[COURT OF CRIMINAL APPEAL]

1967 *Present :* **T. S. Fernando, J. (President), Sirimane, J., and Alles, J.**

U. A. ARIYADASA, Appellant, and THE QUEEN, Respondent

C. C. A. APPEAL NO. 83 OF 1966, WITH APPLICATION 138

*S. C. 117—M. C. Hambantota, 47546*

*Evidence Ordinance—Section 157—"About the time when the fact took place"—Admissibility of evidence—Question must be decided by Judge at the time when the evidence is tendered—Criminal Procedure Code, s. 244.*

In a prosecution for attempted murder, the injured person's evidence at the trial was that, after he was attacked at about 7 p.m. on the day in question and was lying injured right through the night, he made a statement to the doctor who examined him on the following day at 9.10 a.m. when he was taken to the hospital.

[1] *(1932) 35 N. L. R. 28.*

*Held*, that the injured person's statement to the doctor, although it was made about 14 hours after he was attacked, was made at the earliest opportunity and was, therefore, corroborative of his testimony at the trial. It was covered by the expression " about the time when the fact took place " in section 157 of the Evidence Ordinance.

" The corroboration that section 157 contemplates is not corroboration in the conventional sense in which that term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to rendor his testimony more acceptable."

*Held further*, that section 244 of the Criminal Procedure Code requires that the question as to the admissibility of evidence sought to be led at a trial before the Supreme Court must be decided by the Judge at the time when the evidence is tendered.

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

*G. E. Chitty, Q.C.*, with *Anil Obeyesekere* and *M. Kanakaratnam*, for the accused-appellant.

*T. A. de S. Wijesundera*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

January 15, 1967. T. S. FERNANDO, J.—

The appellant as the 2nd accused, along with another man as the 1st accused, stood his trial on an indictment consisting of two counts, both alleging the commission of the offence of attempt to murder. The first count related to injuries inflicted on a man by the name of Heenmahattaya, while the second related to injuries inflicted on his wife Magihamy. The jury returned a six to one divided verdict finding both accused guilty of attempt to murder on the first count, and the first accused alone guilty of attempt to commit culpable homicide not amounting to murder on the second count. The appellant was found not guilty on the second count. In respect of his conviction on the first count the appellant was sentenced to a term of 5 years' rigorous imprisonment. The first accused has not appealed either against his conviction or against the sentence of imprisonment imposed on him.

Of the points raised on behalf of the appellant the only one requiring any serious consideration is that contained in the additional ground of appeal, viz., that the statement made by the injured Heenmahattaya to the doctor who examined him on the morning following the night of the attack upon him was wrongly received in evidence. There was no dispute between counsel that the only section of the Evidence Ordinance under which this statement could have been admitted at the trial is section 157.

Heenmahattaya's evidence at the trial was that he was attacked some time between 6.30 and 7 p.m. on the evening of the 12th November, 1964, that his cries brought to the scene his wife who was herself then attacked

by the 1st accused, and that he and his wife lay injured and bleeding until next morning when they succeeded in drawing the attention of some persons to their plight. The police reached the scene shortly thereafter, and Heenmahattaya and his wife were then taken to hospital. The statement, the admission of which has been questioned on this appeal, was made by Heenmahattaya to the doctor at 9.10 a.m. on the 13th November. His wife, who was examined for injuries immediately thereafter, also made a statement to the same doctor as to the person who attacked her. The appellant was acquitted on the count laid in the indictment in respect of injuries caused to the wife, and, it may be added, the latter did not in her statement to the doctor or in her evidence implicate the appellant as her attacker. Her position throughout was that it was the 1st accused alone who attacked her.

Mr. Chitty has argued before us that the statement in dispute, clearly not having been made " at the time " of the attack on Heenmahattaya, was also not made " about the time " of that attack. We do not think a hard and fast rule can be laid down as to when a statement relied on as corroboration within the meaning of section 157 falls outside the period covered by the expression " about the time when the fact took place ". The question must necessarily depend on the circumstances of each particular case. In the case under review here the fact took place about 7 p.m. on the 12th November and, as Heenmahattaya's evidence was apparently believed by the jury, we are correct in assuming that Heenmahattaya lay injured right through the night. The first person to observe his plight did so at about 7 a.m. the next morning, and he was thereafter taken by some conveyance to the hospital, and on admission thereto made the statement in question at 9.10 a.m. Although about 14 hours had then elapsed after the fact took place (excluding any statement he may have made to the police which is shut out by section 122 (3) of the Criminal Procedure Code), we think the statement to the doctor was made at the first reasonable opportunity that presented itself to Heenmahattaya.

The corroboration that section 157 contemplates is not corroboration in the conventional sense in which that term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to render his testimony more acceptable.

While we have expressed above our own opinion as to whether the statement in dispute fell within section 157 of the Evidence Ordinance, it is necessary here to point out that, in terms of section 244 of the Criminal Procedure Code, in a trial before a judge and jury, it is the duty of the judge to decide all questions as to the admissibility of evidence sought to be led. Where he has so decided such a question, and it cannot be shown that he has in doing so acted contrary to principle, there can be no interference by this Court. Learned Crown Counsel has brought to our notice the decision of the English Court of Criminal Appeal in *R. v. Cummings* [1] where Lord Goddard C.J. observed—(see page 552)—" Who

[1] *(1948) 1 A. E. R. 551.*

is to decide whether the complaint is made as speedily as could reasonably be expected ? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must therefore be a matter for him to decide and a matter for his discretion if he applies the right principle. He had clearly in mind that there must be an early complaint..... If a judge has such facts before him, applies the right principle and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable, this court cannot interfere ". *R. v. Cummings* was a case relating to the commission of a sexual offence, but the dictum quoted above is nevertheless applicable to a case such as that now before us. We must assume that the judge directed his mind to the question at the time the evidence was tendered. That is the only proper assumption in the absence of anything contra.

We dismiss the appeal.

*Appeal dismissed.*