[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Moseley S.P.J., Soertsz and Wijeyewardene JJ.**

THE KING *v.* RAMASAMY

25—M. C. Nuwara Eliya, 3,844.

Evidence of child—Oath deliberately not administered—Not a case of omission under Oaths Ordinance ss. 4 and 9 (Cap. 14).

Where the unsworn testimony of a child of tender years was deliberately admitted on the ground that the Judge was of opinion that the child did not understand the significance of an oath or affirmation,—

***Held*, that the evidence was inadmissible as the deliberate non-administration of an oath or affirmation does not amount to an act of omission within the meeting of section 9 of the Oaths Ordinance.**

THIS was an application for leave to appeal from a conviction for using criminal force.

No appearance for applicant.

E. H. T. Gunasekera, C.C., for *A.-G.* as *amicus curiae.*

October 6, 1941. MOSELEY S.P.J.—

This is an application for leave to appeal on the facts against conviction for using criminal force. Assuming that the evidence of the principal witness for the prosecution, viz., the girl whose modesty is alleged to have been outraged, is admissible, we are unable to say that the verdict of the Jury is unreasonable or that it cannot be supported having regard to the evidence. The girl, at the date of the trial, appears to have been eight years of age. She was questioned by the trial Judge who satisfied himself, in accordance with the provisions of section 118 of the Evidence Ordinance (Cap. 11), that she was capable of giving evidence. She was not, however, allowed to be affirmed since, in the opinion of the trial Judge, she did not understand what is meant by affirmation. I may add that the Jury were carefully warned as to the effect of this procedure upon the value of her evidence.

The point that arises for decision is whether or not, in view of the provisions of the Oaths Ordinance (Cap. 14), the evidence of the girl was admissible.

Section 4 of that Ordinance provides that oaths (or affirmations) shall be made by "all witnesses, that is to say, all persons who may be lawfully examined, or give or be required to give evidence . . . . " Section 9 enacts that "no omission to take any oath or make any affirmation, ... shall invalidate any proceeding, or render inadmissible any evidence whatever in or in respect of which such omission . . . . took place".

There can be little doubt but that section 9 is capable of curing an omission due to inadvertence, or evasion on the part of a witness. Does it correspondingly cure an omission which, as in the present case, is advisedly made by the Court ?

As far as we have been able to ascertain the only local authority on the point is the case of *The King v. Jeeris*[1]. The question was there

[1] *1 Balasingham 185.*

considered by a full Court of three Judges. The only authorities available were those of the Indian Courts. They were, of course, not binding on the Court and in any case, as Layard C.J. observed, the different High Courts in India did not agree. The Court considered a summary of the Indian cases, as set out by the Chief Justice of Madras in *Queen Empress v. Viraperumal*[1], in which attention is drawn to the divergences of opinion which existed at that time, 1892. Layard C.J. accordingly found it necessary to formulate his own opinion. He drew a distinction between acts of omission and acts of commission and was of opinion that, where an oath was advisedly not administered, there was an act of commission to which section 10 (now section 9) could not be extended. He held that the witness had been examined contrary to law and that the evidence was inadmissible.

In 1892, the High Courts of Madras and Allahabad appear to have held the view that evidence taken in such circumstances is inadmissible; those of Bombay and Calcutta held the contrary view. Since that date, however, the Indian Courts appear very largely to have reached agreement on the point. That this is so would appear from the judgment of Mya Bu J. in *Ah Phut and others v. The King*[2] where at page 130 the learned Judge says as follows:—"The word 'omission' is used in the section (section 13 of the Oaths Act which corresponds to section 9 of the Oaths Ordinance) without any qualification and consequently, it must be held to include any omission whether that omission was deliberate or inadvertent. This is the view of the law which is now taken by all the High Courts". The judgment continues by giving references to the more recent decisions of the various Indian Courts.

With all respect to these decisions which we have considered we do not feel disposed to take a view different from that which was expressed by Layard C.J., in *The King v. Jeeris* (*supra*). We are impressed by his opinion that the deliberate non-administration of an oath or affirmation amounts to a case of commission rather than one of omission and does not therefore come within the ambit of section 9.

It may be that there have been cases in this Island in which the evidence of children of tender years has been received without the previous administration of an oath or affirmation. This may have been done in the knowledge of the trend of judicial opinion in India and in accordance with the English practice which has, however, for many years been regulated by legislation. The Criminal Law Amendment Act, 1885, The Children's Act, 1908, and The Young Persons' Act, 1933, have successively provided for this contingency. If it is desired to conform with that practice, as seem to us desirable, it is a matter which requires the attention of the Legislature.

As has already been observed, our view is that at present there is no provision of law under which the evidence of an unsworn child may be deliberately admitted. In this case there is no other evidence upon which the appellant could be convicted. For this reason we are of opinion that the conviction must be quashed and the sentence set aside. The appeal is allowed.

Appeal allowed.

[1] *21 L. R. Madras p. 105.*

[2] *41 Crim. Law Jnl. p. 129.*