1948

[COURT OF CRIMINAL APPEAL.]

Present : **Howard C.J. (President), Jayetileke J. and Nagalingam J.**

THE KING *v.* NAMASIVAYAM *et al.*

Appeals Nos. 21-24 of 1948.

S. C. 21-24—M. C. Kurunegala, 19,878.

Court of Criminal Appeal—Depositions of witnesses in Magistrate's Court—Questions by trial Judge—Resulting affirmation that statement before Magistrate was true—Substantive evidence—Refreshing memory of witness—Misdirection—Prejudice to accused—Verdict based on illegal and inadmissible evidence—Evidence Ordinance, Section 159—Extension of time for appeal.

The accused were charged with being members of an unlawful assembly' rioting, criminal trespass and causing hurt. The defence did not contest the fact of perpetration of the offence but did contest that the prisoners on trial were responsible for it and the question of identification became, in consequence, of extreme importance. Some of the witnesses in the course of examination stated that they could not remember the presence of various accused, whereupon the trial judge proceeded to examine them in the following strain :

Q. You told the Magistrate that four people came and one of them was the first accused. What you said in the lower court, is that true ?

A. Yes.

Q. If you told in the lower court that the first accused was one of them is that true ?

A. Yes.

Held, (i) that such examination let in as substantive evidence the depositions made by the witnesses before the Magistrate and that such evidence was illegal and inadmissible ;

(ii) that although a Judge has very wide powers of asking any questions he pleases in any form and at any time of any witness, those powers should not be so used as to afford ground for the legitimate criticism that the accused persons have not had the benefit of a fair trial ;

(iii) that in the absence of a direction by the Judge as to the position in regard to the statements said to have been made by the witnesses before the Magistrate but which were not proved to have been made by them nor even as to what the effect was even if so proved in the absence of affirmative evidence in court on the part of the witnesses re-iterating the statement alleged to have been made before the Magistrate, it could not be said that the verdict of the Jury may not have been based on illegal and inadmissible evidence.

Held, further, that it is open to the Court of Criminal Appeal to extend the time for appeal if application for leave to appeal is made.

Quaere, whether depositions made at least a month after the event and which were not read over by the witness but read to him could be regarded as falling within the ambit of Section 159 of the Evidence Ordinance which permits a witness to refresh his memory by reference to a document.

APPEALS from certain convictions in a trial before a Judge and Jury.

H. V. Perera, K. C., with *S. C. E. Rodrigo* and *S. Sabapathipillai*, for the 2nd accused-appellants.

S. Saravanamuttu, with *V. Joseph*, for the 7th and 16th accused-appellants.

S. C. E. Rodrigo, for the 18th accused-appellant.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

April 22, 1948. NAGALINGAM J.—

The four appellants, who are the 2nd, 7th, 16th and 18th accused in this case, appeal with leave of Court against their convictions of the offences of being members of an unlawful assembly, rioting, criminal trespass and causing hurt.

Two main grounds have been urged on appeal, firstly, that improper use to the prejudice of the appellants was made at the trial of the depositions made by the witnesses before the Magistrate at the non-summary inquiry, and secondly, that in any event the verdict of the Jury cannot be supported having regard to the evidence in the case.

The first question raises a problem of some importance in the administration of criminal law. For a full and true appreciation of the point raised, it is necessary as a preliminary to refer to certain of the salient facts which are not in dispute. Two women were bathing at a well in their compound, when three men from a military pioneer corps stationed not far from their house came along a footpath that ran close to the well and on seeing the women one of the military personnel went up and got hold of one them. The women raised cries. Male members both from their house and from nearby houses ran up to the scene and the army men perceiving them took to their heels; one of the Army men, however, was pursued and captured; he happened to be the person who had attempted to molest the woman. The other two Army men made good their escape. The man who was seized was tied to a tree and detained pending the arrival of the Headman, to whom a message was sent. This incident may be described as the first event in the series of incidents that took place that day.

Shortly afterwards, four men from the camp came up and tried to induce the captors of their companion to release him; as they failed in their mission, they left the place. This may be regarded as the second incident.

A little later the officer in charge of the camp, one Lt. Ramachandra, accompanied by seven or eight others, several of whom were non-Commissioned Officers, came to the scene and made a second attempt to persuade the captors to surrender their captive. Lt. Ramachandra was told that

the man would only be released after the Headman's arrival. Lt. Ramachandra then appears to have called for a piece of paper and commenced to reduce to writing the statements made to him. This may be referred to as the third occurrence of the series.

