[COURT OF CRIMINAL APPEAL.]

1946 *Present:* **Wijeyewardene, J. (President), Cannon and de Silva JJ.**

THE KING *v* PILORIS FERNANDO *et al.*

15–17—M. C. Chilaw, 25,917.

Evidence—Character of accused—Evidence of previous conviction of accused volunteered by prosecution witness in the course of cross-examination—Undefended accused—Duty of Judge—Evidence Ordinance, s. 54—Criminal Procedure Code, s. 230.

Where, in a criminal trial before a Judge and Jury, a prosecution witness, while being cross-examined by an undefended accused, volunteered the evidence that the accused had been previously convicted for perjury—

***Held*, that the evidence was inadmissible under section 54 of the Evidence Ordinance and it was the duty of the trial Judge to have informed the accused, as he was undefended, that he had the right to apply for a fresh trial.**

***Held, further*, that although the Jury had been directed not to act on such evidence there was a manifest irregularity and the trial Judge should have discharged the Jury under section 230 of the Criminal Procedure Code.**

APPEAL, with leave obtained, from a conviction by a Judge and Jury.

M. M. Kumarakulasingham, for the 1st accused, appellant.—The first accused was not represented by Counsel at the trial. In the cross-examination by the 1st accused of the Crown witness Peter the fact that the 1st accused was convicted for perjury was brought out. The question put by the 1st accused was fair and related to relevant matter, *i.e.*, impartiality of witness, but the answer given by the witness was unfair and introduced irrelevant matter, namely, bad character of the 1st accused. The presiding Judge did not inform 1st accused of his right to submit that the trial should not proceed and decided that the trial against all the accused should proceed. He warned the Jury then and later in the summing-up to disregard that evidence.

[WIJEYEWARDENE J.—An irregularity of this sort only gives the accused the right to make an application that the trial shall not proceed, but the Judge has a discretion either to allow or refuse the application. Has not the Judge used his discretion in this case? See *Rex v. Featherstone* [1].]

As the accused was not informed of his right there is a manifest irregularity. A direction to jury not to act on the particular evidence is not adequate in the circumstances of this case—*Rex v. Norton* [2].

Further the Judge has decided that the case against all the three accused should proceed. The indications are that the Judge has not considered in particular the case of the 1st accused.

[1] *28 Cr. App. R. 176.* [2] *(1910) 2 K. B. 500.*

1—J. N. A 60876-558 (4/46)

In *Rex v. Firth* [1] the conviction was quashed in the case of an accused who was represented by Counsel because a fresh trial was refused on application made by Counsel for the accused when evidence of bad character was brought out against the accused by his own Counsel. *Rex v. Firth* has not been overruled by *Rex v. Featherstone*. In *Rex v. Featherstone* the appeal was dismissed because there was a virtual admission of guilt by the accused.

The evidence against the accused is slender. If the accused gave evidence a verdict of acquittal was possible but accused did not give evidence as his previous conviction for perjury was known to the jury. Thus the accused was substantially prejudiced in his defence and therefore the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should not be applied in this case.

Further there is a difference between our Court of Criminal Appeal Ordinance and the English Act.

Our Ordinance makes provision for a retrial ; the English Act does not. Therefore it is possible for this Court to interfere where the English Court of Criminal Appeal would not interfere.

This is a case where the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance should be applied.

Counsel also cited *King v. Kotalawala* [2].

M. M. Kumarakulasingham (with him *P. S. W. Abeyawardene*), for the 2nd and 3rd accused, appellants.

T. S. Fernando, C.C., for the Crown.—Although the appellant should have been informed of his right to apply for a retrial, the Judge had a discretion to decide whether a retrial should be allowed. In this case it would appear that the Judge gave his mind to the question of a retrial. This Court should not interfere with the exercise of that discretion unless such exercise was unreasonable.

The witness's answer disclosed that the appellant had been convicted of perjury. The charges alleged at this trial against the appellant were not of a cognate nature. In considering whether evidence of bad character has prejudiced the appellant, the real question is whether the jury were likely to believe that on account of such bad character the appellant was more likely than not to have committed the offences charged against him.

[WIJEYEWARDENE J.—But here it is urged that the accused was deterred from giving evidence on his own behalf by reason of the disclosure of a conviction for perjury.] The Judge directed the jury immediately the evidence was given, and also in the course of his charge, to disregard that evidence entirely. If the accused gave evidence he could not have been cross-examined as to this previous conviction.

The fact that evidence of previous conviction has been elicited does not necessarily mean that a conviction should be quashed—See *Williams and Woodley* [3] and *Featherstone's* case referred to. If the jury had been

[1] *(1938) 26 Cr. App. R. 148.*
[2] *42 N. L. R. 265.*
[3] *14 Cr. A. R. 135.*

warned to disregard the evidence of character, and no substantial miscarriage of justice can be said to have occurred, the proviso to section 5 (1) of the C. C. A. Ordinance should be applied—

Counsel cited *Rex v. Lee* [1], *Rex v. Warner* [2], *Rex v. Charles King* [3], *Rex v. Kotalawala* [4].

Cur. adv. vult.

March 14, 1946. WIJEYEWARDENE J.—

This appeal comes before us upon an application for leave to appeal granted by this Court.

The three accused-appellants were charged with being members of an unlawful assembly with some other unidentified persons and with having committed various offences of housebreaking, robbery and grievous hurt. They were convicted on all the counts and were sentenced each to undergo 3 years' rigorous imprisonment and to receive 6 strokes with a rattan.

