[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Soertsz and Keuneman JJ.**

THE KING *v.* JAMES SINGHO AND WIJEMANNE

31—M. C. Panadure, 10,635

Police Headman—Statement made to Police Headman—Not an inquirer or Police Officer within the meaning of Criminal Procedure Code, s. 122 (3) —Failure of accused to disclose defence—Comment by trial Judge.

A Police Headman is not a Police Officer or inquirer within the meaning of section 122 (3) of the Criminal Procedure Code.

In this case the defence of the accused was an *alibi* and the learned Judge in his charge said—"third accused himself when questioned in the lower Court said 'I am not guilty'. So the Crown did not know what his actual defence was going to be".

The latter statement was not accurate as it appeared from the cross-examination of the headman that the third accused told him that he was at his well in his garden when he heard cries and went up to the scene of the offence.

***Held*, that the misdirection was of such a character that the conviction could not be allowed to stand.**

***Held, further*, that it was a proper direction to a jury in such a case to take into consideration that the accused had mentioned other persons who were in a position to support his *alibi* and that those persons had not been called.**

APPEAL from a conviction before a Judge and Jury at the 2nd Western Circuit.

M. T. de S. Amerasekere, K.C. (with him *Siri Perera* and *H. W. Jayawardene*), for accused--appellants.—The trial Judge should not have commented adversely that the second and third accused failed to disclose their defence before the Magistrate. The question of non-disclosure of the defence at the earliest opportunity was considered in *R. v. Don Robert* alias *Beera*[1] where the English cases of *Naylor*[2], *Littleboy*[3], *Parker*[4], and *Smith and Smith*[5] were discussed. Material prejudice was caused to the appellants by the damaging statement in the summing-up that they had not disclosed their defence of *alibi* at the very outset and that they did not call witnesses to establish it. In the case of the third accused in particular the comment of the Judge was not warranted in fact because he had mentioned to the Police that he was bathing at the well with Piloris. The Judge should have ascertained this fact from the Information Book. *Smith and Smith* (*supra*) is directly applicable to the facts of this case.

The admission of the statement made by the witness Gunapala to the headman was contrary to the provisions of section 122 (3) of the Criminal Procedure Code. A police headman is a police officer. See *Hamid v. Karthan*[6]; *Vidane Arachchi of Kalupe v. Appu Sinno*[7]; *Baby Nona v. Johana Perera*[8]; *Binduwa v. Suriya*[9].

[1] *(1940) 42 N. L. R. 73.*
[2] *23 Cr. App. R. 177.*
[3] *24 Cr. App. R. 192.*
[4] *24 Cr. App. R. 2.*
[5] *25 Cr. App. R. 119.*
[6] *(1917) 4 C. W. R. 363.*
[7] *(1921) 22 N. L. R. 412.*
[8] *(1937) 8 C. L. W. 65.*
[9] *(1926) 7 C. L. Rec. 175.*

E. H. T. Gunasekera, C.C., for the Crown, called upon to address on the first ground of appeal only.—The silence of the accused in the Magistrate's Court may be employed as a test of the truth of the defence which he puts forward at the trial, and comment may properly be made provided that it is made with care and fairness to the accused—*R. v. Don Robert* alias *Beera* (*supra*).

There is a great difference between using the silence of the accused as evidence against him and using it to test the weight of the defence—*Littleboy* (*supra*).

The cases of the second and third accused should be considered separately.

[HOWARD C.J.—We do not want to hear you with regard to the second accused.]

With regard to the third accused, his only words to the Magistrate were "I am not guilty". It cannot be said that the Crown was thus informed of the defence which would be put forward at the trial. Nor did the accused mention in his evidence at the trial that he had disclosed his defence earlier. It has, however, to be conceded that the Crown was not taken by surprise by the defence in view of the fact that the accused had mentioned about it to the headman and the Police.

M. T. de S. Amerasekere, K.C., replied.

Cur. adv. vult.

July 7, 1941. HOWARD C.J.—

Two grounds of appeal have been raised by Mr. Amerasekere on behalf of the appellants in this case. These grounds are set out in the notice of appeal as follows :—

(*a*) That the trial Judge should not have commented to the Jury on the failure of the petitioner to disclose his defence at the inquiry before the committing Magistrate;

(*b*) That the trial Judge erred in law in permitting the statement made by the witness Gunapala to the headman to be led in evidence.

