[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.

REGINA *v.* S. PINHAMY

APPEAL NO. 102 OF 1955, WITH APPLICATION NO. 157

S. C. 16—M. C. Puttalam, 3,129

Evidence—Identification of a dead person by his skull—Medical witness—Expert only in medical matters—Evidence Ordinance, s. 45.

In a trial for murder the Judicial Medical Officer of Colombo expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. There was, however, no evidence that the medical witness was an expert on identification by superimposition of photographs.

Held, that it was not established that identification of dead persons by superimposition of photographs was a science or art within the meaning of section 45 of the Evidence Ordinance. The mere reference to the medical witness as " Judicial Medical Officer, Colombo " was insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fell within the functions of a medical officer.

Witness—Right of a party to recall him—Discretion of Court—Evidence Ordinance s. 138 (1).

The Court is not bound to permit a witness to be recalled whenever an application is made in that behalf under section 138 (4) of the Evidence Ordinance, unless the party making the application gives satisfactory reasons.

Jury—Communication between juror and witness—Duty of Court to discharge jury—Oath of separation—Effect thereof.

A Judge would not be justified in discharging the Jury merely because a witness was seen conversing with a Juror, unless the conversation was improper and it is necessary in the interests of justice to discharge the Jury.

On the third day of trial it was alleged by the accused person's pleader that the medical witness was seen talking to a Juror during the luncheon adjournment on the previous day. The allegation was made in the Judge's Chambers without any application for a retrial after investigation. At the time of the alleged conversation the witness had finished his evidence. On the sixth date of trial application was made to discharge the Jury.

Held, that there was no valid ground for discharging the Jury.

Evidence—Opinions of experts expressed in text books—When Counsel may read them during address to the Jury or cross-examine an expert witness on them—Evidence Ordinance, ss. 46, 57, 60.

The proviso to section 60 of the Evidence Ordinance does not enable Counsel to read to the Jury extracts from treatises on medical jurisprudence which were not properly admitted in evidence in the course of the trial and before Counsel's address. Counsel is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless, where the expert himself is dead or cannot be called as a witness, such opinion has been proved by the production of the treatise. *R. v. Baba* (6 N. L. R. 35), followed. *Quaere*, whether the Court could be called upon to take judicial notice of such opinion on application made under section 57 of the Evidence Ordinance.

Although, under section 46 of the Evidence Ordinance, Counsel may cross-examine an expert witness by reading to him extracts from a treatise written by an expert, the witness may be asked only questions which he is competent and qualified to answer.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

G. E. Chitty, with *R. A. Kannangara*, *A. S. Vanigasooriar*, *Dayn Perera*, and *N. C. J. Rustomjee* (Assigned), for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 12, 1955. BASNAYAKE, A.C.J.—

At the conclusion of this appeal we did not announce our decision as we wished to deliver our judgment in writing in view of the importance of some of the points raised by learned Counsel for the appellant.

In regard to the first ground of appeal we do not think that the verdict is unreasonable and cannot be supported by the evidence in the case. There is overwhelming evidence which, if believed, points conclusively to the prisoner as the man who murdered the deceased Katpahan Rasiah *alias* Arunasalam. While learned Counsel for the appellant did not dispute that the evidence, if believed, had this effect, he argued strenuously that the witnesses D. M. K. Punchirala and Kapuru Banda Dissanayake were entirely untrustworthy and no part of their testimony should have been acted upon. The learned Commissioner has, however, placed before the Jury all the matters that should be considered in weighing their testimony. The infirmities in the evidence of those witnesses are not

of such character as to justify us in holding that a verdict based on such evidence is unreasonable. The weight to be attached to the testimony of a witness is a matter for the Jury.

A number of points have been taken on the ground of misdirection, but it is not necessary to discuss them all as the learned Commissioner has dealt with the case very fairly in his charge to the Jury. In certain respects the learned Commissioner's charge is even unduly favourable to the prisoner.

