1978 *Present :* Pathirana, J., Weeraratne, J. and Colin Thome, J.

K. L. PERERA and THREE OTHERS, Accused-Appellants

and

THE REPUBLIC OF SRI LANKA

S. C. 113-116/76—H. C. Batticaloa 1/75—M. C. Kalmunai 48993

Criminal Law—Trial before Jury—Charges of unlawful assembly and attempted murder—Gunshot injuries—Report of Government Analyst produced in evidence though Analyst not called as witness —Question of interpretation of such report—Whether permissible for Jury to interpret opinion of expert witness as found in such report—Misdirection—Need to call expert where clarification needed.

Where certain accused were charged in the High Court with being members of an unlawful assembly the common object of which was to cause hurt to certain persons and with having committed the offence of attempted murder while being members of the said unlawful assembly, the report of the Government Analyst regarding what was described as a "fragment of a pellet" was produced in evidence. He was not called as a witness. The trial Judge invited the Jury to interpret a certain expression of opinion in the report and indicated how they might approach this. It was submitted on behalf of the defence that there was a misdirection in this respect in the summing up of the learned Judge.

Held : That where there is any matter that needs clarification in the opinion of an expert witness, in this case the Government Analyst, on a highly technical science like ballistics, the proper course would have been to have called the expert as a witness and

asked him to clarify any matters that were in doubt or needed clarification. It was a misdirection to have told a lay jury where only the report of the Government Analyst was before them that it was for them to interpret the opinion of the expert and it was also a misdirection to tell the Jury how they should interpret an expert's opinion as was done in this case.

Convictions of the accused-appellants for attempted murder quashed

Per Pathirana, J. :—" ....it is very desirable that in the interests of a fair trial the Director of Public Prosecutions should follow the invariable practice of summoning the Government Analyst, who is the ballistics expert in this country to give evidence if he has submitted a report. The difficulties in this case of attempting to "interpret" the opinion of the Government Analyst would have been obviated if the Director of Public Prosecutions had only taken the sensible step of calling the Analyst as a witness for the prosecution. We hope that this invariable practice will not be departed from in future in cases specially before a lay jury at the trial of offences involving the use of firearms."

APPEAL from convictions in the High Court, Batticaloa.

H. L. de Silva, with *M. Deen*, for the 1st, 4th and 5th accused-appellants.

H. R. Herath (assigned), for the 2nd accused-appellant.

G. L. M. de Silva, State Counsel, for the Attorney-General.

Cur. adv. vult.

April 12, 1978. PATHIRANA, J.

The 1st, 2nd, 4th and 5th accused-appellants were by the unanimous verdict of the Jury found guilty of having on or about the 23rd of December, 1970, at Kotavehera ;

(*a*) On count 1, with others unknown to the prosecution being members of an unlawful assembly the common object of which was to cause hurt to Satyasena Dias and his son Shanthi Dias, an offence punishable under section 140 of the Penal Code.

(*b*) On count 2, whilst being members of the said unlawful assembly committed the offences of attempted murder of Satyasena Dias by shooting him with a gun, an offence punishable under section 300 read with section 146 of the Penal Code.

(*c*) On count 3, whilst being members of the said unlawful assembly committed the offence of attempted murder of Shanthi Dias by shooting him with a gun, an offence punishable under section 300 read with section 146 of the Penal Code.

The 3rd, 6th, 7th, 8th, 9th and 10th accused were found not guilty. On count 1 each of the appellants was sentenced to six months' rigorous imprisonment. On each of the counts of attempted murder whilst being members of the unlawful assembly each was given 9 years' rigorous imprisonment and a fine of Rs. 100.

According to the prosecution on 23. 12. 70 Satyasena Dias and his son Shanthi Dias were on the loft of a hut which was 7 feet

above the ground when at about 4 p. m. about 14 people, among whom were the ten accused in the case, came to a boutique about 100 to 150 yards from their hut. They were abusing in noisy language. The 2nd accused abused Satyasena and told him "I will shoot you today and I will set fire to your hut". These persons thereafter came to his field up to about 15 to 20 yards and stopped. The 2nd accused called Satyasena out. All the accused had weapons in their hands. The 1st accused was armed with a gun and the others were armed with clubs and with torches wrapped with cloth. The 1st accused then fired a shot at them. Shanthi Dias who was standing close to a window received a shot on his finger while the other pellets struck the roof of the hut. The 1st accused fired from a distance of about 54 feet. The 1st accused then fired the gun at Satyasena Dias. The shots struck his right hand and right leg. Then some of the accused set fire to the roof with lighted torches. Thereafter both were assaulted by the accused with hand and clubs. Satyasena Dias had admitted in his evidence that in 1967 he had forcibly evicted a Muslim man and had taken possession of this paddy field of which he was in possession at that time of the incident.

