1928.

Present : Garvin J.

PARUPATHAM *v.* KANDIAH.

277—P. C. Kalmunai, 12,136.

Evidence—Statement by complainant—Not recorded and signed—Criminal Procedure Code, s. 150 (1).

The statement of a complainant which was made in the absence of the accused and which was not recorded in the manner indicated in section 150 (1) of the Criminal Procedure Code cannot be treated as evidence in the case.

APPEAL from a conviction by the Police Magistrate of Kalmunai.

H. V. Perera (with *Ponnambalam* and *Subramaniam*), for accused, appellant.

Crossette Thambiah, C.C., for Crown, respondent.

July 27, 1928. GARVIN J.—

The appellant was at the dates material to this prosecution Assistant Postmaster at Kalmunai. He was convicted of having caused grievous hurt to Kandiah Parupatham, a little girl approximately of the age of ten years, who had since December, 1927, been in his service having been engaged to assist his wife. She was admitted to hospital on January 11, and the medical examination disclosed the following injuries :—(1) Several healed up linear contusions and abrasions on the back, arms, and legs ; (2) several contusions and infected abrasions on both buttocks ; (3) three infected ulcers on the inner aspect of right leg. She remained in hospital for a period of twenty-four days unable to follow her ordinary occupation by reason of her injuries. There is, therefore, evidence that some person or persons had voluntarily caused grievous hurt to this girl. Now apart from the evidence of Parupatham, which it will be necessary to consider more fully later, the only independent evidence tendered to establish that her assailant was the appellant is that of the witnesses Casipillai and Samy. Samy states that he saw the girl being thrashed by the appellant while she was tied to a post in his house. The learned Police Magistrate found himself unable to attach any value at all to the evidence of Samy. Having considered his evidence myself, I entirely agree that the story he tells as to the circumstances under which he happened to be a

witness of what he alleges he did witness, renders the whole of his story utterly improbable. The Magistrate was in my judgment quite right in refusing to act on his testimony. It will be convenient to discuss Casipillai's evidence at a later stage.

The rest of the evidence consists of the testimony of two or three witnesses mainly officials who each state that Parupatham indicated the appellant as the person who assaulted her. But this evidence which consists of a former statement made by a person purporting to be a witness of the fact in issue is only admissible under section 157 of the Ordinance for the purpose of corroborating that witness. It is only admissible therefore in so far as Parupatham herself gives evidence charging the accused, in which case the Court would be right in admitting it to corroborate her evidence.

When the girl was first produced before the Magistrate she made a long statement in which she stated that she ran away from the house of the appellant on several occasions as she wished to return to her parents' house in Jaffna and that on each occasion she was discovered and brought back and on each occasion thrashed. She stated that it was the appellant who thrashed her. Upon this examination the Police Magistrate issued process. On the day appointed for the trial the evidence so recorded was read and her own counsel proceeded to examine her further. The only evidence given by her in the presence of the accused was as follows :—" This is not the accused I charge. Kandiah a servant boy employed by this accused assaulted me with a tulip branch because I wanted to run away home. The accused did nothing to me. He was not even present when I was assaulted by the servant Kandiah. Before I gave evidence on the last day in Court I was tutored by Casipillai and the Udayar to state what I then stated to Court. What I then stated to Court is not true." The Court therefore at this stage had before it an earlier statement in which this girl charged the accused as the person who assaulted her, and a later statement (the only evidence given by her in the presence of the accused) that it was not the accused but his servant Kandiah who is responsible for the injuries found on her person.

Now it is urged that the earlier statement should not in this case have been treated as evidence against the accused. It is a broad principle of justice that a person who is charged with a criminal offence is entitled to be confronted with those who accuse him and it is only in very rare and exceptional cases that statements made by persons who are not called can be admitted as evidence at the trial of a person accused of an offence. The only provision of the law which can be invoked to justify the reception of that statement as evidence is section 189 of the Criminal Procedure Code, which directs that the Police Magistrate when

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proceeding to try a person accused "shall read over to him the evidence (if any) recorded under section 150." Sub-section (2) of this section makes it a condition that the accused should be permitted to cross-examine the person whose evidence has been "so recorded." It is objected that this is not a statement recorded as required by section 150. That the statement was recorded for the purpose of the issue of process is not denied, but it is contended that before a statement could be read under the provisions of section 189 and thereafter treated as evidence in the case it must be recorded in the manner prescribed by section 150. That section requires that the examination held under section 149 shall be reduced into writing, that it shall be read and if need be interpreted to the person examined, that it shall be signed by the person examined and also by the Magistrate. Now the earlier examination of Parupatham was reduced into writing but it has not been signed by her nor is there the certificate which is customarily attached whenever the law required that a statement should be read over and interpreted to a witness. It is not possible therefore to say that this is a statement which has been recorded in the manner prescribed by section 150. Since this is not a statement recorded under section 150 it cannot be treated as evidence in the case (*vide Cadasar v. Muttamma* [1]).

There is therefore no evidence proceeding from Parupatham against the appellant, but on the contrary only her evidence given at the trial in which she says her assailant was not the appellant but his servant. Her evidence and the large body of evidence of persons called to give in corroboration of her story evidence of statements made by her at or about the time of the incident goes out of the case. Indeed this body of evidence should not have been admitted when it became evident that the only admissible evidence which proceeded from Parupatham was her statement that it was Kandiah the servant and not the appellant who caused her injuries. The evidence of Samy has been disbelieved. The only evidence left is that of Casipillai. He spoke to having witnessed an assault on Parupatham on January 5 on the road opposite the Post Office. The girl who had run away was brought back when the appellant struck her five or six blows with his hand and kicked her once. The appellant then dragged her by her hair and put her on the ground. He then asked his servant Kandiah to take her in and tie her up. This evidence has been accepted by the Police Magistrate and I see no reason to differ from his judgment on this point. There is therefore definite evidence of an assault by the appellant on January 5.

Now it is clear from the story told by the girl as well as the medical evidence that the injuries found on her person were the

[1] *3 Browne 93.*

cumulative effect of a series of assaults over a period of about a month and that some of her injuries if not most of them indicate as she herself says that they were caused by a stick or cane.

There is no proof that the appellant inflicted any injuries other than those spoken to by Casipillai. It is at least possible that, as Parupatham stated in her evidence, it was Kandiah the servant who committed the other assaults. In the state of the evidence the appellant can only be convicted of the offence disclosed by the evidence of Casipillai. No weapon was then used by the accused and she did not sustain grievous injury as a result of that assault. The offence which the appellant is proved to have committed is that of having voluntarily caused hurt to Parupatham and the conviction will be altered to one under section 314.

An application has been made by the Solicitor-General for enhancement of the sentence passed by the Magistrate. This application was made on the footing that the appellant had been rightly held responsible for the various assaults the cumulative effect of which was to cause grievous injury to Parupatham.

The evidence falls far short of this. Whatever suspicions may enter one's mind, the appellant can only be convicted and punished for the offence which he is proved to have committed. But the assault spoken to by Casipillai is not one to which a girl of tender years should have been subjected.

I shall therefore leave the sentence imposed by the Police Magistrate unaltered, although that sentence was imposed for the graver offence of grievous hurt which the Magistrate thought had been established.

Affirmed.