Learned Counsel dwelt at great length on the evidence of the Judicial Medical Officer (hereinafter referred to as the medical witness), who expressed the opinion that the skull produced in the case was that of the deceased. He based his opinion entirely on the examination of a superimposition of an enlarged photograph of the head of the deceased on a photograph of his skull. The photographic work of enlargement and superimposition was done by a C. I. D. official photographer of some experience working under the instructions of the medical witness. Under cross-examination the medical witness stated that there was no doubt in his mind that the skull was the skull of the deceased, but on further cross-examination he admitted that in superimposition of a photograph on a skull a lot depends on the skill of the photographer and that there might be cases of individuals who have very much similar skulls. He also admitted in the course of cross-examination that that was the first and only case of identification by superimposition he had done. It was not so reliable as identification by fingerprints. He nevertheless maintained that in this instance he had no doubt that the skull belonged to the deceased on his examination of the superimposition.

Learned Counsel contended that that opinion was not relevant as there was no evidence that the medical witness was an expert on identification by superimposition of photographs. Under section 45 of the Evidence Ordinance opinions of persons specially skilled in science, or art, are relevant when the Court has to form an opinion as to science, or art. It has not been established that there is a science or art of identification of dead persons by superimposition of photographs. Neither the photographer nor the medical witness gave a detailed account of how the superimposition was done, nor did the medical witness give any cogent reasons for his assertion that the skull was without doubt the skull of the deceased. When an expert is called to give evidence the side calling the witness should elicit from him his qualifications and experience in order to establish to the satisfaction of the Court that he is a person who is specially skilled in the science on which he is called to give expert testimony. The record shows the qualifications of neither the medical witness, nor the C. I. D. photographer, both of whom appear to have been called as experts on the matter of superimposition. The mere reference to the medical witness as "J. M. O., Colombo", is insufficient for the purpose of making his evidence relevant under section 45 of the Evidence Ordinance in regard to matters other than those which properly fall within the functions of a medical practitioner.

The medical witness's evidence alone is not conclusive of the identity of the deceased. It can only be taken as an item in the chain of evidence

that was led to establish his identity. It is as such that the learned Judge directed the Jury to regard it. He pointed out that the identification of deceased persons by the superimposition of photographs was not a recognised science; that the opinion based on such examination was not infallible; that even if the superimposition was perfectly accurate there can be no "absolute certainty" that the identity was established; and that there was a possibility of the existence of other skulls which would fit into the picture. The effect of all this was to remove from the mind of the Jury any impression that the dogmatic assertion of the medical witness might have created. In view of the caution with which the Jury has been asked to treat the evidence provided by the superimposition of the photograph of the head of the deceased on his skull, we do not think that the learned Counsel's submission that the Jury has been misdirected on the point can be sustained.

A point was also made of the fact that the learned Commissioner refused to allow the C. I. D. photographer to be recalled. This witness gave evidence on the second date of the trial, and the application was made on the seventh date of the trial, which lasted ten days, after the medical witness had been recalled at the instance of the defence and cross-examined at great length. The learned Counsel who made the application for the recall of the C. I. D. photographer did not give reasons or explain why he wanted him recalled or what evidence he sought to get out of him at that stage. It was contended that the learned Judge was bound to allow such an application under section 138 (4) of the Evidence Ordinance which enables the Court to permit a witness to be recalled either for further examination-in-chief or for further cross-examination.

There is nothing in the language of the section which imposes on the trial Judge an obligation to recall a witness on the mere asking of the prosecution or the defence, nor are we able to agree with learned Counsel that the Court is bound to permit a witness to be recalled whenever an application is made in that behalf. That section vests a discretion in the Court and that discretion is one that must be exercised on the material before it. A party asking for the recall of the witness must indicate, to the trial Judge, why he wants the witness recalled, and satisfy him that it is necessary for a just decision of the case. We are not prepared to say that the learned Commissioner has improperly exercised his discretion in this case.