With regard to ground (*b*) it is contended that the statement made by Gunapala to the headman was a statement made to a Police Officer or inquirer under Chapter XII. of the Criminal Procedure Code and in view of the provisions of sub-section (3) of section 122 could not in spite of the provisions of section 157 of the Evidence Ordinance be given in evidence. Various cases were cited by Mr. Amerasekere in supposed support of this contention. None of them, however, are material. In *Baby Nona v. Johana Perera*[1] it was held by Soertsz J. following *The King v. Kalu Banda*[2], which was also cited, that a statement which was a confession made to a Police Headman was inadmissible in evidence by reason of section 25 of the Evidence Ordinance. Moreover in *Vidane Arachchi of Kalupe v. Appu Sinno*[3], a confession made to a Mudaliyar was for the same reason held to be inadmissible. These decisions are authority for the proposition that, in so far as section 25 of the Evidence Ordinance is concerned, a Police Headman is in the position of a Police Officer. They are not, however, authorities for the contention that a Police Headman is a Police

[1] *8 C. L. W. 65.* [2] *22 N. L. R. 412.* [3] *15 N. L. R. 422.*

Officer for the purposes of section 122 (3) of the Criminal Procedure Code. In that sub-section the use of a statement "made by any person to a Police Officer or an inquirer in the course of any investigation under this Chapter" is prohibited except under certain conditions. The headman in this case had not been appointed an inquirer under the provisions of section 120. To be a "Police Officer in the course of an investigation under this Chapter" he must by virtue of section 121 (1) have been an officer in charge of a police station who keeps an "Information Book". It is impossible in these circumstances to contend that the Police Headman was such a person or that he was conducting an investigation under Chapter XII.

Ground (*a*) has received our most careful consideration and with particular reference to various English authorities to which our attention has been invited. In this connection we have examined the case of each appellant separately. With regard to the second accused the passage in the charge to which exception is taken is phrased as follows :—

> "He says he was never at this scene. Of course, if you accept his statement that he was in Somapala's boutique at this time, then that clearly proves that he could not have been here at this scene. Ask yourselves whether you are prepared to accept that statement or even to say that his evidence creates a reasonable doubt in your minds as to the truth of Gunapala's statement. These accused in the Magistrate's Court are asked when the case for the prosecution is closed, whether they wish to say anything. It is not binding on them to say anything but they are given the opportunity of saying anything. What he stated then was, 'I am not guilty'. He did not mention any of the witnesses. He did not mention anyone as a witness who will prove his innocence. Of course a man cannot be punished because he does not come out with his defence in the lower Court or does not mention his witnesses. But when he makes this statement here that he was in Somapala's boutique at the time, that there were four or five others, but does not summon them as witnesses, those are matters which you may take into consideration in considering how far you can act on that evidence he gives here. If in spite of all that you are prepared to accept his evidence, then, of course, his evidence cuts at the very root of the case for the prosecution against him and he is entitled to an acquittal."

Reading this passage as a whole, we are of opinion that the learned Judge wanted the Jury, when considering what weight could be attached to the evidence of the second accused, to bear in mind that, although he has said he was at the time of the commission of the offence in Somapala's boutique and that there were four or five others there at the same time, yet he has not summoned those persons as witnesses. We do not consider that the passage to which I have referred goes further than this. Nor does it invite the Jury to draw an adverse view of his evidence from the fact that he did not disclose his defence in the lower Court. It was, however, quite proper for the learned Judge to point out to the Jury that the second accused had mentioned that other persons were in a position to support his *alibi* and to take into consideration

when considering his defence that those persons had not been called to give evidence. We are, therefore, of opinion that there is no substance in ground (*a*) so far as the second accused is concerned and his appeal is dismissed.

With regard to the third accused, the passage in the charge to which exception is taken is phrased as follows :—

"As for the statement of the accused, do you accept his evidence? Does that evidence even create a reasonable doubt in your minds as to the truth of Gunapala's statement? If it does create a reasonable doubt give the benefit of the doubt to the accused and acquit him. But does it create a reasonable doubt? That is the question you must ask yourselves.

I might say that a reasonable doubt is not any kind of doubt. It must be such a doubt as would influence you in the more important matters of your life. Does this evidence of the third accused create that amount of reasonable doubt in your minds as to the truth of the evidence given by Gunapala?

The third accused himself when questioned in the lower Court said 'I am not guilty'. So, the Crown did not know what his actual defence was going to be. He comes here and says that he was at the well bathing. He says Piloris was there bathing with him. (That Piloris would be a very material witness in the case.) Well again the fact that he did not say that in the lower Court and the fact that he did not call Piloris here do not necessarily prove his statement here that he was bathing at the well is untrue. I suppose as reasonable men you will think that these are matters which are worth considering when you are deliberating as to the verdict you should reach."

