[COURT OF CRIMINAL APPEAL]

1965 *Present :* **T. S. Fernando, J. (President), Sri Skanda Rajah, J., and Sirimane, J.**

S. H. SIRINIYAL, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 125 OF 1964 (WITH APPLICATION No. 139)

S. C. 46/64—M. C. Balapitiya, 40401

Evidence—Hearsay—Illegal reception—Effect—Criminal Procedure Code, s. 121.

The accused-appellant was charged with committing murder by shooting. The first information of the widow of the deceased as recorded by the police was produced in document form as part of the case for the Crown. The complaint contained, *inter alia*, the following statement :—" He (the accused) has on several occasions threatened to shoot us ". The widow had not, in her evidence, referred to any previous threat. The evidence of previous threats by the accused was therefore hearsay and inadmissible. There was no direction to the jury to disregard it.

Held, that, error of law having been established, the burden shifted to the Crown to satisfy the Court that a reasonable jury, had they been properly directed, would without doubt have convicted the accused.

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

G. E. Chitty, Q.C., with *R. Rajasingham* and *M. Kanakaratnam*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya*, Crown Counsel, for the Crown.

Cur. adv. vult.

February 1, 1965. T. S. FERNANDO, J.—

By a 6 to 1 majority verdict of the jury the appellant was convicted of the offence of murder of a man called Leedin. On the appellant's behalf it was argued (1) that there was non-direction amounting to misdirection of the jury as to the manner in which an inference of guilt may be made in a case depending solely on circumstantial evidence and (2) that there was illegal reception at the trial of hearsay evidence which could well have turned the scale against the appellant.

In regard to the first of these two grounds of appeal, it may be mentioned that the case was one of shooting of the deceased at night by an assailant at a distance of 50 to 60 feet from his victim. The Crown's case in regard to identification of the assailant rested on the testimony of a single witness, Meelin, the widow of the deceased. This woman stated that at about 7.30 p.m. when the deceased was stooping over the edge of the verandah of her house in order to spit on to the compound a shot was heard and the deceased was seen falling as a result of injury caused by that shot. She had an electric torch in her hand and she flashed that torch in the direction from which the shot appeared to come, and she then saw the appellant running with a gun in his hand in the direction of his own house.

The learned trial judge stated more than once to the jury that if they were satisfied that Meelin identified the appellant the latter should be found guilty of the offence of murder. Learned counsel for the appellant argued that identification of the appellant as he was running away was no more than a circumstance which could have tended to incriminate him, and that, as Meelin did not claim to have seen the appellant fire at the deceased, more inferences than one could have been drawn in the case from the fact that the appellant was seen running away. He contended, therefore, that it was incumbent on the learned judge to have directed the jury as to the manner in which circumstantial evidence should be considered before a verdict of guilty can be returned. While it may be correct strictly to label this a case of circumstantial evidence in the technical sense that the fact in issue was dependent on an inference from another fact, we are in agreement with the argument of learned Crown Counsel that in this case the fact in issue could have been decided with as much practical certainty as if it had been observed by Meelin. Therefore, notwithstanding certain infirmities and some improbability in Meelin's evidence to which our attention was drawn, we were unable to take the view that there was a misdirection of the jury. The first ground of appeal failed.

The reception of hearsay evidence took place in the following circumstances. Meelin was the person who carried the first information to the police of the injuries caused to her husband. Her complaint as recorded by the police was produced in document form as part of the case for the Crown, and section 121 of the Criminal Procedure Code, of course, permitted such production. This complaint was read out to the jury and it contained, inter alia, the following statement :—" He (the appellant)

has on several occasions threatened to shoot us ". Meelin had not in her evidence (which had been completed before the production of the document which was made only when the Inspector of Police gave evidence) referred to any previous threat either to shoot or injure in any other way. No attempt was made to recall Meelin in an effort to prove the truth of this statement. The evidence of previous threats by the appellant to shoot was therefore hearsay and inadmissible. It was therefore patent that there was error of law in the conduct of the trial.

It was not possible for us to accede to the argument of Crown Counsel that the jurors were hardly likely to have remembered this bit of evidence. A striking example of the powers of jurors to recollect statements made in evidence is to be found in the reported case of *Ivor Stephen Parker* [1]. That was also a case where certain inadmissible evidence had been given at the trial. The trial judge had not even heard the evidence in question and, when it was brought to his notice by a juror at the conclusion of his summing-up, he directed the jury not to attach any weight at all to it. In regard to this, Lord Parker, L.C.J., stated in the Court of Criminal Appeal :

> " Whether a direction of this sort will in any particular case cure the wrongful admission of evidence must, in the opinion of the court, be one of degree. There may be many cases where the inadmissible evidence is of such little weight or is liable to create so little prejudice that it would be right and proper that the matter should be dealt with by a direction to the jury. On the other hand, there are other cases where the inadmissible evidence is so prejudicial and so likely to influence the jury in arriving at their verdict that the court is reluctantly forced to the conclusion that the matter cannot be left to a direction, but must be dealt with by discharging the jury."

The Court of Criminal Appeal there adopted the test formulated by Lord Normand in the Privy Council in the case of *Teper v. R* [2] in these words :— " The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant ".

In the case before us there was not even a direction to the jury to disregard the evidence wrongly admitted. Error of law having been established, the burden shifted to the Crown to satisfy us that a reasonable jury, had they been properly directed, would without doubt have convicted the appellant. We were unable to say that the Crown has so satisfied us. Indeed, we were unable also to overlook the probability of the evidence of previous threats by the appellant to shoot having turned the scale against him to the point of the jury getting some confirmation thereby of the evidence of identification given by Meelin. Upholding the second ground of appeal, we allowed the appeal and quashed the conviction of the appellant.

Conviction quashed.

[1] *(1960) 45 Cr. A. R. 1.*

[2] *(1952) A. C. 492.*