body of a foetus minus the head. Nurse Kariyawasam describes what happened that day thus :

"The doors and windows were again closed and she was asked to lie on the bed and the plugs put in the previous day were removed as before. After the extraction of the cotton wool on this occasion, the speculum was removed by the accused. The accused wore his rubber gloves which were similar to P5 (which is shown) and he rubbed dettol cream, taking it from a jar like P2, on his gloved fingers and introduced his hand into the vagina. She was not anaesthetized on this day too but I was holding her. Besides me, the doctor and the patient, there was nobody else. A little later, we took another in. When the accused put his hand into the vagina,

I was holding the patient's hands and legs as she was struggling violently. Then the accused withdrew his hand and I saw a part of the child's body in his hand. It was about this much in length—indicates from the tips of her fingers up to the wrist—about 6 inches. He dropped that into the pail which was left there for the blood to flow. He emptied his hand into that. He again introduced his hand into the vagina and withdrew it and there was only blood in his hand at that time. I saw that part or portion of a child below the neck on the first occasion and I did not notice the head. On the second occasion, when he withdrew his hand I saw blood in his hand. Then he wanted me to take the two new forceps from the cupboard. I took them and handed them to him. They were these two (witness identifies P7 and P6). P7 is called the ovum forceps and P6 the weighted speculum. I did not see this accused use these two items together, that is the speculum and the weight. I know these two form one instrument. I took out all these three together. I call them forceps. When I handed these to the accused, he introduced the weighted speculum into the vagina. At this time there was nobody else in the room besides the three of us. When the weighted speculum was introduced into the vagina, there was nobody else in the room. This was introduced into the vagina in this manner (shows). The weight that was attached to the speculum was taken off as it was dropping off. These two were used together, but as the weight was dropping off, it was removed, and after that this was put into the vagina in this manner. At the time this was introduced into her vagina, she was not anaesthetized. She cried out and struggled violently. I was holding her at the time. I found it impossible to hold her down. The accused wanted me to call in the attendant, that is, Ariyawathy. I called her and she came in. The door was relocked. She also held the patient on the instructions of the accused. Both of us were holding her to prevent her struggling. Then the ovum forceps P7 was introduced by this accused. When this was introduced, the weighted speculum P6 was in the vagina held in position. He held this with one hand and introduced the ovum forceps with the other while the two of us were holding her down. She was crying out when P7 was introduced. These two instruments P6 and P7 were also immersed in hot water before they were used. When P7 was introduced and withdrawn, I only saw blood on it. I did not see any pieces on it. He introduced P7 several times and I did not see anything come out. I did not see the head of the child at any stage being taken out either with the hand or with the ovum forceps P7. At no stage did I see that. Thereafter, the vagina was douched in condys water by the accused. Then she was dressed in kotex pad on the instructions of the accused and she was helped on to the ward. We practically carried her to the ward, that is, the three or four of us. Ariyawathy and I were among the four. The accused also helped, and she was taken to her room."

After the removal of the foetus the deceased became very ill and died between 9 and 10 that same night. Terrence Fernando who was present at the time of her death left in the appellant's car at about

11 p.m. promising to return the next morning with a coffin but never did and it was with difficulty that his whereabouts were traced by the Police.

Nurse Kariyawasam, in addition to giving the names of four others who had similar operations performed on them, stated that during the ten months she was employed by the appellant she attended on about 150 to 175 cases in all of which the appellant extracted foetuses. She was present at everyone of those operations. In each of those she saw the whole foetus or pieces of foetus being removed. In each of those cases the speculum, the dilators, and the volsellum were used. In each of those cases the same procedure was gone through by the appellant. The vagina was plugged with cotton wool soaked in condys water. In some instances the foetus dropped by itself and in others the accused introduced his hand into the vagina and brought out the foetus. In some cases the appellant introduced the weighted speculum in order to bring out the foetus.

The appellant disposed of the foetuses either by burning them in a gas incinerator which he had in his Nursing Home or by taking them in the form of parcels and throwing them into a river.