In this passage the learned Judge invited the Jury, when considering their verdict and in particular whether the statement of the third accused created a reasonable doubt in their minds as to the truth of Gunapala's evidence, to bear in mind (*a*) that he did not say in the lower Court that he was at the well bathing with Piloris and (*b*) that he did not call Piloris as a witness. We think that the comment with regard to (*b*) was quite proper and no exception can be taken to it. With regard to (*a*) it must also be borne in mind that the learned Judge has also said that "the third accused himself when questioned in the lower Court said 'I am not guilty'. So, the Crown did not know what his actual defence was going to be". This latter statement is not accurate inasmuch as it appears from the cross-examination of the headman that the third accused told the latter that he was at his well in the garden when he heard cries and went up to the scene of the offence. The information book also disclosed this fact and Crown Counsel has confirmed it that the Police were informed by the third accused that he was bathing at the well and Piloris was with him. The question that arises for our decision is whether in view of this comment by the learned Judge on the failure of the third accused to disclose his defence when charged in the lower Court coupled with the inaccurate statement that the Crown did not know what his defence was going to be, the conviction can be allowed to stand. Mr. Gunasekera has argued that the statement with regard to the

knowledge of the Crown was accurate as until the third accused gave evidence in Court his defence was not known. We cannot accept this argument as the Jury would obviously understand this statement to mean that the third accused had not until his trial made mention of the fact that he was at the well. The English authorities were considered by this Court in *R. v. Don Robert* alias *Beera*[1] when it was held that there was no misdirection in the Judge, whilst pointing out to the Jury that the accused had failed to disclose his defence before the Magistrate, proceeding to state that it was not obligatory upon the accused to say anything and that his failure to do so did not mean that the defence put forward at the trial was false. In his judgment in this case Moseley S.P.J. distinguished it from *R. v. Smith and Smith*[2] from the fact that in the latter case the prisoners, whilst maintaining silence before the Magistrate, had each previously given his answer to the Police and that answer was before the Court. It, therefore, could not be said that the defence of the prisoners in *R. v. Smith and Smith* (*supra*) was belated. In *R. v. Littleboy*[3] the principle laid down in *R. v. Naylor*[4] was explained and it was stated that it was not intended to lay down the proposition that a Judge may not, in a proper case, comment on the fact that the defence has not been disclosed on an earlier occasion. Observations, however, upon the failure to disclose a defence at some date earlier than the trial have to be made " with care and with fairness to the accused in all the circumstances of the case ". The law was still further clarified in *R. v. Smith and Smith* (*supra*) where Singleton J. in giving the judgment of the Court stated as follows :—

"Further, in one passage of the summing-up, the Acting Deputy Chairman said : 'Then again, when they were before the Magistrate, when they were asked if they had anything to say, they had an absolute defence if it is true : 'I never received these things, they have never been in my possession except as a bailee. I let the premises to those people to store the things for four shillings . . . . not a word was said'. That follows a passage in which he had pointed out that not a word had been said by Smith, junior, when he was seen by the Police Officer. According to the evidence given by smith junior, at the trial, a great many words had been said, and he had told the officer what had happened. Having commented inaccurately on that part of the case, the Acting Deputy Chairman proceeded to tell the Jury that both prisoners had said nothing when they were before the Magistrate. They were entitled to say nothing. Each had given his answer to the Police, and each was represented at the Police Court. The fact that they said nothing at that stage ought not to have been used against them in the summing-up. We think that there was a misdirection in that respect also.

On all these grounds we feel that there is no course open to this Court except to allow the appeals and quash the convictions of both appellants.".

We find ourselves unable to distinguish the present case from that of *R. v. Smith and Smith* (*supra*). In both of them the summing-up made it

[1] *42 N. L. R. 73.*
[2] *25 Cr. App. R. 119.*
[3] *24 Cr. App. R. 192.*
[4] *23 Cr. App. R. 177.*

appear to the Jury that the first mention of the defence put forward by the accused was at his trial and therefore it was belated. To use the phraseology employed in Littleboy's case (*supra*) we do not think that the comment can be said to be fair to the third accused.

We have next to consider whether the misdirection was of such a character that the conviction cannot be allowed to stand. The case against the third accused was based on the evidence of Gunapala and the dying deposition of the deceased. It was not one of overwhelming strength. Moreover the fact that the third accused appeared on the scene in the circumstances deposed to by the witness Prematilleke and that the latter deputed him to inform the headman of what had occurred, lend weight to his plea of innocence. The case against the third accused on the whole of the evidence cannot, therefore, be regarded as particularly strong. It is in these circumstances impossible to say what effect the misdirection in the summing-up had on the minds of the Jury. The appeal must, therefore, be allowed and the conviction and sentence of the third accused quashed. We do not think that this is a case in which a new trial should be ordered.

Conviction of 3rd accused quashed.
Conviction of 2nd accused affirmed.