1939 *Present :* **Soertsz A.C.J., Hearne S.P.J. and Cannon J.**

THE KING *v.* VIDANALAGE ABRAHAM APPU.

89—P. C. Avissawella, 17,610.

Insanity—Indictment for murder—Plea of insanity—Burden of proof upon accused—Nature of proof—Case of doubt—Direction to Jury—Evidence Ordinance, s. 105.

Where, in a charge of murder, the defence of insanity is set up, the burden is upon the accused to prove that he did not know the nature of the act or that it was contrary to law.

It is not sufficient for the defence to raise a doubt in the minds of the Jury as to the sanity of the prisoner.

Where a plea of insanity is set up and the issue of insanity is left in doubt, it would be a misdirection to ask the Jury to give the accused the benefit of the doubt.

THIS was a case stated by the Attorney-General in terms of section 355 (3) of the Criminal Procedure Code. The facts are stated as follows:—

The prisoner was tried on May 5, 1939, before the Honourable Mr. O. L. de Kretser and an English-speaking Jury on an indictment charging him with having committed murder by causing the death of one Poonahelagoda Mudiyanselage Heras Singho *alias* Entappu, an offence punishable under section 296 of the Penal Code.

By an unanimous verdict the prisoner was convicted of culpable homicide not amounting to murder, an offence punishable under section 297 of the Penal Code and he was sentenced to ten years' rigorous imprisonment.

At the trial a defence of insanity was set up on behalf of the prisoner.

In several places in his charge to the Jury, the learned Judge directed them to the effect that this defence was entitled to succeed if they were satisfied on the evidence that the prisoner was of unsound mind and did not know the nature of the act or that it was wrong or contrary to law:—

(*a*) "It is therefore only if a person is proved not to know the nature of the act or not to know that it is wrong or contrary to law that he is treated as a lunatic, and the law states that although he did it, he is not responsible".

(*b*) "If you think he knew that the knife was open and deliberately caused the injury, whether he intended death or not, it would be *prima facie* murder. If you are satisfied on the medical evidence and other evidence that the accused did not know what he was doing, or that it was wrong or contrary to law, you will not find him guilty, but you will find that he committed the act".

(*c*) "The question is whether on that evidence you can hold that he was of unsound mind".

(*d*) "Do you think putting those things together he must have been mad at the time he committed this act, that he did not know what he was doing".

(*e*) "It is murder if you are satisfied that the man intentionally caused the injury and was not of unsound mind, or it is at least hurt if you think he intended and used his fist or closed knife and did not know that he was using an open knife. In either case if you think he was of unsound mind, then your verdict will be that he committed the act but not guilty by reason of unsoundness of mind".

(*f*) "If he was not of sound mind—if he did not know the nature of the act or that it was wrong or contrary to law, then you acquit him, but you will also bring in a finding that he committed the act. If you find that he was of sound mind, then your finding should be murder or culpable homicide not amounting to murder".

Finally, the learned Judge went on to say—

"Accused does not come before you innocent in the sense that he is not proved to have committed the offence. The only question is what is the actual offence he has committed if he was of sound mind, and (2) was he of sound mind or not? As between those matters you will remember always that an accused person is always given the benefit of any reasonable doubt—as between any two situatons, if there is a reasonable doubt—a doubt which appeals to your commonsense, you will give the benefit of the doubt to the accused."

The question submitted for the determination of the Court is whether the charge to the Jury contained a sufficient direction as to the burden which lay on the accused to establish his defence of insanity.

H. V. Perera, K.C. (with him *E. A. P. Wijeratne* and *H. A. Chandrasena*), for the prisoner.—The question for decision is whether the trial Judge rightly directed the Jury with regard to the defence of insanity that was raised. It is a settled principle of criminal law that the *onus* is on the prosecution to establish the charge beyond all reasonable doubt—*Woolmington v. The Director of Public Prosecutions*[1].

[SOERTSZ A.C.J. refers to sections 101 and 105 of the Evidence Ordinance and to the meaning of "proved" in section 3.]

Section 101 speaks of *facts*. The word "fact" is defined in section 3. Section 105, however, speaks not of facts but of circumstances. Further, section 100 brings in English law. The burden of proof, therefore, in the first instance, is on the accused to prove the circumstances which might produce a doubt as to his sanity. It is not necessary for us to prove insanity affirmatively. It is sufficient for us to show a reasonable doubt as regards sanity. For meaning of "reasonable doubt", see *Ramasawamy Chetty v. Uduma Lebbe Marikar* [2] and *Rengaswamy v. Pakeer* [3].