It was urged on behalf of the appellant that the medical witness was seen talking to a Juror during the luncheon adjournment on the second day of trial and that the learned Commissioner was wrong in refusing to discharge the Jury when it was brought to his notice. At the time the medical witness was alleged to have conversed with the Juror he had finished his evidence and had not been informed, and had no reason to think, that he would be recalled. In fact the application was made on the sixth date of trial and six days after the alleged conversation. The official record in regard to this matter reads as follows :—

"Mr. Balasuriya brings to my notice that he saw Dr. P. S. Gunawardena, J. M. O., Colombo, who is a witness in this case, speaking to a

juror, Mr. P. H. A. Fernando, during the luncheon interval yesterday. He requests me to make a note of this in Chambers. He does not want me to inquire into this matter in open Court as he says this might prejudice the prisoner more.

"I indicate to him that I am unable to entertain any application for a retrial without an investigation into the charge that he is making and satisfying myself that the conversation was improper and was likely to prejudice a fair trial in this case. Mr. Balasuriya states that he does not desire to have an investigation into this matter and therefore he is not asking for a retrial".

The appellant's pleader tendered no affidavits in support of his allegation. Even if an affidavit had been tendered we do not think that the above material disclosed any valid ground for discharging the Jury, A Judge would not be justified in discharging the Jury merely because a witness is seen conversing with a Juror. There would be no justification whatever for such a course when the witness happens, as in this instance, to be a witness who has no interest in the case. The discharge of the Jury is a matter within the discretion of the Judge. That discretion has to be exercised judicially on reliable material placed before him. A Jury should not be discharged unless the Judge is satisfied that it is necessary to do so in the interests of justice.

When such an allegation is made an investigation as to the impropriety of such conversation must be held if the Jury is to be discharged. For, if a Judge were to discharge a Jury, without inquiry, upon a mere allegation that the Juror was seen talking to a witness he would be doing grave harm both to the witness and the Juror. Jurors are administered an oath of separation whenever the Court adjourns. By that oath Jurors undertake not to hold communication with any person other than a fellow Juror upon the subject of the trial during their separation.

In view of that oath the need for the Judge satisfying himself that there has been in fact an improper conversation between Juror and witness is greater. For a discharge without inquiry may cast on the Juror an undeserved reflection that he had acted contrary to the terms of his oath. A Juror should be free to talk to anyone on matters unconnected with the subject to the trial. It would be an interference with the rights of Jurors if they were to be totally debarred from conversing with a witness under any circumstances. Nevertheless, prudence demands that a Juror should avoid conversing in public with a witness during the trial. Similarly a witness should avoid conversation with a Juror in public however familiar and friendly he may be with him in private life. The importance attached to keeping the Jury beyond any kind of influence can be realised from the fact that in the early days in England Jurors were kept together from the commencement of a trial till its conclusion. But to-day we are satisfied with the safeguard of an oath of separation. The greater is the need therefore not only to ensure that the oath is observed strictly but also to make it appear that it is so observed.

What we have said above should not be taken as an invitation to Jurors to throw discretion to the winds and converse freely in public with witnesses on subjects other than the trial.

Jurors and witnesses should be mindful of the fact that the uninformed and uninitiated onlooker is likely to draw wrong inferences from a conversation between a witness and a Juror. For that reason Jurors should be extremely circumspect.

Learned Crown Counsel drew our attention to the case of *Rex v. Twiss* [1] where it was sought to have a Jury discharged on the ground that certain of the witnesses for the Crown were seen conversing with some of the Jurors at a cafe during the luncheon adjournment. Darling, J., in refusing the application on the ground that there was nothing in the affidavits to show that the conversation was on the subject of the trial, said—

> "It is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the appellant in this case. It is not enough to say that he spoke to somebody ; it is not enough to say that the person to whom he spoke was a witness in the case, although that makes it necessary to consider the matter more carefully".

Learned Counsel for the appellant relied on the case of *Rex v. Green* [2], where a conviction was quashed on the ground that a written communication, which had not been made known to the parties, had passed between the Jury and the recorder while the Jury were in their room considering the verdict, but that decision was made on the ground that it had been said by the Divisional Court more than once that any communication between the Jury and the Presiding Judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the Jury are asking and what is the Judge's answer. That decision has no application to the present case.

