Present: Fisher C.J., Garvin and Lyall Grant JJ. 1928.

(CROWN CASE RESERVED.)

KING *v.* SILVA.

1—P. C. Kalutara, 22,652.

Evidence—Statement by witness to Police Officer—Statement denied at trial—Proof of statement—Purpose to which the statement may be put—Corroboration of witness—Evidence Ordinance, ss. 145 (1) and 155 (3).

A statement, which is made by a witness to a Police Officer and is afterwards denied by the witness at the trial, cannot be used as substantive evidence of the facts stated against the accused.

Such a statement is only relevant for the purpose of impeaching the credit of the witness.

CASE certified by the Solicitor-General under the provisions of section 355 (3) of the Criminal Procedure Code. The accused was charged before the Supreme Court Criminal Sessions at Kalutara with the murder of a boy in his employment on August 27, 1927. One Mohammadu made a statement on September 19, 1927, to an Inspector of Police, who recorded his statement and took him before a Superintendent of Police, to whom a similar statement was made by Mohammadu. In the Police Court Mohammadu denied the truth of the allegations in the statement. At the trial before the Supreme Court the Police Inspector was called and in the course of his evidence read the statement recorded by him. Mohammadu was called after the Police Inspector and denied the alleged statement. His statement to the Superintendent was read to him and he denied having made any of the statements recorded. The Superintendent was then called and he produced the statement. The learned Judge directed the jury that the statements made by Mohammadu were so contradictory that they should not act on anything said by him unless it was corroborated by other evidence. The jury found the accused guilty of grievous hurt. Two questions were submitted to the Supreme Court—(1) whether the statements made by the witness Mohammadu to the Police were admissible in evidence, and, if so, to what extent and for what purpose; (2) whether there was a misdirection by the learned Judge.

H. V. Perera (with *Sri Nissanka* and *A'hulatmudali*), for accused.

L. M. D. de Silva, Acting Deputy Solicitor-General (with *Deraniyagala, C.C*), for Crown.

1928.

King v. Silva

November 7, 1928. FISHER C.J.—

This is a case submitted for our consideration under section 355, sub-section (3), of the Criminal Procedure Code.

The following are the material facts :—The accused was charged with the murder of a boy, alleged to have been in his employment, on August 27, 1927. One Mohammadu made a statement on September 19, 1927, to an Inspector of Police, who recorded his statement and took him before a Superintendent of Police, to whom Mohammadu made a similar statement on September 20, 1927. In the Police Court proceedings Mohammadu gave contradictory evidence as to the making of the statement and denied the truth of the material allegations in the statement. The Police Inspector was called at the trial, and, in the course of his evidence, read the record of the statement made to him by Mohammadu. An objection taken to his doing so by the defence was overruled. Mohammadu was called after the Police Inspector had given evidence and stated to the Court that he knew nothing about the incident, and was cross-examined by Crown Counsel as an adverse witness. His statement to the Superintendent of Police was read to him and he denied having made any of the statements recorded. An objection by Counsel for the defence as to the admissibility of this statement was overruled. The Superintendent of Police was then called and he produced the statement and stated that it was made without any coercion being used, without any reluctance, and that it was explained by him to Mohammadu who put his mark to it.

The learned Judge directed the jury that the statements made by Mohammadu were so contradictory that they should not act on anything said by him unless it was corroborated by other evidence which they could accept. The jury found the accused guilty of grevious hurt and they added a rider that Mohammadu had given false evidence, and the learned Judge dealt with him under section 440 of the Criminal Procedure Code.

Two questions were submitted for our decision, namely :—

(1) Whether the statements made by the witness Mohammadu to the Police were admissible in evidence, and, if so, to what extent and for what purposes.

(2) Whether the direction by the learned Judge, above referred to, amounted to a misdirection.

As to (1), primarily, the only evidence of witnesses called at a trial which the jury are entitled to take into consideration is the evidence then given by them in the witness box. This general rule is, of course, subject to some qualifications. For instance, if in the course of giving evidence at the trial a statement whether verbal or reduced into writing which contains relevant facts

previously made by a witness is specifically put to him as having been made by him, and he admits that he made it and that what he stated therein is true, the relevant facts in the statement may be treated as if they had been deposed to in the ordinary way. This is not really an exception to the general rule, because in effect the witness repeats what he had previously said.

In this case the statements in question were reduced into writing, and the only qualification of the general rule which applies to them is that provided for under section 145 (1) of the Evidence Ordinance, 1895, which, as pointed out by Mr. R. F. Dias at page 275 of his valuable treatise on that Ordinance, must be read with section 155 (3). These enactments are as follows :—

> 145 (1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved ; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.
>
> 155 (3) The credit of a witness may be impeached by the adverse party, or with the consent of the Court by the party who calls him, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

It was in accordance with section 145 (1) that the statement made by Mohammadu to the Superintendent of Police was put to him, and in accordance with section 155 (3) that the Superintendent was called to prove that Mohammadu in fact made this statement. The statement to the Inspector of Police is not covered by these enactments, nor is it covered by the provisions of section 157, which enacts that—

> " In order to corroborate the testimony of a witness any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved."

As regards this statement, in my opinion the objection to its admission should have been upheld. If it was intended to apply section 157 it was admitted prematurely ; a witness cannot be corroborated in advance, and moreover the sequel showed that the statement would not have been corroboration of his evidence. This statement was therefore inadmissible under the circumstances.

As regards the statement to the Superintendent, it was admissible only for the purpose of impeaching the credit of the witness Mohammadu and, in view of the fact that his evidence amounted

1928.

FISHER C.J.

King v. Silva

to a denial of all knowledge of the circumstances, it could not strengthen the case for the prosecution. A statement such as this so put in evidence is not substantive evidence of any of the alleged facts stated in it against an accused person; it is merely evidence of the unreliability of the person who denies having made it. That being so, the learned Judge's direction to the jury that they should not act upon Mohammadu's statements unless they were corroborated by other evidence they could accept was a misdirection. That direction amounts to a direction that if the facts stated in the statement were corroborated by reliable evidence they could act upon the statements as substantive evidence against the accused. They should have been directed that they were not entitled to consider any of the contents of either of these statements as evidence against the accused.

From the fact that the jury expressed the opinion that the evidence of the witness Mohammadu given before them was false it is clear that they did, in fact, take into consideration the statements in question as evidence against the accused and that these statements served the purpose of making good something which Mohammadu had failed to depose to in the witness box. Once the jury so took these statements into consideration it is obvious that they must have had a very substantial effect on their minds and that their verdict must have been based to a very considerable extent on reliance on these statements, and counsel for the Crown stated that he was not in a position to press the view that there was sufficient evidence without the statements to support the conviction of the accused.

The conviction therefore must be quashed.

GARVIN J.—I agree.

LYALL GRANT J.—I agree.

Conviction quashed.