[COURT OF CRIMINAL APPEAL.]

1946 *Present:* **Howard C.J. (President), Soertsz S.P.J. and de Silva J.**

THE KING *v.* SUDU BANDA.

8—M. C. Nuwara Eliya, 9,243.

Evidence—Trial before Supreme Court—Reference to evidence given by witness before Magistrate—Duty of presiding Judge.

The appellant was convicted of the offence of murder.

In re-examination of a witness the prosecution was permitted by Court to put to the witness, in order to discredit him, certain portions of the evidence given by him before the Magistrate stating that the accused had admitted to the witness that he was responsible for the death of the deceased. The witness, however, denied that any such admission was made by the accused.

Held, that the Jury should have been specifically directed that whatever the witness had said to the Magistrate was not substantive evidence and that the only evidence before them was the testimony given by him at the trial. Even if such direction had been given it could not possibly eradicate the impression, on the Jury's mind, of an admission by the accused.

APPEAL against a conviction by a Judge and Jury.

Mahesa Ratnam, for the appellant.

D. Jansze, C.C., for the Crown.

Cur. adv. vult.

March 6, 1946. HOWARD C.J.—

The appellant appeals against his conviction of the offence of murder on the following grounds :—

(*a*) That the medical evidence did not establish the fact that the death of the deceased was caused by an injury inflicted by the appellant.

(*b*) That in re-examination of the witness Punchirala, Crown Counsel was permitted to put to this witness certain portions of the evidence he gave before the Magistrate. The purpose of this re-examination was to prove that the appellant had stated to the witness that the death of the deceased had happened at the hands of the appellant. The Jury, in these circumstances, might have come to the conclusion that in fact such an admission was made to the witness. Such an admission not having been proved there was a substantial miscarriage of justice and the conviction could not be maintained.

With regard to (*a*) the medical evidence was to the effect that there was an incised wound about 3 inches long and half an inch deep, situated transversely on right side of the neck exposing the muscles. In the opinion of the doctor this injury, even without medical treatment, was

not sufficient to cause death. Death was due to cerebral haemorrhage which could, in the opinion of the doctor, have been caused by a blow on the head or by a fall. In cross-examination the doctor also said that the cerebral haemorrhage might have been caused by high blood pressure. Having regard to the nebulous character of the medical testimony we do not think that it has been proved that the death of the deceased was caused by an injury inflicted by the appellant.

With regard to (*b*) there is no note on the record to indicate that Crown Counsel requested permission and was granted such permission to put the question of which complaint is made on the ground that Punchirala was a hostile witness. It must be assumed that permission was granted on this ground. In these circumstances the only object of putting the questions and the only basis on which such questions were permissible was to discredit the evidence of Punchirala. The questions could not be put in order to prove that the appellant had admitted to Punchirala that he was responsible for the death of the deceased. Punchirala had denied in examination in chief and in cross-examination that any such admission was made. When the questions were put in re-examination after permission had been given, Punchirala again stated that no such admission had been made. Punchirala's statement to the Magistrate was not proved by the production of his deposition and so his evidence was not discredited. The Jury, however, may have been left with the impression that he did tell the Magistrate that the appellant had made such an admission. It is true that at p. 12 of the charge the following passage occurs :—

> " I may here tell you that you have to find out the facts from which you can draw inferences from the evidence placed here before you and not from any statements made before the Magistrate, although those statements may have been referred to in the cross-examination of the witnesses. I am referring to the statements made before the Magistrate."

The learned Judge, however, has not specifically directed the mind of the Jury to the questions put by Crown Counsel to Punchirala in re-examination and directed them to the effect that, whatever Punchirala said to the Magistrate was not substantive evidence and that the only evidence before them was the testimony given by him at the trial. Without such a direction the Jury may have thought that there was evidence of such an admission by the appellant. Even if specific reference had been made to these questions, we do not think that any such direction can possibly eradicate the effect on the Jury's mind. We do not think that we can say that, if the questions had not been put, a reasonable Jury must have come to the same conclusion. We cannot, therefore, use powers given to us under the proviso to section 5 (1) of the Criminal Appeal Ordinance. The appeal is allowed and the conviction set aside.

We do not consider that this is a case in which a fresh trial should be ordered.

Appeal allowed.