[IN THE COURT OF CRIMINAL APPEAL]

1955 ***Present:*** **Gratiaen, J. (President), Weerasooriya, J., and Fernando, J.**

THE QUEEN *v.* B. M. HETHUHAMY *et al.*

Appeal No. 77, with Applications 121–123, of 1955

S. C. 9—M. C. Kurunegala No. 9/10229

Evidence—Witness—Conflict between evidence on oath and an earlier statement—Verdict should then be found on the rest of the evidence—Summing-up—Misdirection—Power of Judge to interrogate witnesses.

(i) If the evidence of a witness on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his evidence is worthless and cannot properly be taken into account at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that, because his evidence cannot be acted upon, the opposite of what he said represented the truth, and (2) that as the opposite of what he said at the trial happens to coincide with the version given by another witness, the veracity of that other witness is thereby confirmed.

(ii) Although a presiding Judge is entitled to interrogate a witness for the prosecution, it is generally far more satisfactory to leave the conduct of the case on any vital point of controversy in the hands of the prosecuting Counsel, who must make his own decision whether or not to apply to the Judge for permission to cross-examine as an adverse witness a man whom he has advisedly called.

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

G. E. Chitty, with *Malcolm Perera*, for the 1st accused-appellant.

M. D. Jesuratnam, for the 2nd accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

October 6, 1955. GRATIAEN, J.—

The appellants, three in number, were convicted at the Kurunegala Assizes of the following offences alleged to have been committed by them in the village of Galwewa on the night of 14th June, 1954 :

(1) being, together with three others unknown to the prosecution, members of an unlawful assembly the common object of which was to commit robbery of cash and jewellery belonging to M. D. Charles Appuhamy, and also to cause hurt to him ;

(2) rioting ;

(3) robbery of cash and jewellery belonging to the said Charles Appuhamy in prosecution of their common object ;

(4) causing simple hurt to the said Charles Appuhamy in prosecution of their common object.

These offences had unquestionably been committed by five or more persons some at least of whom Charles Appuhamy had been unable to identify.

The only disputed issue at the trial was whether the purported identification of all or any of the appellants by Charles Appuhamy had been established beyond reasonable doubt. At the conclusion of the argument we quashed the convictions and stated that the grounds of our decision would be pronounced later.

Charles Appuhamy owned a tea boutique in which he resided alone except for his infant child, his wife having previously deserted him. At about 7.30 p.m. on the day in question the front portion of the boutique had been closed, and he was about to put the child to sleep when six persons entered the boutique through the back door which was still open : they seized him and tied him up with a rope and one of them stabbed him once, but not seriously, on the fleshy part of each leg ; having proceeded to remove all his money and jewellery from a cupboard in an adjoining room, the intruders left the boutique with the loot. Shortly afterwards, Charles Appuhamy released himself and, with his child in his arms, he rushed out of the boutique appealing for help. Several neighbours including the prosecution witnesses Ukku Banda and Mudalihamy arrived on the scene. Mudalihamy went almost immediately to report the incident to the Village Headman of Dorabawila who lived some distance away. The Headman reached the scene of the burglary at about 10.45 p.m. and, on being questioned, Charles Appuhamy named the appellants as three of the persons who invaded his home ; he added that he had failed to identify the other members of the unlawful assembly.

No part of the stolen property was traced to the possession of any of the appellants, and proof of their complicity in the crime depended entirely on the reliability of their purported identification by Charles Appuhamy. It was a point in his favour that he knew them before. On the other hand, neither he nor the other prosecution witnesses had previously seen them in each other's company. According to Charles Appuhamy, he identified the appellants by the light of a kerosene oil lamp ; but when the Headman arrived on the scene this lamp was found lying on the ground in a damaged condition with its chimney broken. Charles Appuhamy says that there was also a small lamp used by his customers for lighting cigars and cigarettes, but no such lamp is mentioned in the evidence of the Headman or of the Police officers who visited the boutique on the following morning. The jury was not invited to hold that the light reflected by this second lamp, which was not a production in the case, could have served as an aid to identification. The Police found some decipherable finger-prints at the scene of the burglary, but the expert who examined them could not connect them with any of the appellants.

