[COURT OF CRIMINAL APPEAL]

1967 *Present :* **H. N. G. Fernando, C.J. (President), Abeyesundere, J., and Manicavasagar, J.**

THE QUEEN *v.* J. A. D. Q. A. JAYASINGHE

APPEAL No. 66 OF 1967, WITH APPLICATION No. 89

S. C. 222/66—M. C. Colombo, 26783/C

Trial before Supreme Court—Witness for the prosecution—Adverse evidence given by him—Proof of former inconsistent statements—Limited scope—Evidence Ordinance, ss. 154, 155 (c).

Where, at a trial before the Supreme Court, a prosecution witness gives evidence which damages the prosecution case, section 155 (*c*), read with section 154, of the Evidence Ordinance may permit the prosecuting Counsel to prove former inconsistent statements of the witness. In such a case, however, Crown Counsel's questions must be restricted to contradict the witness in respect only of matters concerning which the witness has already given unfavourable evidence. Section 155 cannot be utilised to prove former statements which may in advance contradict evidence which the prosecution fears that the witness may give.

The Queen v. Abilinu Fernando (70 N. L. R. 73) followed.

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

E. R. S. R. Coomaraswamy, with *M. D. K. Kulatunga*, *N. Wijenathan*, *D. Jayawickrema* and *S. C. Crossette Thambiah* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 2, 1967. H. N. G. FERNANDO, C.J.—

This was an appeal from a conviction of the accused at a trial by Jury of the offence of culpable homicide not amounting to murder.

It appears that the prosecution expected to prove at the trial that the accused, the deceased man, and the witnesses Thegonis and Pinto had been together on the evening of 1st December 1965, that three of the persons (not including the accused) had shared in the smoking of a ganja cigar, that the accused had complained that he was not given a share of the smoke and abused the others on that account, and that shortly after this incident the accused had stabbed the deceased man with a knife. In regard to the alleged act of stabbing itself, it would appear that the only direct evidence available to the prosecution was the evidence of the witness

1*——H 12771 (36/68)

Pinto. In fact Pinto was the first witness whom the prosecution called. In answer to a leading question " On this day at about 5 p.m. did you and the deceased and one Thegonis decide to smoke a ganja cigarette ? ", the witness replied : " Yes ". Very shortly thereafter, in answer to another question " The deceased, *this accused*, Thegonis and you were the persons to smoke this ganja cigarette ? ", the witness replied : " The accused did not come there ". In answer to five other leading questions, the witness repeatedly denied that the accused had come to the spot or been in the company of the other three men. Thereafter the learned Crown Counsel asked the following question :—

" 24. *Q.* Did you see at any stage the accused coming and picking a quarrel with the deceased about not getting his share of the ganja cigarette ?

A. No. "

At this stage Crown Counsel applied to examine the witness under the provisions of s. 154 of the Evidence Ordinance, and this was allowed by the learned trial Judge.

The further examination of the witness by the Crown Counsel was such that the deposition of the witness in the Magistrate's Court was read to him, and that the witness admitted that the sentences thus read to him had in fact constituted his evidence before the Magistrate. One such admission of the witness was that he had stated to the Magistrate that the accused had in fact been present when the other three men smoked the cigar. But, at a very early stage of this further examination, the witness repeatedly said that the accused did not come to the place where the others were smoking the ganja cigar, and in answer to Question No. 44 the witness said that his different statement to the Magistrate had been a lie. I reproduce a few of the subsequent Questions and Answers :—

" 47. *Q.* The accused asked Egonis for his share of the ganja as he also contributed ?

A. Yes, I said so.

Q. Is that also incorrect ?

A. That is not correct. It is a lie.

Q. ' I waited there '.

A. That is correct.

Q. ' The accused then started abusing the deceased because his share of the ganja was not kept for him '.

A. Yes, I said so. That is also a lie.

Q. What you have done is to tell the Magistrate bits of truth and chunks of lies ?

A. Yes.

. . . . . .

62. *Q.* Did you say : " I saw the accused and the deceased very clearly by the boutique lights " ?

A. I said so but it is false.

63. *Q.* " *I saw the accused stabbing the deceased* ", *did you say that ?*

A. I said so but it is false.

Q. The deceased was holding his chest and came up to the boutique and fell down ?

A. I said so but it is false.

Q. I saw the accused going towards his house ?

A. I said so but it is false. "

The situation which arose at the very commencement of this trial was almost precisely that which was anticipated in one of the concluding paragraphs of the recent judgment of this Court in *The Queen v. Fernando* (C. C. A. Appeal No. 17 of 1967 delivered on 18th April 1967 [1]). But neither the trial Judge nor Counsel were then aware of that unreported judgment. What actually occurred in the present case was that, because the witness Pinto stated at the trial that the accused had never been in the company of the persons who were smoking the ganja cigar, evidence was led which made the Jury aware that, in his deposition to the Magistrate, the witness had not only alleged that the accused was present, but had further testified directly to the facts that the accused did commit the offence charged, and also that he had some motive against the deceased man.

No doubt the witness had damaged the prosecution case by his evidence that the accused had not been present at all ; the prospective damage would have been clear to Crown Counsel, who expected that his other witness Thegonis would testify to the presence of the accused during the smoking of the cigar. This damage of course the prosecution was quite entitled to repair by proving that the witness Pinto had in the Magistrate's Court stated that the accused had been present, and proof of that former statement was sufficient and necessary to discredit the witness and to invite the Jury to disregard his denial of the accused's presence.