Next we come to the fourth and last episode : When Lt. Ramachandra started to record statements, a whistle was blown and a crowd of about two hundred men, all from the camp, rushed up to the scene, armed with stones and waving clubs, and they not only threw stones at the civilians but also assaulted them with clubs ; the house of the civilian who had detained the military man was also set fire to.

The indictment presented against the accused persons was in respect of the last incident, during the course of which the various offences with which they were charged are alleged to have been committed. The date of the offences was as far back as August 20, 1944, but the case came up for trial only on January 19, 1948, that is, about three and a half years later. It is therefore not a matter for surprise that the witnesses pleaded ignorance of facts which were sought to be elicited from them in examination, with the result that the normal method of placing evidence before Court was to some extent deviated from and has given rise to the complaint of the appellants that the depositions before the Magistrate had been used unfairly against them at the trial. The course the examination took of several of the witnesses may best be illustrated by reference to the evidence given by the principal witness in the case, Bandahamy.

After referring to the first event the witness spoke to the second incident and he said in answer to Crown Counsel that *he remembered the presence of the 1st accused but could not remember whether he was one of the four who came.* He further added he could not remember the presence of the 2nd accused but said he thought the 4th accused was there. Crown Counsel at this stage put the question, " You told the Magistrate that the 1st accused was one of the four men who came up ? ". Defence Counsel objected to the question and Crown Counsel dropped it. It will be noticed that the witness had already said that he could not remember whether the 1st accused was one of the four who came. The Court then intervened and examined the witness as follows :—

Q. You told the Magistrate that four people came and *one of them was the 1st accused. What you said in the lower Court, is that true ?*

A. Yes.

Q. If you told in the lower Court that the 1st accused was one of them, is that true ?

A. Yes.

This examination resulted in establishing that although the witness could not now remember whether the 1st accused was one of the four men who came, nevertheless, as he had spoken the truth before the Magistrate and as it now appeared that he had told the Magistrate that the 1st accused had been one of the four men who had come, it must follow that the 1st accused was in fact one of the four men.

The witness next spoke to the third occurrence of the day when the batch of eight men came to his house. Crown Counsel asked him if he could say whether any of the accused was among them. His answer was :—

"I was unconscious for several days. *I was able to point out only four* out of the twenty-four produced in Court."

The witness's answer, therefore, amounted to this, that although he had been in a position to point out at an antecedent date four out of the twenty-four men produced in the Magistrate's Court (there were only nineteen accused persons indicated at the trial) he was then not in a position to point out any. The Court thereupon again intervened and took up the examination :—

Q. You say eight people came up including an officer ?

A. Yes.

Q. Among the eight, *you said in the lower Court, was the 1st, 2nd and 17th accused. Is that what you said in the lower Court true.*

A. That is true.

Q. The 1st, 2nd and 17th accused are three who came with the eight ?

A. I was not able to identify clearly those eight people who came but I was able to identify the officer.

Q. Then what do you say about the statement you made in the lower Court that you identified the 1st, 2nd and 17 th accused ? Is that correct, incorrect, false or true ?

A. I cannot recollect having pointed out three out of the eight but I could remember generally that these three were present.

One effect of this examination, again, was to prove that the 1st, 2nd and 17th accused had come with the eight although the witness himself could not then say so but only because he had so stated to the Magistrate. Another and more conspicuous result was that the witness's attention was, if not improperly, at any rate unjustifiably, directed specifically towards three alone of the prisoners in the dock, thereby facilitating the concentration of the witness's evidence on them.

As stated earlier, other witnesses too were similarly examined by Court. It has been argued that the procedure adopted by the learned trial Judge tended very grievously to prejudice the accused. It cannot be emphasised too strongly that the crux of this case lay in the identification of the offenders rather than in the proof of facts establishing that offences were committed. The defence itself did not contest the fact of the perpetration of the crime, but what it did contest was that the prisoners on trial were not those responsible for it. The question of identification, therefore, assumed very large proportions indeed in the eyes of the defence and overshadowed from its point to view every other question in the case. Where, therefore, a witness was unable to identify any particular prisoner, the procedure adopted in examining the witness unwittingly tended to bring about the identification of that prisoner by an affirmation that the statement made by the witness identifying him before the Magistrate was true. It would be observed that no attempt was made to ask the

witnesses whether, although they may have identified certain prisoners before the Magistrate, they did in fact identify them there again, except that when such an attempt was made on one occasion, the witness (Bandahamy) proved himself unhelpful.

