[IN THE PRIVY COUNCIL]

1962 *Present:* **The Lord Chancellor, Lord Morton of Henryton, Lord Evershed, Lord Guest, and Lord Pearce**

G. R. DANIEL APPUHAMY, Appellant, *and* THE QUEEN, Respondent

Privy Council Appeal No. 12 of 1961

S. C. 19—M. C. Kegalle, 22,585

Criminal Procedure Code—Section 440 (1)—Summary punishment of a witness for perjury in open court—Procedure that should be followed in a trial before Supreme Court—Duty of Court to inform witness of the gist of the accusation against him.

Under section 440 (1) of the Criminal Procedure Code it is for the Court, and not for the jury, to decide whether false evidence has been given by a witness, and if in the Court's opinion the witness has given false evidence, then the Supreme Court has power to sentence summarily "as for a contempt of the Court".

A rider brought by the jury to the effect that the witness should be dealt with for giving false evidence is not equivalent to a verdict of guilty to a charge of perjury.

It is not necessary when proceeding under section 440 (1) for the accusation of giving false evidence to be stated with the particularity required in a count of an indictment. If the Court is of the opinion that the whole of a witness's evidence was false, it may be sufficient just to say that. But when it is not suggested that the whole of a witness's evidence is false, it is essential that the witness be left in no doubt as to which parts are alleged to be false. The Court should, before sentencing a witness, give the witness an opportunity of explanation and possibly of correcting a misapprehension as to what had been in fact said or meant.

APPEAL, by special leave, against an order of a Commissioner of Assize summarily sentencing a witness to three months' rigorous imprisonment for having given false evidence.

E. F. N. Gratiaen, Q.C. with *Dick Taverne*, for the witness-appellant.

John A. Baker, with *Annesley Perera*, for the Crown.

Cur. adv. vult.

December 13, 1962. [*Delivered by* THE LORD CHANCELLOR]—

The appellant Gamalath Ralalage Daniel Appuhamy was a witness for the prosecution at the trial of eight persons at the Kandy Assizes of the Supreme Court of Ceylon in April 1960. At the end of the trial the Commissioner of Assize summarily sentenced the appellant to three months' rigorous imprisonment for having given false evidence.

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Power to pass such a sentence is given by s. 440 (1) of the Criminal Procedure Code of Ceylon which provides that :—

> " If any person giving evidence on any subject in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of the court to imprisonment either simple or rigorous for any period not exceeding three months..... "

The relevant part of s. 188 of the Penal Code reads as follows :—

> " Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give ' false evidence '."

The Charges against the eight accused were in respect of the looting of a boutique run by a Tamil, Mooka Pillai, on the 29th May 1958 during the racial riots that occurred at that time. Mooka Pillai gave evidence that the appellant, the village headman of a neighbouring village, came to his boutique in the evening of the 29th May 1958 and told him that people were planning to loot it that night. A lorry was sent for and loaded with goods from the boutique with the intention of taking them to an empty boutique close to the appellant's house. While the lorry was being loaded or just after the loading was finished, three men came into the boutique. One of them, the accused Seda, said that he had brought about 200 people to loot the shop and in the presence of the appellant and without any attempt by him to protect them, Seda struck both Mooka Pillai and his wife who then ran out of the back of the boutique and took refuge in a neighbour's house.

The appellant stated that he had remained in the boutique until after the raid was over and that he had then driven the lorry, which had not been taken away by the looters, to the police station a short distance away and had then reported the matter to the police. He had made no effort to inform the police before the raid took place or to secure their assistance during the course of it although there was a post office with a telephone close by. His role throughout the raid had been that of a spectator. His evidence differed from that of Mooka Pillai in a number of particulars. He said that he had come to the boutique with a Tamil, Perumal Pillai, on foot while Mooka Pillai said that he had come by car and that Perumal Pillai had not come at all. In his notebook he had recorded that the information about the looting had been given to him by Perumal Pillai but he had told the police when he did report the matter that he had received the information from persons unknown. He said that Perumal Pillai had given him the information when he was at his desk in his house, whereas the note in his notebook stated that it was

given to him at Perumal Pillai's boutique. He did not get Perumal Pillai's signature to the report as it was his duty to do.

The appellant was treated as an accomplice by the prosecution and it was suggested to him on behalf of the defence that the looting was planned by him and carried out by him.

The learned Commissioner in the course of his summing up, after reminding the jury of the evidence given by the appellant, invited the jury to consider whether or not it was their duty to return a rider indicating what they felt about the evidence of the appellant. " A headman " he said " is a person appointed to protect the public, to serve the public, especially at a time of stress like the emergency ; and if a headman conducts himself in a way that jeopardises the safety of the public, surely you, gentlemen, who sit in judgment in the highest tribunal of the land, will consider whether it is not your duty to indicate what you think about his conduct, whatever your decision with regard to the accused may be."

Although this might have been taken as an invitation to condemn the appellant for his failure to report the threatened raid to the police and for his failure to take any action to protect Mooka Pillai and his wife, it would seem that it was not so understood by the jury. After returning their verdicts in relation to the accused, the Foreman said " The headman may be dealt with for giving false evidence ".

After sentencing the seven accused who were found guilty, the Commissioner said to the accused :

> " The jury have brought a rider against you that you should be dealt with for giving false evidence. Have you any cause to show why you should not be dealt with ?"

