[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *v.* K. Y. SIRIPINA

APPEAL NO. 42 OF 1962, WITH APPLICATION NO. 46

S. C. 405—M. C. Ratnapura, 78,048

Evidence—Omission to administer oath to witness—Effect—Oaths Ordinance, ss. 4 (1) (a), 9—Evidence Ordinance, s. 118.

Once the Judge has elected to take the statement of a person as evidence, he has no option but to administer either an oath or affirmation to such person as the case may require. Section 9 of the Oaths Ordinance which provides that evidence is not invalidated by omission of oath applies only to cases of accidental omission to administer the oath and not to cases of deliberate omission.

Where, without an oath or affirmation being administered, the evidence of a boy who was 11 years of age was taken after the trial Judge made the following order :—

"I order that in view of the fact that the witness does not seem to understand the meaning of the words of the affirmation that his evidence be recorded without the witness being affirmed. "—

Held, that the evidence of the boy was inadmissible.

The King v. Dingo (1948) 50 N. L. R. 193 not followed.

APPEAL against a conviction in a trial before the Supreme Court.

K. Viknarajah (assigned), for Accused-Appellant.

Vincent T. Thamotheram, Deputy Solicitor-General, for Attorney-General.

September 4, 1962. BASNAYAKE, C.J.—

It is common ground that the only evidence in the case is the evidence of the boy K. Y. Premadasa. The learned trial Judge after questioning the boy made the following order :—

> " I order that in view of the fact that the witness does not seem to understand the meaning of the words of the affirmation that his evidence be recorded without the witness being affirmed. "

The boy was 11 years of age, and his evidence was taken without the oath or affirmation being administered. Section 4 (1) (*a*) of the Oaths Ordinance provides that all witnesses shall make an oath or affirmation. Section 118 of the Evidence Ordinance provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Once the Court is satisfied that a person is competent to testify, then such a person must be required to make an oath or affirmation before being examined as a witness. Except in the cases covered by section 9 of the Oaths Ordinance, the testimony of a witness competent to testify who does not take an oath or affirmation cannot be regarded as legal evidence. Section 9 reads—

> " No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth. "

The cases of *The Queen v. Buye Appu* [1], *The King v. Jeeris* [2] and *The King v. Ramasamy* [3] all support that view. In the case of *The King v. Jeeris* (*supra*) the effect of section 9 (then section 10) of the Oaths Ordinance was considered. It was held by a full Bench that once the Judge has elected to take the statement of a person as evidence, he has no option but to administer either an oath or affirmation to such person as the case may require, and that the omission contemplated in section 9 is an accidental omission. In the case of *The King v. Ramasamy* (*supra*) it was held that a deliberate non-administration of an oath or an affirmation does not amount to an act of omission within the meaning of section 9. In the case of *The King v. Dingo* [4], following a decision of the Privy Council in the case of *Mohamed Sugal Esa Mamasan Mer Alalah* [5] it was held that section 9 applied not only to cases of accidental omission to administer

[1] *(1883) Wendt, p. 136 at 140 (F.B.).*
[2] *(1905) 1 Balasingham Reports 185.*
[3] *(1941) 42 N. L. R. 529.*
[4] *(1948) 50 N. L. R. 193.*
[5] *1946 Appeal Cases 57.*

the oath, but also to cases of deliberate omission. We find ourselves unable to subscribe to that view and we prefer the view taken in the earlier cases.

We therefore hold that the failure of the Judge to require the witness Premadasa to make an oath or affirmation renders the statements made by him in Court inadmissible in evidence.

We accordingly quash the conviction and direct that a judgment of acquittal be entered.

Accused acquitted.