[COURT OF CRIMINAL APPEAL]

1967 *Present :* **H. N. G. Fernando, C.J. (President), Manicavasagar, J. and Siva Supramaniam, J.**

THE QUEEN *v.* R. R. ABILINU FERNANDO

C. C. A. APPEAL NO. 17 OF 1967, WITH APPLICATION NO. 19

S. C. 271—M. C. Avissawella, 76439

Evidence—Witness for the prosecution—Adverse witness—Proof of former statements made by him incriminatory of the accused—Admissibility—Evidence Ordinance, s. 154—Court of Criminal Appeal Ordinance, s. 5 (1).

The accused-appellant was charged with the murder of his brother's wife. At the trial the father of the appellant was called as a witness for the prosecution. In the examination-in-chief he was questioned only in order to elicit from him the fact that he had identified the deceased woman at the *post mortem* examination. In cross-examination his evidence was favourable to the accused on three points (1), (2) and (3). In view of this evidence Crown Counsel, after obtaining permission from Court, put questions which might have been put in cross-examination concerning points (1), (2) and (3). Furthermore, he asked the witness questions relating to two new points (4) and (5), viz., whether he saw the appellant just after the alleged murder, and whether the appellant had a knife in his hand at that time. In view of the denials made by the witness in respect of all five points, Crown Counsel confronted him with the statements he had made in his depositions in the Magistrate's Court. Those statements were contradictory of his evidence at the trial not only in respect of points (1), (2) and (3) but also in respect of points (4) and (5).

Held, that the prosecution should not have been permitted to prove the witness's former statements incriminatory of the accused in respect of points (4) and (5). "If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with a statement made by him in his deposition, the discretion of the trial Judge under s. 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused."

Held further, that, in view of other independent testimony, the conviction of the accused should be affirmed in terms of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

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

M. M. Kumarakulasingham, with *Cosme Dalpathado, H. W. A. Andrado* and *N. Balakrishnan* (Assigned), for the Accused-Appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 18, 1967. H. N. G. FERNANDO, C.J.—

The appellant was convicted by an unanimous verdict of the jury of the murder of his brother's wife. The principal witness for the prosecution, one Premaratne, gave evidence which if believed clearly establishes that he had seen the appellant stab the deceased woman more than once ; and this together with certain independent evidence as to motive sufficed to establish the guilt of the appellant.

After leading the medical evidence, the prosecution called one Samel Fernando, the father of the appellant and the father-in-law of the deceased woman. This witness was in examination-in-chief questioned only in order to elicit from him the fact that he had identified the deceased woman at the post mortem examination.

In cross-examination, Samel Fernando in answer to certain questions gave evidence—

(*a*) suggesting the possibility that the previous witness Premaratne may not have been able to identify the assailant of the deceased woman because of trees and hedges which could have impeded his view of the scene ;

(*b*) indicating that there had been no ill-feeling between the appellant on the one hand and the deceased woman and her husband (the appellant's brother) on the other ;

(*c*) suggesting that there had been police interference with witnesses prior to their giving evidence in the Magistrate's Court.

In view of this evidence Crown Counsel moved to put to the witness questions which might have been put in cross-examination, and this application was allowed by the learned Commissioner. Thereafter Crown Counsel proceeded to examine the witness further, firstly with the object of negativing the suggestion that there had been police interference with the witness himself ; secondly, there was the following examination :—

" Q. Did your son John complain to you prior to this incident that this accused was trying to get on terms of intimacy with his wife and was harassing them ?

A. No.

Q. Did you say this in the Magistrate's court ?

Court : I take it that John will be a witness.

Crown Counsel : Yes, My Lord.

Q. Did you say this in the Magistrate's Court : "Prior to this incident I received a complaint from my son John Fernando.... (Crown Counsel omits four words) that this accused was attempting to get on terms of intimacy with the deceased " ?

A. No.

Q. Did you also say in the Magistrate's Court : " In consequence I advised this accused "?

A. No.

Q. Did you continue and say this : " For some time prior to this incident the accused was angry with the deceased as she rejected his advances " ?

A. No.

Q. As a result of this were any complaints made to the Grama Sevaka and the police ?

A. No.

Q. And did you say this continuing your evidence in the Magistrate's Court : " Several complaints had been made to the Grama Sevaka and the Police " ?

A. No. "

These statements in the witness's depositions were subsequently proved at the trial.

It will be seen that the matters which were thus for the subject of Crown Counsel's further examination related to that part of his testimony to which I have referred at (*b*) above. I can see no objection to the examination with respect to these matters.

