[COURT OF CRIMINAL APPEAL.]

1942 *Present* : **Howard C.J., Moseley S.P.J. and Hearne J.**

THE KING *v.* ALLIS SINGHO *et al.*

*6—M. C. Kalutara, 8,338.*

*Charge to the Jury—Judge is not bound to refer to minor contradictions in the evidence—Statement put in corroboration of testimony of witness—Evidence Ordinance, s. 157.*

A Judge is bound to refer in his summing-up only to such contradictions that may arise in the course of a case as are or paramount importance that the absence of any specific reference to them would cause injustice or prejudice to the accused.

A statement of a witness relating to the offence made at or about the time when the offence took place, which is put in corroboration of his testimony under section 157 of the Evidence Ordinance, is admissible, even where the statement contradicts the evidence of the witness in one respect.

THIS was a case heard before a Judge and Jury in the fourth Western Circuit, 1941.

*C. Suntharalingam*, for first accused, appellant.

*D. D. Athulathmudali*, for second accused, appellant.

*E. H. T. Gunasekera*, C.C., for the Crown.

February 2, 1942. HOWARD C.J.—

The Court in this case granted leave to the appellants to appeal against their conviction on charges of attempted murder and causing grievous hurt at Kalutara Assizes on October 16, 1941. They were separately represented on the hearing of this appeal. Counsel on their behalf have, however, to some extent relied on the same grounds of appeal. It has been contended that a statement made by the first appellant to inspector Potger was wrongly admitted in evidence. Inspecor Potger was called by the Crown at the close of the case for the defence in order to put in this statement of the first appellant by way of rebuttal. It is argued that this statement amounts in law to a confession, in which case it is clearly inadmissible. In this connection we have been referred to the judgment of Lord Atkin in *Narayana Swami v. Emperor*.[1] In this judgment Lord Atkin dealt with the meaning that must be attached to the word "confession" and held that, so far as the law in India is concerned, "confession" could not be constructed as a statement by an accused "suggesting the inference that he committed" the crime. The Indian Evidence Act does not contain the definition that is to be found in section 17 (2) of the Ceylon Evidence Ordinance. The case to which I have referred is of no relevance in this case inasmuch as the statement made by the first appellant to Inspector Potger did not in any way state or suggest the inference that he committed the offence and hence cannot be regarded as a confession. It was therefore clearly admissible.

The next point taken by Counsel for the appellants was that the document P 2 was improperly admitted in evidence. P 2 was a statement made by the witness Albert to the Village Headman soon after the commission of the offence. We are of opinion that this statement was clearly admissible under section 157 of the Evidence Ordinance. It was a statement put in evidence by the Crown to corroborate the testimony of Albert, a witness, relating to the offence at or about the time when the offence took place. The fact that the statement contradicted the testimony of Albert in regard to one matter is immaterial so far as the admissibility of the statement is concerned.

On behalf of the first appellant the point was taken that the learned Judge did not in his charge direct the Jury to consider whether the first appellant acted under grave and sudden provocation. The charge did direct the Jury to consider whether the first appellant was exercising the right of private defence or whether the offence was committed in a sudden fight. In fact, having regard to the fact that the law places on an accused person against whom there is a prima facie charge of attempted murder the burden of establishing either of these defences, the summing-up as regards these defences may be regarded as unduly favourable to the first appellant. We do not think that the first appellant has suffered any injustice by the omission of any reference to a possible defence based on grave and sudden provocation. The charge asked the Jury to decide whether they accepted the evidence of Lihinis. By their verdict they indicated that they did accept his evidence. If the evidence of Lihinis

[1] (1939) *A. I. R. (Privy Council) 47.*

is accepted, no question of grave and sudden provocation could arise inasmuch as a long interval of time intervened between the alleged provocation and the commission of the offences with which the first appellant was charged. In these circumstances the complaint that the charge made no reference to a possible defence based on grave and sudden provocation is without substance.

Both Counsel have taken the point that the learned Judge in his charge to the Jury did not bring some facts and contradictions to the knowledge of the Jury. So far as the knowledge of the Jury of these facts and contradictions is concerned, it must be borne in mind that they are contained in the evidence which was before the Jury. It is not necessary that the Judge in his summing up should make specific reference to every fact and every contradiction and discrepancy that may arise in the course of a case. In this connection I would invite attention to the dictum of Lord Esher in *Abrath v. North Eastern Railway Company*[1] cited with approval in *Rex v. Joseph Stoddart*[2]. Counsel for the appellants have invited our attention to several contradictions that were not made the subject of specific reference in the summing up. We do not consider that these contradictions were of such paramount importance that the omission of specific reference thereto could occasion injustice or prejudice to the appellants.

In addition to the grounds to which reference has been made Counsel for the second appellant invited our attention to the following grounds:—

(*a*) That the evidence against the second appellant did not establish attempted murder.

(*b*) That there was no clear direction to the Jury with regard to the exercise by the second accused of the right of private defence.

Ground (*a*) was based on the supposition that in law a person cannot be said to have a murderous intention if he assails his victim with a club. We are unable to accept such a contention.

There is no substance in ground (*b*) inasmuch as there is no evidence to suggest that this appellant was exercising the right of private defence. A different situation might have arisen if he had elected to go into the witness box and given evidence on his own behalf. In this connection it must be borne in mind that the burden of establishing such a defence lay on him.

We see no reason for interfering with the sentence passed by the learned Judge. For the reasons I have given the appeals are dismissed.

*Appeals dismissed.*

[1] *11 Q. B. D. 452.*

[2] *2 Criminal Appeal Reports 246.*