Between affirmative proof of sanity and affirmative proof of insanity, there is a region when there may be a doubt, regarding the sanitary or insanity of the accused. The Judge has misstated the extent of the burden of proof resting on the accused. At various stages of his charge he indicated that the *onus* on the accused was to prove his insanity beyond

[1] (1935) *App. Cas. 462.* [2] (1901) *5 N. L. R. 310.*

[3] (1911) *14 N. L. R. 190.*

all doubt. The burden of proof on an accused where the defence of insanity is raised is no higher than that resting on a plaintiff or defendant in a civil action—*Sodeman v. Rex* [1]; *Rex v. Zulch* [2].

There is a mental ingredient, namely, the existence of sanity, in the offence of murder, and where the prosecution has been shaken on that point by the defence, the *onus* falls back on the prosecution to remove all reasonable doubt regarding sanity. It is a fundamental principle that every ingredient of the offence should be proved by the prosecution. The test that has to be applied is the one applied in *Lawrence v. King* [3].

J. W. R. Ilangakoon, K.C., Attorney-General (with him *M. F. S. Pulle, C.C.*) as *amicus curiae.*—The language used by the trial Judge in the summing-up contained a sufficient direction as regards the *onus* of proof. Where the defence of insanity is raised, accused has to satisfy the Jury that he actually was of unsound mind. See the cases cited in *Russell on Crime (9th ed.) pp. 16-36,* particularly the summing-up of Rolfe B. at p. 26; *Criminal Law Journal of 1938, pp. 555 et seq.; 83 Law Journal p. 298;* the summing-up of Justice MacCardie in the trial of Ronald True. The *onus* is on accused to prove insanity; if any doubt is raised regarding his insanity, he cannot avail himself of the plea of insanity.

Cur. adv. vult.

August 4, 1939. SOERTSZ A.C.J.—

This is a case stated by the Attorney-General under section 355 (3) of the Criminal Procedure Code. The question submitted to us for decision is whether or not, the trial Judge's charge to the Jury empanelled in this case, contained a sufficient direction in regard to the nature and extent of the burden of proof which the Law imposed on a prisoner on whose behalf the defence of insanity is set up.

Mr. H. V. Perera who appeared for the prisoner, submitted to us that there was misdirection because, at several stages of his charge, the learned Judge told the Jury that the prisoner must *prove* that he did not know the nature of the act or that it was wrong contrary to law; that the Jury "must be *satisfied* on the medical evidence and the other evidence that the accused did not know what he was doing or that it was wrong or contrary to law". Counsel contended that these and similar directions in the charge were calculated to create in the minds of the jurors the impression that the accused was bound to prove his insanity by establishing that he did not know the nature of his act or that it was wrong or contrary to law, whereas, he submitted, in point of fact, the burden imposed by law on the prisoner was no greater than to raise a reasonable doubt in the minds of the Jury as to his sanity. In other words, the contention was that in regard to the burden of proof, the position in a case of this kind, was not different from that in other criminal cases, and that if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to the guilt of the prisoner, the prosecution has not made out the case, and the prisoner is entitled to a verdict in his favour. That is undoubtedly, the general principal of English Law, reaffirmed by

[1] *(1936) 2 A. E. R. 1138.* [2] *S. A. L. R. (1937) T. P. D. 400.*
[3] *(1933) A. C. 699.*

the House of Lords in the remarkable case of *Woolmington v. The Director of Public Prosecutions*[1]. But, it is a question whether in view of Chapter IX. of our Evidence Ordinance, particularly of section 105, our law is the same as the law of England. Section 105 of the Evidence Ordinance enacts that "when a person is accused of any offence, the burden of *proving* the existence of circumstances bringing the case within any of the *general exceptions* in the Ceylon Penal Code or within any *special exception or proviso* contained in any other part of the same Code, or in any law defining the offence, is upon him *and the Court shall presume the absence of such circumstances*". These are very clear words, and can only mean that so far as our criminal law is concerned, the position is exactly the same whether the defence is "insanity" or "accident", to adduce two instances from among the general exceptions in the Penal Code, or "culpable homicide not amounting to murder" by virtue of the special exceptions created by section 296 of the Code, to take an instance from outside the general exceptions. In each of these cases, the accused must *prove* that he is within the exception or proviso. Section 3 of the Evidence Ordinance defines the word "prove" for the purpose of that Ordinance. It says that "a fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists". In that view of the matter, it would appear that where any of these exceptions or provisos are set up, the defence is not proved if "the circumstances bringing the case within" any of the exceptions are involved in doubt. Our Courts have, however, as a rule, guided themselves in accordance with the principle stated in *Woolmington v. The Director of Public Prosecutions* (*supra*), and no occasion arises in this case, to pursue that matter any further.