At the conclusion of the argument we affirmed the verdict of the Jury on count 1. We set aside the convictions and sentences of the appellants on count 2 and 3 of having committed attempted murder of Satyasena Dias and Shanthi Dias whilst being members of the unlawful assembly but substituted therefor a verdict of causing simple hurt to the two persons mentioned whilst being members of the said unlawful assembly. We sentenced each of the appellants to one year's rigorous imprisonment and a fine of Rs. 100 on each count.

The medical evidence of the two doctors who had examined the injured persons did not affirmatively support the prosecution case that the injuries the two injured persons received which formed the basis of the charges involving the offences of attempted murder, were gun shot injuries. According to the medical evidence, at most, these injuries were equally consistent with having been caused by gun shot or by a pointed weapon or "other means". One of the doctors who examined Satyasena Dias had recovered from an injury on his upper arm what he described as a "fragment of a pellet (P1)" which had been sent to the Government Analyst for examination and report along with the evidence of the two doctors who had examined the injured persons.

The Government Analyst had expressed the following opinion in his report P3 :—

> "P1 is not a fragment of a pellet and it would not therefore have been discharged normally from a cartridge."

The learned trial Judge having referred to the inconclusive nature of the medical evidence on the question whether the injuries which the prosecution alleged to be gun shot injuries, adverted to the report of the Government Analyst, who had, however, not given evidence in the case. His report marked P3 was produced in evidence on the application made at the trial by the defence Counsel.

I shall quote the following passage from the trial Judge's summing-up, in regard to the opinion expressed in the report by the Analyst, to which exception was taken by learned Counsel for the defence as amounting to a misdirection to the Jury.

> "The Analyst's report is to this effect that the fragment or piece of substance that was taken out of injury No. 1 on the upper arm was not from a pellet that could have been normally discharged from a cartridge. The Analyst has used the word "normally". If he had said that it could not have been fired from any cartridge and that would probably contradict the Doctor's evidence that injury No. 1 where this fragment was embedded could have been caused by gun shot. But as I said, the Analyst is guarded in his opinion *because he says the fragment could not normally have been discharged from a cartridge. It is for you to interpret that expression in the Analyst's report.* Does that mean the sort of cartridge that you normally come across ? Does he mean by that, the normal factory loaded cartridge as distinct from home made cartridges. You probably may, in the course of your experience, have come across cartridges made locally by the villagers in their homes. I suppose in times when factory loaded cartridges are difficult to come by when they are scarce and when villagers need cartridges to scare away elephants, you will probably come across villagers making cartridges on their own by filling spent factory cartridges. What they use is not the factory made lead balls, the round spherical lead balls, but they fill the spent cartridges with lead foils, bits of nails, stones and so on. You heard Dr. Saraweswaran who was a lecturer in Forensic Medicine, say in his evidence that he has come across these home made cartridges and that they are filled with lead foils, bits of nails, stones and so on. In the light of that evidence, consider whether the fragment that was removed from the arm of Sathiyasena Dias could not have been a fragment from a home made cartridge. Ask yourselves, Gentlemen, *the question whether that is why the Government Analyst says that it is not factory made pellets and consider also whether that is why the Analyst says that the fragment that was sent to him for examination was not a fragment that was normally discharged from a cartridge.*

Did he mean by that the fragment was not a fragment from a factory loaded cartridge but from some home made cartridge ?

Look at it from that point of view, Gentlemen, consider whether it was for that reason that Doctor Saraweswaran said injuries Nos. 1 and 3 did not have the specific pattern characteristics of firearm injuries were not factory made pellets ? These are matters, Gentlemen, you must consider "

Learned Counsel's reasons for his submission that this passage amounted to a misdirection to the Jury can in our view be formulated as follows :

Firstly, that it was wrong for the trial Judge to have directed a lay Jury to interpret the opinion of an expert, in this case the opinion of the Government Analyst, as a ballistics expert, in order to elucidate or clarify matters arising out of that opinion. The proper course was for the trial Judge to have called him as a witness to clarify and elucidate any question that may arise in the opinion expressed by the expert.

Secondly, that the trial Judge's directions can be justified only on the basis that the Analyst had affirmatively and unequivocally stated in his opinion that (*a*) P1 was in fact a fragment of a pellet and (*b*) that it was not a fragment of a pellet from a factory loaded cartridge but from a home made cartridge when the Analyst had not so stated in his opinion.

