

1926

*Present: Jayewardene A.J.*BINDUWA *v.* SIRIYA.

211—P. C. Kandy, 17,806.

Evidence—Previous statement by witness—Contradicted by evidence in Court—Evidence Ordinance, s. 155 (3)—Criminal Procedure Code, s. 122 (3).

A previous statement made by a witness, which he admits to be true, but which is contradicted by his evidence in Court, cannot be used as substantive evidence against the accused.

*Re: v. Charles Perera*¹ followed.

THE accused was convicted of causing hurt to the complainant with a knife, under section 315 of the Penal Code. In their statements to the Korala the complainant and his witnesses stated that the accused had deliberately stabbed the complainant in the course of a quarrel. But in Court the complainant attempted to make out that the injury was caused accidentally. When the statement recorded by the Korala was read out to him the complainant admitted that it contained the truth. Other witnesses were called, and they also stated that the injury was caused accidentally. Then the Korala gave evidence and produced his notes. On his evidence the learned Police Magistrate convicted the accused.

S. W. R. Dias Bandaranaike, for accused, appellant.

May 13, 1926. JAYEWARDENE A.J.—

This case raises the question of the admissibility in evidence of a former statement which the person who made it admits to be true, but which is contradicted by the evidence given by him in Court.

In this case the accused was charged with causing hurt to the complainant with a knife, an offence punishable under section 315 of the Penal Code. He was convicted and sentenced to undergo two months' rigorous imprisonment. In their statements to the police officers, among whom was the Korala of the district, the complainant and his witnesses had stated the accused had deliberately stabbed the complainant in the course of a quarrel which followed a game of cards. The complainant had himself bitten the accused's nose in the struggle. But in Court the parties, who are relations, attempted to make out that the injury was caused accidentally. The complainant said he asked the accused for a piece out of an arecanut which he was peeling at the time. Accused

slipped, and tried to save himself by catching hold of the complainant. The knife just caught his arm. He also said that he could not say that the accused voluntarily stabbed him and that he got cut in the struggle. In cross-examination he added that the accused did not deliberately seek to injure him. With regard to the statement made by him to the Korala he said he was examined by the Korala thirteen days after the incident, that he signed the statement made to the Korala, which was in English, and did not know exactly what the Korala wrote down. In re-examination the statement recorded by the Korala was read out to the witness. That statement was as follows:—

1926

JAYEWAR-
DENE A.J.*Binduwa v.
Siriya*

“ On January 25, at about 9 A.M., I, with accused, Kondedeniye Gedara Tikiriya, and Ukkuwa played cards, but not for stakes. Witness, Ukkuwa, shuffled the pack of cards and divided the leaves to me. He put into my heap one card extra. I suggested to divide the pack of cards again. The accused did not agree with my suggestion. I refused to take part in the play. The accused abused me in dirty language. I also insulted him. He got up and caught my body. He stabbed me with a knife. Witnesses, Ukkuwa and Siriya, caught the accused and stopped him. I was at the hospital for four days. Binduwa Vidane came to the spot. He took the accused's knife into his hand. Other Vidane recorded the statements and sent me down to the hospital.”

With regard to this statement the complainant said: “ I admit the Korala just now read out the statement I made to him. It was translated to me, and I heard it. I admit it is what I told the Korala, and that it is the truth.” Several witnesses who were present when the complainant received his injury were called, and they also stated that the injury was caused accidentally and supported the complainant's evidence as given in Court. The Korala also gave evidence and produced his notes. On this evidence the learned Magistrate has convicted the accused.

It is contended for the accused that there is no legal evidence on which a conviction can be based. I think it is clear that the Magistrate has based his finding on the admission of the complainant that the statement he made to the Korala was true. I entirely agree with the Magistrate in thinking that the story narrated by the complainant and his witnesses in Court is untrue, and that the statement made to the Korala probably contains the truth. But can a conviction be based on a statement of a witness made to the police officer or other person which he admits is true, but which is inconsistent with his evidence given in Court? Under our Evidence Ordinance, a former statement made by a witness, whether written or verbal, can be used for the purpose of contradicting a witness and

1926

JAYEWAL-
DENE A.J.*Banduwa v.
Sirinya*

thereby impeaching his credit (section 155 (3)) or of corroborating the testimony of the witness (section 157), and under section 122 (3) of the Criminal Procedure Code, if the statement is not the first complaint of the commission of an offence, a statement made by any person to a police officer or an Inquirer in the course of an investigation under Chapter XII. cannot be used otherwise than to prove that a witness made a different statement at a different time. These appear to be the only purposes for which a former statement can be used under our law. Former statements cannot be used under our law as substantive evidence (*Rex v. Charles Perera (supra)*). In the present case the statement of the complainant to the Korala has been used, not to contradict or corroborate evidence given in Court, but as substantive evidence against the accused, because the witness who made the statement says it is true. I do not think that such a use of a former statement is authorized by law. The question whether a former statement is true or false does not arise in a case like this, and it seems to me doubtful whether a Court can ascertain from a witness whether such a statement is true or not for the purpose of utilizing it as evidence in the case. It would, of course, be different if the witness repeats on oath what he had said in his former statement. Further, the Korala appears to have been acting in this matter as an Inquirer under Chapter XII. of the Criminal Procedure Code, as he says he held the preliminary inquiry into the case. If so, then section 122 (3) prohibits the use of a statement made to an Inquirer in the course of an investigation otherwise than to prove that a witness made a different statement at a different time or to refresh the memory of the person recording it.

In the circumstances, I do not think that the statement can be used as substantive evidence against the accused. If this statement is excluded, there is no legal evidence to prove that the accused voluntarily caused hurt to the complainant, and the conviction must be set aside. I do so, however, with considerable reluctance. The appeal is allowed.

Set aside.