While it cannot be doubted that a Judge has very wide powers of asking any question he pleases in any form and at any time of any witness, we feel that those powers should not be so used as to afford ground for the legitimate criticism that the accused persons have not had the benefit of a trial which can be regarded as entirely fair. Had the learned Judge not himself pursued the question of identification at the stages at which he intervened, it is clear to see that Crown Counsel could not have taken the case beyond the stage of generalisations by witnesses of acts done not by any particular prisoner but by some unidentifiable and unidentified persons. The cross-examination then may have been able to consolidate the position of the defence to more effective purpose.

It would not be inappropriate to refer in this connection to a passage in the judgment of Garth C.J. in the case of *Noor Bux Cazi et al. v. The Empress* [1] :—

> "We find that on the examination in chief being finished the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective by assisting the witnesses to explain away in anticipation the point which might have afforded proper ground for useful cross-examination."

There is also another aspect of the matter: the deposition of a witness before the Magistrate can properly be used for the purpose of contradicting a witness and not for the purpose of corroborating him. In the case before us the depositions of the witnesses were not made use of either for the purpose of contradicting or corroborating the testimony given in Court. The witnesses were not asked whether they had made a particular statement to the Magistrate or not Had they been so questioned the witnesses would have been free to admit or deny having made such a statement or even plead lack of recollection on the point. But what really was done was to ask the witness whether a particular statement attributed to him as having been made by him to the Magistrate was true or not, thereby giving him no opportunity at all of admitting or denying that he had made the particular statement or pleading want of recollection. It is needless to say that a witness can hardly bring himself to the position of admitting that a statement made by him to the Magistrate was not true. The effect of this mode of formulating questions, therefore, was to let in at the trial the statements made by witnesses before the Magistrate as substantive evidence. It is hardly necessary to observe that there is no warrant in our law for incorporating the depositions taken by the Magistrate as part of the legally admissible evidence against a prisoner at his trial.

[1] *(1880) I. L. R. 6 Cal. 279.*

Learned Crown Counsel submitted that the procedure followed was intended to refresh the memory of the witnesses and was therefore justified in law. Section 159 of the Evidence Ordinance was relied upon. Commenting upon the corresponding section of the Indian Evidence Ordinance Woodroffe in his work [1] says :—

> "Here the writing is in the stricter sense used to refresh the memory, that is, *the witness has a present memory of the facts* after the inspection of the writing. In this case the document is resorted to *to revive a faded memory and* the witness swears from the actual recollection of the facts which the document evokes. Memory is, in other words, restored."

Apart from the difficult questions whether depositions made a month at the earliest after the event and whether a deposition which is not read over by the witness but read to him can be regarded as falling within the ambit of this section, it is manifest, in view of what has been said already, that here the depositions before the Magistrate were not used to revive a faded memory but for an altogether different purpose. Besides it is essential not to lose sight of the fact that in a trial before a Jury the reading out of the deposition makes the contents thereof available to the Jury, while if the section is adhered to in the light of its proper construction, the witness can only be permitted to look at the document himself and then to state whether he recollects the facts or not. Further, as pointed out earlier, the depositions were made use of to enable witnesses to identify accused persons. One would have thought that the best possible method of refreshing the memory in such a case was to call upon the witness to look at the accused persons themselves and say whether the features of the prisoners evoke a response in the chords of their memory. But to read to a witness a passage in his deposition showing which of the accused persons he had identified earlier is not calculated to stimulate the memory at all. If a witness after looking at the men in the dock is unable to identify them, how can he by merely looking at (or being read to) a document which gives certain numbers, when those numbers do not even correspond to the numbers borne by them as they stand in the Court of trial, excite his memory as to the identity of the individuals ? In fact what was done in certain instances was to read the relevant statement in the deposition after making the necessary alteration therein after study of the numbers found in it, the names of the prisoners and the numbers they bore in Court, before putting it to the witness with a view to point to the witness correctly the prisoners whom he had purported to identify before the Magistrate. This process cannot by any means be said to be a method of refreshing the witness's memory. It is far removed from that. In reality it is a naked act *simpliciter* of telling the witness in a direct manner that he had pointed out the prisoners who are now pointed out to him in Court.

