

[COURT OF CRIMINAL APPEAL]

1968 Present : H. N. G. Fernando, C.J. (President), T. S. Fernando, J.,
and Abeyesundere, J.

R. H. WEERASENA and another, Appellants, and THE
QUEEN, Respondent

C. C. A. APPEALS NOS. 145 AND 146 OF 1965, WITH APPLICATIONS
NOS. 189 AND 190

S. C. 86/67—M. C. Galle, 47753

*Summing-up—Inadequacy of direction to jury upon a vital question—Effect—Burden
of proof—Misdirection.*

The two appellants were charged with murder, and were convicted of culpable homicide not amounting to murder. In regard to the only material witness for the prosecution, there were four circumstances which were indicative of the falsity of his evidence. The vital question for the Jury was whether they could be certain that the witness actually saw an assault on the deceased.

Held, that it was the duty of the Judge to have sufficiently directed the Jury on the vital question which they had to decide.

Held further, that a direction to the Jury that there was a burden on the accused to have proved that they had not been present at the alleged scene of offence at the relevant time constituted a misdirection of law as to the burden of proof.

APPEALS against two convictions at a trial before the Supreme Court.

Prins Gunasekera, with *K. S. Rajah* (assigned), for the accused-appellants.

T. A. de S. Wijesundera, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 30, 1968. H. N. G. FERNANDO, C.J.—

The two appellants in this case were charged with the murder of one Somaratne, and were convicted of the offence of culpable homicide not amounting to murder.

Sumathipala, the brother of Somaratne, was the prosecution's only material witness, and he gave the following version. The two brothers had spent the morning of 2nd March 1967 tilling a field and were thereafter returning home along a village road for the mid-day meal. Both men were carrying their ~~nammoties~~ mammoties, and Somaratne was walking ahead. Sumathipala suddenly saw these two accused jump on to the road, the 1st with an iron rod in hand, and the 2nd with a club, and both of them assaulted Somaratne; but he did not see where any of the blows alighted. Somaratne then fell down. At this point, Sumathipala cried out, dropped the mammoty he was carrying, and rushed up to his brother. The 2nd accused then struck Sumathipala a blow on his chest and he fell down unconscious; when he regained consciousness, he found himself in hospital; as a result of the assault on himself, he had injuries on his chest and mouth.

It was proved, *by evidence called by the defence*, that both Somaratne and Sumathipala had been examined by a Doctor at the Neboda Hospital on the afternoon of 2nd March. But the prosecution led no evidence whatsoever to inform the Court how they arrived at the Hospital, and by whom they were taken. In view of the hospital testimony that Somaratne was examined and found to be in a semi-conscious state at 2.40 p.m. on the afternoon of 2nd March, it is highly probable that some assault on him had rendered him immediately unconscious. It is therefore very likely that someone took him to the hospital; and if Sumathipala truly stated that he himself became unconscious when he received a blow, he too could not have reached the hospital on his own steam. The prosecution's case being that both brothers had fallen unconscious on the road, it is extraordinary that no witness who saw them lying fallen was called to speak to that simple fact, and that the prosecution did not adduce evidence concerning the admission of Somaratne to the Hospital.

Sumathipala's evidence was cast in grave doubt by the Doctor at the hospital. Examination of Sumathipala at 3.30 p.m. on 2nd March revealed no injuries on him. Moreover his version that he received a blow on his chest and some injury to his mouth, conflicted with his earlier statement to the Magistrate that he received a blow on his temple. No such injuries were mentioned to the Doctor or noticed on examination.

