[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J., Moseley S.P.J., and Cannon J.**

THE KING *v.* MUDALIHAMY *et al.*

11—M. C. Chilaw, 11,730.

Depositions—Used by defence to contradict witnesses—Right of jury to have the whole of the depositions referred to them—How depositions should be read in evidence.

Where, during a trial, witnesses were cross-examined by Counsel for the defence regarding statements made in their depositions in order to show that they had contradicted themselves,—

Held, that it was competent for the Judge to refer to the whole of the depositions not only for the purpose of forming an opinion with regard to the contradictions but also with a view to discovering to what extent they corroborated the testimony given at the trial.

Where, in such a case, the clerk of the Assize is called to produce the depositions, he should be asked to read those passages from the evidence of witnesses relied on as contradictory so as to have those passages formally recorded in the evidence.

APPEAL from a conviction by a Judge and jury before the Fourth Western Circuit.

J. E. M. Obeysekere (with him *S. W. Jayasooriya*), for accused, appellants.

E. H. T. Gunasekera, C. C., for the Crown.

Cur. adv. vult.

December 18, 1940. HOWARD C.J.—

The appeal in this case is based mainly on the ground that portions of the depositions in the Magistrate's Court of the witnesses Jothipala, Dingiri Banda, Jayakodi, and William were improperly placed before the jury. During the course of the trial these witnesses were cross-examined by Counsel for the defence with regard to statements made in their depositions with a view to showing that they had contradicted themselves. At the close of the evidence for the defence Counsel for the accused called the Clerk of Assize who produced the record of the proceedings in the Magistrate's Court. This witness did not follow the usual practice of reading out those portions of the evidence of the witnesses on which Counsel relied to establish contradiction. He merely referred to the numbers of the pages where the evidence of these witnesses was recorded. In his charge to the jury the learned Judge read out to the jury various passages from the depositions of these witnesses. In doing so he did not confine himself to reading only those portions of the evidence in the lower Court that contradicted the testimony given in the trial Court. It has been contended by Counsel for the appellants that a deposition may only be used for cross-examining a witness to show that such witness has contradicted himself and hence only the passages in support of such contradictions can be put to the jury. Counsel maintained that certain passages in the charge of the learned Judge not only invited the attention of the jury to contradictions established by the depositions, but also treated as substantive evidence parts of those depositions that did not indicate contradictions. In particular, complaint was made in the recapitulation to the jury of what Jothipala said in the lower Court with regard to the fourth accused striking the deceased with an iron rod twice on the legs and the four accused and the other man hitting the latter with clubs, whilst he was lying fallen on the ground. Objection was also taken to the learned Judge stating to the jury " that is the evidence of Dingiri Banda in both Courts " and to the detailing of what William said in the Court below. It was suggested by Counsel for the appellants that these passages from the depositions of the witnesses filled in gaps in the evidence produced at the trial and were treated by the Judge as substantive evidence. Comparison, however, of the passages from the depositions cited in the charge to the jury with the evidence tendered at the trial by the three witnesses mentioned in the grounds of appeal indicates that these passages did not fill in gaps in the evidence and that all these witnesses gave substantially at the trial the same evidence as they had tendered in

the lower Court. The statements of these witnesses, as revealed by the depositions, could be regarded merely as corroboration of what the witnesses said at the trial. It has been contended by Mr. Gunasekera that in such circumstances there has been no irregularity in the admission of the evidence of the depositions. In this connection he has referred us to the provisions of section 157 of the Evidence Ordinance. Mr. Obeyesekere on the other hand has cited the judgment of Fisher C.J. in the case of *The King v. Silva* [1], as authority for the proposition that a previous statement of a witness can only be used in evidence for the purpose of impeaching the credit of a witness. In that case a statement made by a witness to a Police Officer and afterwards denied by the witness at the trial was used as substantive evidence of the facts stated against the accused. It was held that such a statement was admissible neither under section 145 (1) nor 155 (c) of the Evidence Ordinance. Morever it was not admissible under section 157 inasmuch as the witness had not given evidence when the statement was put in. Such witness could not be corroborated in advance. Nor in the face of his denial could the statement be regarded as corroboration of his evidence. In the present case we are of opinion that the depositions were referred to by the learned Judge so that the jury might be able to form an opinion as to what extent the witnesses had contradicted themselves. The jury was entitled to examine the whole of these depositions not only for the purpose of forming an opinion with regard to the contradictions, but also with a view to discovering to what extent they corroborated the testimony given at the trial. The case of *The King v. Silva (supra)* is not an authority for the proposition that the depositions were not admissible for the purpose I have mentioned. In this connection the following commentary of Woodroffe & Ameer Ali on the corresponding section in the *Indian Evidence Act* at page 1024 of the 9th edition of the *Law of Evidence applicable to British India* is in point :—

> "The section, however, proceeds upon the principle that consistency is a ground for belief in the witness's veracity. So Chief Baron Gilbert was of opinion that the party who called a witness against whom contradictory statements had been proved might show that he had affirmed the same thing before on other occasions and that he was therefore consistent with himself."

When it was suggested by the defence that the witnesses had made inconsistent statements, it was proper for the Judge to examine the extent of such inconsistency by reference to the whole of their depositions. We are, therefore, of opinion that there is no substance in this objection of Counsel for the appellant to the citation by the learned Judge in his charge to the jury of passages from the depositions. We consider, however, that there was some irregularity in the manner in which the depositions were tendered in evidence. The Clerk of Assize after producing the record should have been invited by Counsel for the defence to read out those passages from the evidence of the various witnesses relied on as contradictory. The shorthand writer would then have recorded those passages in his notes of the evidence and only those passages would be formally put in.

[1] *30 N. L. R. 193.*

The other grounds of appeal require only brief consideration. Ground 4 which suggested that the charge of the learned Judge contained certain misstatements of the evidence was not pressed. Nor do we consider that there is any substance in it. Ground 5 complained that the learned Judge has failed to direct the jury upon (*a*) contradictions in the evidence of the prosecution witnesses and (*b*) the failure of the prosecution to explain the injuries on the first accused. With regard to (*a*), the attention of the jury was directed generally to inconsistencies and contradictions in the evidence and the manner in which the jury should deal with them. In this connection the learned Judge cited a passage from *Wills on Circumstantial Evidence*. Moreover the charge dealt with the alterations in the evidence of the various witnesses. It cannot, therefore, be said that the charge failed to deal adequately with this aspect of the case. With regard to (*b*), we do not consider that it was incumbent on the prosecution to explain the injuries on the first accused. It should also be borne in mind that the latter himself could have explained how he received his injuries. He failed to do so. We do not consider that ground 5 indicates any non-direction. Ground 6 was not pressed.

For the reasons I have given this appeal must be dismissed.

Appeal dismissed.