The case of *Queen v. Williams et al* [2] was also cited as lending support to Crown Counsel's proposition. In that case a prosecution

[1] *Evidence : 9th ed. p. 1029.*

[2] *(1853) 6 Cox 343.*

witness made a statement in examination in chief inconsistent with what he had previously sworn at the inquest before the Coroner. Counsel for the Crown showed him his deposition to refresh his memory and on repeating the question the witness adhered to the statement he had already made in Court. Thereupon the question was repeated in a leading form. Objection taken by defending Counsel to the form of the question was disallowed by Court. It will be seen that firstly the deposition made use of was one made at the inquest and therefore very probably within twenty-four or forty-eight hours of the commission of the offence, secondly the witness had already made a statement inconsistent with his previous deposition before the deposition was permitted to be shown to him, thirdly the question in its original form was repeated after the witness had perused the deposition, fourthly, after the witness continued to persist in contradicting the deposition, it was that the question was allowed to be put in a leading form. Not a single of these several steps was taken in this case and what is more the witness was made to adopt or treated as adopting the statement attributed to him. This case is therefore of no assistance to the Crown at all.

The question must now be considered as to what the effect of letting in this evidence was or would have been on the Jury. In his charge to the Jury in dealing with this subject, the learned trial Judge directed them as follows :—

> " Then, gentlemen, you will have to go on the evidence which is given in this Court. If a man says ' I did not make a statement at another place ' although it is proved to your satisfaction that he did make it, that is not substantive evidence on which you can act. You cannot say ' The man said such and such a thing there. We will take that as evidence in this case.' You cannot do that ".

The learned Judge, however, did not point to the Jury what the position was in regard to the statements *said* to have been made by witnesses before the Magistrate but which were not *proved to have been so made by them* nor even indeed as to what the effect was *even if so proved in the absence of affirmative evidence in Court on the part of the witness reiterating the statement alleged to have been made before the Magistrate.* In the absence of a direction on this point the Jury may very well have taken the view that all the statements incriminating the various accused persons and alleged to have been made before the Magistrate and declared by the witnesses at the trail to have been made truthfully by them was evidence which they could properly take into consideration against the prisoners in arriving at their verdict. In fact it will be very difficult to say with any degree of confidence that such an impression may not have been formed by the Jury, especially when one bears in mind that it was not a lone witness who gave evidence in that manner but sereval of them and no words of caution were addressed to them not to treat as evidence in the case the statements which were alleged to have been made before the Magistrate. In this view of the matter the majority of the Court are unable with any degree of certitude to

say that the verdict of the Jury may not have been based upon illegal and inadmissible evidence. The convictions cannot therefore be sustained.

There is also considerable force in the argument that the verdict cannot be sustained having regard to the evidence in the case. It will be convenient to deal with the case of the appellants in the reverse order to that in which their cases were presented.

To take the case of the 18th accused first, the evidence against him is said to be that of Podiappuhamy and Ausadahamy. Podiappuhamy's evidence clearly establishes that he was one of those who had come up in the group of eight men with the officer. It is to be noted that the indictment does not refer to what has been termed the third occurrence, for in fact at that stage no offence was committed. Podiappuhamy, it is true, did state that the eight men "got together along with those who came and partook in the assault along with the other". However, he expressly states that he noticed no weapons in the hands of anyone of the eight and that he did not see any of them whom he identified actually taking part in the assault. Ausadahamy died before trial and his deposition before the Magistrate was read in evidence as part of the case for the Crown. He also says that the 18th accused was one of those who came with the officer. He further says that the eight men joined the crowd that came rushing up but he himself does not say that the men with the officer did anything themselves.

Learned Crown Counsel also pointed out that the witness Kiribanda incriminated the eight persons who came with the officer. This witness said that the overseer, meaning thereby the officer, stretched out his hand and said, "Ha, Ha," but instead of paying heed to the overseer the eight men rushed at Bandahamy. This is a very general statement and in view of the evidence that not one of the eight men was armed and that it was the crowd that came thereafter that was armed with clubs and stones, it is not possible to attach very great weight to this witness's testimony to the extent of letting it override the other evidence in the case. Taken as a whole the evidence against the 18th accused does amount to no more than proving that he was one of those who had accompanied the officer, and discloses at best no more than a case of suspicion.

