[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Hearne, Keuneman, and Cannon JJ.**

THE KING *v.* MATARAGE MARTIN *et al.*

35—M. C. Colombo, 207.

Evidence—Court of Criminal Appeal—Discrepancy between Judge's note and the shorthand report—Judge's note to be preferred.

Where there is a discrepancy between the notes made by the presiding Judge of the evidence of a witness and the report of the shorthand writer, the Judge's note should be preferred.

APPEAL from a conviction before a Judge and jury in the Western Circuit.

S. W. Jayasuriya, for first and second accused, appellants.

Third and fourth accused-appellants in person.

E. H. T. Gunasekera, C.C., for the Crown.

October 11, 1940. HEARNE J.—

The first, second, third, and fourth appellants were convicted of abduction and rape. The second was also convicted of causing grievous hurt and mischief by fire. The first and second appellants were represented by Counsel on appeal: the third and fourth appellants appeared in person.

Dealing with the conviction of the second appellant of grievous hurt to Lenohamy, his Counsel referred to a passage in the summing-up in which, it was stated that Lenohamy's evidence of an assault upon her by the second appellant was confirmed by her husband, Baby Singho.

This is not in accordance with the note made by the Court stenographer who records Baby Singho as having said that the fourth appellant assaulted his wife. The note made by the Judge, however, is that Baby Singho's evidence was to the effect that the second appellant had struck Lenohamy on her side. In the circumstances we should, we think, be governed by the Judge's note of what Baby Singho said.

In the case of *James Beauchamp*[1] it appeared that the learned Chairman had referred to facts as being in evidence which were not reported by the shorthand writer. Mr. Justice Jelf remarked, "It is not right that the shorthand reporter should omit anything from the witnesses' examinations. In the case of a discrepancy, the Court will prefer the Judge's note." Whereupon, the Lord Chief Justice said, "That is the practice of the Court".

But even if the Judge was wrong in the note he had made and which he followed in his summing-up to the jury, Counsel for the second appellant at the trial should, at that time, have suggested to the Judge that his recollection would appear to have been at fault. The Judge could then have consulted the Court stenographer, and if so advised, have amended

[1] *2 Cr. App. Reps. 40.*

his direction to the jury. It was, we consider, the duty of the appellant's Counsel to have acted in that way—not to have kept silent and so have enabled the appellant to make a relatively minor misdirection of fact, assuming the Judge was wrong, a point of appeal in this Court.

The submission that there was no independent evidence to corroborate the complainant's charge of rape—it was advanced very perfunctorily—is, in our opinion, without merit.

The final point that was argued before us was that the Judge had not adequately explained to the jury the defence of the first and second appellants which was that of an alibi. The defence was not that of an alibi in the strict sense that the appellants claimed not to have been anywhere near the scene of the abduction at the time it occurred. The first appellant gave evidence, which was supported by that of the third appellant, that he, the second appellant, and the fourth appellant were near a boutique in the vicinity of the house from which the complainant is alleged to have been abducted, and they saw the third appellant leading her unresisting away. The defence was, in our opinion, fairly put to the jury and must have been present to their minds at the time they considered their verdict.

We have also considered the submissions made by the third and fourth appellants and, in our opinion, all the appeals must be dismissed.

Appeals dismissed.