[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Nagalingam A.C.J. (President), Gunasekara J. and Swan J.**

CHELLIAH, Appellant, *and* THE QUEEN, Respondent

APPEAL 18 WITH APPLICATION 26 OF 1952

S. C. 4—M. C. Jaffna, 22,799

Trial before Supreme Court—Failure of accused to give evidence—Adverse comment by Court—Scope of inference against accused—Misdirection.

In a trial before the Supreme Court, the accused neither gave evidence on oath nor made an unsworn statement. Commenting on this circumstance the Judge directed the Jury that it would be a factor which they could take into consideration for the purpose of drawing an inference adverse to the defence set up by the accused. He did not, however, explain to the Jury the nature of the inference they could draw.

Held, that there was a misdirection in law.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *T. W. Rajaratnam*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 26, 1952. NAGALINGAM A.C.J.—

At the conclusion of the argument we made order allowing the appeal and acquitting the accused. We now proceed to give our reasons.

The prisoner was convicted of having committed an offence under section 191 of the Penal Code in that he had given false evidence intending thereby or knowing it to be likely that he would thereby cause one Kandiah Vyramuttu to be convicted of the offence of murder. The prisoner neither gave evidence on oath nor made an unsworn statement. Commenting on this circumstance the learned trial Judge in his charge to the Jury expressed himself thus :

" The accused has not given evidence in this case. If he so wished he could have given evidence, but he can also refrain from giving evidence. Do not draw an adverse inference against the accused because he has not given evidence. That is just one small item which you can take into consideration, but do not necessarily base a very strong adverse inference from that fact alone. If he so wished he could even have made an unsworn statement from the dock. "

The question for determination was whether this passage amounted to a misdirection so as to vitiate the conviction.

Although the learned Judge told the Jury, " Do not draw an adverse inference against the accused because he has not given evidence ", yet when he proceeded to direct them that the circumstance of the accused not having given evidence was just one small item which they could take into consideration, and that they should not necessarily base *a very strong adverse* inference on that circumstance alone, it is difficult to say that the effect of the earlier direction that the absence of the prisoner from the witness-box was not to be made the basis of an adverse inference to be drawn against him was not entirely whittled away. On the contrary, it may be said the Jury were given the impression that the absence of the prisoner from the box was a circumstance which they could take into consideration, upon which though they might not base a very strong adverse inference, they might nevertheless base some sort of strong adverse inference against him, or that in some view of the matter they were entitled to base a very strong adverse inference against the prisoner.

In considering this question one has also to look at the last sentence of the passage excerpted, wherein the learned Judge again stressed the fact that the prisoner had not even made an unsworn statement from the dock. The emphasis given to the passage by the use of the word " even ", clearly in the context in which that sentence occurs, would have indicated to the Jury that the failure of the accused either to get into the witness-box and give evidence or to make an unsworn statement would be a factor which they could take into consideration for the purpose of drawing an inference adverse to the defence set up by the prisoner.

In the case of *King v. Duraisamy* [1] where the charge contained the direction, " so where there is evidence adduced by the Crown which implicates the prisoner and the prisoner does not give evidence, you are entitled to draw an inference against him from that fact ", but the nature of the inference that could be drawn was not explained, though it was repeatedly stressed that it was not for the prisoner to prove his innocence, this Court held that such a direction amounted to a misdirection sufficient to vitiate the conviction. This Court took the view

> " that in the absence of an explanation of the nature of the inference the Jury were ' entitled to draw ' against the accused as he had not given evidence, they may have felt entitled to draw the inference that the prosecution evidence was true. "

In that case, Hearne J., who delivered the judgment of the Court, quite properly, if I may respectfully say so, stated the principle underlying to be that " the standard of proof required in criminal cases remains constant, irrespective of the fact that the accused has not given evidence ".

If an inference that the accused person is guilty be permitted to be drawn from the fact that he has not chosen to get into the witness-box and deny the case set up against him by the prosecution, whatever the infirmities of that case may be, it would be easy to see that far from the

[1] *(1942) 43 N. L. R. 241.*

burden of proof remaining from start to finish on the prosecution it gets shifted to the accused on the close of the case for the prosecution, whatever the case established against the accused may be, a proposition which under our law at any rate carries with it its own condemnation.

In a later case, *King v. Geekiyanage John Silva* [1], this Court had occasion to consider the effect of a direction that the failure of the accused to give evidence was an element that they may take into consideration in discussing whether the Crown has proved the case beyond all reasonable doubt, and came to the conclusion that there was no misdirection. It was pointed out that the charge " makes it clear that the Jury are not to convict if they have a reasonable doubt ". The case of *King v. Duraisamy* (supra) was distinguished on the ground that in that case the Judge " did not explain the nature of the inference " that the Jury were entitled to draw against the accused, and

> " also said that in deciding the Crown case, whether it had been established beyond reasonable doubt, the Jury were to take notice that the accused had not given evidence at all without pointing out to them that the existence of a reasonable doubt enured to the benefit of the accused whether he gave evidence or not. "

In the present case, however, as in *Duraisamy's Case,* the learned Judge did not explain to the Jury the nature of the inference they could draw and in the absence of such explanation " they may have felt entitled to draw the inference that the prosecution evidence was true ". The charge, therefore, to the Jury cannot be said to be one which did not cause serious prejudice to the prisoner. Therefore, the conviction cannot stand. The case against the prisoner, having regard to the entire body of evidence adduced by the prosecution, is a weak one, and justice in these circumstances demands that the accused should not be placed in jeopardy once again. Hence the acquittal.

Appeal allowed.

[1] *(1945) 46 N. L. R. 273.*