[COURT OF CRIMINAL APPEAL]

1951 *Present:* **Gratiaen J. (President), Gunasekara J. and de Silva J.**

KIRIWANTHIE *et al.*, Appellants, *and* THE KING, Respondent

APPEAL NO. 44 OF 1951 WITH APPLICATIONS NOS. 59-60

S. C. 3—M. C. Nuwara Eliya, 4,874

Criminal procedure—Speech to jury—Credit of witness attacked improperly—Summing-up—Right of presiding Judge to criticise conduct of the lawyer.

If a lawyer, in his speech to the jury, makes statements of fact unfavourable to a witness and which are not borne out by the evidence in the case, the presiding Judge is entitled in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

APPEAL, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *J. G. Jayatilleke* and *J. C. Thurairatnam*, for the accused appellants.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 13, 1951. GRATIAEN J.—

The appellants were jointly tried for the murder of J. A. Podisingho, which offence was alleged to have been committed on November 5, 1949. Podisingho had been employed since October, 1948, as a lorry driver on an estate in which the witness D. Manikkam was acting as superintendent during the relevant period. The Crown alleges that on November 5, 1949, Podisingho left the estate in order to visit his wife and that in the course of that journey he was waylaid and murdered by the appellants.

The case against the appellants was based almost entirely on circumstantial evidence. The evidence that Podisingho, who had admittedly been away from the estate on leave at the end of October, had returned to the estate on November 2 and worked there until November 5 on which date he once again left the estate with Manikkam's permission, formed a vital link in the case for the prosecution. These facts were deposed to by the witness Manikkam. The learned presiding Judge made it very clear to the jury that the credibility of Manikkam was therefore a question of fundamental importance for their consideration. Indeed, he specifically directed them that if they entertained reasonable doubts as to the truth of his evidence, the case against the appellants necessarily broke down, as the rest of the evidence was by itself insufficient to establish their guilt.

It is not surprising that in these circumstances the credit of Manikkam was vigorously attacked by the defence in the course of the trial, and the learned Judge charged the jury at some length and in considerable detail with regard to the various points on which Manikkam's evidence was challenged. It so happened that in this connection the learned Judge appears to have taken the view that the lawyer who appeared for one of the appellants had in some respects exceeded the bounds of decent advocacy in the manner in which he attacked Manikkam's integrity and reliability as a witness of truth. This opinion was communicated to the jury in the course of the summing-up, and at one stage the learned Judge indicated to them that it might be his duty, whatever the result of the case, to consider whether disciplinary action should be taken against the lawyer in question. That, of course, was a matter with which the jury were not concerned.

Learned Counsel for the appellants does not suggest that the conviction was bad for misdirection as to the law or as to the evidence. He complains, however, that the trial was unsatisfactory because, in considering for the purpose of their verdict the fundamental question as to the

credibility of the witness Manikkam, the jury might well have been unduly influenced by the very strong views expressed by the learned Judge on an allegedly extraneous matter, namely, the impropriety imputed to the lawyer who had attacked the witness. We are unable to accept this submission. It is quite impossible, and we do not presume, to lay down any hard and fast rule as to how a Judge should control the proceedings in a criminal trial over which he presides. When the credit of a prosecution witness has been attacked, or when specific allegations have been made against him by way of defence, it may well be proper in some circumstances and indeed necessary to point out to the jury that certain of these criticisms or allegations have not been substantiated by evidence. If, in this connection, the lawyer for the defence is so unwise, in the course of his final speech to the jury, as to make statements of fact unfavourable to a witness which are not borne out by the evidence in the case, we do not doubt that it is the duty of the presiding Judge in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

In the context in which the lawyer's conduct was criticised in the present case, we have come to the conclusion that the learned Judge was merely giving strong expression to his own opinion as to Manikkam's credibility and as to the weight which he personally attached to the criticisms offered and the allegations made against the witness. At the same time, the learned Judge had made it very clear to the jury that they were the sole judges on all questions of fact, and that they were in no way bound by his opinions on such questions. For these reasons the Court was of the opinion that the grounds of appeal relied on by the appellants must fail and that the convictions must be affirmed. We accordingly made order dismissing the appeals. My judgment records the grounds of our decision.

Appeal dismissed.