Counsel on behalf of the appellant then asked the Commissioner to deal with the matter the next day whereupon the Commissioner said that he was dealing with the appellant summarily. Counsel then urged some matters in mitigation. The learned Commissioner again called upon the appellant, saying :

> " Have you any cause to show ?"

The appellant begged his Lordship's pardon. The Commissioner then said his offence was a very serious one and sentenced him to three months' rigorous imprisonment.

The statements made by the learned Commissioner to the appellant tend to support the view that the Commissioner regarded the finding of the jury in relation to the appellant as equivalent to a verdict of guilty to a charge of perjury. The appellant was not told that in the opinion of the Court he had given false evidence nor was any indication given to him of the matters in respect of which he was alleged to have given false evidence. He was simply told that the jury had brought a rider against him that he should be dealt with for giving false evidence although the jury's rider was that he might be dealt with for that. He was not asked whether he admitted or denied giving false evidence but only to show

cause why he should not be dealt with, a procedure similar to that followed in the criminal courts of England when after a conviction of felony the prisoner is called upon to show cause why sentence should not be passed upon him.

The course taken by the learned Commissioner in his summing up also tends to support the view that he regarded the rider of the jury as equivalent to a verdict of guilty. After directing the jury very properly as to the way they should regard the evidence of the appellant when considering the guilt or innocence of the accused, he read to the jury a note of the evidence given by the appellant as to the source of the information he had received as to the plot to loot and as to the place where he received it and he reminded the jury that the appellant had said that he came to Mooka Pillai's boutique on foot when Mooka Pillai said he came by car.

Having read this passage from the shorthand note and having reminded the jury about the car, the Commissioner invited the jury " to return a rider indicating what " they felt " about the evidence of this headman ".

S. 440 (1) of the Criminal Procedure Code does not require a finding by a jury as a condition precedent to the exercise by the Supreme Court of the summary power to sentence for giving false evidence.

Their Lordships are reluctant to conclude that the learned Commissioner decided in the course of the trial of the eight accused to add to that trial, the trial of the appellant, a witness for the prosecution, on a charge of perjury. They do not find it necessary to reach a conclusion on this. If the Commissioner did so decide, appellant was tried for perjury, without any charge being formulated against him and without any opportunity being given to him to put forward any defence he might have.

In *Subramaniam v. The Queen* [1], Lord Oaksey delivering the judgment of their Lordships said that in their opinion it was never intended that in the exercise of the power under s. 440 (1) in the course of a criminal trial, a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case and that if such an investigation is necessary it can and should be set on foot under s. 440 (4).

It may be, as Counsel for the Crown submitted, that the learned Commissioner merely sought to be helped by the jury on a question of fact. Even so the course taken by the learned Commissioner would not appear to their Lordships to be justified. Under s. 440 (1) of the Criminal Procedure Code it was for the Court to decide whether false evidence had been given, and if in the Court's opinion it has, then the Supreme Court has power to sentence summarily " as for a contempt of the Court ".

It was clearly established in *Re Pollard* [2], on a reference to the Judicial Committee of the Privy Council, that no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him.

[1] *(1956) 1 W. L. R. 456.* [2] *(1868) 5 Moore N. S. III : 16 E. R. 457.*

The same rule applies in relation to summary punishment for giving false evidence, see *Chang Hang Kiu v. Piggott* [1]. In that case their Lordships held that the gist of the accusation against the appellants ought in the circumstances of the case to have been sufficiently clear to the accused from the language employed by the learned Chief Justice. The Chief Justice had said that the whole evidence given by the appellants convinced him of a conspiracy and all that they had said material to one issue was a tissue of deliberate falsehoods. A little later in their judgment they expressed the opinion that the language used by the learned Chief Justice was quite sufficiently specific to make the appellants aware of the pith of the charge against them. But their Lordships advised that the appeal should be allowed on the ground that the Chief Justice should, before sentencing them, have given the accused an opportunity of giving reasons against summary measures being taken, "an opportunity of explanation and possibly the correction of misapprehension as to what had been in fact said or meant."

It is not in their Lordships' opinion necessary when proceeding under s.440 (1) for the accusation of giving false evidence to be stated with the particularity required in a count of an indictment. If the Court is of the opinion that the whole of a witness's evidence was false, it may be sufficient as in the case of *Chang Hang Kiu v. Piggott* (*supra*) just to say that. But when it is not suggested that the whole of a witness's evidence is false, it is essential that the witness should be left in no doubt as to which parts are alleged to be false. Unless he is so informed, he is deprived of the opportunity of explanation and possibly of correcting a misapprehension as to what had been in fact said or meant.

It cannot, in the opinion of their Lordships, be said that the observations made by the learned Commissioner to the jury in the course of his summing up, were sufficient if the appellant was present and heard what was said—and there is no evidence that he was—to leave him in no doubt as to the matters on which, in the opinion of the Court, he had given false evidence.

It was not suggested that the whole of the appellant's evidence was false. It clearly was not ; and no doubt the prosecution sought to attach some importance to his evidence of identification.

In their Lordships' opinion the appellant was not informed by the Commissioner of the gist or substance of the accusation against him and accordingly was given no opportunity of dealing with it.

For these reasons their Lordships have humbly advised Her Majesty that this appeal be allowed and the sentence passed upon the appellant quashed.

Appeal allowed.

[1] (*1909*) *A. C. 312* (*J. C.*).