In this state of the evidence, a great deal turned on the conduct of Charles Appuhamy during the interval of time which elapsed between the completion of the crime and the arrival of the Headman over two hours afterwards. Throughout this period he was in the company of his immediate neighbours all of whom knew him well and also knew the appellants. It would be natural therefore to suppose that, if a man in his situation had in fact identified some of his assailants, he would have mentioned that fact to his friends. But as far as the 2nd and 3rd appellants are concerned, this is precisely what he admits was not done.

Charles Appuhamy stated that he did at any rate mention to the witness Ukku Banda, but to nobody else, that Hethuhamy (i.e., the 1st. appellant) was the person who had stabbed him. But his evidence on this point was categorically contradicted by Ukku Banda. The reliability of the identification of all the appellants was therefore a matter which called for very cautious scrutiny.

The only explanation given by Charles Appuhamy for his failure to mention the names of the 2nd and 3rd appellants to anybody until the Headman arrived was that he was " in pain " and that " the child was crying ". It is indeed a question whether such a lame excuse for reticence on the part of a villager in the company of his friends could reasonably be believed. But the weakness of the case against the appellants was further increased when Mudalihamy said that, before leaving the Headman's house, Charles Appuhamy expressly stated that he " did not know who the thieves were ". This evidence, given by a witness whom prosecuting Counsel did not apply to treat as hostile or adverse, is supported by what Mudalihamy told the Headman at about 9.30 p.m. So significant an item of evidence should have been brought prominently to the attention of the jury in the summing up ; in fact it was not mentioned at all. On the contrary the jury were invited to consider the possibility that Mudalihamy had " deliberately suppressed " the names of the appellants because " the names involved his own relations ". There was no evidence to support this suggested theory of suppression, and the jury should not have been misled into the belief that Mudalihamy had perhaps been told something by Charles Appuhamy implicating any of the appellants before he went in search of the Headman. The learned Judge's summing-up on this part of the case was therefore defective both for misdirection and for non-direction as to the evidence which was favourable to the defence.

The jury were also misdirected as to the law in regard to another aspect of the issue of identification. As Charles Appuhamy alone had purported to identify the appellants, it became very important to test his evidence (lacking as it did " corroboration " in the strict sense of the term) in the light of his conduct during the interval of time preceding the arrival of the Headman. Ukku Banda was apparently the first neighbour to reach the scene after the commission of the crime, and he denied that Charles Appuhamy had implicated even the 1st appellant as a person who had taken a prominent part in the commission of the crime. No request was made on behalf of the Crown to treat him as an adverse witness, and it was not suggested to us in the course of the argument that such an application, if made, ought to have been allowed. His evidence at the non-summary proceedings was (so Mr. Pullenayagam confirms) consistent with what he said at the trial. The learned presiding Judge, however, took over the " examination-in-chief " of Ukku Banda, and twenty-one consecutive questions were put to him for the purpose of suggesting that his contradiction of Charles Appuhamy on this crucial matter was untrue—indeed, the opposite of the truth—because it was contradicted by a statement which (so the presiding Judge categorically asserted) he had made to a Police officer on the morning after the burglary. The witness persisted for some time in denying that he had been guilty of any such inconsistency;

but the learned Judge continued, in so many words, to assure him that he had. Eventually, the witness acknowledged the suggested inconsistency but refused to retract his assertion that Charles Appuhamy had not mentioned the 1st appellant's name to him until the Headman arrived.

A presiding Judge is no doubt entitled, in the exercise of his discretion, to interpose questions to a witness for the prosecution during his examination-in-chief, and in rare cases he may even be justified in questioning him with such severity as to suggest that that his evidence is unworthy of credit. But on any vital point of controversy, it is generally far more satisfactory to leave the conduct of the case for the Crown in the hands of the Advocate selected for the purpose by the Attorney General. Prosecuting Counsel should make his own decision whether or not to apply to the Judge for permission to cross-examine as an adverse witness a man whom he has advisedly called.