The first accused was undefended at the trial while the second and third accused were each represented by Counsel.

The main point which had to be considered by the Jury was whether the Crown had proved beyond reasonable doubt that the accused were some of the persons who formed the unlawful assembly. The Crown relied on the evidence of Simon Appuhamy whose home was burgled and Rosalin, a girl of 13 years, employed as a servant by Simon Appuhamy. Rosalin said that the burglars flashed a torch three or four times and she identified the first accused by that light. Simon Appuhamy stated that there was one flash of the torch and he identified the three accused thereby and mentioned the names of the accused to his neighbour Sediris who sent a messenger Dharmasena to make a complaint to the headman. However, in that complaint 2D1 Dharmasena stated that " he was not told who the thieves were ". Sediris gave evidence explaining that he did not mention the names of the accused to Dharmasena " as people who were there (in the burgled house) and the thieves might get information and they may not be able to be traced ".

In the course of the trial a Crown witness, one Peter, gave the following evidence while under cross-examination by the first accused :—

(*a*) " the first accused had given evidence against me in a murder case ".

(*b*) " the first accused was sent to jail for giving false evidence ".

There is no doubt that the evidence (*a*) must have been given in answer to a question tending to impeach his impartiality. It appears to me, however, that Peter took advantage of the opportunity offered by that question to volunteer the evidence (*b*) that the first accused had been convicted for perjury. That evidence was clearly irrelevant under section 54 of the Evidence Ordinance as neither had evidence been led to prove the good character of the first accused nor was his bad character a fact in issue in the case. The record shows that immediately after Peter gave that evidence, the Counsel for the third accused made the somewhat cryptic statement, " He may get into the witness box

[1] *1 Cr. A. R. 6.*
[2] *1 Cr. A. R. 227.*
[3] *20 Cr. A. R. 158.*
[4] *42 N. L. R. 265.*

and give that same evidence ". Neither the Crown Counsel who appeared before us nor the Counsel for the accused-appellants was able to say what that statement meant, but it is not possible to dismiss as far fetched the suggestion that the Jury might have understood it to mean that if the first accused " got into the witness box " he would be giving false evidence on this occasion too.

At this stage the trial Judge addressed the Jury and said :—

" The first accused in cross-examining this witness elicited something prejudicial to him. I must direct you to disregard that and put it away from your minds and not be influenced in the slightest degree. It has nothing to do with the other accused. I have decided that the case should go on. I would warn you regarding this at the proper time."

In his charge to the Jury the Judge said :—

" I told you, and I tell you again, that it is your duty completely to banish from your minds everything that took place in that connection. It is my clear duty to direct you to disregard it and not let it influence your minds. You are not concerned with it."

No application was made in the trial Court for a fresh trial on behalf of any of the accused.

A witness for the Crown has given evidence of a conviction for perjury. That evidence was in the circumstances of this case irrelevant and inadmissible. It is true that the first accused did not apply to the trial Judge for a fresh trial. But in the case of an undefended accused it is the duty of the trial Judge to inform the accused that he has such a right. In *Featherstone's case* [1] Caldecote L.C.J. said :—

" In cases where a prisoner is not defended, and an irregularity of this character takes place, it is, in our opinion, the duty of the Judge to inform the prisoner that he has a right to submit that the trial should not proceed, and that he should make the application then and there if he wishes to do so. It by no means follows that in every case the prisoner would desire to apply for a fresh trial, but, if an application is made to that effect, it is the duty of the Judge to decide upon the application according to the circumstances. In this case the appellant was not informed of that right. Whether or not he knew that he had the right is not possible for us to decide, but the opportunity not having been given to him to apply for the Jury to be discharged, we think that a manifest irregularity took place."

Regarding the note made by the learned Judge it is clear that the first accused was not informed of his right to ask for a fresh trial. No doubt the learned Judge has considered whether the case as against the three accused should proceed and desired that it should proceed as he thought the situation created by the admission of the irrelevant evidence could be met by a direction to the Jury not to act on such evidence. The Counsel for the accused contends that the direction is not adequate in the circumstances and invites our attention to the observation in *Rex v. Norton* [2] that " whatever direction be given to the Jury, it is almost

[1] *(1942) 28 Cr. App. R 176.* [2] *(1910) 2 King's Bench 500.*

impossible for them to dismiss such evidence entirely from their minds." Dealing with a similar situation Hewart L.C.J. observed in *Firth's case* [1]

> " It is not very profitable or satisfactory to enter on the sphere of inquiries with regard to the precise effect which may be produced on the mind of a Juror—and still less on the minds of a collection of Jurors—by a piece of evidence but the principle laid down by the Court is that, where an irregularity manifestly takes place, then there ought to be an end of the trial in that form. It seems to us in a high degree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which here was inadvertently permitted."

Here there has been a manifest irregularity. Could it be said that there has been no substantial miscarriage of justice ? The evidence given by Peter that the first accused had been convicted for perjury might have weighed with the Jury in refusing to act on his defence that this was " a false case " and that he had been " falsely implicated " in it.

We are of opinion that the trial Judge should have discharged the Jury under section 230 of the Criminal Procedure Code.

No doubt, the appeal of the first accused stands on a different footing from the appeals of the second and third accused, as (*a*) the evidence of Peter was against the character of the first accused alone and (*b*) the second and third accused were represented by Counsel who did not make an application for a fresh trial. But in the special circumstances of this case we think we should quash the conviction not only of the first accused but of all the accused.

We order a new trial of all the accused in terms of the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, No. 23 of 1938.

New trial ordered.