The post-mortem disclosed that the deceased was a well-nourished subject free from heart disease or any other disease. Her uterus was enlarged to about 4 months' pregnancy. The uterus was 8" long, 4½" broad and 3" thick. There was a well marked placental site on the front wall of the fundus, and small pieces of decomposing placental tissues were adhering to it. There was also some clotted blood in the uterine cavity. The cervix was soft and swollen and admitted the index finger with ease. There was an irregular circular perforation of the posterior wall of the uterus at the junction of the body with the cervix about 1" in diameter, and this opening corresponded with the tear in the pubic peritoneum, and there was infiltration of blood into the extra peritonial pelvic tissue in the neighbourhood of the tear. The vaginal passage contained the head of a foetus of about 4 months' gestation. The legs and trunk were missing. There was also placental tissue and clotted blood. Death was due to shock and haemorrhage following the perforation of the pregnant uterus.

Both the peritoneum and the uterus were injured. The injury was necessarily caused by the introduction of some instrument.

It is not necessary to refer in detail to the other items of evidence led by the prosecution because they have little bearing on the questions that arise on this appeal.

The appellant gave evidence on his behalf. He said that he admitted the deceased on 29th May as a case of heart disease and that later he discovered that she was pregnant for about 3½ months and showed signs of a threatened abortion. Later he saw signs of an inevitable abortion and performed an operation on the deceased on the day she died in order to evacuate her uterus as otherwise she might have died of haemorrhage. He dilated her cervix using three dilators and the volsellum and proceeded to evacuate the uterus with his finger. He managed to get two legs and the trunk of the foetus out, but the head

got stuck in the uterus and after unsuccessfully trying to bring the head out with the smaller ovum forceps he let the head remain in the uterus as the deceased was showing signs of fatigue. He also expected that the head would come out after sometime. The injury to the uterus according to the appellant was caused by the foetal head. He discounted the theory that the ovum forceps or any other instrument could have caused it.

There was sufficient evidence for the jury to return the verdict they did. Learned Counsel for the appellant therefore sought to attack the conviction on the ground of misdirection.

He referred us to a number of passages in the learned Commissioner's summing-up which he submitted contained misdirections. It is sufficient to set out here the passages to which learned Counsel gave particular attention in the course of his argument. They are as follows :—

"I do not propose to explain the section dealing with that offence which is named foeticide, because there is no such charge against the accused. But his Counsel has put forward as a defence that the act done by the accused was done in good faith for the purpose of saving the life of the mother. You are, undoubtedly, entitled to consider that defence in all its bearings, and, if you believe the accused, there is no doubt that he is entitled to an acquittal.

"But you will have to remember, gentlemen, that it is not sufficient for the evidence to point out that the act was done for the purpose of saving the life of the mother. It must also point to good faith. A mere statement that a person did something in good faith is not enough. I am sure that that would commend itself to you without any wealth of words from me.

"You should consider this evidence in the light of the defence. If you believe the evidence of the accused, he is entitled to be acquitted. When you assess his evidence, you have to make a large allowance for the fact that he is charged with a grave offence and, unlike other witnesses, you cannot expect from him the same mental process, and you must make every allowance for his demeanour; he might have been nervous or hesitant, even though he is a qualified medical practitioner.

"I should also remind you, gentlemen, that, when you consider his defence, you must keep in mind that nothing is said to be done or believed in good faith which is done or believed without due care and attention.

"Learned Counsel for the defence, in the course of his interesting address to you, stated that it was the conscientious opinion of the accused that he had to evacuate the uterus to save the life of the woman. You have to consider carefully whether the circumstances arising from the performance of the operation alone would save the life of the mother. If there were such circumstances, the law allows the sacrifice of one rudimentary life to save another comparatively more valuable. That is the stated point of the law which is availed of in accord with common sense.

"But of course, you have to consider the matter in its practical administration. What steps did the accused take? Was the operation a life saving work he did, and was it done in good faith.

"The accused knew he was performing a voluntary illegal act, so far as the law lays it down. He also knew he would have to operate. You should consider his defence and be in a position to say whether his defence absolves him.

"What was of primary importance was to save the life of the mother, not the foetus.

