[IN THE COURT OF CRIMINAL APPEAL]

1965 *Present:* **Sansoni, C.J. (President), Tambiah, J., and Sri Skanda Rajah, J.**

THE QUEEN *v.* K. A. PIYADASA

APPEAL NO. 145 OF 1964, WITH APPLICATION NO. 163

S. C. 53—M. C. Matara, 12456

Criminal procedure—False evidence given by a witness—Order of Court to keep the witness in Fiscal's custody—Effect—Criminal Procedure Code, s. 440.

In a trial before the Supreme Court an eye-witness P, who was called by the prosecution, admitted that portions of the statement which he had made to the Police were false. At the end of his re-examination, and before two other eye-witnesses K and N were called, the trial Judge addressing him said, " You will stand down and remain in Fiscal's custody. I shall deal with you thereafter ". He was in Fiscal's custody until the conclusion of the trial.

Held, that the treatment meted out to witness P was premature, and that the witnesses K and N might have been influenced thereby when it came to their turn to give evidence.

APPEAL against a conviction in a trial before the Supreme Court.

T. W. Rajaratnam, with *J. Peri Sunderam* and *R. Bodinagoda* (Assigned), for Accused-Appellant.

R. Abeysuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

May 10, 1965. SANSONI, C.J.—

We now give our reasons for the order made by us on April 12, 1965, whereby we set aside the conviction of murder and substituted a conviction of culpable homicide not amounting to murder.

The case for the prosecution was that on the day in question a perahera had been organised by the Young Men's Buddhist Association of Kamburupitiya, which was to start at 2 p.m. from the Kamburupitiya Police Station and go to the Wilegoda Temple. The deceased man, who was to act the part of a tiger in the perahera, was rehearsing his performance near the bus stand at Kamburupitiya at about 1.30 p.m. At that time the accused was said to have stabbed the deceased with a pointed knife in an entirely unprovoked attack. The medical evidence showed that the deceased received four incised wounds, two of which were necessarily fatal.

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Every witness called for the prosecution was cross-examined in an effort to show that, far from the accused going up to the deceased and stabbing him on the tarred surface of the road without any warning or reason, it was the deceased who went up to the accused while the latter was standing on the edge of the road amongst a crowd of spectators. Another point sought to be made by the defence was that the deceased hit the accused with his hands more than once, and that the accused then retaliated by stabbing the deceased.

The first witness, Kodikara Arachchige Robert, in the course of cross-examination gave the following evidence :—

"Q. You saw the deceased practising this tiger performance ?
A. Yes.

Q. You saw him leaping forward just before the stabbing ?
A. Yes.

Q. He jumped forward and went in the direction of the accused who was standing in the crowd ?
A. Yes.

Q. You saw the accused standing in the same way as the other spectators in that crowd watching that performance ?
A. Yes."

Later on he said :—

"Q. And did you see the deceased chasing the accused towards the public latrine from the tarred road ?
A. Yes".

The witness denied, however, that the deceased dealt blows on the accused.

The next prosecution eye-witness was Wanni Achchige Piyadasa. He gave no support, either in evidence in chief or in the earlier part of his cross-examination, to the defence suggestions that the deceased had been the aggressor. He maintained at that stage that the accused came out from between two cars, and stabbed the deceased while the latter was going towards the Police Station. But defending counsel at a certain stage elicited the following evidence :—

"Q. Did you or did you not see the deceased deal a few blows on this accused ?
A. I saw 2 or 3 blows being dealt by the deceased on the accused."

The presiding Judge then asked : "When was that ?" and the witness replied, "When the accused was near the two cars." After further questions by defending counsel, the learned Judge took over the questioning. In the course of 34 questions and answers the witness said in plain terms that the deceased went up to the accused and struck him two or three blows before the accused stabbed him with the knife. These answers were undoubtedly helpful to the defence.

The learned Judge partly nullified the effect of them by reading out to the witness, sentence by sentence, the statement which he had made to the Police shortly after the incident. The witness accepted that he had said some of the things which appeared in that statement, but denied the rest. He also explained that he made some false statements to the Police because one Jothipala Nanayakkara, the President of the Y. M. B. A., and others asked him not to tell the Police that the deceased had assaulted the accused.

