[COURT OF CRIMINAL APPEAL]

1953 *Present :* **Rose C.J. (President), Nagalingam S.P.J. and K. D. de Silva J.**

S. S. FERNANDO, Appellant, *and* THE QUEEN, Respondent

APPEAL No. 46, WITH APPLICATION No. 82

S. C. 3—M. C. Panadure, 24,458

Evidence—Indictable offence—Statement made by a witness at non-summary inquiry—Evidentiary value of it at trial.

When a statement made by a witness at a non-summary inquiry is denied by him at the trial of the accused, it cannot be used as substantive evidence.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. C. Nadarajah, with *H. L. de Silva*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1927) C. P. D. 8.*

September 13. 1953. NAGALINGAM S.P.J.—

At the conclusion of the argument of this appeal we set aside the conviction and acquitted the accused and stated that we would give our reasons later. We now proceed to do so.

The prisoner was indicted on a charge of murder. The evidence relied upon by the prosecution was that of three witnesses each of whom was put forward as an eye-witness, but during the course of the trial it became apparent that not one of them was a credible witness and that the evidence of each one of them was so full of infirmities and improbabilities that no reliance could safely have been placed upon their testimony; in the result the learned trial Judge took the view which was expressed by him thus after dealing specifically with the nature and character of the evidence given by each of them :

> " Then you have no evidence of an eye-witness to say that it was the accused who committed this offence. "

The learned trial Judge would seem to have formed this opinion of these witnesses, if not earlier, at least at the stage when from the Crown point of view all the material evidence which the prosecution could with advantage place before the Court had been led ; for when all that remained to be done by the prosecution was to close its case, the learned Judge intervened and recalled Mitchel, one of the alleged eye-witnesses, and questioned him with regard to certain statements made by him at the Magisterial inquiry. In answer to Court that witness said :

> " I remember that the accused put to me that I and the deceased went to his house to assault him . . . . It was put to me that the deceased had a crow bar in his hand when he went. I denied that. *It was not suggested that the accused snatched the crow bar and struck the deceased on his head. I do not remember the suggestion being put in the form that the deceased had a crow bar and that the accused snatched it and struck the deceased on his head with it.* "

With a view to contradict this evidence the Clerk of Assize was called to prove the following statement made by the witness at the Magisterial proceedings :

> " I deny that the deceased had a crow bar in his hand, and that the accused snatched the crow bar and struck the deceased with it a blow on the head. "

In the course of his address to the Jury the learned trial Judge, after having indicated to the Jury that the evidence of the eye-witness was unacceptable, proceeded to charge them as follows :

> " If on a consideration of the evidence of the witnesses you are not prepared to accept that evidence, you are left with other evidence to which I shall refer. "

And the " other evidence " the learned Judge referred to was no other than the statement made by the witness Mitchel in the Magistrate's Court, to which he adverted in the following words :

> " When the Magistrate started the inquiry at the hospital, the accused who was undefended cross-examined Mitchel, and in the course of that cross-examination the accused suggested to Mitchel that he (Mitchel) and the deceased entered the accused's house, the deceased being armed with a crow bar, and when they were about to assault the accused, the accused snatched the crow bar from the deceased and struck the deceased with it. "

Emphasis was further given to this aspect by another passage in the summing up :

> " The suggestion made, or at least the reasonable inference one may draw (from the statement made to the Magistrate) is that the accused took the weapon which the deceased had . . . . and struck the deceased with it on the head. That statement was elicited by me, and it was no part of the Crown case. "

The ground urged on appeal is that the use of this " other evidence " was improper and not warranted by law for more than one reason, and that the Jury were swayed in arriving at their verdict by this " other evidence ". To put it at the lowest, clearly an improper use was made of the statement given by the witness before the Magistrate. It is to be remembered that the witness denied that any suggestion was made to him by the accused that he (the accused) had snatched a crow bar from the deceased and struck the deceased with it. Notwithstanding this denial, which was the only evidence of the witness before Court, the contrary was sought to be established by drawing two deductions successively from the statement proved to have been made by the witness before the Magistrate. The first deduction was a postulation of the form of the question in answer to which that statement was deemed to have been made. The second deduction was an inference that was said to arise from the form of the question so deduced.

The learned Judge dealt with this topic in this way :

> " The question put by the accused must have been, ' Did not the deceased have a crow bar in his hand and I snatch it and strike the deceased with it a blow on his head ? ' If that was the question put, is it not an admission by the accused that he was the person who struck the deceased ? Is that not the reasonable inference to be drawn ? "

The statement made by the witness before the Magistrate could have been proved at the trial only for the purpose of contradicting him, but the statement itself could not have been used as substantive evidence ; but that was precisely the effect of what was done. It was only on the basis that that statement was legal evidence upon which the Jury could act, that it was possible to hypothesize the form of the question therefrom (which was the first deduction made) and then to infer from the form of the question so hypothesized an admission on the part of the accused that he had inflicted the injuries on the deceased (the second deduction).

Furthermore, it is needless to say that a variety of reasons may underlie the propounding of a question in cross-examination, and the cross-examination conducted by an accused in person should not receive less favourable treatment than if it had been conducted by counsel on his behalf.

We do not therefore think that in the first place the statement made by the witness at the Magisterial inquiry should have been treated as substantive evidence in the case, nor do we think that it was proper for the first and second deductions to have been drawn therefrom.

The next point to which attention has to be directed is as to what the effect of the use of the evidence in this manner has been on the trial of the prisoner. The ultimate position was that while the evidence of the prosecution witnesses other than what was objected to failed to establish that it was the accused who inflicted the injuries on the deceased, the second deduction referred to above was placed before the Jury as establishing " an admission by the accused that he was the person who struck the deceased". That the Jury laid very great emphasis on the statement made by the witness before the Magistrate and that that statement must have loomed large in their deliberations is fairly obvious from what transpired after the learned Judge had concluded his summing up. The only admissible evidence in the case is such that a reasonable Jury properly directed could not but have come to the conclusion that the charge against the prisoner had not been established.

Having regard to these considerations, we arrived at the view that the conviction could not be sustained.

Appeal allowed.