It was submitted that as a result of the directions by the trial Judge, the Jury would have been justified in thinking that it was legitimate for them to conclude firstly, that the opinion of the Analyst was consistent with and supported that part of the medical testimony in regard to the injuries, which the prosecution relied on as gun shot injuries, that they could have been caused by gun shot. Secondly, that the opinion of the Analyst was consistent with and supported the evidence of the injured persons that the injuries in question, which the prosecution relied upon as gun shot injuries, were injuries received by them as a result of gun shots fired by a gun by the 1st accused.

It was, however, submitted by Counsel for the appellants that the Analyst's opinion was clear and unambiguous that what was described as " a fragment of a pellet " was not a pellet which could have been ordinarily discharged from a cartridge. The result of the misdirection by the trial Judge was that the Jury were deprived of the opportunity of testing the credibility of the two injured persons in regard to their evidence on the charges involving the offences of attempted murder, whether in fact they received such gun shot injuries, by evidence inconsistent with their testimony.

I shall now refer to the injuries, deposed to by the two Doctors, which the prosecution alleged were as a result of a gun shot.

Dr. Rajendra, who said that he was not an expert on ballistics, had examined Satyasena Dias. He has referred to 10 injuries he found on him. The injuries which the prosecution relied on as gun shot injuries are injuries 1, 2 and 4, viz. :

"1. Contusion 1½ inches long and 1 inch across, lateral aspect of right forearm, one inch above the elbow.

2. Contusion one inch by one inch on back of the right thigh one inch above the knee running across.

3. Contusion 2 inches long and one inch wide on the lateral aspect of right foot."

He said that he could not say with absolute confidence whether injury No. 1 could have been caused by a gun shot. In fact he had put a question mark regarding injury No. 1. He said that injuries 1, 3 and 4 could have been caused by gun shots. He also expressed the view that injuries 1, 3 and 4 could have been caused even by a pointed object. Later he said that injuries 1, 2 and 3 could have been caused by other means also. Satyasena Dias was also examined by Dr. Saraweswaram. He referred to the three injuries the prosecution relied upon as gun shot injuries, viz. :

"1. Lacerated wound ½ inch long on the outer aspect of right upper arm 3 inches above the elbow.

2. Circular lacerated wound ¼ inch in diameter on the back of right forearm 2 inches below the right elbow. Around it was contusion collar.

3. Lacerated wound 1¼ inches long on the front of right leg 2 inches below the right knee with underlying fracture."

He too said that injuries 1, 2 and 3 could have been caused by gun shots but in cross-exmaination he said that they did not have the typical characteristics of firearms injuries. No. 2 could have been caused by other means. No. 1 could have been caused by an iron rod with a pointed end. He also said that it was not possible for him to say whether these injuries were caused by a home made cartridge or a factory manufactured cartridge.

This doctor recovered what he described as "a fragment of a pellet" from injury No. 1 from the right upper arm of Satyasena Dias. He was questioned in regard to the opinion expressed by the Government Analyst in his report P3. I shall set out the answers given by this witness. I might state that at the time he gave evidence this witness was a Lecturer in Forensic Medicine at the Medical College.

"Q. Now that the Government Analyst's report is going to be produced in evidence, do you know whether the Analyst had said that the fragment was not a fragment of a pellet and that it could not have been discharged normally from a cartridge?

A. I don't know whether he refers to a home made cartridge or a factory loaded cartridge.

Q. Do you agree with the statement of the Analyst that P1 is not a fragment of a pellet?

A. Yes, if he states so.

Q. The Analyst has also said that it could not therefore have been discharged normally from a cartridge?

A. Therefore, it would imply that it was a factory loaded cartridge."

Dr. Rajendra had also examined Satyasena Dias. He referred to the injury that the prosecution relied on as a gun shot injury, i.e. injury No. 2 which was described as follows:

"Lacerated wound 1/5th of an inch in diameter on the medial aspect of the right index finger distal end and there was an injury 1/5th of an inch in diameter."

He expressed the view that it could have been caused by a gun shot.

I might mention that both doctors found other injuries on the two injured persons which were consistent with injuries from blows with hands and clubs.

We agree with the submission made by learned Counsel for the defence that if there was any matter that needed clarification in the opinion of the expert, in this case the Government Analyst, on a highly technical science like ballistics, the proper course would have been to have called the expert as a witness and asked him to clarify any matters that were in doubt or needed clarification. Without adopting that course it was a misdirection to have told a lay Jury that it was for them to interpret the opinion of the expert and it was also a misdirection to tell the Jury how they should interpret an expert's opinion as was done in this case.

