1954 *Present :* Gratiaen, J.

G. L. JAYASINGHE, Appellant, *and*
THE LINDULA POLICE, Respondent.

S. C. 1130—M. C. Hatton, 2105

Criminal Law—Non-disclosure of defence to Police—Inference of guilt.

The failure or refusal of an accused person to disclose his defence to the Police does not justify an inference of guilt, although it may, in any particular case, affect the weight of the evidence which is led in support of it.

APPEAL from a judgment of the Magistrate's Court, Hatton.

H. V. Perera, Q.C., with *J. C. Thurairatnam* and *F. Silva*, for the accused appellant.

T. A. de S. Wijesundera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 11, 1954. GRATIAEN, J.—

This case has caused me a great deal of anxiety. The appeal is from a conviction for the theft on 12th June 1953 of 82 lb. of manufactured tea from the factory of Melton Estate, Lindula, of which Mr. M. J. Maitland is the Managing Proprietor. The appellant was the estate teamaker and had served Mr. Maitland in that capacity for over 31 years.

It is common ground that at about 5.50 p.m. on the day in question Mr. Maitland, who was in his bungalow, received an anonymous letter to the following effect :

" Honoured Sir,

Check the Hoare & Co. van immediately. Urgent. "

On receipt of this document, Mr. Maitland went up to the factory and saw a van belonging to the firm of engineers concerned whose representatives were at that time engaged in attending to some work in the factory. The van was searched, and there was found in it a sack containing 82 lb. of manufactured tea. I agree with the learned Magistrate that the identity of the tea as tea manufactured in Melton Estate has been established beyond doubt.

Mr. Maitland proceeded with his investigations, and it was brought to light that the author of the anonymous letter was the " learner tea maker " Selladurai who claimed that his suspicions had been aroused when he noticed an estate labourer putting " a bag " into the van at about 3.30 p.m. that afternoon. The labourer concerned was the prosecution witness Sandanam who explained that he had done so on the instructions of the appellant. Sandanam denied, however, that the bag was the same article (containing tea) which Mr. Maitland later discovered in the van. The van-driver also stated that the appellant had requested him to return " a bag of rice " on his account to the firm of David & Co. when the van returned to Talawakelle, the explanation being that David & Co. had sold him a bag of rice which on examination was found to be of poor quality.

The appellant gave evidence on his own behalf admitting the versions of the van-driver and Sandanam to be true. He also called David Silva of Talawakelle who confirmed that he had in fact despatched a bag of rice by Horare & Co.'s van to the appellant earlier in the day. David Silva's evidence on this point was not challenged.

The defence was that some enemy of the appellant (possibly Selladurai, the author of the anonymous letter which led to the detection of the " theft ") had caused a sack of tea to be substituted for the rejected " bag of rice " at sometime between 3.30 p.m. and 5.50 p.m. that evening. The appellant protested his innocence and relied strongly on his long and unblemished record of service in a position of responsibility under Mr. Maitland.

The bare possibility of substitution could not be ruled out completely. It is true that the door of the van was found " closed " when Mr. Maitland inspected it, but there was no suggestion that it had been " locked " during the crucial period. It is also a matter of some importance that the sack of tea was discovered in the van more than two hours after Sandanam had placed in it a bag whose contents had not been examined during that long interval of time.

Although Sandanam and the van-driver were vital witnesses for the prosecution, the learned Magistrate seems to have regarded them as accomplices of the appellant, and he rejected their evidence on every point except when it implicated him. The learned Magistrate also disbelieved the appellant and, in convicting him, stated somewhat dramatically that he " would have to torture himself into having fantastic doubts to give any weight " to the defence.

The case is certainly one of very strong suspicion, but it is indeed unfortunate that Selladurai, instead of busying himself over the preparation of an anonymous letter, did not immediately examine in Sandanam's presence the bag which Sandanam had carried into the van. Had that been done, the defence of substitution, if false, would have been conclusively disproved. It would be quite unjust for me to reject the evidence of this witness as untrue without having had the advantage of seeing and hearing him for myself, particularly as he made a favourable impression on the learned Magistrate. But I am not precluded from observing that his regrettable preference for anonymity has deprived the Court of material evidence on a very vital issue.

There is one matter at least on which the learned Magistrate, in analysing the defence, has seriously misdirected himself in law. It has been proved that, at a certain stage of the investigation, the appellant was taken to the Police Station to have his statement recorded. What he stated to the investigating officer I do not know. But he admitted under cross-examination that " at that time I did not think of protesting to anybody that in reality it was a bag of rice that I put in. I cannot remember what I told the constable ". In considering this admission, the learned Magistrate made the following criticisms which, to a very large extent, formed the basis of his ultimate conclusions :

" This conduct of the accused appears to me to be the conduct of a guilty man, *for an innocent man with 31 years' service would, I think, immediately have protested his innocence* ".

It seems to me that, in making this observation, the learned Magistrate regarded the appellant's failure to disclose his defence to the Police with any precision as tantamount to a confession of guilt. That was a grave misdirection. There is no evidence that the appellant did not protest his innocence, and if he had made any statement to the Police which would justify the inference that he admitted his guilt, section 25 of the Evidence Ordinance would necessarily have shut it out.

Even in England, where a voluntary statement made by an accused person to a Police officer, after being duly cautioned, is admissible in evidence at his trial, the Courts have consistently pointed out that failure or refusal to make such a statement does not justify an inference of guilt. Similarly with regard to a prisoner's replies to the committing Magistrate. In *R. v. Naylor* [1] the prisoner, in answer to a statutory caution addressed to him by the Magistrate said, " I do not wish to say anything except that I am innocent ". At the subsequent

[1] *(1933) 1 K. B. 685.*

trial, the Recorder, in his summing up to the Jury, commented on this answer and said that "if the prisoner was innocent he would doubtless have disclosed his defence in the Police Court". The Court of Criminal Appeal held that this was a misdirection, and quashed the conviction; see also *R. v. Leckey* [1] and *R. v. Haddy* [2].

I agree that adverse comment is permissible if an accused person, by disclosing his defence at a very late stage, has thereby deprived the prosecution of a reasonable opportunity of testing the truth of his evidence—*R. v. Parker* [3], *R. v. Littleboy* [4], and *R. v. Tune* [5]. If, therefore, the learned Magistrate had confined his criticism only to the delay in disclosing the defence of substitution in so far as that delay had to some extent prejudiced the Police investigation, such comment would have been unobjectionable. But the actual criticisms which I have quoted go beyond legitimate comment. As Lord Hewart C.J. pointed out in *Littleboy's case* (*supra*):

> "It is one thing to make an observation with regard to the force of a defence (e.g. an alibi) and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; *but it is another thing to employ that non-disclosure as evidence against an accused person*".

In other words, a delay in disclosing one's defence may, in any particular case, go to the weight of the evidence which is led in support of it; but such delay can never be regarded as evidence of guilt. The learned Magistrate seems to have misunderstood the purport of the legitimate cross-examination of the appellant on this aspect of the case.

In my opinion, it is not safe, in view particularly of this misdirection, to allow the conviction to stand. I allow the appeal and acquit the accused.

Appeal allowed.