1947 *Present :* **Canekeratne J.**

GUNAWARDENE, Appellant, *and* KELAART (A.S.P.), Respondent.

S. C. 1,006—M. C. Colombo South, 11,960

Appeal—Admissibility of affidavit to contradict record.

The Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate.

APPEAL from a judgment of the Magistrate, Colombo South.

E. F. N. Gratiaen, K.C. (with him *K. C. Nadarajah, Titus Goonetilleke* and *A. B. Perera*), for the accused, appellant.

T. S. Fernando, C.C. (with him *H. A. Wijemanne, C.C.*), for the Attorney-General.

Cur. adv. vult.

[1] *(1944) 45 N. L. R. 136.*

October 17, 1947. CANEKERATNE J.—

This is an appeal by the accused from a conviction under section 486 of the Ceylon Penal Code.

On June 8, 1947, the accused who is described as a leader of a party called the Sama Samajist Party came with six others, one of whom was a man called Hema, another a Perera, near the garage of the South Western Bus Company Ltd.—which I shall refer to as the company—at Ratmalana. He got inside an omnibus that was about to be driven by one Paulis and accosted him with some words which included, according to a witness, the following, "You may go but we won't let you come back". The company had at this time among its drivers a man named Simon who had been in its employ for four years. He was desirous of working on June 8. I had better let him tell his account of the meeting with the accused in his own words as he told it in the court below—

"Accused came up to me along with the other six persons, brother about 45,000 servants have struck . . . . you also must strike. I replied we cannot strike . . . . Then the accused said if the buses run they will be damaged, the drivers would be assaulted. I became frightened of physical injury as a result of accused's words . . . . On this day I was not able to get out at that time because I was frightened by accused's threats . . . . I had not intended to take leave. I took nearly two weeks leave . . . . I was too frightened to go out as a result of accused's threats . . . . I applied for leave in the afternoon of June 8 . . . . Accused did not say that the bus owner's owners would be injured. He said the drivers would be injured."

The Magistrate finds that these words were used by the accused.

It is useless to try and conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance.

One of the contentions advanced at the argument was that the Magistrate failed to read out the judgment on July 7, 1947, in accordance with the provisions of sections 304 and 306 of the Criminal Procedure Code; to establish this fact Counsel proposed to read the statement made by the accused in an affidavit dated October 13, 1947. What happened, according to Counsel, was this—the accused was required to attend to hear judgment delivered on the morning of July 7, 1947, that morning he was asked to present himself at 1.30 p.m., he was informed that afternoon by the Magistrate in Court that he was convicted and sentenced to three months' rigorous imprisonment, he filed a petition of appeal and was later released on bail.

Another contention was that there was a discrepancy in the evidence recorded by the Magistrate compared with what a witness is alleged to have said in the witness-box. To establish this Counsel proposed to read the statement contained in an affidavit sworn to on October 13, 1947, by one of the junior Counsel who appeared at the trial. No note was made by him or by any other person appearing at the trial of the evidence given by the witness in question. The deponent, it is stated, saw a copy of the proceedings for the first time on August 13, and the words used by the witness were present to his mind then. It was also

stated at the argument that his recollection was supported by what appeared in a newspaper report. I would prefer the record kept by a Magistrate to what is taken down by a reporter or shorthand writer. Crown Counsel objected to the reading of those affidavits; he argued that extrinsic evidence is inadmissible to contradict, vary, or add to the matters required by law to be reduced to the form of a document, *e.g.*, depositions of witnesses and referred in this connection to section 91 of the Evidence Ordinance. He further objected to the reading of these belated affidavits and referred me to the case of *Orathinahamy v. Romanis*[1], where Bonser C.J. said:—"With the appeal was filed an affidavit which I have not read and I understand that the affidavit is to the effect that the record of the evidence taken by the Magistrate does not give a correct account of the statements of the witnesses, and it is sought to impeach the record, and to prove that certain statements were made which do not appear on the record . . . . It seems to me to be contrary to all principle to admit such an affidavit, and I certainly will not be the first to establish such a novelty in appellate proceedings. The prospect is an appalling one, if on every appeal it is open to the appellant to contest the correctness of the record. If such a procedure is to be introduced it must be introduced by some other Judge than myself." There is no reason why I should not follow the dictum of Bonser C.J. I am of opinion that the affidavits are inadmissible and I therefore reject them. As regards the earlier of the two contentions it must be remembered that the Magistrate has been officiating as a judicial officer for a few years and is not one who is new to his work. The presumption is that he did what the law required him to do. With respect to the general principle of presuming a regularity of procedure the true conclusion appears to be that whatever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. It is a principle that irregularity will not be presumed. The presumption of regularity supplied any omission in the order sheet of the Magistrate. A belated statement made as in the circumstances of this case is hardly sufficient to displace this presumption.

The main contention in the case was that the words used by the accused did not amount to a threat, they were used by way of advice or warning. The Magistrate after a careful consideration of the law and the evidence has come to the conclusion that when the accused addressed the words complained of to Simon he did so with the intention of intimidating him and preventing him from carrying out his legitimate duties. It is not surprising that the Magistrate came to the conclusion that the words used constituted a definite threat. The action of the accused in going to the extent of using the words which the Magistrate has held were used places him in a very different position to that occupied by a person whose duty it is to offer advice to one who needs to be guided. The witness and the accused were apparently strangers. What may begin as peaceful persuasion may easily become and in disputes of this nature generally does become peremptory ordering with threats, open or covert, of very unpleasant consequences to those who are not persuaded. I see no reason to interfere with the conviction.

[1] *(1900) 1 Browne, 188.*

Mr. Gratiaen urged that the sentence should be altered. The accused interfered with the lawful pursuit of his work by the witness Simon and as a consequence of the accused's act Simon was without work for a number of days and in all probability deprived of his wages. The act was not one done by a man impulsively, it was not the act of an illiterate person. The Magistrate would have taken these into consideration when he formed the opinion, "this is a serious type of offence and a jail sentence is called for". The functions of a Court of Appeal are limited. It may have a discretion but it is a judicial discretion regulated according to known rules of law, and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet. The trial judge has not proceeded on a wrong principle in imposing a sentence of three months. I can see no valid ground on which I can make a substantial reduction in the sentence. Were I to accede to the suggestion that relief may be given by taking off a few days from the period of the sentence it would be open to the comment that it is the result of a half-formed thought: it would not be the exercise of a judicial discretion at all.

The appeal is dismissed.

Appeal dismissed.