IGH COURT OF AUSTRALIA.]

MAY . . . . . APPELLANT;
DEFENDANT,

AND

O'SULLIVAN . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1955.

ADELAIDE, *June* 14;

MELBOURNE, *July* 18.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Criminal law—Evidence—Burden of proof—Onus on prosecution from first to last to establish guilt beyond reasonable doubt—Prima facie case made by prosecution—Onus on prosecution notwithstanding—No burden of disproof cast upon accused.

In criminal cases, when the prosecution has made out a prima facie case, the burden of proof does not in the absence of some statutory provision on the subject shift to the accused with the consequence that, if he fails to displace the prima facie case by denial or explanation, he ought to be convicted. The burden of proving guilt beyond reasonable doubt rests on the prosecution from first to last.

A finding that a prima facie case has been made out is a finding of law that on the evidence as it stands the defendant *could* lawfully be convicted of the offence charged. Whether he ought to be convicted depends upon the tribunal being satisfied beyond reasonable doubt on the whole of the evidence before it that the defendant is guilty. This question of fact must be decided, whether or not the defendant has given evidence, upon the basis that the prosecution throughout carries the onus of proving guilt beyond reasonable doubt, even though in some cases it may be legitimate to have regard to the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear.

R. v. *Lovett* (1908) 1 Cr. App. R. 111; *Wilson* v. *Buttery* (1926) S.A.S.R. 150; *O'Halloran* v. *Crafter* (1940) S.A.S.R. 29 and *Giles* v. *Dodd* (1943) S.A.S.R. 132, discussed.

H. C. OF A. 1955. MAY v. O'SULLIVAN.

APPLICATION for special leave to appeal from the Supreme Court of South Australia.

Francis Charles May was charged, before a court of summary jurisdiction at Adelaide, with (i) unlawfully carrying on the business of a bookmaker otherwise than in accordance with Pt. IV of the *Lottery and Gaming Act* 1936-1950 (S.A.) contrary to sub-s. (1) (*a*) of s. 42a of that Act, and (ii) being in a public place, namely, the Thistle Hotel, Waymouth Street, Adelaide, for the purpose of betting otherwise than by means of a totalisator duly licensed under the *Lottery and Gaming Act* 1936-1950 (S.A.), contrary to s. 62 of that Act. He was convicted on both counts.

An appeal by May to the Supreme Court of South Australia (*Abbott* J.) was dismissed.

May sought special leave to appeal to the High Court.

H. G. Alderman Q.C. (with him *R. C. Ward*), for the appellant. The idea has become prevalent in South Australian courts that, if a prima facie case is made out, then some sort of an onus is imposed on an accused person, to raise a reasonable doubt in his own favour. It is suggested that the mistaken idea referred to arose from a misinterpretation of *R.* v. *Lovett* (1) and from observations by the Full Court of the Supreme Court of South Australia in *Wilson* v. *Buttery* (2). This idea has led the courts below to make a wrong approach to the present case. The correct course was simply to consider whether, after all the evidence has been heard, guilt has been proved beyond reasonable doubt. [He referred to *Crafter* v. *Thompson* (3); *O'Halloran* v. *Crafter* (4); *Giles* v. *Dodd* (5).]

W. A. N. Wells, for the respondent. If there has been any error of the kind suggested by the appellant, it has been an error in expression only. Even if the expression of the test to be applied has been in some respects unfortunate, the test in fact applied has been : On all the facts is there a reasonable doubt ?

Cur. adv. vult.

July 18.

THE COURT delivered the following written judgment :—

The appellant, May, was convicted before a stipendiary magistrate on two charges arising out of alleged betting in a hotel. An appeal to the Supreme Court of South Australia was dismissed by

(1) (1908) 1 Cr. App. R. 111.
(2) (1926) S.A.S.R. 150.
(3) (1935) S.A.S.R. 159, at pp. 162, 163.
(4) (1940) S.A.S.R. 29, at pp. 39, 40.
(5) (1943) S.A.S.R. 132, at p. 140.

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Abbott J. From this order dismissing the appeal the applicant now seeks special leave to appeal to this Court.

At the hearing before the magistrate evidence was called for the prosecution and for the defence. It is unnecessary to refer to this evidence, beyond saying that, if the defendant's evidence had been believed, it would have established that the defendant was not present in the hotel at the times when all but one of the alleged bets were made, and, with regard to that one bet, such serious doubt would have been cast on the evidence for the prosecution that a conviction could hardly have been justified. It is sufficient to say that the magistrate accepted without qualification the evidence of the principal witness for the prosecution, Constable Aldridge, and disbelieved the evidence given by the defendant as to his movements on the day in question. He expressed himself strongly, but his findings are not, in our opinion, open to attack. With regard to one of the witnesses called for the defence, a Miss Edge, he said that he was " unable to say that there is sufficient reason to distrust her evidence ", and it was said that acceptance of her evidence ought to have led him to a different view of the evidence of Aldridge and of the defendant. But Miss Edge's evidence was only one link in a chain, and it by no means followed from its acceptance that the defendant's " alibi " was established. It was a matter of proving the happening of events at precise times, and it was clearly open to the magistrate to find, as he did, that the precise times were not established.