It was distinguished in the subsequent case of *Rex v. Furlong* [3] in which the Court, while confirming that the proper practice is that any communication from the Jury after they have retired to consider their verdict, and the Judge's answer thereto, should be read out in open Court before the Jury have returned their verdict and that the Judge has a discretion whether he will allow Counsel or the prisoner if undefended to address him on the Jury's communication, refused to quash the conviction on the ground that the communication between the Judge and the Jury after the Jury had retired was not read out in open Court before the verdict. This is what happened in that case. In the course of the deliberations, the Jury desired to ask a question of the learned Judge. The Judge at that time had gone to his lodgings which were very close to the Court—just across the road. He directed his clerk to go into Court and ask the

[1] *13 C. A. R. 177.*
[2] *1950 (1) All E. R. 38 and 34 C. A. R. 33.*
[3] *34 C. A. R. 79.*

Jury to put their question into writing, and the Jury put their question into writing and handed it to the bailiff. The Judge came over to the Court immediately after he had written his answer to the question and the answer was taken back to the Jury. The Judge intended to announce in Court at once what the question and answer were, but the Jury came back to Court before he had the opportunity of doing so, and he accepted their verdict and read out the communication thereafter.

In the course of the argument in that case a point was made that the Judge's clerk entered the Jury room. It was found that he did not, but the Court held that even if he did it would not have been in itself an irregularity because the Court had always the power to allow somebody to make a communication to the Jury if it is a communication proper to be made and if it is made by the direction of the Court.

In the subsequent case of *Fromhold v. Fromhold* [1], which is a civil case, it was held that there is no difference in practice between civil and criminal cases in regard to communication between Judge and Jury, and that it was the duty of the Judge to disclose the contents of any communication from the Jury. Although the proceedings were quashed and a retrial was ordered, the failure to make known to the parties the communication from the Jury was not the ground for the order.

In the case of *Straffen* [2], in the course of the trial it was brought to the notice of the Judge that a Juryman had a conversation about the case with a person other than a fellow Juror at the Southsea Liberal Club. In that case the Jury was discharged on material which had been placed before the trial Judge, and after they were discharged an investigation was held in open Court at which the Jurors were given an opportunity of being represented if they wished to do so.

Learned Counsel also made a point of the fact that the appellant's pleader was not permitted to refer in his address to "medical textbooks" and to "the Ruxton Case", and that the accused was prejudiced thereby. There is no record of what exactly the pleader for the defence wanted to read to the Jury and of the ruling given by the learned Commissioner. Learned Counsel was unable to cite any authority in support of the proposition that Counsel is entitled to read to the Jury extracts from treatises on medical jurisprudence which have not been properly admitted in evidence. We are unable to agree with learned Counsel's submission that it was permissible under the proviso to section 60 of the Evidence Ordinance to read to the Jury the opinions of experts which had not been admitted in evidence. The only reported decision on the point is clearly against him [3]. In that case Counsel for the defence sought to read to the Jury passages from Taylor's Medical Jurisprudence containing opinions expressed there in relation to homicidal mania. The trial Judge on objection taken by the Crown refused to allow the defence Counsel to do so. After the trial the presiding Judge submitted for the opinion of two Judges of this Court the question, whether he was right in refusing to allow Counsel to read to the Jury opinions from a

[1] *1952 W. N. 278.* [2] *London Times—23/7/52.*

[3] *Rex v. Baba (6 N. L. R. 35).*

book which (1) had not proved to be what learned Counsel asserted it was ; (2) nor was found to contain the opinion of an expert on homicidal mania ; (3) nor had been referred to in any way before, so that, if it did contain opinions which were applicable to the facts of the case under trial, there had been no opportunity for the Counsel for the Crown to test or discuss such opinions.