The complaint of Counsel for the accused relates mainly to the Question No. 47 and the subsequent questions which I have reproduced above. Prior to that stage, there had been one, and only one, statement which needed contradiction, and it was contradicted. But after that stage the witness did not at the trial give any direct testimony relevant to the commission of the offence charged. For instance, he did not say that the accused did not abuse the others, and thus there was no occasion for the prosecution to prove a former statement inconsistent with his evidence. The same observation has to be made with regard to the much more important Question No. 63.

[1] *(1967) 70 N. L. R. 73.*

Again, the prosecution proved the whole of the statement which the witness Pinto had made to the Police, including statements that the accused had been after liquor, and that the witness himself feared the accused ; this although the witness had not testified at the trial that the accused had been sober, or that he did not fear the accused.

Thus (apart from the one matter as to the accused not being present), s. 155 of the Evidence Ordinance was utilized, not to contradict testimony given at the trial, but to prove former statements which might in advance contradict evidence which the prosecution feared that the witness might give. If a witness has given some testimony at a trial, then s. 155 (*c*), read with s. 154, may permit proof of a former inconsistent statement ; but s. 155 (*c*) does not in law authorise the slaying of phantom dragons.

We must add that Crown Counsel was not even entitled to ask Question No. 24 without the permission of the trial Judge, because at that stage s. 154 had not yet being invoked. When Counsel is examining his own witness, and hence not relying on s. 154, it is contrary to common sense, and not only to law, to ask whether X did something on a particular occasion if the witness has already vehemently denied X's presence on that occasion.

In effect, the attempt on the part of the prosecution to discredit its own witness had the consequence that a number of former statements were proved which could well have satisfied the Jury of the guilt of the accused, although in law they were completely irrelevant as evidence of his guilt. The learned trial Judge quite properly directed the Jury that these statements must not be taken into account against the accused ; but, having regard to the gravely incriminatory nature of the statements, we cannot think with any confidence that the Judge's warning must have been heeded by the Jury.

The ideal criminal trial is one at which the prosecution leads *only* evidence which is relevant and admissible *in proof of the offence charged*, and at which there is accordingly no occasion to instruct the Jury to repress the natural human tendency to take account of all the matters proved in evidence. One major instance in which such an instruction is inevitable is a case where two or more persons are charged together, and a confession by one of them is proved. That exception to the ideal is permitted by our procedure, subject to the discretion of a Court to order separate trials. Another exception arises under s. 155 (*c*) of the Evidence Ordinance, but it is ordinarily the defence which utilises the section. In this case, the prosecution purported to utilize the section, but did so illegally ; hence the major part of the Crown's examination elicited evidence which was not legally admissible.

Learned Senior Crown Counsel has submitted that it is the duty of the prosecution to make its best efforts to induce a witness to speak the truth. The argument, in its application in the present context, presupposes

that if a witness gives evidence exculpating an accused person, then the evidence must be untrue. The argument seems also to be opposed to the presumption of innocence, for evidence exculpating an accused person can be thought to be false only because of a supposition that the accused must be guilty.

Learned Senior Crown Counsel made a respectful but somewhat provocative enquiry as to what questions are in our opinion permissible under s. 154 of the Evidence Ordinance, if the limitations mentioned in the recent judgment of this Court and those discussed at the hearing of this appeal are applicable. An answer to his inquiry, if given in this appeal, would be merely *obiter*, for the recent judgment, and the one now pronounced, deal only with matters provable under s. 155 (*c*) of the Evidence Ordinance. But Counsel is no doubt aware that research into the scope and effect of s. 154 must involve consideration also of s. 155 (*a*), (*b*) and (*d*), s. 140, s. 143, s. 145, s. 146, ss. 147 and 132, s. 148, s. 149, s. 150, s. 153, and perhaps of other sections of the Evidence Ordinance. The fruits of such research will presumably be available if and when the occasion arises for this Court to construe any of these sections as read with s. 154.

Before leaving the matters discussed, we should note that a situation such as that which arose at a very early stage of this trial can sometimes be retrieved if the trial Judge in his discretion seeks fit to intervene, or if the prosecutor utilises s. 154 otherwise than in the manner provided by s. 155 (*c*). For example, a general reference to the fact that the Court is aware of former statements made by the witness, or a suggestion that the witness may have some reason to conceal facts within his knowledge, occasionally serves to " soften up " an unwilling witness. But it is clear that any such treatment would have had no response in the case of the witness Pinto.

Evidence of the following matters was adduced by the prosecution in this case :—

(1) Thegonis stated at the trial that the accused had been present at the smoking party, and had abused the others because he was not given a share of the smoke.

(2) Thegonis also stated that, shortly after the smoking party dispersed, the accused had borrowed a clasp knife from him.

(3) The deceased man was found stabbed and lying a little distance away from the scene of the smoking.

(4) The deceased man had made a statement to the Doctor at the hospital that he had been stabbed by the accused.

The most weighty of the circumstances listed above is a statement made to the Doctor. But much of its value is reduced by the fact that, only a few minutes earlier, the deceased had stated to the Apothecary that he had fallen in a paddy field and injured himself. The Apothecary had also noticed that the deceased man was smelling of liquor. Having regard to the contradictory nature of these two statements of the deceased

man, it is difficult for us to understand why the Jury should have preferred to accept the statement made to the Doctor as being true in preference to the statement made to the Apothecary. We thought it quite likely that the preference of the Jury was influenced by their knowledge of the evidence which has been given by the witness Pinto in the Magistrate's Court and which, as we have held, should not have being led at the trial. In these circumstances, we did not think this to be a fit case in which to order a fresh trial.

For these reasons we allowed the appeal and directed a verdict of acquittal be entered.

Accused acquitted.