Privy Council Appeal No. 27 of 1968

Rajapakse Pathurange Don Jayasena – – – – *Appellant*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY 1969

Present at the Hearing:
LORD HODSON
LORD DEVLIN
VISCOUNT DILHORNE
LORD DONOVAN
LORD PEARSON
[*Delivered by* LORD DEVLIN]

This is an appeal from a judgment given by the Court of Criminal Appeal of Ceylon. The accused, who was the appellant in that Court and is now the appellant before the Board, was on 3rd March 1966 convicted of murder. At the trial the accused admitted that the deceased died of wounds deliberately inflicted by him, his defence being that he was acting in self-defence. The sole question in the appeal is whether at the trial the jury was rightly directed on the burden of proof on the issue of self-defence, or private defence as it is more precisely called in the Penal Code.

The Penal Code defines murder in ss. 293 and 294. Since no question arises in this case about the quality of the intention, it is sufficient to say that it is murder if the act by which the death is caused is done with the intention of causing death or bodily injury of a sort that is likely to cause death. The right of private defence is given in the Code by s. 89 and following sections which form part of Chapter IV headed "General Exceptions". Its use as a defence to a charge of murder is permitted not only as a general exception by s. 93 but also as a special exception in s. 294 itself.

The burden of proof is settled by the Evidence Ordinance s. 105, which reads as follows:

> "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 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."

The argument turns upon the construction of s. 105 and the meaning to be given to "burden of proving".

Mr. Kellock for the appellant submits that there are two kinds of burden. One, which he calls the legal burden, is the burden of establishing the case; the other, called the evidential burden, is the burden of adducing some evidence in support of the case. Mr. Kellock submits that the burden

imposed by s. 105 is in the second category. If it were in the first category, the direction given to the jury by the trial judge in his summing-up cannot be criticised by the appellant, to whom it might be said to be unduly favourable. If it is in the second category, it is at least doubtful whether the direction would be adequate. Rather than scrutinise the summing-up to see whether the direction will pass muster in either category, their Lordships will determine whether the appellant's argument on s. 105 is correct.

To understand the argument it is necessary first to understand the position in English law. Before 1935 it was widely believed that in English law killing was presumed to be murder unless the contrary appeared from circumstances of alleviation, excuse or justification; and accordingly that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof on any of these issues rested upon him. There was, as Sankey L. C. said in *Woolmington v. D.P.P.* [1935] A.C. 462 at 473 "apparent authority" for this view, the foundation for it being the statement of the law in Foster's Crown Law written in 1762. In *Woolmington v. D.P.P.* where the accused was charged with murder and gave evidence that the killing was accidental, the trial judge directed the jury in accordance with this view of the law. The House of Lords declared this view to be erroneous. The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt. To prove murder the prosecution must prove that the killing was intentional and unprovoked. This does not mean, as the House made clear in subsequent cases, that a jury must always be told that before it can convict, it must consider and reject provocation and self-defence and all other matters that might be raised as an answer to a charge of murder. Some evidence in support of such an answer must be adduced before the jury is directed to consider it; but the only burden laid upon the accused in this respect is to collect from the evidence enough material to make it possible for a reasonable jury to acquit.

Against this background the appellant's argument can be appreciated and in particular the distinction drawn between what are said to be the two categories of proof,—the establishing of a case, and the adducing of evidence. The argument is not of course that *Woolmington v. D.P.P.* is directly applicable; it is a decision on the common law and the Board is required to interpret and apply the code. The argument is that the code should be interpreted in the light of *Woolmington v. D.P.P.* In his speech Sankey L. C. dealt in two ways with Sir Michael Foster's statement of the law. While at 482 he made it quite clear that he was prepared, if necessary, to reject it, he had earlier at 480 indicated that it could be reconciled with the principle which the House was laying down. If the statement in Foster can be reconciled with the doctrine, then, as Mr. Kellock argues, so can s. 105. The way of reconciliation is by construing "burden of proving" as referring to the burden of adducing evidence, the so-called evidential burden of proof. In this way the "golden thread", as the Lord Chancellor described it in a famous passage, can be preserved for the law of Ceylon.

This is an argument which has prevailed in several jurisdictions where there is an Evidence Ordinance containing a provision in the same terms as s. 105. It was adopted in the High Court of Rangoon in the *Emperor v. U. Damapala* (1937) 14 A.I.R. 83, by a majority in the High Court of Allahabad in *Emperor v. Parbhoo* (1941) A.I.R. 402 and in Malaysia in *Looi Wooi Saik v. Public Prosecutor* (1962) 28 M.L.J. 337. It has however been decisively rejected by the Court of Criminal Appeal of Ceylon sitting as a court of seven with one dissentient, in *R. v. Chandrasekera* (1942) 44 N.L.R. 97. In the present case the Court dismissed the appeal without giving reasons, doubtless following the previous decision. This appeal is therefore in effect an appeal against *R. v. Chandrasekera* which Mr. Kellock invites the Board to disapprove.

Their Lordships do not understand what is meant by the phrase "evidential burden of proof". They understand of course that in trial

by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof,—a misnomer which serves to give plausibility but nothing more to Mr. Kellock's construction of s. 105.

S. 3 of the Evidence Ordinance deals with proof in the following terms:

> " A fact is said to be proved when, after considering the matters 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."

Their Lordships do not think that proof means anything different in English law. But at any rate in the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by s. 105 can be anything less than proof in accordance with s. 3. Their Lordships will not elaborate further since the incongruities of any such supposition are fully exposed in the judgments of the majority in *R. v. Chandrasekera* particularly the judgment of Soertsz, J.

