[COURT OF CRIMINAL APPEAL.]

1947 *Present :* **Howard C.J. (President), Jayetileke and Dias JJ.**

THE KING *v.* H. R. S. FERNANDO, *et al.*

Appeals Nos. 34-35, with Applications 82-83.

S. C. 81—M. C. Avissawella, 35,325.

Burden of proof—Prima facie *case established by prosecution—Explanation offered by accused—Proper direction to Jury as to burden of proof.*

Where a *prima facie* case is made out by the prosecution and the accused by his defence offers an explanation, the Jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and that if, upon a review of the evidence on both sides, they are in doubt, they ought to acquit. It is a misdirection to tell them that because the evidence for the prosecution established a *prima facie* case, the burden of proof is shifted to the accused.

APPEALS, with applications for leave to appeal, against two convictions in a trial before a Judge and Jury.

H. Wanigatunga (with him *C. C. Rasaratnam* and *J. Pathirana*), for the 1st accused, appellant.

M. M. Kumarakulasingham (with him *K. Sivasubramaniam* and *M. E. Dharmawardene*), for the 3rd accused, 2nd appellant.

E. L. W. de Zoysa, C.C., for the Attorney-General.

Cur. adv. vult.

June 3, 1947. HOWARD C.J.—

In this case five persons were charged before a Judge and Jury of the offences of—

(*a*) being members of an unlawful assembly, the common object of which was to commit housebreaking by entering the house of Mary Nona,

(*b*) in the course of the same transaction, committing murder by causing the death of K. A. Pieris Singho, an offence which they knew was likely to be committed in prosecution of the common object, and

(*c*) in the course of the same transaction committing murder by causing the death of K. A. Pieris Singho.

The Jury by a unanimous verdict found the 3rd accused, that is to say, the 2nd appellant, guilty on counts 1 and 2 and the 1st accused, that is to say, the 1st appellant, guilty on the same counts by a majority of five to two. The 2nd, 4th and 5th accused were found not guilty.

It has been contended by Counsel for the appellants that the verdict of the Jury in regard to the appellants cannot stand by reason of a misdirection in law in the charge to the Jury. On page 44 the following passage occurs :—

> " If you find that you have a reasonable doubt about the case for the prosecution, it is your duty to acquit the accused. If, however, you find the story for the defence to be true, or probably true, in preference to the story for the prosecution, you have to acquit the accused.
>
> I forgot to tell you one little matter, gentlemen. In regard to the defence, the burden of proof is on the defence, but you will keep in mind that the burden of proof on the accused is not so heavy as the burden of proof upon the prosecution, who have establish their case beyond reasonable doubt. When you consider the two cases—the prosecution case and the defence case—and come to the conclusion that the defence version is more probably true than the prosecution story, then the defence has discharged its burden. So that, gentlemen, if you think that the defence is true or very probably true in preference to the story for the prosecution, you will acquit the accused."

Counsel for the appellants contend that this passage does not correctly formulate the law in regard to the burden of proof. It is stated that the burden of proof is on the defence and that the defence discharges its burden if the Jury come to the conclusion that the defence version is more probably true than the prosecution story. Also, if the Jury think that the defence is true or probably true in preference to the story for the prosecution, they will acquit the accused. The Jury should have been instructed to acquit the accused not if their story was to be preferred

to the story for the prosecution, but if after hearing all the evidence they had a reasonable doubt as to their guilt. Again on page 49 it is stated as follows :—

> "So that, gentlemen of the Jury, it is open to you, as I have told you already, if you have a reasonable doubt in regard to the story for the prosecution, to acquit the accused.
>
> If you come to the conclusion that the defence is very probably true, then, also, you will acquit them."

In regard to this passage Counsel for the appellants maintain that to instruct the Jury to acquit "if you have a reasonable doubt in regard to the story for the prosecution" is not an accurate statement of the law. The Jury should have been instructed to acquit, if on the whole of the evidence and not merely by reason of the story for the prosecution, they had a reasonable doubt. Also the instruction to the Jury to acquit if "you come to the conclusion that the defence is very probably true" is not in accordance with the law. It places too heavy a burden on the accused. The instruction should have been to acquit if the story put forward by the defence creates in the minds of the Jury a reasonable doubt.

We are of opinion that the contention of the appellants' Counsel is correct. In *R. v. Stoddart*[1] it was held by the Court of Criminal Appeal in England that where a *prima facie* case is made out and the defendant by his defence offers an explanation the Jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and if upon a review of the evidence on both sides they are in doubt, they ought to acquit. It is a misdirection to tell them that because the evidence for the prosecution established a *prima facie* case, the burden of proof is shifted to the defendant. The same principle is formulated in the House of Lords is *Woolmington v. Director of Public Prosecution*[2]. In *The King v. James Chandrasekera*[3] this Court considered the effect of the latter decision in relation to the exceptions referred to in section 105 of the Evidence Ordinance. The Court decided the general principle formulated in the *Woolmington* case that the burden of proof rests on the prosecution throughout applied in Ceylon. On page 126 the following passage occurs in the judgment of Soertsz J. :—

> "Similarly, in a case in which the accused's plea is simply that he is not guilty, or in a case in which he pleads an alibi, if he creates a sufficient doubt in the minds of the Jury as to whether he was present or not, or as to whether he did the act or not, or as to whether he had the necessary *mens rea* or not the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case."

The only exception to this rule is when the defence calls in aid a general or special exception or proviso. We have, therefore, come to the conclusion that there was a mis-statement of the law in the summing up, that such mis-statement was on a vital point and amounts to a misdirection which vitiates the convictions.

[1] *(1909) 2 Criminal Appeal Reports 217.*
[2] *(1935) A. C. 462.*
[3] *(1942) 44 N. L. R. 97.*

We have given careful consideration to the question as to whether we should direct a retrial. The offence was alleged to have been committed on December 30, 1945. The case for the Crown rested on the credibility of Mary Nona. The evidence in regard to this witness's identification of the robbers cannot be regarded as satisfactory. Its assailability will be increased by the passage of time. The chances of a conviction in the event of a fresh trial are in our opinion remote. In these circumstances the appeal is allowed and there will be no order in regard to retrial.

Appeals allowed.