The Police officer who recorded Ukku Banda's statement on the morning of 15th June 1954 was not called to give his version of what exactly Ukku Banda had said on that occasion. The jury were therefore left to speculate as to the extent and gravity of the inconsistency imputed to the witness. After all, the vital question was whether Charles Appuhamy had mentioned the 1st accused's name *at the earliest opportunity, and not whether he had mentioned it at some later point of time.* Ukku Banda's admission of inconsistency was not so "distinct" as to obviate the necessity for calling the Police officer, as provided by section 145 (2) of the Evidence Ordinance, to prove what Ukku Banda had actually said to him. It is also reasonable, we think, to conclude that Ukku Banda's "admission" was based not so much on his own recollection of what he told the Police officer on 15th June 1954, as on the assurance given to him 14½ months later by the learned Judge who was himself guided by the contents of the officer's note book.

The learned Judge explained to the jury why he had taken up the interrogation of Ukku Banda. "I felt," he said, "that on that point he was trying to mislead you". Having referred to the "inconsistency," he directed the jury that the statement made to the Police officer on the earlier occasion was relevant in two ways—"*not merely* to know whether Ukku Banda was told by Charles Appuhamy that Hethuhamy (i.e., the 1st appellant) stabbed him, *but also* to show you that what Ukku Banda told you here cannot be relied upon on that point". In our opinion the first part of this passage constitutes a misdirection.

> "If a witness is proved to have made an earlier statement *in distinct conflict* with his evidence on oath, the proper direction to the jury is that his evidence is negligible and that their verdict should be found on the rest of the evidence." *R. v. Harris* [1].

But in the present case certain parts of the summing-up might well have misled the jury into thinking that their disbelief of Ukku Banda was a factor which would entitle them to accept as true Charles Appuhamy's assertion that he had in fact named the 1st appellant as his assailant at the earliest opportunity; in other words, that they were justified in regarding Ukku Banda's earlier statement to the Police (though repudiated at the trial as incorrect) as substantive evidence in favour of the

[1] *(1927) 20 C. A. R. 106.*

case for the Crown. It is no doubt true that, at the commencement of his summing-up the learned Judge had told them that this was not the law. Unfortunately, the effect of the earlier explanation in general terms was nullified by the specific direction given in this particular context.

The jury might very well have been influenced by this misdirection in approaching the crucial issue whether Charles Appuhamy did mention the 1st appellant's name at the earliest opportunity. In view of Ukku Banda's unequivocal denial at the trial that such a statement was made to him, the jury should have received a clear direction in conformity with the rule laid down in *R. v. White* [1]. In that case, a prosecution witness had similarly given evidence which supported the defence, but, when confronted with contrary statements previously made in the absence of the accused, he admitted having made these earlier statements but swore they were mistaken. Lord Hewart C.J. observed :

> "It is one thing to say that, in view of an earlier statement, the witness is not to be trusted : it is another thing to say that his present testimony is to be disbelieved and that his earlier statement, which he now repudiates, is to be substituted for it ".

This latter inference, which is not legitimate, is what the jury were virtually invited to draw in the present case.

If a man's evidence on any particular issue is demonstrably unreliable owing to some proved or distinctly admitted inconsistency on a material point, his evidence is worthless and cannot properly be taken into account at all for the purpose of deciding that issue. It is illogical to conclude in addition (1) that, because his evidence cannot be acted upon, the opposite of what he said represents the truth, and (2) that as the opposite of what he said at the trial happens to coincide with the version given by another witness, the veracity of that other witness is thereby confirmed.

If the jury rejected Ukku Banda's evidence, Charles Appuhamy's uncorroborated evidence stood by itself, and represented the whole of the case for the Crown. It had to be tested in the light of his admission that he had not mentioned the names of at least two appellants at the earliest favourable opportunity and also in the light of his uncorroborated assertion that he had mentioned the name of the 1st appellant to only one of his numerous friends who remained with him for over two hours until the Headman arrived. Having regard to his unconvincing excuse for reticence (which was out of harmony with the normal habits of the average Sinhalese villager) we doubt if the jury, properly directed, could reasonably have returned a verdict against any appellant. Add to that the circumstance that, according to the prosecution witness Mudalihamy, Charles Appuhamy had, in answer to a specific question, replied that he " did not know who the thieves were ". In that state of the evidence, a verdict of guilt, if not vitiated by misdirection, might well have justified the reproach that it was quite perverse.

For all these reasons, we took the view that the trial of the appellants was unsatisfactory, and that the verdicts against all three appellants should be quashed.

Verdicts quashed.

[1] *(1922) 17 C. A. R. 69.*