[COURT OF CRIMINAL APPEAL.]

1946 *Present:* **Cannon J. (President), Jayetileke and Canekeratne JJ.**

THE KING *v.* KARTHIGESU.

14—M. C. Chavakachcheri, 22,852.

Evidence—First information to Police—Must not be based on hearsay—Informant must be called as witness—Evidence Ordinance, s. 157—Criminal Procedure Code, s. 121—Court of Criminal Appeal Ordinance, proviso to s. 5 (1).

The rule for the admissibility, under section 157 of the Evidence Ordinance, of first informations given under section 121 of the Criminal Procedure Code may be said to be this: first of all, the information must not be based on hearsay, unless the hearsay matter is relevant to explain conduct; secondly, the informant must be called as a witness, unless the evidence is tendered under section 32 of the Evidence Ordinance.

The proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, that the Court of Criminal Appeal may dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred, assumes a case where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt, convict.

APPEAL, with application for leave to appeal, from a conviction by a Judge and Jury.

H. W. Thambiah (with him *M. M. Kumarakulasingham*), for the accused, appellant.

T. S. Fernando, C.C., for the Crown.

April 10, 1946. CANNON J.—

The appellant was convicted of voluntarily causing grievous hurt to one N. Kandiah by shooting him in the thigh with a shot gun. The main question for this Court to decide is whether certain evidence was of a hearsay nature and prejudicial to the appellant.

The questioned evidence consists of the information given by one V. Kandiah to the headman. This was as follows :—

> " S. Velan told me and Vairamuthu that Kandiah told him that while Kandiah of Allalai went, a short while ago, to his tobacco garden for watching, E. Karthigesu *alias* Chelliah of Allalai who was one of those in the said garden breaking the leaves of tobacco plants shot at Kandiah on his thigh. I came here because Vairamuthu asked me to fetch you. I did not go to the spot and come here. I know nothing more "

The effect of this statement is that the informant himself knows nothing about the shooting but that Kandiah, the injured man, told S. Velan and Vairamuthu that the accused shot him. Further, the informant depends for this information on S. Velan, not on Kandiah, the injured man. It is what has been termed " double hearsay "

The Crown, having elicited this hearsay evidence from the vidane, then proceeded to call the informant V. Kandiah to say that he had conveyed this hearsay information to the headman. In our opinion, this information was not admissible nor was the evidence of the informant. The rule for the admissibility of what have become known as " First Complaints ", that is to say, first informations, given under section 121 of the Criminal Procedure Code, may be said to be this : First of all, the information must not be based on hearsay, unless the hearsay matter is relevant to explain conduct ; secondly, the informant must be called as a witness. I am referring to the evidence as being admissible under section 157 of the Evidence Ordinance. The second condition which I have mentioned could not be complied with if the evidence were tendered under section 32 of the Evidence Ordinance. It is clear that the information in this case does not comply with the first of these conditions. The question we have to consider then is whether the admission of this evidence prejudiced the trial of the accused. In order to do so, it is necessary to examine what happened at the trial.

For the accused, it is pointed out that the shooting took place at night, and that the identity was said to have been by the aid of an electric torch ; and, further, that the presiding Judge did not direct the Jury on the inadmissibility of this information. Moreover, it was pointed out that no statement by either the injured man or another witness named Paramu, who purported to be an eye-witness, was taken on the day of the shooting. It was, therefore, contended that when the Jury were deciding whether or not they could accept the evidence of the injured man and Paramu, they might have been influenced by the evidence that, according to the inadmissible information, the injured man had told Velan that the accused was the man who shot him. On the other hand,

the shooting by the accused was deposed to by two eye-witnesses, namely, the injured man and Paramu, and the medical evidence showed that the shooting must have taken place at close range within a few yards—within 6 to 10 yards. There was also evidence that one Muttiah had seen accused with a gun the same evening. Furthermore, no evidence was called by the defence to contradict this evidence which was given by the prosecution; and, further, although the Judge did not direct the Jury on the matter, he did not suggest that the offending passage in any way corroborated the evidence of the injured man; in fact, he did not mention the passage at all. Ought this Court, then, to allow the appeal?

By the proviso to section 5 of the Court of Criminal Appeal Ordinance, this Court may dismiss this appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused, and the proviso assumes a situation where a reasonable Jury, after being properly directed, would, on the evidence properly admissible, without doubt, convict. We feel that that is an assumption that may, having regard to the course the trial took, be safely made in the present case. In point are the cases *Rex v. Haddy*[1] and *Stirland v. The Director of Public Prosecutions*[2]. The appeal is, therefore, dismissed and the application for leave to appeal on the facts refused.

Appeal dismissed.