

[COURT OF CRIMINAL APPEAL]

1970 *Present* : H. N. G. Fernando, C.J. (President), Silva, S.P.J.,
and Samerawickrame, J.

S. P. G. STANLEY DIAS, Appellant, *and* THE QUEEN,
Respondent

S. C. 382/68—M. C. Gampaha, 19490/A

Criminal Procedure Code—Section 121—Information Book—Statements recorded therein—Scope of their admissibility in evidence—Evidence Ordinance, s. 157.

Where a first information recorded by a police officer in the Information Book related to an alleged assault but also contained the following last note :—
“When I (the police officer) first questioned him (the informant) he told me that he was shot by Kalumahathaya of Walgammulla”—

Held, that the record of the allegation about the shooting was not made in compliance with section 121 of the Criminal Procedure Code and the allegation was therefore not a part of the first information.

Held further, that even if it was permissible under section 157 of the Evidence Ordinance to admit as evidence the informant's oral statement about the shooting, it was necessary for the police officer to give evidence that the oral statement was actually made. A first information is as much hearsay as any other statement made outside a Court.

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

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *T. Joganathan*, *S. C. B. Walgampaya*, *P. H. Kurukulasooriya* and *M. Nassim* (assigned), for the accused-appellant.

J. R. M. Perera, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

November 24, 1970. H. N. G. FERNANDO, C.J.—

The appellant in this case was convicted on a charge of the attempted murder, by shooting, of one Karunaratne. There is no doubt that Karunaratne received gun shot injuries on the day of the incident, and that whoever fired at him could properly have been convicted of attempted murder. The gist of Karunaratne's evidence as to the incident in the course of which he received gun-shot injuries is stated in the summing-up of the learned trial Judge as follows:—

“ Now, the evidence of Karunaratne is that on this day in question at about 6 or 6.30 in the evening—the time is rather material in view of the defence that has been taken up on behalf of the accused—he was in the house of school master Manchanayake, when he heard this accused shouting on the road. The accused is supposed to have asked, “ kavuda yako ” and Karunaratne's father happened to be there—he was returning after tethering a cow in the garden beyond Manchanayake's house. Karunaratne's father answered, “ it is I ”, and then there was an assault. Karunaratne says that the accused assaulted his father. Karunaratne went there and released him. There was no assault as such to leave any injury or mark and as Karunaratne was taking his father away, the accused said, “ I will do something to you ” or words to that effect. Karunaratne says that he was leading his father, fifty-five years of age. He was going to their house and the accused's house was in the opposite direction, when the accused is supposed to have overtaken Karunaratne and his father, and went to the house. And the evidence is that at a certain stage they lost sight of the accused. Then you will find the evidence of Karunaratne when he says that at a certain point, when he was walking on the road the accused was with another man called Ariyapala and that other man aimed a stone which struck Karunaratne. At the time Karunaratne was not holding the father. He had released the hold on his father and he was walking, when

the stone struck Karunaratne. He hurried, or more or less, ran towards his house, and apparently he heard this accused say, "take this also", and when he heard the accused say that, he turned back, and at a distance which he indicated to you, hundred feet or thirty-three yards, the accused was behind, at this distance of thirty three yards, aiming a gun and as Karunaratne turned, which is natural, more or less turning to run away, a shot was fired and the shot struck his back."

Karunaratne made a statement at the Kirindiwela Police Station the same night; the statement as recorded refers briefly to an alleged assault by the accused on Karunaratne's father, but contains nothing about any shooting incident. Apparently Karunaratne fainted very soon after he commenced to make his statement at the Police Station. The Constable who recorded the statement at that stage made some notes in the Information Book, the last note being "when I first questioned him he told me that he was shot by Kalumahathaya of Walgammulla." In the summing-up, the learned trial Judge directed the Jury that in his statement at the Police Station "Karunaratne has stated almost exactly what he has told you in the witness box." This direction was incorrect in more than one respect.

Far from relating in his statement the version of the shooting given at the trial, which takes up some twenty lines of the Judge's own summary, Karunaratne (as already pointed out) said nothing at all about the shooting in his recorded statement. No doubt, according to the Constable's note, Karunaratne had at first told the Constable orally that *Kalumahathaya shot him*. But no record of this allegation was made in compliance with s. 121 of the Criminal Procedure Code, and the allegation was therefore not a part of the first information.