To turn to the case of the 16th accused, it is said that Ausadahamy brings home guilt to him. Ausadahamy identifies him as one of those who came with the officer and, as already stated, beyond his statement that the men with the officer joined the crowd, there is nothing to indicate that the 16th accused or any of the other did anything at all. It must also ne noted that Ausadahamy, although he purported to identify the 16th accused on the first day he gave evidence before the Magistrate, in cross-examination at a later date would not identify him. Ausadahamy also failed to identify the 16th accused at the identification parade held soon after the incident by Inspector Jonklaas. Ukkuamma is another witness upon whose testimony a certain amount of reliance is placed but her evidence, in accepted, contradicts that of Ausadahamy and goes only to show that the 16th accused was one of the three men who went up to the

well at the time of the first incident and was not seen thereafter. The case against the 16th accused is weaker even than that against the 18th accused.

The case against the 7th accused is also unsatisfactory. The only witness who identifies him is Rambanda. At the date this witness gave evidence he declared his age to be fifteen years. At the date of the offence, therefore, he must have been a lad of eleven or twelve years. His evidence, placing upon it the greatest weight one can, shows that he saw the 7th accused among the crowd of two hundred people who came throwing stones and waving clubs. He does not specifically state that the 7th accused was armed himself nor that he did any specific act. There is no other evidence which touches him. The majority of the Court think it quite unsafe to base a conviction on the uncorroborated testimony of a little boy who himself is not prepared to say any more than that he could only point out roughly the persons whom he saw. The qualifying epithet "roughly" cannot be ignored, and the possibility of a mistake cannot be entirely negatived.

The case against the 2nd accused may on first impressions appear to be stronger than that against the other appellants, but on a scrutiny of the evidence against him, it appears to be just as hollow as that against the others. Bandahamy's evidence is not referred to by the trial Judge as one that implicates the 2nd accused for good reasons. The witness purported to identify before the Magistrate the 2nd accused as one of the eight who came with the officer and his evidence is that he was one of those who assaulted him. Under cross-examination in the Magistrate's Court, however, at a later date, he resiled from the position that the 2nd accused had come with the group of eight men and took upon himself to say that he had come with the crowd of two hundred persons. This latter statement, it is obvious, is entirely incorrect in view of the other evidence in the case. If Bandahamy did identify the 2nd accused as one of the eight, it is impossible to believe that he could have made the mistake of saying that the 2nd accused came with the crowd. The question then arises whether any reliance can be placed on Bandahamy's identification or whether it is not more likely that Bandahamy, who had been severely assaulted and had received injuries on the head, himself did not see his assailant but on returning from hospital had received information from the other witnesses as to who his assailant or assailants were and hence his vacillation. To state the proposition in another form Bandahamy after seeing his assailant once was able to identify him but after seeing him twice he could not. Podiappuhamy says that *he saw Bandahamy being struck* but he is explicit in his statement that although he *identified the 2nd accused* as one of those who were there and had *come up with the group of eight with the officer* and asked for the release of the man who had been tied up, the 2nd accused as well as the other eight were unarmed and *that he did not see the 2nd accused assault anybody*. The boy Rambanda also identifies the 2nd accused as being among the group of eight that came with the

officer. This is common ground. He, however, expressly states that the 2nd accused assaulted Bandappu. I have already discussed the weight to be attached to this boy's evidence, and as his evidence is contradicted by Podiappu, I do not think any reliance can be placed upon his evidence. There are other witnesses who refer to the 2nd accused, for instance Dingiriamma, who says that he came with the first group of four and that he saw the 2nd accused speak to Bandahamy when he came with the group of four. This is obviously a case of mistaken identity. There is also the evidence of Kiribanda which, as has already been pointed out, is of a general character and which shows that the eight men took part in the assault which again is in the teeth of the evidence of other witnesses, notably of Podiappu himself. The 2nd accused's case is again one that in the view of the majority of the Court cannot be said to have been carried beyond the field of suspicion.

For these reasons too the majority of the Court think that the convictions of the appellants cannot be allowed to stand. The Court is unanimously of opinion that the convictions of the 16th and 18th accused should be set aside and the majority of the Court are of opinion that the conviction of the 2nd and 7th accused should also be set aside.

There remains for consideration the cases of the other prisoners who have been convicted and who have not appealed. We do not have powers to make any order in regard to them, such, for instance, as the Supreme Court in its appellate jurisdiction possesses, to act by way of revision in regard to accused persons who have not appealed. But we have power to extend the time if application for leave to appeal is made to us. See the case of *Mary Priestley* [1]. We can only indicate, which the majority of us do now, that should the other prisoners apply for leave to appeal notwithstanding lapse of time we would be prepared to consider their applications.

Appeals allowed.