"You must consider, gentlemen, whether this evidence supports his defence that he acted in good faith, for the purpose of saving the life of the woman."

Learned Counsel's submissions on the ground of misdirection may be summarised thus :—

(*a*) The summing-up of the learned Commissioner might have created in the minds of the jury the impression that the appellant admitted that he caused the miscarriage.

(*b*) The appellant did not intend to cause a miscarriage but when he saw that a miscarriage was inevitable took steps to evacuate the uterus in order to save the life of the deceased.

(*c*) If the appellant's admitted acts establish that he intended to cause a miscarriage then the onus is on the prosecution to prove that the miscarriage was not caused in good faith in order to save the life of the deceased.

In making his submissions under heads (*a*) & (*b*) learned Counsel referred us to certain passages in the evidence of the medical witnesses called by the prosecution in support of his argument that the appellant did not intend to cause and did not cause a miscarriage. He also relied on the evidence of the appellant which he submitted should receive the same consideration as those of the prosecution medical witnesses.

The learned Solicitor-General contended that there was ample evidence that the appellant intended to and did in fact cause a miscarriage. He drew our attention to the passages in the evidence he relied on for the purpose of establishing his contention. They are too numerous and lengthy to admit of citation here. We are satisfied upon an examination of those passages that there was ample material before the jury to warrant the conclusion implicit in their verdict that the appellant did insert certain instruments into the vagina of the deceased with intent to cause a miscarriage. The learned Solicitor-General further submitted that the expression miscarriage in the context of section 305 should be given its ordinary meaning of the premature expulsion of the contents of the womb before the term of gestation is complete. He also cited the definition of the expression miscarriage in the Oxford Dictionary in support of his argument. He contended that the appellant's own evidence showed that he did the acts he described with intent to expel a foetus before its time.

Under head (c) learned Counsel submitted that section 303 defines the offence of "causing miscarriage" and that the words "cause the miscarriage" in section 305 must be read subject to the section which defines the offence of causing miscarriage. In a charge under section 305 he submitted that the prosecution must prove—

(a) that the accused did an act,
(b) which caused the death of a woman,
(c) with intent to cause a miscarriage, and
(d) that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.

We are unable to uphold the interpretation learned Counsel sought to place on section 305. Unlike section 304, section 305 contains no pointer to section 303, nor is there any indication in that section that the Legislature intended that it should be controlled by section 303. It is not essential that, in a prosecution under section 305, it should be proved that the accused caused a miscarriage. What is material is the intent to cause a miscarriage. The essential elements of an offence under that section, are that—

(a) the accused did any act,
(b) which caused the death of a woman with child, and
(c) that the act was done with intent to cause the miscarriage of the woman.

An interpretation such as the one learned Counsel sought to place on section 305 involves the interpolation in that section of words which do not occur in it and the recasting of the entire section. Such an interpretation is not warranted by the rules of interpretation and does not commend itself to us.

In a charge under section 305 of the Penal Code, it is not necessary that the prosecution should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman.

The learned Commissioner's direction that the appellant was entitled to an acquittal if he proved that he caused the miscarriage in good faith for the purpose of saving the life of the deceased appears to have been influenced by the defence indicated at the very outset of the trial by appellant's Counsel. It would appear from the transcript of the shorthand notes of the proceedings that learned defence Counsel held the view that, if the miscarriage had been caused in good faith for the purpose of saving the life of the deceased, the appellant was entitled to an acquittal. We are not satisfied that the appellant was in any way prejudiced by the learned Commissioner's direction. He did not fail to indicate clearly to the jury the onus that lay on the prosecution. The jury was at no time asked to assume that the appellant admitted that he caused the miscarriage.

The learned Commissioner's direction as to the appellant's defence is not unfavourable to him although it might have been better if it had been stated in terms of the relevant general exception. Learned Counsel

for the appellant submitted that whether his argument based on section 303 succeeded or not he was entitled to the benefit of the relevant general exception. He did not indicate precisely under which general exception in Chapter IV of the Penal Code he sought to bring the appellant's case. We hold that a person indicted on a charge under section 305 is entitled to the benefit of any general exception within the ambit of which he could bring himself.

