[COURT OF CRIMINAL APPEAL]

1970 *Present*: Sirimanē, J. (President), Samerawickramē, J. and de Kretser, J.

H. H. BABYSINGHŌ, Appellant, *and* THE QUEEN, Respondent

C. C. A. 66 of 1970, with Application 113

S. C. 138/69—M.C. Ratnapura, 30680

Evidence—Former statement of a witness made to another witness outside Court—Conflict between that statement and his evidence in Court—Evidential value of the former statement—Evidence Ordinance, s. 157.

Where witness A who makes a statement in his evidence concerning a fact denies having made to witnesses B and C outside Court certain statements which are in conflict with his own evidence, the jury must be told that the earlier statements made by A to B and C do not form A's substantive evidence on which they can act. The statements made by A to B and C—if B and C to whom they had been made are believed—would tend to show that A who now denies them is unworthy of credit, but these statements which he repudiates in his evidence cannot be substituted for his own evidence.

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

A. C. de Zoysa, with *Sarath Muttetuwegama*, *M. Mousoof Deen* and (assigned) *B. Bodinagoda*, for the accused-appellant.

P. Colin Thome, Senior Crown Counsel, with *P. Tennekoon*, Crown Counsel, for the Crown.

Cur. adv. vult.

November 22, 1970. SIRIMANE, J.—

By a divided verdict of the jury (five to two) the appellant was found guilty of the attempted murder of one Heen Mahathmaya by shooting him with a gun. The injured man had been hit by a pellet in the region of his right eye, but there was no definite evidence relating to the range from which the shot had been fired.

A young woman named Ramany had stated that on hearing a gun shot, she looked in that direction and saw Heen Mahathmaya fallen and the appellant standing close by with something in his hand which she thought was a gun. Though it would appear that she had been persuaded to say at one stage that it *was* a gun that she had seen with the appellant, yet she stated more than once, in the course of her evidence that she could not be definite as to what the appellant had in his hand.

The injured man Heen Mahathmaya had stated quite categorically that he did not see the person who fired the shot which injured him.

The prosecution apparently relied on statements alleged to have been made by Heen Mahathmaya to two withnesses who came on the scene shortly after the shooting, and to the two doctors who examined him, that it was the appellant who fired the shot.

A statement made by a witness outside Court may always be used for the purposes of contradicting his evidence. Under section 157 of the Evidence Ordinance, such a statement made at or about the time when an incident took place can be used, within the limits (now authoritatively defined) in order to show consistency, and thus corroborate the witness's evidence. The most common example of this is the "First Information" on which investigations by the police were initiated.

But, once a witness denies having made the statements attributed to him, as in this case, the jury must be told that these statements do not form substantive evidence on which they can act. Such statements—if the witnesses to whom they had been made are believed—would tend to show that the person who now denies them is unworthy of credit, but those statements cannot be substituted for his evidence.

Lord Hewart, C.J. said in *Rex v. White* [1] (1922) 17 C.A.R. 60) :—

> "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."

[1] *(1922) 17 C. A. R. 60.*

This rule was followed by this Court in *Queen v. Hethuhamy*[1] (57 N.L.R. 255).

The learned Commissioner in directing the jury said :—

"So that, gentlemen, you have the evidence of four people, shall I say Podi Appuhamy, Jayasekera Appuhamy, and the two doctors who say that the injured man said that Baby Singho shot. On the contrary you have the evidence of the injured man himself who says he does not know who shot him."

And later—

"So that, even if you accept the evidence of the two doctors and those other witnesses I referred to, you must be satisfied beyond all reasonable doubt *that the Baby Singho referred to in their evidence was the Baby Singho who is here in the dock facing this serious charge.*"

The jury would have inferred from these directions that if they accepted the evidence of the doctors and the two witnesses that Heen Mahathmaya told them that it was Baby Singho who shot at him, then they could act on those statements which Heen Mahathmaya now denies if they were convinced that it was the appellant to whom he referred as Baby Singho.

We are of the view that the verdict of the majority of the jury cannot be supported having regard to the evidence led in the case, and learned Crown Counsel, rightly we think, did not seek to support it.

For these reasons we quashed the conviction and acquitted the appellant.

Accused acquitted.