Present : Bertram C.J.

1924.

MONIS APPU *v.* HEEN HAMY *et al.*

577—P. C. Panadure, 82,822.

Evidence—Co-accused—Statement from the dock by one implicating another—Evidence Ordinance, s. 30.

A statement made by an accused person from the dock implicating a co-accused is not admissible in evidence against the latter.

APPEAL from a conviction by the Police Magistrate of Panadure. The two accused in this case were charged with the theft of cattle. Both absconded. The second accused was arrested first and produced by the police. On the charge being explained to him from the warrant, he stated: "I saw Heen Hamy (*i.e.*, the first accused) removing the bull about 12 o'clock." The first accused was not produced for another fortnight. He pleaded not guilty. Later the second accused repudiated the statement and said that it was made under police coercion. The learned Police Magistrate expressed his disbelief of the allegations against the

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police, and relying on the statement of the second accused held: "Now, taking this confession as a genuine one, and the rest of the evidence led in the case as corroborative of that confession, I think there is no other conclusion that is possible than that both accused are guilty."

No appearance for accused-appellants.

November 4, 1924. BERTRAM C.J.—

This is an ordinary cattle theft case, with the usual difficulties that present themselves in the evidence in such cases. There is a further difficulty, however, which arises out of a statement by one of the prisoners, and the manner in which it has been dealt with by the learned Magistrate. According to the story of the prosecution, the owner of the animal woke up and saw the two accused taking it away. He woke his son and gave him their names. They went in pursuit, and met the principal witness, Konja, who told them he had seen and recognized the thieves. The son, however, in giving his evidence in the Police Court, some three and a half months after the event, said that when Konja met them he stated he had seen the thieves, Heen Hamy and Peter. "My father asked which Peter. Konja said: 'Mr. Wickrarage Peter of Handapangoda.' Further asked who this Heen Hamy was, he said Jakodige Heen Hamy." He persists, however, that his father gave him their names when he woke him up. This evidence at once suggests a doubt as to whether the prosecutor did recognize the thieves, and whether he told his son their names. He reported the matter that morning to the Vidane Arachchi, who was acting for the local headman. To this man he gave no names. The Vidane Arachchi said that he made no inquiries. It is difficult to believe that any headman receiving a report of a cattle theft would not ask who were the witnesses. A belated witness, Raphael, turned up later in the day, and his name was given to the headman two days afterwards.

The case, therefore, on the face of it, was a dubious one, but both accused absconded. The second accused was arrested and produced by the police a month later, and on the charge being explained to him from the warrant, he stated: "I saw Heen Hamy removing the bull about 12 o'clock. I went out to answer a call of nature, then I saw him." Heen Hamy, the first accused, was not produced for another fortnight. He pleaded not guilty. In subsequent proceedings the second accused repudiated his statement and said that he made it under police coercion.

The learned Magistrate in his judgment drew attention to this statement as a special feature of the case, expressed his disbelief of the allegations of police coercion, and said: "Now, taking this

confession as a genuine one and the rest of the evidence led in the case as corroborative of that confession, I think there is no other conclusion that is possible than that both the accused are guilty of the offence with which they are charged. "

When this case came up on appeal, the accused were not represented by counsel. The attention of the learned Magistrate was drawn to section 30 of the Evidence Ordinance as precluding him from taking into consideration as against the first accused any " confession " made by the second, and he was asked for a further report on the facts. The learned Magistrate replied by pointing out that by the Full Bench decision in *Rex v. Ukku Banda*[1] it was ruled that section 30 related solely to " confessions " made before the actual trial. Whereas this confession was made in the course of the trial itself. This is certainly a most pertinent comment by the learned Magistrate, but there is only one circumstance which somewhat mitigates its effectiveness, and that is, that the statement was not made in the course of the trial of the first accused against whom it is used, but was made before he was arrested and was produced against him afterwards. The learned Magistrate has nevertheless drawn attention to a question which deserves consideration, namely, what is the legal effect of a statement made in the dock by one prisoner which implicates another ? The learned Magistrate is quite right in pointing out that, strictly interpreted, section 30 does not apply to a statement of this nature, but only applies to statements previously made which are tendered in evidence at the trial. It applies, for example, to a statement made to the Magistrate in a non-summary inquiry, which is afterwards tendered in evidence at the trial. But what if the case is being disposed of summarily ? The answer to this inquiry is, I think, that it is only on evidence that a case can be decided. If one prisoner makes a statement implicating himself, this is an admission which may be taken into account. But if one prisoner standing in the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court. Attention has been already drawn to this matter in the Full Bench case to which the learned Magistrate refers on pages 333-334.

It was not competent, therefore, to the learned Magistrate to treat this utterance of the second accused, which he rightly describes as being in law a " confession, " as evidence against the first accused.

But this aspect of the case presents itself. Supposing the evidence leaves the mind of the Magistrate in doubt as to whether there was any actual identification, and as to whether the charge may not be based on mere conjecture or on malice. One of the prisoners in the dock thereupon makes a statement which discloses

[1] *(1923) 24 N. L. R. 327.*

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that he was on the spot at the time of the theft. He says in effect: "I was there, but it was the other man who stole the animal." This statement shows that the prisoner making it was, at any rate, on the spot, and that the case for the prosecution is not a pure invention. A Magistrate thereupon may feel more confident in acting on the evidence against the accused person making the statement, even though that statement is exculpatory in intention. May he not at the same time say: "The witnesses are, at any rate, right about this man. I feel more confident therefore in acting on their evidence against the other." I have carefully considered this aspect of the case, but I have come to the conclusion that this would be a dangerous course to pursue. In cases of identification, particularly where the identification is said to have been made at night, it is important that the case against each prisoner should be fully established. Let us suppose that there was a case in which the evidence of identification was not satisfactory, and that afterwards a witness appeared and said: "I saw two men carrying off the animal. One I recognized as Appu Hamy, but I could not see the face of the other as it was wrapped in a shawl." Let us suppose that there was some circumstance which made the evidence of this supervening witness absolutely unimpeachable, should we be justified in saying: "The witnesses are proved to be right about Appu Hamy, we may therefore rule that they are right about the other man." I feel that this would be a dangerous principle to adopt. I think that the question of the guilt of each prisoner must be separately considered, and that, if the evidence against him suggests a doubt, he is entitled to the benefit of that doubt.

Acting on this principle, I confirm the sentence against the second accused, and allow the appeal of the first.

Appeal allowed.