Even if there were any ambiguity in the language of ss. 3 and 105 of the Evidence Ordinance, their Lordships would not be aided in resolving it by the decision in *Woolmington v. D.P.P.* In saying this their Lordships are not questioning the place which this authority now holds in the law of England. But it is not necessary to read more than the speech of the Lord Chancellor himself to see that by far the greater strength of previous authority supported the view which the House rejected. Nevertheless, for some considerable time before 1935 many English judges had in practice been applying the law with less strictness towards the defence than its terms warranted. This is illustrated by the judgment of the Court of Criminal Appeal in the very case as it appears from the speech of the Lord Chancellor at 470. The Court said that while there was ample authority for the trial judge's statement of the law, " it may be that it would have been better " if he had told the jury that if they entertained any reasonable doubt about the accused's explanation they should acquit; and in fact they dismissed the appeal, not as being unfounded in law, but by resorting to the proviso to section 4 (1) Criminal Appeal Act 1907. Thus the decision of the House of Lords is an example of a change in the content of the law resulting from a change in the manner of applying it. The common law is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a code is not. Foster's statement of the law is not in their Lordships' opinion reconcilable with the law as laid down by the House of Lords. But there can be no doubt that it was adopted in the codification of the law introduced into Ceylon. It was at that time set out in all the English textbooks (from which it has now been dropped), including Stephens' Digest of the Criminal Law; and Sir James Stephens, as is well known, was the begetter of the Evidence Ordinance. The code embodied the old criminal law and cannot be construed in the light of a decision that has changed the law.

In support of his argument Mr. Kellock pointed to s. 73 of the Penal Code which includes accident among the General Exceptions. He submitted that the effect upon this of s. 105 would be, unless it is given

the modified reading for which he contends, to put the burden on the defence of negativing intention. Their Lordships consider that the language of ss. 3 and 105 in combination is so compelling that they would not be deterred from interpreting it in the way in which they have even if in its application to s. 73 it had the consequences which Mr. Kellock foresees. Having said this and since no case under s. 73 is before them, they do not propose to decide where the burden of proof lies when accidental killing is in question. Such a question would raise different considerations from those material in the present case. Proof of intentional killing does not negative the answer of private defence; on the contrary, it is only after intentional killing is proved that private defence need be put forward. But proof of intentional killing does negative accident. In *R. v. Chandrasekera,* Soertsz, J. at 125 dealt with the point as follows:

> "The position is however different in cases in which, by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law in the *Woolmington* case, if on the charge of murder, on all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary cause [sic] of nature to cause death, existed or not. In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case."

As at present advised, their Lordships agree with this dictum.

The attention of the Board has been drawn to cases in which the direction to the jury has been that, while the burden of proof of a particular defence is upon the accused, the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution. Such a direction might appear at first sight to lend support to Mr. Kellock's contention that some lighter burden than the ordinary burden of proof is in these cases placed upon the accused. If that is the effect of it, it would in their Lordships' opinion be wrong. But it must be remembered that the evidence on which the accused relies, when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own. The present case, as Mr. Gratiaen has said, is a clear case of confession and avoidance; the defence admitted the intention to kill and relied entirely upon private defence. It is however much more frequent for an accused to deny the intention. He will say that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. Likewise provocation and accident often feature together in an accused's story. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution. The point has recently been before the Supreme Court of India in relation to the defence of insanity. In *Dahyabhai v. State of Gujarat* (1964) 7 S.C.R. 361 Subba Rao J. at 365 pointed out that evidence that fell short of proof of insanity might yet raise a reasonable doubt about the existence of the requisite intention. In *Bhikari v. State of Uttar Pradesh* (1965) 3 S.C.R. 194 Mudholkar J. said at 198:

> "If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in s. 105 of the Evidence Act."

Their Lordships respectfully agree with this observation.

Finally, Mr. Kellock points to s. 106 of the Evidence Ordinance which says:

> " When any fact is especially within the knowledge of any person the burden of proving that fact is upon him."

He relies upon two decisions of the Board, *Attygalle v. R.* [1936] A.C. at 338 2 A.E.R. 116 and *Seneviratne v. R.* [1936] 3 A.E.R. 36 in which this section was considered and was not applied so as to shift the burden from the prosecution.

The principle involved in this section derives from the English law of evidence, where it has however been sparingly used. The prosecution is usually able to establish that an accused person has special knowledge of the circumstances of the crime with which he is charged. Under some systems of law this is considered to be sufficient for the accused to be called upon at the outset of a trial to say what he knows. Such a procedure would be quite inconsistent with the accused's right to silence which prevails in the English system as adopted in Ceylon.

Their Lordships are concerned with s. 106 only to see whether it gives any support to Mr. Kellock's argument on s. 105. He submits that the right solution lies in treating s. 106 as imposing only an evidential burden of proof; and that if s. 106 has to be treated in that way, why not also s. 105? This submission gets no help from the two authorities cited. In these cases the Board said simply and without elaboration that the section does not cast upon an accused the burden of proving that no crime has been committed. Their Lordships in no way dissent from this conclusion. It may well be that the general principle that the burden of proof is on the prosecution justifies confining to a limited category facts " especially within the knowledge " of an accused; but their Lordships do not consider that it can alter the burden of proof either in s. 106 or s. 105.

For these reasons, and generally for the reasons given in the majority judgments in *R. v. Chandrasekera*, their Lordships have humbly advised Her Majesty to dismiss this appeal.

310042—4 Dd. 178157 80 11/69

In the Privy Council

RAJAPAKSE PATHURANGE DON JAYASENA

v.

THE QUEEN

DELIVERED BY
LORD DEVLIN

Printed by HER MAJESTY'S STATIONERY OFFICE
1969