

1964

*Present : Tambiah, J.*

R. P. KANDIAH and 2 others, Appellants, and S. I. POLICE,  
NORTON BRIDGE, Respondent

*S. C. 85-87/64—M. C. Hatton 7,876*

*Criminal procedure—Summary procedure—Charge—Different offence of attempt disclosed in course of proceedings—Duty to frame fresh charge—Criminal Procedure Code, ss. 152 (3) 193 (1).*

*Evidence—Witness—Indivisibility of credibility—Corroboration.*

Where, in a prosecution for an offence triable summarily, the accused is found guilty of having attempted to commit the offence with which he is charged, the Magistrate must, under section 193 (1) of the Criminal Procedure Code, frame a fresh charge before he can convict the accused of attempting to commit the offence.

It is not permissible, in a criminal case, to disbelieve a witness on a material point and, at the same time, believe him on other points without corroborative evidence.

**A**PPEAL from a judgment of the Magistrate's Court, Hatton.

*Colvin R. de Silva*, with *M. T. M. Sivardeen*, for 1st to 3rd accused-appellants.

*D. S. Wijesinghe*, Crown Counsel, for the Attorney-General.

March 13, 1964. TAMBIAH, J.—

The appellants were charged on the following counts :—

- (1) The first accused did cheat by personation T. Vythilingampillai of Lonach Division by pretending to him that he was a " Price Control Inspector " and did thereby dishonestly induce the said T. Vythilingampillai to deliver him a sum of Rs. 1,500, to avoid a prosecution and thereby committed an offence punishable under section 402 of the Penal Code, Chapter 19 L.E.C.
- (2) At the time and place aforesaid and in the course of the same transaction the 2nd and 3rd accused did cheat by personation T. Vythilingampillai of Lonach Division by pretending to him that they were officers of the C. I. D. and did thereby dishonestly induce the said T. Vythilingampillai to deliver a sum of Rs. 1,500 to the 1st accused and thereby committed an offence punishable under section 402 read with section 32 L.E.C.
- (3) At the time and place aforesaid and in the course of the same transaction the abovesaid 1st, 2nd and 3rd accused did attempt to commit extortion by putting T. Vythilingampillai of Lonach Division in fear of injury to his reputation by prosecuting him under the Food Control Act for possession of imported

rice and in such attempt did do an act towards the commission of the offence of extortion to wit by demanding that a sum of Rs. 1,500 be paid to the 1st accused to avoid the prosecution under the Food Control Act and thereby committed an offence punishable under section 373 read with section 490 and section 32 of the Penal Code, Chapter 19 L.E.C.

- (4) At the time and place aforesaid and in the course of the same transaction the abovesaid 2nd accused did commit theft of cash Rs. 59 from the drawer of T. Vythilingampillai's boutique, property in the possession of the said T. Vythilingampillai and thereby committed an offence punishable under Section 369 of the Penal Code.
- (5) At the time and place aforesaid and in the course of the same transaction the abovenamed 2nd and 3rd accused did commit theft of 2 bags of country rice valued at Rs. 125, 6½ lbs. of imported rice valued at 81 cts. and 12½ lbs. of white country rice valued at Re. 1.62 cts. all to the value of Rs. 127.21 from the boutique of T. Vythilingampillai and thereby committed an offence punishable under section 369 read with section 32 of the Penal Code, Chapter 19 L.E.C.
- (6) At the time and place aforesaid and in the course of the same transaction, the abovenamed 4th accused did aid and abet the 1st, 2nd and 3rd accused in the commission of the offence of cheating by personation T. Vythilingampillai of Lonach Division by pretending to him that the 1st accused was the Price Control Inspector and the 2nd and 3rd accused were from the C.I.D. and dishonestly induce the said T. Vythilingampillai of Lonach Division to deliver a sum of Rs. 1,500 to the 1st accused which said offence was committed in consequence of such abetment and thereby committed an offence punishable under section 102 read with section 402 of the Penal Code, Chapter 19 L.E.C.