The reference was heard before Moncrieff, A.C.J., and Wendt, J. It was held that Counsel was not entitled to read to the Jury extracts from any scientific treatise unless such extract had been introduced by way of evidence in the course of the trial and before Counsel's address. We were invited by Counsel to review and overrule this decision as, he submitted, it was wrong. We are unable to uphold the submission of Counsel and we wish to state that we are in entire accord with the ruling that Counsel or pleader is not entitled to read to the Jury the opinion of an expert expressed in any treatise commonly offered for sale unless such opinion has been proved by the production of the treatise in a case where the expert himself is dead or cannot be called as a witness.

Learned Counsel also complained that the appellant's pleader was not permitted to cross-examine the medical witness by reading to him extracts from a treatise entitled " The Medico-Legal Aspects of the Buck Ruxton Case ". Under section 46 of the Evidence Ordinance Counsel is entitled to show that an expert witness's opinion is inconsistent with the opinions of other experts. The learned pleader was allowed to cross-examine the medical witness on those lines. The learned Commissioner intervened only when the pleader asked the medical witness questions which he was not qualified to answer. In disallowing the first of such questions he said—

> " I disallow this question. If Professor Glaister says something which this witness is competent to answer, I will allow ".

We are unable to find in the rulings of the learned Commissioner any departure from the provisions of the Evidence Ordinance. We do not think therefore that the complaint is justified.

Learned Counsel for the appellant also referred to the last two paragraphs of section 57 of the Evidence Ordinance. Those two paragraphs read—

> " on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference. If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so ".

It is not necessary to discuss this provision as the Court was not called upon by the appellant's pleader at any stage of the proceedings to take judicial notice of the opinions he attempted to read to the Jury.

Another ground of appeal argued at length was that the learned Commissioner "failed to charge the Jury either adequately or properly on the bearing of police assault, duress, and influence on the case". This ground relates to the evidence adduced by the prosecution through witnesses who in the course of the Police investigation had produced various articles which, on their testimony at the trial, had been sold, bartered or given to them by the appellant (allegedly according to the prosecution) after the deceased had been murdered. There was evidence that some of these articles formed the stock-in-trade of the deceased who was an itinerant seller of jewellery, and that the other articles too belonged to him. One witness, indeed, states under cross-examination that he had been "mercilessly" assaulted by the Police and asked "to come out with things" which he did not know. But he denied that any part of the evidence which he gave at the trial was false or that it was induced by the assault. This witness also spoke to people in the village generally having been assaulted by the Police, but when the appellant's pleader sought to enlarge on this theme the learned Commissioner intervened and cautioned the witness against speaking about matters which were not within his personal knowledge. This caution was repeated by the learned Commissioner when the village headman was questioned in cross-examination about complaints received by him from various people in the village that they had been assaulted by the Police. The view taken by the learned Commissioner seemed to have been that evidence relating to the existence of a state of fear among the inhabitants of the village where the murder had been committed and which had been brought about by assaults or reports of assaults at the hands of the Police was inadmissible as hearsay. Learned Counsel for the appellant contended, on the other hand, that such evidence was relevant and admissible as having an important bearing on the credibility of the witnesses who in those circumstances had come forward and made statements to the Police on the basis of which they were called to give evidence at the trial. We are not satisfied, however, that this evidence was sought to be elicited at the trial on the ground of relevancy urged by learned Counsel for the appellant at the hearing before us. Even otherwise, at the conclusion of the case for the prosecution there was sufficient evidence on record which if believed pointed to the fact (although it was denied by the Police officers themselves) that the Police had, in the course of their investigation, been guilty of acts of intimidation and assault. The learned Commissioner did not, in his charge to the Jury, invite them to disregard this evidence. On the contrary he specifically asked them to consider whether the witnesses concerned had given false evidence as a result of fear induced by assaults or threats of assault. We are of the opinion, therefore, that this ground fails.

For the above reasons the appellant is not entitled to succeed and his application is refused and the appeal is dismissed.

Appeal dismissed.

Application refused.