Moreover, Karunaratne throughout his evidence at the trial referred to this accused by the name Senadeera. Nowhere in any prosecution evidence, was it proved that this accused was known as "Kalumahathaya". The only reference to this *alias* is in the brief recorded statement at the Police Station that "Senadeera *alias* Kalumahathaya" had assaulted Karunaratne's father. But the contents of that statement were admissible under s. 157 of the Evidence Ordinance only as corroboration of testimony at the trial. In the absence of any such testimony as to the fact that the accused has the *alias* Kalumahathaya, the reference in the statement to Senadeera *alias* Kalumahathaya was not admissible in proof of that fact.

Thirdly, although the trial Judge directed the Jury that Karunaratne told the Police that it was this accused who shot, there was not at the trial any evidence from anybody that Karunaratne made such a statement to the Police. The direction on this point which the trial Judge gave to the Jury was based purely on his reading of the Constable's note which was attached to the extract from the Information Book and was available to the Judge and Counsel.

What happened at the trial was that when the Constable was called to prove Karunaratne's statement, it was noticed that there was some error in the English translation of the statement which the Constable had prepared. Because the Judge was much concerned to reprimand the Constable at that stage, everybody seems to have overlooked the fact that, even if it was permissible to admit as evidence Karunaratne's alleged oral statement that Kalumahathaya had fired at him, it was necessary for the Constable to give evidence that the oral statement was actually made.

In the result, the Jury was informed in the summing-up of an alleged oral statement which had not in fact been proved at the trial. There was thus misdirection both of law and of fact in informing the Jury of this alleged oral statement.

We think it necessary in passing to refer to the misconception that anything which a witness may have stated in a first information is *per se* admissible at a trial. A first information is as much hearsay as any other statement made outside a Court, and its contents may only be proved at a trial if such proof is permissible under one or other of the provisions of the Evidence Ordinance which are exceptions to the rule against hearsay. In the present context, s. 157 is such a provision; but as we have shown, the former oral statement was not in fact proved in this case, because the Constable gave no evidence concerning the statement.

Karunaratne's version of the incidents which preceded the alleged shooting referred to some persons being in the garden of one Sederis, and to a stone having been thrown by one Ariyapala from that garden, before a gun was fired. The defence called Sederis as a witness. According to Sederis he had been in his garden when he noticed an altercation on the road between Ariyapala and Karunaratne, and at this time there were also other people on the road. Sederis then called Ariyapala away, and at that stage Sederis heard a gun shot. According to him it was dark at that time and he did not see the accused anywhere there.

The learned trial Judge obviously formed a very unfavourable impression of the witness Sederis, in regard to whom he made rather scathing observations in the summing-up. Unfortunately, the final observation regarding Sederis was: "taking his evidence at its highest, you will ask yourselves on that evidence, can you say that the accused was not there and did not shoot."

We agree with the complaint of Counsel for the accused that the trial Judge here placed on the defence the burden of proving as a fact that the accused did not shoot. When a witness gives evidence indicating the possibility that some unknown person may have committed the act charged and the possibility that the accused was not present at the scene, the proper direction in our opinion is whether, at the lowest, that evidence casts any reasonable doubt on the prosecution case that the accused did indeed commit the act.

On Karunaratne's own evidence, the accused overtook him on the road shortly before Ariyapala threw a stone at him. He saw the accused again standing by the side of Ariyapala at the stage when the stone was thrown. Karunaratne then started to run away, whereupon a gun was fired, and according to him he turned back and saw this accused aiming the gun. On this version, the accused had no gun with him, either when he overtook Karunaratne on the road, or when he was seen standing by the side of Ariyapala. There is thus much room for doubt whether in the brief moments which elapsed between the aiming of the stone by Ariyapala and the firing of the gun at Karunaratne who was then running away, the accused could have got possession of a gun. He certainly had no opportunity of getting a gun from his home, which was nowhere near the scene of the stone-throwing and of the shooting.

The conviction in our opinion was vitiated by the misdirections to which we have referred, and we have no reason to think that a Jury properly directed would in all probability have convicted him. We therefore set aside the verdict and sentence, and direct a verdict of acquittal to be entered.

Accused acquitted.