[COURT OF CRIMINAL APPEAL]

1971 *Present :* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Thamotheram, J.**

K. KANDAKUTTY, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 79 OF 1970, WITH APPLICATION No. 128

S. C. 109/70—M. C. Kalmunai, 38125

Charge of murder—Defence of accident—Burden of proof—Misdirection.

In a prosecution for murder by shooting, the defence was that the deceased man was shot accidentally in consequence of an attempt made by another man to wrest the accused's gun.

Held, that, where a plea of accident is raised, it would be a misdirection to tell the Jury that there is a burden on the accused to satisfy them that his version is probably true. In the present case, it was the duty of the Judge to have directed the Jury that, if on the evidence led in the whole case they entertained a reasonable doubt on the question whether or not the shooting was accidental, the accused was entitled to an acquittal.

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

A. C. de Zoysa, with *I. S. de Silva, Justin Perera, Anura Vellappali* and *Asoka Gunasekera* (assigned), for the accused-appellant.

P. Colin Thome, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

January 27, 1971. H. N. G. FERNANDO, C.J.—

The principal question which arose for the determination of the Jury upon the charge of murder in this case was clearly stated at the commencement of the summing-up of the learned trial Judge :—

"The issue that calls for a decision by you in this case is : did the accused deliberately with the intention to kill shoot at the accused, or did this gun which the accused had with him fire off accidentally while he was struggling with the deceased's father-in-law Ponnan. In short the issue is, was the firing intentional or accidental ? "

The summing-up further contained the usual general directions of law and a summary of the prosecution evidence. Thereafter the trial Judge directed the Jury as follows :—

"Now, Gentlemen, that is the essence of the Crown case, which I have summed up to you. You will now turn to the defence. The defence is one of accident."

"The accused says that the shot went off accidentally. Now, I must tell you the onus is not on the accused to prove his case affirmatively, like in the case of the Crown having to prove the case beyond all reasonable doubt. The burden on the accused is not so heavy. If the accused's story is a probable story, though you might believe it, if you think it is a probable story then he had discharged the duty cast on him; if the story is probable, you should in those circumstances acquit the accused. And again you must examine the evidence in the background of reality and ask yourselves 'Is this story, a story, which for a moment, can be believed?' If you think it is a fantastic story then you are entitled to throw it over-board and reject his evidence. If you think it is a false story you reject it. Then, Gentlemen, however painful it may be, you will have to do your duty, and if you reject the defence version then the verdict that you will bring will be one of guilty of murder, or as indicated by me."

The principal argument of Counsel for the appellant was that these directions wrongly placed on the defence the burden of proving that the deceased man was shot accidentally.

The case of *Dionis*[1] was, like the instant case, one in which the accused had stated in evidence that his gun went off in consequence of an attempt made by another man to wrest the gun. This Court made the following observations:—

"In the opinion of the Court there was no burden on the appellant to prove any of the facts alleged by him. The burden lay throughout on the Crown to prove beyond reasonable doubt that the death in question was caused by an act done by the appellant and done by him with the intention or knowledge requisite for the constitution of the offence of murder. If his version of the circumstances created a reasonable doubt either as to the factum or as to the mens rea he was entitled to be acquitted of the offence charged. It was a misdirection to tell the Jury that there was a burden on the appellant to satisfy them that his version was probably true and that 'he must not leave the matter in doubt'."

Again, in the case of *Thuraisamy*[2], where also the accused gave evidence as to an accidental shooting, this Court held that it was a misdirection to tell the Jury that there was a burden on the accused to satisfy them that his version was probably true. Gunasekara, J. added that the appellant in that case would have been entitled to an acquittal "even if it was not proved that the injury was a result of an accident but there was a reasonable doubt on that point". In the instant case the Jury were not directed that, if on the whole of the evidence they entertained a reasonable doubt on the question whether or not the shooting was accidental the accused was entitled to an acquittal.

[1] *(1951) 52 N. L. R. 547.* [2] *(1952) 56 N. L. R. 449.*

We were in agreement with Counsel's submission that there was a misdirection as to the burden of proof, which in the words of Gunasekara, J.[1] is " a misdirection on a fundamental point ".

Learned Senior Crown Counsel submitted that we should order a fresh trial. We did not however consider this a fit case for a fresh trial, because there were several matters which cast doubt on the truth of the prosecution evidence.

It suffices to mention only one of these matters : the evidence of the principal witness Ponnan was that he was walking along the road, with the deceased man following him just two feet behind. According to Ponnan the accused approached him from the opposite direction and uttering some words of abuse fired a gun from a distance of about 10 feet, and it was this shot which injured the deceased man. According to his evidence, the deceased man received an injury from a gun shot fired at a range of less than 15 feet.

The Assistant Government Analyst who was a witness at the trial stated his opinion that the minimum range at which the shot had been fired was 40 feet. His opinion as to a range of 40 feet supported the accused's version that when Ponnan tried to wrest the accused's gun and the gun fired, the deceased man was not close to Ponnan.

Had the attention of the Jury been directed to the evidence of the Assistant Government Analyst, it is unlikely that the Jury would have found acceptable Ponnan's version that the accused fired towards two people who were then only about twelve or fifteen feet away from the accused.

For the reasons now stated we quashed the conviction and acquitted the accused.

Accused acquitted.