The appellant's case was that he did not intend to cause the death and that the deceased had impliedly consented to undergo his treatment and that whatever he did was done in good faith for her benefit.

The verdict shows that the jury did not accept the appellant's version for if they did they should have acquitted him in accordance with the direction of the learned Commissioner.

The exception in section 81 of the Code required the appellant to show that the deceased expressly or impliedly gave her consent to suffer the harm caused or to take the risk of that harm—in the present case death. While the Jury might have held on the evidence adduced by the defence that the deceased consented *to be treated* medically and surgically by the appellant, there was in our own opinion scarcely any evidence to justify a finding that she consented *to suffer or to take the risk of the harm which was actually caused to her.*

Learned Counsel also submitted that inadmissible evidence had been admitted to the prejudice of the appellant. Although learned Counsel did not take exception to the admission under section 15 of the Evidence Ordinance of evidence of similar occurrences, he submitted that specific evidence of each of such occurrences must be given as in the case of those whose names were given by Nurse Kariyawasam and that it was not open to the prosecution to lead evidence generally that 150 to 175 similar operations were performed, while Nurse Kariyawasam was in the appellant's service. He therefore did not object to evidence of the cases of Jayanthi, Leilawati, Vimala Kumari, and Mrs. Mather, but objected to that part of Nurse Kariyawasam's evidence where she said that during the ten months of her service under the appellant 150 to 175 similar occurrences took place. Before we examine learned Counsel's submission it will be useful to set out the evidence objected to. Nurse Kariyawasam said—

"I said that after the death of Mrs. Nugera there was another case of extraction of foetus, that is the case of Jayanthi on whom instruments were used.

Q. How many other cases had you attended on where these instruments had been used by this accused ?

A. Many.

Q. About how many roughly ?

A. Is it where whole foetus were removed or where parts were removed ?

Q. In all how many such cases did you attend on ?

A. About 150 to 175 cases during the months I was there. In all those cases these instruments were used and some other instruments were also employed.

Q. In each of those cases where you saw whole foetus or pieces of foetus being removed the speculum, the dilators, and the volsellum were used ?

A. Yes.

To Court : I was present at every one of those cases.

"I am the nurse who attended on all the women who were taken into the consulting room. In each of those cases I was there. P43 is supposed to be a steriliser. There was no other steriliser apart from this. I have never seen this steriliser being used for the purpose of sterilising instruments.

"Yesterday I spoke about the 150 or 175 cases where instruments were used. In each of those cases, the speculum, volsellum and dilators were used. I also said that, in addition to these instruments, there were certain other instruments which were also used. I can pick them out here. (Witness picks out P37, the flushing curette, and P38 the catheter.) In each of these cases, the vagina was plugged with cotton wool soaked in condys water by the accused. In some instances, the foetus dropped by itself, in some instances the accused introduced his hand into the vagina and brought out the foetus ; and in some instances he introduced the weighted speculum in order to bring out the foetus—not this one but what Dr. Ekanayake brought with him. In each of these cases, the foetus either came out or was taken out, and in each of these cases, the foetus came out after the use of these instruments. In each of these 150 to 175 cases that I witnessed, it was the accused who used the instruments. All these instruments were used by him."

Before learned Crown Counsel led this evidence at the trial he announced his intention to do so in the absence of the jury. Learned Counsel for the appellant submitted that the evidence of similar occurrences would be admissible only if the defence is that of accident. He submitted that his defence was not that it was an accident and objected to the evidence being led. Learned Crown Counsel then submitted that intention was an element of the offence and cited in support of his submission a number of cases[1] practically all of which are decisions of the English Courts.

[1] *52 N. L. R. 457.*
(1894) A. C. 57 at 65.
(1906) K. B. 389, 404, 405, 424, 425.
15 Cr. App. Reps. 50 and 52.
16 Cr. App. Reps. 61 and 69.
13 Cr. App. Reps. 78.
(1949) A. C. 182.
36 Cr. App. Reps. 39.

