[COURT OF CRIMINAL APPEAL]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Samerawickrame, J.**

Y. P. SETHUWA and 4 others, Appellants, *and*
THE QUEEN, Respondent

C. C. A. 96-100 OF 1968, WITH APPLICATIONS 144-148

S. C. 154/67—M. C. Kegalle, 65250

Trial before Supreme Court—Examination of a Crown witness—Judge must not perform functions of prosecutor—Opinion of Judge as to credibility of a witness—Duty of Judge not to express it during the examination of the witness.

At a trial before the Supreme Court, the Judge must not take on the examination of a prosecution witness in such a manner that the whole of his evidence incriminating the accused is elicited in answer to questions put by the Judge. In such a case, the Jury can scarcely resist the impression that the Judge is presenting the evidence of the witness as being evidence in which the Judge himself has confidence.

However much a trial Judge may be entitled, in his summing-up, to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considers his evidence to be trustworthy.

APPEALS against certain convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *T. Joganathan*, *Kosala Wijayatilake* and *S. C. B. Walgampaya*, for the 1st, 3rd and 5th accused-appellants.

Y. C. David, for the 2nd accused-appellant.

Colvin R. de Silva, with *Bala Nadarajah*, *I. S. de Silva* and *C. Sandrasegera*, for the 4th accused-appellant.

J. Muthiah (assigned), for the accused-appellants.

T. A. de S. Wijesundera, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

June 8, 1969. H. N. G. FERNANDO, C.J.—

Five accused were indicted in this case on charges of being members of an unlawful assembly the common object of which was to cause the death of one Siyathuwa, of the murder of Siyathuwa, and also of causing grievous hurt to the son of Siyathuwa. On the 4th and 5th counts the five accused were charged with the murder of Siyathuwa, on the basis that the murder was committed by these accused and others in pursuance of a common intention, and the 5th count was of causing grievous hurt to the son of Siyathuwa also on the basis of common intention. All five accused were convicted on the first three counts, but only on the footing of a common object to cause grievous hurt. On the 4th and 5th counts also the first four accused were convicted of causing grievous hurt to Siyathuwa and to his son.

The prosecution called two alleged eye witnesses, the first of whom was Karunaratne the son of Siyathuwa. This witness was examined by Crown Counsel on some preliminary matters as to the inmates of Siyathuwa's house and the relationship between Siyathuwa and some of the accused. At this stage the learned trial Judge took on the examination of the witness, with the result that the whole of his evidence incriminating the accused and describing alleged assaults by some of them on Siyathuwa, his wife and his son was presented to the Jury in answer to questions by the Judge ; some of these questions were of a leading nature. In fact, Crown Counsel had nothing further to ask this witness, except a couple of formal questions which elicited the fact that the witness had made a statement to the Police. It was most unfortunate that the Judge thus performed the functions of the prosecutor, for the Jury could scarcely have resisted the impression that the trial Judge was presenting the evidence of the witness as being evidence in which the Judge himself had confidence.

The evidence both of this witness and the other principal prosecution witness (one Wimalaratne) fell short of establishing that the seven persons came armed to the scene. On the contrary, it was clear from both witnesses that the 1st accused had on previous occasions been in the habit of coming near the house of the deceased and of abusing him, and that on these prior occasions events had not proceeded beyond the stage of abuse. The learned trial Judge himself appears to have appreciated at one stage that the evidence fell short of proving that the persons who came on the night of the commission of these alleged offences had entertained a common object of killing or injuring the deceased man. This point was made in the following passage in the summing-up :—

> " The evidence in this case—I have not dealt in detail with the evidence of Wimalaratne and Karunaratne ; I will do so in due course—seems to indicate that these five persons with others came there not with the object of causing the death of Siyathuwa, because if that was the case they could have waylaid him and attacked him without making

their presence felt ; they had come there abusing, challenging Siyathuwa to come out and, gentlemen, the evidence is that there were some fence sticks closeby and some of these assailants may have pulled out the fence sticks ; there is no evidence that they came there armed. The only indication that one of them had come armed was that small kitul club P1. We do not know who it was who brought that."

We agree entirely that this was a correct direction on the facts. It follows that unless there was some impressive evidence of the actual conduct of the members of the accused's party which might have justified an inference of a common object to kill or injure the deceased man, the prosecution could not establish any of the charges based upon the existence of an unlawful assembly.

The second prosecution witness Wimalaratne fell into somewhat serious difficulty in the course of cross-examination, when he contradicted himself as to what he claimed to have been the acts done by some or other of the accused in the course of their alleged assaults on the deceased, his wife and his son. At more than one stage, the learned trial Judge interposed with remarks such as this :—

"*Q.* Are you quite sure : Please don't say 'yes' to everything, think and answer—are you quite sure that it was Gunasekera who assaulted you ?

A. Yes."

I want to remind you that there is really no harm if you say 'You cannot say or you did not see.' If you say that all of them came and assaulted you all, that is quite sufficient. No one expects you to give evidence in such details."

With great respect it seems to us that observations such as these were bound to create in the minds of the Jury an impression that the trial Judge himself fully accepted the evidence of the witness to the effect that the accused did participate in the alleged assaults, even though the witness was unable to speak with certainty to any act done by each or any of the accused. However much a trial Judge may be entitled in his summing-up to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considered his evidence to be trustworthy. Moreover, the remark that the witness need not give details concerning alleged assaults by various people on the deceased's party was in fact highly prejudicial to the defence. Wimalaratne gravely contradicted the 1st witness Karunaratne as to the identity of the persons responsible for the assault on the deceased and also on the deceased's wife and Karunaratne. In respect therefore of each one of the accused the defence was quite entitled to ask the Jury to disbelieve the evidence as to these alleged assaults, on the ground that the two principal witnesses contradicted each other on questions of

identity; and if evidence as to any one of the accused was disbelieved on this ground, that disbelief would then cast doubt on the truth of the evidence that that accused had even been present at the scene. The defence was entitled to a consideration by the Jury of the entire evidence before it reached a conclusion that any one of the accused had been a member of the alleged assembly, and it was a mis-direction to leave it open to the Jury to reach such a conclusion independently of the evidence which related to the alleged assaults.

On the grounds which have already been stated, we are satisfied that, but for these misdirections the Jury could not have reasonably reached the conclusion that there had been an assembly the common object of which was to kill or cause hurt to Siyathuwa, and on this ground we directed a verdict of acquittal of all the accused on the first three counts. We saw no reason however to interfere with the conviction of the 3rd accused for the offence of causing grievous hurt.

All the accused acquitted on counts 1 to 3.

Conviction of the 3rd accused for the offence of causing grievous hurt affirmed.