

1943

Present : Moseley A.C.J.

THE KING *v.* DASSENAYAKE.

903—M. C. Jaffna, 20,046.

Statement to Police Officer—Complainant cross-examined on statement—Statement put in by Police Officer in course of evidence for defence—Criminal Procedure Code, s. 122 (3).

Where a complainant was cross-examined on a statement made by him to a Police Officer in the course of his investigation to the offence in order to show that his evidence was contradictory of his statement and where the entire statement was put in by the Police Officer in the course of his evidence for the defence.

Held, that the Court was entitled to take the statement into consideration in deciding whether the story of the complainant was substantially true.

The King v. Davith Singho (37 N. L. R. 313), followed.

A PPEAL from a conviction by the Magistrate of Jaffna.

H. V. Perera, K.C. (with him *C. S. Barr Kumarakulasingham, U. A. Jayasundera, F. W. Obeysekere* and *H. W. Jayewardene*), for the accused, appellant.

S. J. C. Schokman, A.S.-G., (with him *T. S. Fernando, C.C.*), for the complainant, respondent.

Cur. adv. vult.

June 9, 1943. MOSELEY A.C.J.—

The accused-appellant, an Inspector of Police, was charged with the following offences :—

- (1) Causing hurt ;
- (2) Wrongful confinement ;
- (3) Wrongful confinement ; and
- (4) Causing grievous hurt.

Each offence was alleged to have been committed towards the person of one Kathiravelu, a barber, who had come to reside in Jaffna a week or two before the date of the alleged offences which it is said were committed

in the course of the same transaction. The appellant was convicted on charges 1, 2, and 4. The medical evidence disclosed that hurt and grievous hurt had been caused and it was admitted by the appellant that he had tied Kathiravelu up in the manner alleged by the latter. The points for decision were:—were the injuries inflicted by the appellant in the circumstances affirmed to by Kathiravelu and was the confinement wrongful?

The story told by Kathiravelu was that he was invited to the house of the appellant by a boy named Kulasekera, a servant of the appellant, to see a female inmate of the house, and that as he approached the gate he was seized by the appellant who dragged him into the compound, tied him to a pillar, and there and then assaulted him, taking him later to the shore of the lagoon where he was further ill-treated, stripped and thrown into the water. The appellant's version, on the other hand, was that he had found Kathiravelu at about 10 P.M. seated on the boy's mat at the back of the house, that the man attempted to run away, that he had chased the man, caught him and struggled with him, that in the course of the struggle the man must have sustained the injuries found by the medical witness, and that he tied the man to the pillar in order to detain him pending the receipt of instructions from A. S. P. de Zoysa to whom, or to whose house, the appellant had telephoned asking the A. S. P. to come to the spot. He had apparently assumed that Kathiravelu had come to the house to have improper relations with the boy since, he was told, he says, by Kathiravelu that the boy had invited him there and he had given the boy 25 cents. I would observe here that the medical witness, who examined Kathiravelu nearly four days after the incident found twenty-one distinct injuries, most of them trivial, the only serious one being the fracture of a rib. His opinion, briefly, was that all the injuries were consistent with the story of a struggle as related by the appellant. His evidence, therefore, was of no great value to the Magistrate when he came to consider the credibility or otherwise of the respective versions. In this connection, however, it is worthy of mention that the appellant at 11 P.M. that night made an entry in the Information Book at the Police Station in which he omitted to mention that he himself had received any injuries in the course of a struggle which, according to him, lasted two or three minutes. In the course of his evidence he stated that the injuries were too trivial to mention. If this be a fact, it seems strange that Kathiravelu sustained so many injuries, albeit most of them trivial, in the course of the same struggle.

The trial proceeded on November 10, 11, 12, 13, and 16. On the last day the evidence of four witnesses for the defence, including that of Inspector Rodrigo was recorded, after which the Magistrate called P. C. Thambirajah for the purpose of producing the first statement made by the injured man, after which counsel for the defence addressed the Court and judgment was delivered forthwith. These details have some bearing upon the case in view of certain criticisms made by Counsel for the appellant.

The learned Magistrate, in the course of recalling the story put forward by Kathiravelu, referred to the statement made by Kathiravelu to P. C. Thambirajah, which I think I may say was, during the argument,

admitted to be the first information given to anyone in authority that an offence had been committed. He found that that "statement as well as the statement as recorded by Sub-Inspector Rodrigo who went to the Nayamakadu Hospital on the night of August 23, 1942, after the injured man was examined by Police Constable Thambirajah are, as regards the main details, substantially the same as the story narrated to Court by the injured man. The injured man himself was not examined by the Magistrate until after a petition was presented by the wife of the injured man to the Magistrate stating that he was on the point of death. The Magistrate then proceeded to the Nayamakadu Hospital and recorded the deposition of the injured man, who was then considered to be in a serious condition, on September 8, 1942. His statement to the Magistrate as then recorded, probably as a dying deposition, I find, is substantially the same as regards the main incidents as the story which he had placed before the Court.

The statements referred to were before the Court and are marked as follows :—

A. 4 Notes of Sub-Inspector Rodrigo,

X. 1 Statement of Kathiravelu recorded by Police Constable Thambirajah,

while the deposition referred to was recorded by the Magistrate who subsequently commenced non-summary proceedings, which were properly abandoned in favour of summary proceedings before the Additional Magistrate.