Before the Court adjourned for the day, Crown Counsel made an application under Section 154 of the Evidence Ordinance, for permission to cross-examine this witness. The learned Judge, who reserved his order for the following day, refused the application on the ground that the witness had already admitted that what he told the Police was false. The witness was also remanded to Fiscal's custody before the Court adjourned that day, and he was in Fiscal's custody until the conclusion of the trial. At the end of his re-examination, the learned Judge addressing him said : " You will stand down and remain in Fiscal's custody. I shall deal with you thereafter. "

There were two other eye-witnesses called by the prosecution, Dharmadasa Kodikara, a brother of the first prosecution witness Robert, and Jothipala Nanayakkara already referred to. The former admitted that he had been convicted of possessing ganja ; his brother Robert said that Dharmasasa had also been convicted of selling arrack illicitly. Jothipala Nanayakkara admitted that he was sentenced to 4½ years imprisonment on being convicted of looting during the communal riots : he was fortunate enough to be released from jail after he had served only 2 months and 6 days of his sentence. Both these witnesses denied the defence suggestion that the deceased had assaulted the accused before the accused used the knife. But the defence established that all the witnesses had shown, as the place where the stabbing occurred, a spot inside a car park and not on the tarred surface of the road.

The accused himself gave evidence and said that he had been struck by the deceased 4 or 5 times before he took a knife, which he had in the waist, and stabbed the deceased with it.

In this state of the evidence, it was plainly a question of fact for the jury to decide whether the admitted stabbing by the accused was unprovoked or not. In arriving at their decision on this question, the jury would naturally have had to decide whether there had been any kind of assault by the deceased prior to the stabbing.

The first witness, Robert, went part of the way with the defence when he said under cross-examination that he saw the deceased leaping forward in the direction of the accused who was standing in the crowd, just before the stabbing. Though he did not admit having seen any blows being dealt on the accused, he said he saw the deceased chasing the accused from the tarred road towards the public latrine.

The witness Piyadasa's evidence had to be considered very carefully by the jury. While it is true that he made a different statement to the Police from the statement he made in evidence, it was for the jury alone to decide how much of his evidence they should accept or reject. If they chose to accept his evidence, the accused could not have been convicted of murder.

The complaint made to us at the hearing of this appeal was that the jury were hampered in coming to a free and independent decision by certain words and actions of the learned Judge. It was submitted that the learned Judge should not have remanded the witness to Fiscal's custody while he was giving evidence; nor should he, in the presence of the jury, have remanded the witness to Fiscal's custody, or told him that he would be dealt with later at the end of his evidence; by doing so he unmistakably indicated his opinion of the witness's evidence. That opinion was also expressed in strong terms in the course of his summing-up where the learned judge said:—

> "Now, gentlemen, when W. A. Piyadasa is described as a self-confessed liar it is a correct description. You remember he got into the witness box and admitted that what he told the police was false and that what he told the Magistrate was false. So that from his own mouth he has admitted that he has not spoken the truth. Well, gentlemen, although he has admitted that he has not spoken the truth in his statement to the police or in his evidence before the Matara Magistrate, it is still your duty to consider his evidence like the evidence of any other witness. If, for instance, you think that at this last stage, he has come out with the truth and says, "In fact, this is what happened", you can act on that evidence, but, Gentlemen, having regard to his testimony, you have to ask yourselves the question whether you can accept any portion of his evidence, whether he is a witness on whose testimony you can place any reliance. Those are matters entirely for you, Gentlemen of the Jury, to determine."

Though he did finally leave the matter to the Jury, he condemned the witness in such strong terms, and dealt with him in so drastic a fashion, that we think the Jury would have felt bound to reject the witness's evidence.

We think it would have been better if the learned Judge had followed the views expressed by De Sampayo J. in *Cooray v. The Ceylon Para Rubber Co. Ltd*[1]. De Sampayo J. said this: "The proceeding has, however, a serious aspect about which I wish to add a word. The appellant was dealt with for contempt of Court, while he was still under examination and before the conclusion of the case of the defendant company which had called him. In my opinion, a proceeding such as this is apt to intimidate the witness with regard to the rest of his evidence, and other witnesses who are still to be called, and generally to prejudice the course of justice. Section 440 of the Criminal Procedure Code no doubt provides that it shall be lawful for the Court to sentence a witness 'summarily'.

[1] *(1922) 23 N. L. R. 321 at 326.*

But that expression refers not to the time at which a witness should be dealt with, but to the nature of the proceedings. I think it should be laid down, as a general rule, that the proper time for dealing with a witness under section 440 is after the conclusion of his own evidence and after the close of the case of the party who calls him, or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement." In this case, it is possible that the witnesses Dharmadasa Kodikara and Jothipala Nanayakkara might have been influenced, when it came to their turn to give evidence, by the treatment meted out to Wanni Achchige Piyadasa.

In dealing with the evidence of Kodikara Aratchchige Robert, the learned Judge, no doubt unintentionally, omitted to tell the jury that the witness did admit, though perhaps reluctantly, that he saw the deceased chasing the accused from the tarred road just before this stabbing. On this point, the witness made a concession which the defence was able to extract from him, and it would have been better if the learned Judge had mentioned this in his summing-up.

In all the circumstances we felt that the Jury may well have convicted the accused of culpable homicide not amounting to murder, if the evidence which supported the defence of grave and sudden provocation had been fairly submitted for their consideration.

Conviction altered.