In this case, we are only concerned with the question of the burden of proof and the extent of that burden where the defence is one of insanity. In regard to this defence, the English Law is very clear. When this question arose in 1943 in M'Naughton's case, and the Judges were asked to rule upon it, they declared that "in all cases every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be *proved to their* (the Jury's) *satisfaction*, and that to establish a defence on the ground of insanity, *it must be clearly proved* that at the time of committing the act . . . . the accused did not know the nature and quality of the act he was doing, or if he did know it, he did not know that he was doing what was wrong". That is the rule which the Courts in England have acted upon ever since. In *Rex v. Stokes*[2] Rolfe B. said in the course of his charge to the Jury "if a prisoner seeks to excuse himself upon the plea of insanity, *it is for him to make it clear* that he was insane at the time of committing the offence charged. The *onus* rests on him, and the Jury *must be satisfied* that he actually was insane. *If the matter be left in doubt, it will be their duty to convict him*, for every man must be presumed to be responsible for his acts till the contrary is *clearly shown*". The learned Baron referred to a case that came before Alderson B. where the Jury hesitated as to their

[1] (1935) *App. Cas. 462.*

[2] (1848) *3 C. & K. 185.*

verdict, on the ground that they were not satisfied whether the prisoner was or was not of unsound mind when he committed the crime, and that learned Judge told them that *unless they were satisfied* of his insanity, it would be their duty to find a verdict of guilty. In *Rex v. Townley* [1] Martin B. directed the Jury that "*unless they were satisfied*—and it was for the prisoner *to make it out*—that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder". Again in *Rex v. Layton* [2] Rolfe B. reiterated the views he expressed *in Rex. v. Stokes* and observed that in cases of this kind there was "one cardinal rule which should never be departed from, namely, that *the burden* of proving innocence rested on the accused and that the question was not whether the prisoner was of sound miud, but "*whether he had made out to their satisfaction* that he was not of sound mind". It is unnecessary to multiply instances. There is the very definite pronouncement by the House of Lords in *Woolmington v. The Director of Public Prosecutions* (*supra*) that "M'Naughton's case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. *It is quite exceptional* . . . . In *M'Naughton's case,* the *onus* is definitely and exceptionally placed upon the accused to *establish* such a defence". Lord Sankey refers to the case of *Rex v. Oliver Smith* [3], "where it is said that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, *must be established by the defendant*". In the earlier case of Joseph Edward Flavell [4], Sankey J., as he then was, stated in the Court of Criminal Appeal that "the defence raised at the trial of the applicant was that of insanity, *the burden of proving which lay on the defence*". Section 77 of the Ceylon Penal Code is a condensed reproduction of the rule in M'Naughton's case, and in view of section 105 of our Evidence Ordinance, there can be no doubt that the burden of proving insanity is on the prisoner. So far as English decisions go, this principle has been enunciated in different ways, but the principle itself has never been called in question judicially. In the words of the Judges in M'Naughton's case, insanity must be "clearly proved", "proved to their satisfaction" (*i.e.*, of the Jury), or as Rolfe B. stated it is for the prisoner "to make it clear", "he Jury must be satisfied", "the burden of proving innocence rested on the accused". Counsel for the prisoner relied on the recent case of *Sodeman v. Rex* [5], in which Hailsham L.C. put the matter in a different way. He said "the other point is that the trial Judge in directing the Jury as to the burden of proof . . . . went on to say that the burden of proof in a case of insanity rested upon the accused, and the suggestion made by the petitioner was that the Jury may have been misled by the Judge's language into the impression that the burden of proof resting on the accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact, there is no doubt that the burden of proof for the defence is not so onerous. It has not been very definitely defined . . . . It is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated to be no higher than

[1] (*1863*) *3 F. & F. 839.*
[2] (*1849*) *4 Cox 149.*
[3] (*1910*) *6 Cr. App. 19.*
[4] (*1926*) *19 Cr. App. 141.*
[5] (*1936*) *2 A. E R. 1138 (P.C.).*

the burden which rests upon a plaintiff or defendant in civil proceedings". This, no doubt, is less compendious, less direct language than the language used in the earlier cases, but it brings us in the end to the same point, and that is that if the issue is left in doubt, the prisoner must fail. In civil proceedings the burden remains throughout the entire case where the pleadings originally place it. It never shifts. The burden of adducing evidence constantly shifts. But in regard to the burden of proof, "the party whether plaintiff or defendant, who substantially asserts the affirmative of the issue has the burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence by whomsoever introduced is all in, if he has not by the preponderance of evidence required by law *established* his position or claim, the decision of the tribunal must be adverse". It is, I think, clear that the Lord Chancellor said what was said in the earlier cases but in a circumlocutory manner. If Counsel's suggestion was that this case is authority for saying that it is sufficient for a prisoner to throw doubt on his sanity, I cannot entertain that suggestion. In the case before him the Lord Chancellor was face to face with M'Naughton's case, for an attempt was made to obtain a reconsideration of the rules laid down there by pleading that "uncontrollable impulse" was a good ground for exculpation. He unhesitatingly rejected that contention, upheld the prevalent view, and went on to consider "the other point", that is the burden of proof. On that point, the Judges in M'Naughton's case had laid down, as I have already pointed out, that insanity *must be proved to the Jury's satisfaction*, that *it must be clearly proved*, and it cannot, in my view, be supposed that Lord Hailsham meant to depart from that interpretation when he expressed himself as he did.