After trial the learned judge convicted and sentenced them to various terms of imprisonment. The learned judge, after trial, found that the charges on counts 1 and 3 have not been proved against the 1st and 2nd accused, but he proceeded to convict them for attempting to commit the offences set out in counts 1 and 2 without framing charges and giving an opportunity to the accused to defend themselves. The learned Magistrate assumed jurisdiction under section 152 (3). Thereafter it was incumbent on him to follow the procedure set down in Chapter 18. Section 193 (1) enacts in categorical terms, that the Magistrate must frame a fresh charge if he wanted to convict the first and second accused for attempting to commit the offences set out in counts No. 1 and 2. I am further strengthened by the ruling in *Rankira v. Sergeant Schulling*<sup>1</sup>,

<sup>1</sup> (1949) 41 C. L. W. 27.

in which a similar view was expressed by Wijeyewardene, C.J. Therefore the convictions of the 1st accused on counts 1 and 3 and the 1st accused and 2nd accused on count No. 2 have to be set aside.

Dr. Colvin R. de Silva further contended that on the facts and the findings the conviction on the other counts cannot stand. The whole case rested on the evidence of one Vythilingampillai, a boutique keeper, who stated that the 1st accused came and posed as a Food Control Inspector and the 2nd and 3rd accused posed as C. I. D. officers and deprived him of two bags of rice and relieved him of Rs. 59. He said in the course of the evidence that when this alleged incident took place a number of people were present in the boutique, but it is strange that not one of them was called in order to support his evidence. Vythilingam further stated in the course of evidence that after the accused had left the boutique with the articles and the money the Thalavar had come and he made a complaint to the Thalavar and thereupon the Thalavar, with the assistance of others, arrested the accused and kept them in the boutique till the Police came. If this be true one would expect the Thalavar to be called as a witness but it is strange that he was not called.

The case, however, does not rest there. Vythilingampillai made a statement to the police, marked D1. His version in Court differs materially from the statement he has made to the police. In the course of his judgment the learned Magistrate observes: "Vythilingam's evidence undoubtedly is contradicted on many points by the first information he gave to the police marked D1". Then he states the various points on which Vythilingam's evidence is at variance with the statement made to the police. Having stated these discrepancies the learned judge observes that he does not think that Vythilingampillai is giving false evidence.

The learned Magistrate then proceeds to find corroboration to believe Vythilingampillai. He states in the course of his judgment that Vythilingampillai's evidence is corroborated by the evidence of Sivalingam to this extent, namely, that he had been sent by the accused to purchase some provisions from the complainant's boutiques as a decoy. The learned Magistrate disbelieves Sivalingam while he is dealing with the case against the fourth accused, but he states in the same breath that he thinks it safe to accept the evidence of Sivalingam when the latter said that it was the second and fourth accused who asked him to go and buy provisions. It is not permissible for a judge in a criminal case to disbelieve a witness on a material point and then believe him on other material points without corroborative evidence. In a criminal case a witness's credibility cannot be divided. This view of indivisibility of a witness's credibility is strengthened by the ruling in *Baksh v. Queen*<sup>1</sup>. The Privy Council observed as follows:—"Their credibility cannot be treated as divisible and accepted against one and rejected against the other." In *Queen v. Vellasamy*<sup>2</sup>, the Court of

<sup>1</sup> (1958) *Appeal Cases*, 162 at 172.

<sup>2</sup> (1960) 63 *N. L. R.* 265 at 270.

Criminal Appeal upheld the same view. Having stated that Sivalingam's evidence cannot be accepted against the fourth accused and also against the second and third accused the learned Magistrate then proceeded to say that he does not think that Sivalingam is a false witness. I regret I cannot follow the reasoning of the learned Magistrate in this case. His judgment is self-contradictory in certain matters.

The defence position is that the first accused, third accused and fourth accused had gone for a wedding from an estate to another estate where the boutique of Vythilingampillai is situated. It is the case of the defence that Vythilingampillai did not like the marriage between the first accused and one Mariyay's daughter. Therefore to prevent this marriage Vythilingampillai had got the first accused arrested on a false charge. The learned Magistrate in dealing with the defence states as follows :—“It may no doubt be true that the first to the fourth accused did come in connection with the marriage proposal of the first accused to Mariyay's daughter on this estate.” If I understand the judgment correctly the learned Magistrate takes the view that part of the defence version cannot be rejected. According to the evidence of Rupasinghe, the driver of the car in which these accused came on the day in question, the mother of the first accused was also in the car. It seems unlikely that if the second to the fourth accused had come to attend a wedding of the first accused, they would have committed this daring robbery, particularly, with the mother of the first accused in the car. In view of these infirmities it is unsafe to allow this conviction to stand. Therefore, I set aside the conviction on all counts and acquit the accused.

*Appeal allowed.*

---