Sumathipala said at the trial that when his brother was assaulted he saw one Weeraratne at a distance. But he was positive that Weeraratne took no part in the assault. Nevertheless he had stated to the Doctor at the hospital that there had been an assault by these two accused and by Weeraratne. In fact, Weeraratne himself had been examined at the Galle Hospital on the night of 2nd March and had then been found to bear injuries. There was no explanation from Sumathipala for the conflict between his different versions concerning this Weeraratne. In regard to this matter, the learned trial Judge directed the Jury as follows :—

“The defence sought to contradict him on that evidence again and placed before you a statement made by him to Dr. Fernando in which he had apparently said, or had said in fact that there was an assault by the 1st accused, 2nd accused, and by this man Weeraratne or Upasaka. Gentlemen, you must bear in mind that there is no direct evidence or any evidence at all before you that Weeraratne was present there at all. This matter is put to you as some evidence given somewhere else. The only evidence before you is that the 1st and 2nd accused attacked and that Weeraratne neither attacked nor received injury which was seen by Sumathipala.”

There was here a misdirection in law, for the Defence proved by the Doctor's evidence an admission by Sumathipala that Weeraratne had participated in the assault. The direction deprived the Defence of the benefit of that admission.

Somararatne was found on examination at the hospital to be smelling of liquor. According to Sumathipala, he had been together with Somararatne from 7.30 p.m. until the time of the assault at or about noon, and he was definite that Somararatne took no liquor that morning :—

“Q. And on that day did you see him taking liquor ?

A. I did not.

Q. And he would not have had any opportunity because he was with you together ?

A. That is so.”

The direction in the summing-up as to this matter was as follows :—

“Witness Sumathipala protested right throughout in his evidence that his brother did not drink that morning. Of course, Crown Counsel says that all he did say was that he did not see his brother

taking any drinks ; if he drank he would not have seen him taking any drinks or he would not have drunk in his presence. It may be that he is lying on some material portions of his evidence. Is he lying because they were drinking some illicitly manufactured arrack and he does not want to disclose that fact."

In substance these directions drew attention only to the possibility that Sumathipala had incorrectly or falsely denied the fact that Somaratne did take liquor that morning. But the learned Judge perhaps did not himself realise the graver implications of this matter. Somaratne undoubtedly took liquor that morning ; and, if Sumathipala was on his own showing not aware of this, the truth could well be that the brothers had not spent the morning together, and that Sumathipala had not witnessed the assault on Somaratne. That was precisely the inference which the Defence suggested in cross-examination, but the Jury was not invited by the learned Judge to consider its validity.

In view of—

(a) the lack of evidence that the two brothers were found together unconscious or injured on the road, and of evidence concerning their arrival at the hospital ;

(b) the apparent falsity of Sumathipala's evidence that he himself received injuries ;

(c) the conflict between Sumathipala's evidence, and his admission to the Doctor, concerning Weeraratne's participation in the alleged assault ;

(d) Sumathipala's possible ignorance of the fact that Somaratne consumed liquor ;

the vital question for the Jury in this case was whether they could be certain that Sumathipala actually witnessed an assault on his brother. The reference in the summing-up to the position of the Defence that "Sumathipala is a liar" was not in our opinion a sufficiently direct presentation of the vital question which the Jury had to decide in the particular circumstances of this case.

The following is the last reference in the summing-up to the factual aspects of the case :—

"You will ask yourselves 'Could Sumathipala be mistaken about the identification of these two persons?' Well, there was no suggestion that they were elsewhere. You will ask yourselves, in broad daylight, mid-day, whether they were at home or somewhere else. No evidence has been called to show their presence at some other place other than the place where this incident took place."

The Jury were quite clearly directed in this passage that they were entitled to take into account the fact that the accused had not adduced evidence showing that they had not been at the alleged scene of this incident at the relevant time. Despite correct directions which were given at earlier stages as to the burden of proof this passage could well

have led the Jury to think that a burden lay on the accused to prove that they had not been present at the alleged scene of this offence. The passage in our opinion thus constituted a misdirection of law as to the burden of proof.

For the reasons which we have now stated, we directed that the convictions of the accused and the sentences passed on them be quashed, and that verdicts of acquittal be entered. Having regard to the available evidence, we saw no reason to order a fresh trial.

Accused acquitted.