The Attorney-General to whom we are indebted for much assistance in this case referred to *Cant v. Alexander Hailey & Sons, Ltd.*, a note of which appears in the *Criminal Law Journal* of October, 1938, at page 555 *et seq.* (the report itself is not available here). In that case du Parcq J. adverted to the difference between "proof beyond all reasonable doubt", and "proof", and he said the burden of proof on the prosecution in a criminal case was to prove beyond all reasonable doubt, while the burden of proof in a civil case was to prove. I cannot help feeling that some confusion of thought has been created by a not too precise use of words. Although the phrase "to prove beyond reasonable doubt" has become inveterate in the language of the Courts, logically this discrimination between "prove beyond reasonable doubt" and "prove" seems no more defensible than it would be to speak of a squarer square or a rounder circle, or in Rupert Brooke's phrase of "wetter water, slimier slime". The word "prove" involves the idea of placing beyond reasonable doubt, and to speak of "proving beyond reasonable doubt" has the sound of tautology. The phrase is not intended to convey the idea that there is a difference of meaning between it and the word "prove" but to make it clear that so far as the case for the prosecution in a criminal trial is concerned, it will not suffice for it to make out a case of grave suspicion against an accused person; it must establish its case by eliminating all reasonable doubts; in other words it must prove its case, and so long as there is a reasonable doubt left, there is no proof. The phrase "to prove

beyond reasonable doubt " is explanatory of the meaning of the word prove. As du Parcq J. went on to observe "prove" meant "prove no more and no less; where the matter is left in a state of doubt the defence was not proved". It must, however, be borne in mind that du Parcq J. was speaking with reference to a statutory offence in regard to which the prisoner had to exculpate himself. So far as English Common law offences are concerned, the general rule is that an accused need not prove his innocence. It is sufficient for him to create a reasonable doubt as to the truth of the case for the prosecution. But the defence of insanity occupies an exceptional position, and the prisoner must, in the words of Rolfe B., "prove his innocence" by proving his insanity. If he only involves that issue in doubt, he fails. The position in our law is not different. Section 105 of the Evidence Ordinance makes that clear.

The question in regard to the test to be applied to determine insanity, namely, whether the prisoner knew the nature of his act or that it was wrong or contrary to law was not disputed at the argument before us. But the case stated appears to ask for our decision on the sufficiency of the charge as a whole. I would, therefore, rule that the learned trial Judge directed the Jury correctly and sufficiently on what constitutes insanity in the eye of the law.

I would also rule that it was an incorrect direction when the Judge said to the Jury "Was he of unsound mind or not. As between these matters, you will remember always that an accused person is always given the benefit of any reasonable doubt. As between any two situations, if there is a reasonable doubt, a doubt which appeals to your commonsense, you will give the benefit of the doubt to the accused". The correct direction would have been that if the issue of insanity was left in doubt, the defence failed. In earlier parts of his charge, the trial Judge had correctly stated that the prisoner must prove, must satisfy the Jury, but the passage I have quoted occurs in the concluding part of the charge and qualifies the whole of it. But, the misdirection I have referred to was unduly favourable to the prisoner, and it is of no consequence in this case in view of the verdict that was returned.

There is one other matter I would refer to, and I refer to it because Counsel for the prisoner repeatedly called out attention to it, and that is the observation made by the learned Judge in the course of his charge that if the prisoner "is not guilty because of unsoundness of mind, the case will be reported to the Governor, and the man will be treated as a criminal lunatic and he stands the chance of being locked up for life". Counsel for the prisoner submits that the Jury may have been influenced by this remark to return the verdict they did, rather than return a verdict of not guilty by reason of unsoundness of mind lest the prisoner "be locked up for life".

In my opinion, it is desirable that we should refrain from expressions as vivid and cogent as that, although in view of the nature of the verdict to be returned in cases of this kind—not guilty, but committed the act—there can be no objection to Juries being acquainted with the fact that such a verdict does not mean that the prisoner is set free.

HEARNE S.P.J.—I agree.

CANNON J.—I agree.