Mr. *Alderman*, for the applicant, referred to certain passages in the judgment of *Abbott* J. which, he said, reflected a wrong view relating to the burden of proof in criminal cases. He said that this view had gained currency in recent years in South Australia, and was particularly apt to be applied by magistrates in such a way as to cause serious prejudice to persons accused of offences triable summarily. It has not appeared to us that the decision of the magistrate in the present case was open to attack on the ground of any misapprehension as to burden of proof, and, for the reasons given above, we are of opinion that special leave to appeal from the judgment of *Abbott* J. should be refused. The point raised by Mr. *Alderman*, however, is one of importance, and there are passages in the judgment of *Abbott* J. in the present case and in the judgments in certain other cases which may be thought to express a mistaken conception relating to burden of proof. It seems, therefore, desirable to make certain brief observations on the matter.

The question which is actually raised is whether, when the prosecution has made out what is called a " prima facie case " or

a " case to answer ", the burden of proof shifts to the shoulders of the accused person or defendant, with the consequence that, if he fails to displace that prima facie case by denial or explanation, he ought to be convicted. It is, of course, clear that there is no such shifting of the burden in such a case. The burden of proving guilt beyond reasonable doubt rests on the prosecution from first to last, and, even though the defendant remains silent after a prima facie case has been launched against him, it may very well be that he ought to be acquitted. That the contrary view should be entertained at all is perhaps due to *R.* v. *Lovett* (1).

In *O'Halloran* v. *Crafter* (2), *Richards* J. said : " The position created in a criminal proceeding by a *prima facie* case of guilt was dealt with in *Lovett's Case* (1). The Recorder, in directing the jury, had told them that the onus was on the prosecution, and later said :—' If you come to the conclusion to your satisfaction that the prosecution have made out a *prima facie* case, and the prisoners have not satisfactorily answered it, it is your duty to find them guilty.' The Court (the Lord Chief Justice and *Darling* and *Phillimore* JJ.) held that that was not a substantial misdirection " (3). The same learned judge in *Giles* v. *Dodd* (4), quoted the same passage from *Lovett's Case* (1) and said that the Court of Criminal Appeal had " held it not to be a misdirection ". If *Lovett's Case* (1) is to be regarded as authority for saying that the passage quoted is not a misdirection, it must, in our opinion, be taken to have been wrongly decided. What the recorder said seems to us to have been a palpable and serious misdirection. It would seem, however, that the reason why the conviction was not quashed was that the recorder had already told the jury distinctly that the onus lay on the prosecution. It was with reference to the recorder's charge as a whole, and not with specific reference to the passage quoted by *Richards* J., that the Court of Criminal Appeal said that there had been " no substantial misdirection ".

It seems desirable also to refer to what was said in the judgment of the Full Court, delivered by *Napier* J. (as he then was), in *Wilson* v. *Buttery* (5). The court there said :—" It is therefore necessary to consider whether the evidence before the justices disclosed what is referred to as a *prima facie* case. Of course, the charge was one of an offence, and when the evidence came to be finally considered it was necessary that it should be such as enabled the Court to come to a conclusion, free from any reasonable doubt. But, for the

(1) (1908) 1 Cr. App. R. 111.
(2) (1940) S.A.S.R. 29.
(3) (1940) S.A.S.R. 29, at pp. 39, 40.
(4) (1943) S.A.S.R. 132, at p. 140.
(5) (1926) S.A.S.R. 150.

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purpose of raising a *prima facie* case *and thereby throwing upon the defendant the onus of making an answer, or giving an explanation for facts which he may be presumed to know*, we cannot find that there is any distinction between civil and criminal cases" (1). In the next paragraph their Honours say:—"When this stage has passed, and the defendant has been called upon for his explanation or answer, and no evidence has been forthcoming, the Court or jury is entitled to take into consideration the probable means of knowledge on either side. If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider. They have, then, to say whether in this state of the evidence they have any reasonable doubt of the guilt of the accused. If they have they must acquit" (2). If the words italicized above were omitted, the passages quoted would seem to be unexceptionable and to contain an accurate statement of the law. We think, however, with respect, that the introduction of those italicized words (which were not essential to the reasoning of the learned judges for the purpose in hand) is apt to be misleading. It is not really correct to say that the "raising of a prima facie case" throws upon the defendant "the onus of making an answer".

When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there *is* a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson* v. *Buttery* (3) for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it

(1) (1926) S.A.S.R., at pp. 153, 154.
(2) (1926) S.A.S.R., at p. 154.
(3) (1926) S.A.S.R. 150.

might otherwise possibly appear: cf. *Morgan* v. *Babcock & Wilcox*, per *Isaacs* J. (1). But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a prima facie case", but it does not follow that in the absence of a "satisfactory answer" the defendant should be convicted.

We have thought it proper to make these observations in view of the cases cited by Mr. *Alderman*. But, for the reasons given, special leave to appeal from the order of *Abbott* J. should, in our opinion, be refused.

Special leave to appeal refused with costs.

Solicitors for the appellant, *Alderman, Brazel, Clark & Ward.*

Solicitor for the respondent, *R. R. St. C. Chamberlain*, Crown Solicitor for the State of South Australia.

B. H.

(1) (1929) 43 C.L.R. 163, at p. 178.