The main objection of Counsel for the appellant is that the Magistrate acted improperly in using these statements to corroborate the evidence of Kathiravelu on the ground that A. 4 and X. 1 are statements made to a public officer in the course of an investigation and may, therefore, as provided by section 122 (3) of the Criminal Procedure Code, be used only to prove that a witness made a different statement at a different time, or to refresh the memory of the person who made such a statement. The objection has no substance as regards X. 1 since, as I have already indicated, it is now conceded that X. 1 is the first information given to the police and may therefore be properly used to corroborate the evidence of the person who made it. In regard to A. 4, Kathiravelu was cross-examined extensively in regard to what he had told Sub-Inspector Rodrigo. When the latter gave evidence on the last day of the trial, he produced a certified copy of the statement made to him by Kathiravelu whereupon the learned Magistrate made the following note :—“I indicate to Counsel for the defence that in so far as he refers to recorded statements made by this witness for the purpose of showing that the injured man made statements different to the statements made by him in Court, those statements as recorded are admissible in evidence in terms of section 122, sub-section (3), of the Criminal Procedure Code. Those statements are marked A. 4. I point out to Counsel for the defence that if those statements are produced to show that they are contradictory, the entire statement as recorded should be put in evidence, as otherwise it would be impossible for the Court to find out whether they are in fact contradictory, unless the Court has before it the entire statement as

recorded by him. The entire recorded statement is allowed to go in for the limited purpose of merely ascertaining whether the passages relied on by the defence as contradictory statements are in fact contradictory or not. The fact that the entire statement is marked would not entitle the prosecution to rely upon other statements in it for the purpose of proving those statements as corroborative evidence of the evidence given by the injured man in Court. I mark the entire "statement A. 4". I do not find it easy to believe that a Magistrate sufficiently careful to direct himself on this point in such detail and so correctly could, *in the course of the same day* have so far have forgotten his direction that he could bring himself to act in direct opposition to the principle he had expounded. I prefer to believe that what the Magistrate meant to say was that notwithstanding the discrepancies between the evidence given by Kathiravelu and his statements made on the several previous occasions, he was satisfied that his story was substantially true. A similar point was raised in *The King v. Davith Singho*¹ in which statements of witnesses recorded by a Police Officer under section 122 (1) were admitted for the purpose of contradicting them and were read *in toto* to the jury. The jury were told by the trial Judge that "they were entitled to take into consideration the statements made by these witnesses at the investigation made by the Sub-Inspector of Police in order to decide for themselves whether or not they were prepared to believe the evidence given by the witnesses during the trial". Dalton J. (Akbar and Poyser JJ. agreeing) was of opinion that the direction was correct. In the present case the Magistrate seems to have, in effect, directed himself on similar lines.

These observations apply, though perhaps not to the same extent, to the deposition made by Kathiravelu to Mr. Fernando in the hospital. That deposition was not, however, before the trial Magistrate, except in so far as the cross-examination of Kathiravelu upon it. In view of what I have presently to say, I do not think the mind of the Magistrate can have been seriously influenced by a consideration of the statements and the deposition.

It must be conceded that the story told by Kathiravelu cannot in certain details be reconciled with those put forward by Kulasekera, Lewis, and Velupillai, all servants of the appellant, who claim to have been eye-witnesses of some part of the incident. In this connection it may be said that it would not be unnatural for them to be swayed by conflicting inclinations, on the one hand to give a correct version of the incident, on the other, if necessary, to put things in the best possible light for their employer. Moreover, they had been questioned by Mr. Rodrigo in the presence of the appellant who "asked them leading questions" and over whom Mr. Rodrigo "was powerless to exercise any authority, he being a senior officer". They had also been closely questioned by Mr. Bromley who had gone to Jaffna to inquire into the matter. It would not be surprising if these witnesses, whose ages range from 12 to 17, became somewhat muddled.

The learned Magistrate was satisfied that Kathiravelu had "not told the whole story to the Court", but the Magistrate found it not unnatural that he should be unwilling to disclose facts which did not redound to his

¹ 37 N. L. R. 313.

credit. Nevertheless the conviction grew upon him that the man was speaking the truth. I feel strongly that I would have arrived at the same conclusion. It was suggested that the prosecution is the result of a plot fabricated in the mind of a local proctor. The evidence of such independent witnesses as Edwards, who says he overheard the appellant speaking to someone at the bungalow of the A. S. P., and Eliyathamby, a fisherman who says that he found Kathiravelu on the beach, in the condition described by the latter, make such a suggestion difficult to entertain.

On the other hand there are several features in the defence version which have not been satisfactorily explained. Why should a police officer of the standing of the appellant, who considers that an offence (criminal trespass) has been committed on his own premises, and who has caught the offender in the act, deem it necessary to communicate with an A. S. P. before taking action? Why, when he learned that A. S. P. de Zoysa was not in the bungalow, did he not consult A. S. P. Jilla, who appears to have answered the telephone, instead of leaving a message asking Mr. de Zoysa to come to the spot? Why did the appellant and Mr. de Zoysa, two experienced officers, take it upon themselves to release the man who had been apprehended in the commission of an offence? Why did the appellant, with or without the advice of Mr. de Zoysa, deem it necessary to make the entry in the Information Book to which I have referred above? In the absence of credible answers to these questions, it is not surprising that the Magistrate found it proved that "the boy Kulasekera did communicate to his master on the noon of August 21, 1942, that a stranger had made inquisitive inquiries from him and had made certain improper suggestions as well which concerned a lady of the house". No doubt it was that communication which led the appellant to lie in wait for Kathiravelu and handle him as it is alleged by the latter that he did.

The learned Magistrate gave, as he said, his most anxious consideration to the evidence, being fully conscious of the grave consequences to the accused which would follow from a conviction. He found that the evidence proved the guilt of the appellant beyond doubt. Having given the case the same consideration I am, as I have already indicated, in entire agreement with that conclusion. The appeal is dismissed.

Affirmed.