The best approach to this question would be by a consideration of section 15 of the Evidence Ordinance in the first instance. That section reads—

> " When *there is a question* whether an act was accidental or intentional, or done with a particular *knowledge* or *intention*, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is relevant ".

Intention to cause miscarriage is an element of the offence with which the appellant was charged and in his defence he denied that he intended to cause a miscarriage. The issue of intention therefore became one of vital importance.

Here the question was whether the appellant did the act which caused the death of the deceased with the intention of causing a miscarriage. It was therefore relevant to show that the act done by the appellant in regard to the deceased was a part of a series of similar occurrences in each of which the appellant was the person who did the act which caused the miscarriage.

In resorting to English cases for the purpose of seeking an elucidation of section 15 of the Evidence Ordinance it should be borne in mind that the English principle and our section of the Evidence Ordinance are not the same. The English principle is thus stated in Stephen's Digest of the Law of Evidence (11th Edn., p. 20) :

> " Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant ".

It will be seen that section 15 of the Evidence Ordinance is wider than the English rule of evidence. Under our provision evidence of similar occurrences is relevant for the purpose of proving a particular intention or knowledge. Judicial opinion in England [1] appears to be divided on the question of a proper approach to the English rule cited above. But the tendency seems to be towards admitting evidence which is relevant to the issue before the jury and not to regard the fact that the evidence is prejudicial to the accused as rendering relevant evidence inadmissible. The most recent decision on this point is the case of *Rex v. Lumeline* [2].

It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal. Counsel for the appellant correctly did not take the course adopted by Counsel for the defence at the trial.

[1] *Sims 31 Cr. App. R. 161 (1946).*
Noormohamed (1949) A. C. 182.
Frank Harris 36 Cr. App. R. 39 (1952).
Straffen 36 Cr. App. R. 132.

[2] *London Times August 17, 1955.*

The occurrence of which evidence is given must be one in a series of similar occurrences in each of which the accused was concerned. Nurse Kariyawasam's evidence quoted above satisfies the requirements of the section. The names of the persons on whom the operations were performed are not necessary to make her evidence relevant. In each of the 150 to 175 cases a miscarriage was caused and it was the appellant who caused the miscarriage. In each of those cases he used the same instruments and resorted to the same procedure.

There remains one more point raised by learned Counsel for the appellant. He contended that there was no direction by the learned Commissioner that the appellant should be given the benefit of any reasonable doubt caused by his evidence. The learned Commissioner has more than once indicated in the course of his summing-up that the prosecution must prove its case beyond reasonable doubt and that the appellant must be given the benefit of any reasonable doubt. What is more, when at the end of the summing-up, on being asked whether there was any matter he had omitted, learned Crown Counsel invited the learned Commissioner to direct the jury that if the evidence adduced by the appellant created any reasonable doubt it was their duty to acquit him, the learned Commissioner once more directed the jury on the matter. The directions on the burden of proof are ample and we do not think that there is any substance in learned Counsel's submission.

There appears to be a mistaken notion that the jury should be reminded at every turn that they should give the benefit of every reasonable doubt to the accused. Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, for it is in regard to it that the question of reasonable doubt is material, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt. The rule is that a case is never proved if the jury is left in doubt. It is sufficient if it is made clear to the jury that the burden of establishing the charge in the indictment is all the time on the prosecution and that they should return a verdict against the prisoner only if upon the evidence they are convinced of the accused's guilt. The Judge is not fettered in the use of the language which he may choose for the purpose of this direction. If the summing-up indicates that the jury have been clearly directed as to the burden and standard of proof, the accused cannot be heard to complain that a particular formula was not used.

The recent pronouncements of the British Court of Criminal Appeal in *R. v. Kritz* [1], *R. v. Alfred Summers* [2] and *R. v. Hepworth Fearnley* [3] indicate that the tendency of the British Courts is to get away from the rigid formula of words of the past and not to expatiate on what is a "reasonable doubt" and seek to explain the difference between a "reasonable doubt" and a "fanciful doubt".

Appeal dismissed.

[1] *(1949) 2 All E. R. 406.*

[2] *36 Cr. App. Reps. 14.*

[3] *(1955) 3 W. L. R. 331.*