We also agree with the submission made by learned Counsel that the trial Judge was wrong in directing the Jury on the basis—

(1) that according to the Government Analyst the pellet P1 was in fact a fragment of a pellet and,

(2) that it could have been discharged from a home made cartridge.

A study of the opinion expressed by the Analyst makes it clear without ambiguity that what he meant was :

" (1) P1 is not a fragment of a pellet.

(2) Being not a fragment of a pellet it could not, therefore, have been discharged normally from a cartridge."

It was also wrong to attribute to the Government Analyst the opinion that when he said in his report it could not therefore have been discharged " normally from a cartridge " he used the expression " normally from a cartridge " to mean not a factory loaded cartridge but a home made cartridge. If the Analyst was of opinion that it was a pellet and a pellet from a home made cartridge we are sure that with his knowledge and experience as a ballistics expert he would not have hesitated to have said so in his report. It suprises us therefore how a lay Jury can be called upon to interpret the word " cartridge " in the context of the Analyst's report to mean not a factory loaded cartridge but a home made cartridge. The verdict of the Jury that they found the appellants guilty on the counts involving attempted murder could be on the hypothesis that they accepted the directions of the trial Judge that :

(1) P1 was in fact a fragment of a pellet, and

(2) it was discharged from a home made cartridge.

The misdirections have, therefore, resulted in the Jury having being led to the conclusion that the opinion of the Analyst had tilted the inconclusive nature of the medical evidence in favour of the view that the injuries in question could have been caused by gun shot and secondly, that the opinion of the Analyst and the medical evidence that the injuries in question could have been caused by gun shot therefore corroborated the oral testimony of Satyasena Dias and Shanthi Dias, the injured persons, that they received gun shot injuries from a gun fired by the 1st accused. The Jury were, therefore, deprived of the opportunity of considering whether in fact (1) the opinion of the Government Analyst was inconsistent with the medical evidence that the injuries in question were gun shot injuries and (2) of testing the credibility of the two injured persons when they said that they received gun shot injuries from a gun fired by the 1st accused if in fact the Analyst stated that P1 was not a fragment of a pellet. In the light of the inconclusive medical testimony on the question whether the injuries in question were in fact gun shot injuries, the misdirection has in our view caused serious prejudice to the appellants on the charges involving the offence of attempted murder.

In view of these misdirections we gave serious consideration whether we should order a re-trial of the appellants. We desisted from adopting such a course in view of the fact that the offences were committed on the 23rd of December, 1970, and the trial in the case took place in March, 1975. It would be too much to expect to rely on the memory of witnesses after a lapse of eight long years.

We have examined, however, the evidence in the case and we are satisfied that no cogent reasons have been given as to why we should upset the verdict of the Jury on count 1 that the accused were members of an unlawful assembly the common object of which was to cause hurt to the two persons. We are also satisfied that the two injured persons received injuries which would come under the category of simple hurt at the hands of the members of the said unlawful assembly. The medical evidence regarding these injuries stands unassailed. The injured persons had received these injuries by hands and clubs inflicted by the members of the unlawful assembly.

We would, therefore, think that the proper course would be not to send the case for re-trial. As the Jury must have been satisfied of the facts which proved that these appellants—

(1) were members of the unlawful assembly, and

(2) that as members of the unlawful assembly inflicted injuries on the injured persons which come under the category of simple hurt,

we affirmed the convictions and sentences on count 1. On count 2 we set aside the convictions and sentences and substituted therefor a verdict that the appellants were guilty of having caused simple hurt whilst being members of the unlawful assembly. We sentenced each of the accused to one year's rigorous imprisonment and a fine of Rs. 100. We set aside the convictions and sentences on count 3 and substituted therefor a verdict that the appellants were guilty of causing simple hurt whilst being members of the unlawful assembly. We sentenced each of the appellants to one year's rigorous imprisonment and a fine of Rs. 100.

The prison sentences will run concurrently.

Before we conclude we wish to state that in the trial of offences which involve the use of firearms, it is very desirable that in the interests of a fair trial the Director of Public Prosecutions should follow the invariable practice of summoning the Government Analyst, who is the ballistics expert in this country, to give evidence if he has submitted a report. The difficulties in this case of attempting to "interpret" the opinion of the

Government Analyst would have been obviated if the Director of Public Prosecutions had only taken the sensible step of calling the Analyst as a witness for the prosecution. We hope that this invariable practice will not be departed from in future in cases specially before a lay Jury at the trial of offences involving the use of firearms.

WEERARATNE, J.—I agree.

COLIN-THOME, J.—I agree.

Convictions for attempted murder quashed.