Thereafter Crown Counsel put to the witness the following part of his deposition in the Magistrate's Court :—

" Today at about 12.30 p.m. I went to the latrine behind this house. At the time the deceased was at home and my son John had gone to work in a gem pit which is about half a mile from here. When I was in the latrine I heard the deceased crying out " අම්මෙ " about four times. I rushed out of the latrine and I saw the deceased fallen on the rubber land behind her house..... "

At this stage, after an intervention by Court, Crown Counsel asked the witness the following questions :—

" Q. When you came out and saw your daughter-in-law lying fallen did you see this accused running away ?

A. I did not see.

Q. Did you see this accused having a knife or some other pointed object in his hand ?

A. No. I saw 2 or 3 people running along the road.

Q. Did you say this in the Magistrate's Court : " I saw the accused running away " ?

A. No.

Q. Did you further say : " he had a knife or some other pointed object " ?

A. No. (The whole passage is marked X2)."

It appears from certain remarks made by Crown Counsel during the trial that he was aware that the witness Samel would not give evidence on the lines of his deposition in so far as the evidence would implicate his son the appellant. That presumably was why the examination-in-chief did not cover the alleged incident of stabbing. It will be seen, however, that during the examination permitted under Section 154 the prosecution did refer to the contents of the deposition to the effect that the witness had seen the appellant running away with a knife in his hand from the place where the deceased woman lay fallen, and that those contents of the deposition was ultimately proved in the extract marked " X 2 ".

Now the witness had not previously given at the trial any testimony to the effect either that he had not seen the appellant just after the incident, or that the appellant did not have a knife in his hand at that time. Hence the assertions in " X 2 " concerning those matters were not used to contradict any testimony to the contrary which had been elicited from him by Counsel for the defence. What actually took place at the trial was that Crown Counsel, knowing that the witness would deny these matters, first elicited such a denial and then proceeded to show that the witness had made different statements at a different time.

Learned Senior Crown Counsel at the argument of the appeal justified this course on the ground that there had been in the cross-examination by the defence the following evidence from the witness :—

" Q. Did you hear anybody crying in pain ?

A. Yes. I went out to see.

Q. Did you see anybody ?

A. Yes.

Q. Then what did you do ?

A. My daughter-in-law was lying fallen and I raised her up."

The argument was that this evidence, because it did not contain any reference to the appellant having been seen by the witness at the time when he saw the deceased woman lying fallen, might lead the jury to

doubt whether the previous witness Premaratne could himself have seen the appellant stabbing the deceased. We do not agree with the factual implication of this argument. So far as the Jury was concerned, there was no real inconsistency between the evidence of the witness Premaratne, which related to a stage up to and including the fall of the deceased woman, and that of Samel, which related to a stage subsequent to a fall of the deceased woman. Had the matter been left as it remained at the end of the cross-examination there was very little or nothing elicited by the defence from the witness Samel as to the presence or absence of the appellant at the scene.

Moreover, the prosecution case as presented to the Jury was clearly not intended to include any testimony from Samel implicating the appellant as having been present at the scene with a knife in his hand. If that had been the prosecution's intention Samel should have been questioned with respect to these matters during the examination-in-chief.

In fact what transpired at the trial was that the prosecution elicited denials on these matters from the witness with the intention of contradicting him by proof of his deposition. As learned Senior Crown Counsel has presented the point, this course was followed only in order to shake the witness's credibility by showing that he said one thing in the trial Court and another to the Magistrate. But it happens that the Jury was then informed of evidence given before the Magistrate which was clearly prejudicial to the appellant.

In the ordinary case where a prosecution witness turns adverse he does so during the course of his examination-in-chief. Thus a witness may have testified before a Magistrate that he was present at a certain place, that he saw A and B together, that they had an argument, and that ultimately A stabbed B. It may happen at the trial that the witness commenced his evidence by stating that he was not present at the particular place and that he did not see A and B together, thus indicating that he will not give testimony in accordance with his deposition. If such a situation occurs, the prosecution should, unless it succeeds in tactfully persuading the witness to come out with his former testimony, abandon him for the purpose of the trial. If a witness persists in denying that he saw A and B together on the particular occasion, there is no need for the prosecution to proceed further and obtain a denial from the witness that he saw A stab B, and thereafter to contradict that denial by proving a deposition that he did see A stab.

If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with a statement made by him in his deposition, the discretion of the trial Judge under s. 154 of Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely some testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement

incriminatory of the accused by the device of first tempting or provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more serious consequence is to cause grave prejudice to the accused.

There was however ample evidence from the witness Premaratne and the witness John Fernando as to the stabbing of the deceased woman by the appellant and the strong motive for the stabbing. Under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance we upheld the conviction and dismissed the appeal.

Appeal dismissed.