

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 59/71 & 60/71

B E F O R E : The Hon. Mr. Justice Fox - Presiding
 The Hon. Mr. Justice Graham Perkins
 The Hon. Mr. Justice Hercules

CHARLEY CHEN v REGINA)
) Shooting/Intent
LOUIS CHEN v REGINA)

Frank Phipps and Hugh Small for the Appellants
Courtney Orr for the Crown.

7th, 8th February, 1972.

FOX, J.A.

The appellants were convicted in the Home Circuit Court on the 4th June, 1971 on all three counts of an indictment which charged them jointly with shooting with intent and wounding with intent. Their applications for leave to appeal were granted by a single Judge. Several grounds of appeal were taken, but having regard to the view which the court has of the first ground it is not necessary to deal with the others.

The first ground complained that the learned trial Judge had misdirected the jury on the burden of proof by directing them that there was some burden on the appellants to establish their innocence on a balance of probabilities. In the relevant passage of the summing-up at page 6, the Judge said this:-

"Now Mr. Foreman and members of the jury, with regard to the accused, those two men there, Mr. Charley Chen and Mr. Louis Chen they are not obliged to say anything to you. Under our system the Crown must prove its case against them but these two people there have elected to give their evidence in the witness box and their

"evidence is not to be treated in the same way as the prosecution because they are not obliged to say anything to you. As I understand it here all they have to do is satisfy you of their innocence on a balance of probability."

Mr. Phipps submitted that this direction suggested that there was a burden upon the defence to prove innocence. We agree.

Counsel for the Crown did not seek to controvert this contention but he pointed out that at several places in the summing-up it had been correctly stated that the burden of proving guilt was upon the prosecution. He submitted that as a result the evil in the misdirection had been arrested. We do not agree. An error of such proportions could have been satisfactorily remedied only by specific reference to it coupled with a precise statement of the correct position. No where in the summing-up did this occur, and even though the jury were told that they had to feel sure of the appellants' guilt before they could convict, they were also left with the understanding that when they came to assess the appellants' evidence they had to be satisfied on a balance of probability. This was wholly erroneous. The appellants were not required to go so far. It was enough to secure acquittal if their evidence raised up a reasonable doubt as to their guilt.

This error was compounded by further wrong directions in relation to corroboration. At page 8 of the summing-up, the Judge defined corroboration to the jury and continued -

"There is one other little thing I will leave with you for this evening and tomorrow morning when I come back I will deal with you on this threat of shooting with intent and wounding with intent; that is this. This case, it seems to be, that all the witnesses, the crown witnesses, the main witnesses for the crown, Mr. Lennox Henriques, Mr. Muirhead and the two Chens, are all people with some interest deserving" (sic)(an obvious misreading of the phrase 'interest to serve') "therefore you have to view their evidence very carefully bearing

"in mind as I said before that it is for the Crown to prove the guilt of these two accused to your satisfaction so that you feel sure about it."

At the end of the summing-up, Counsel for the defence, Mr. Hugh Small, asked the Judge to tell the jury that if they thought that the complainants (there were two) had a motive for giving untruthful evidence they should look for corroboration of their evidence. In compliance with this request, the Judge said this at page 36 -

"With regard to Mr. Henriques and Mr. Muirhead I told you yesterday that it seems to me that these men may have an interest to serve. That is the way I put it to you yesterday; may have an interest to serve. And people who have interest to serve sometimes do not tell you the truth. I put that to you yesterday and that when this happens you have to view their evidence with the greatest of suspicion. This is because they are alleging that Mr. Henriques and Mr. Muirhead were trying to get money illegally from Mr. Charley Chen and if this were true he would probably lose his job. Therefore he may have some motive or reason for not telling you the truth. That is what I told you yesterday. I told you about that. That is a matter for you. And where you find people who possibly if you do look at it this way it may be unsafe for you to convict without corroboration. I explained to you yesterday what corroboration was. I defined it to you. I told you what it was."

It is true that in this passage the Judge ^{con} defined his observations to the two complainants, but in the earlier passage at 8, he had embraced the two Chens within the ambit of people with some interest to serve. There is no answer to Mr. Phipps' complaint that as a result of the overall effect of these directions the jury had been invited to approach an evaluation of the appellants' evidence with an unwarranted caution, and might even have been under the impression that if they were of a certain view, it would be unsafe to act upon that evidence without

corroboration.

In the light of these substantial misdirections, the appeal must be allowed. The convictions are quashed and the sentences set aside. The appellants must undergo a new trial in the present session of the Home Circuit Court, and to this end they must each give bail in the sum of \$1,000 for their due appearance in that court.