VITHARANA
v.
THE STATE

COURT OF APPEAL
PALAKIDNAR, J. (P/C.A.) AND
GUNAWARDANA, J.
H.C. MATARA NO. 38/90
COURT OF APPEAL NO. 165/90
30 OCTOBER AND 02 NOVEMBER 8, 1992

Criminal Law – Giving false evidence – Procedure to be followed to prove a charge under Section 190 of the Penal Code, read with section 448 of the Criminal Procedure Code.

The accused was indicted in the High Court for giving false evidence. At the trial, the only evidence was that of the Interpreter Mudaliyar of the High Court, who produced extracts of the non-summary proceedings. In answer to leading questions, the Interpreter Mudaliyar had stated that the accused had given contradictory evidence in the High Court. The extracts of the accused's evidence in the High Court were not produced.

Held:

The proper procedure to prove a charge under Section 190 of the Penal Code, read with Section 448 of the Criminal Procedure Code, is to mark and produce through the appropriate Court official, the extract of the Magistrate's Court record of the non-summary inquiry and the extract of the evidence of the accused, given in the High Court.

This procedure will not only provide adequate proof of the contradictory evidence given by the accused, but also would facilitate the Jury to compare the two sets of evidence, and arrive at the verdict, whether the accused had given contradictory evidence, without having to rely on any opinion expressed by a witness.

Per Gunawardana, J., "Otherwise, as it appears to have happened in the instant case, the Jury is called upon to rely on an opinion given by a witness, and not on the actual contradictory items of evidence. This would result in begging the very question from the Jury, which they are called upon to decide."

Case referred to:

1. *S. Pedrick Singho et al. v. The King* 52 NLR 241.

APPEAL from order of High Court of Matara.

Dr. Ranjith Fernando with *J. Fernando* for accused-appellant.

R. Arasecularatne Senior State Counsel for the State.

Cur. adv. vult.

2nd November, 1992.

GUNAWARDANA, J.

The accused in this case was charged in the High Court of Matara with having given false evidence, an offence punishable under Section 190 of the Penal Code, read with Section 448 of the Criminal Procedure Code.

After trial, before a Jury, the accused was convicted and sentenced to 3 years rigorous imprisonment and a fine of Rs. 100/-. This appeal is from the said conviction and sentence.

The accused was a witness for the prosecution in a High Court trial, where another person was charged for murder. It was alleged that the accused retracted or contradicted the evidence given by him before the Magistrate, and the other person who was charged for murder was acquitted.

After that trial was concluded, the accused was indicted before the same Jury on a charge of giving false evidence. At the trial of this

accused, the only evidence that was led, was that of the Interpreter Mudaliyar of the High Court of Matara, who produced the relevant extracts of the evidence of the accused, given in the Matara Magistrate's Court, in non-summary proceedings, in case No. 88285. The four extracts of the accused's evidence in the Magistrate's Court were produced by him, marked X1, X2, X3 and X4. Thereafter in answer to a leading question by the learned State Counsel, as to whether the accused in his evidence in the High Court has stated that, he did not see anything of the incident, the Interpreter Mudaliyar has said "yes". To another leading question as to whether the accused had denied being there at the scene or having seen anything, although he has stated so in X2, the witness has answered "yes". In answer to a question whether the accused had stated that he did not see one Wasantha Batagoda, but in cross-examination had stated that Wasantha Batagoda was there with another person, although he has stated otherwise in X3, the witness had answered "yes". In reply to a question as to whether the accused has stated in the High Court, that he went from another place to the scene with Wasantha, the second witness for the prosecution, at the time the deceased sustained the injuries, the witness had stated "yes". Finally, when he was asked as to whether the accused had stated in the High Court, that the accused delayed to make the statement to the police, because the accused had not seen the incident, the witness had replied "yes". No extracts from the evidence of the accused in the High Court were produced.

The above questions were reproduced in detail firstly, to show that the form and content of the questioning is erroneous. All the questions are leading questions to which the witness has merely said "yes". Secondly, it is not discernible from the questions as to what context in the High Court record, the learned State Counsel is referring to, when he traced the said questions. Thirdly, the actual contents of the High Court record not being before the Jury, it would amount to the witness giving an opinion, on whatever the contents of the High Court record, the Interpreter Mudaliyar was looking at, when he gave evidence. Fourthly, it would tantamount to negativing the function of the Jury, because the Jury being judges of fact, must consider the two sets of evidence given by the accused, and then

decide whether one is contradictory of the other, rather than rely on an opinion given by a witness.

In the light of the procedure adopted by the prosecution in this case, the learned Counsel for the accused submitted that there was no proof before the Jury that the accused had given false evidence in the High Court. He argued that, therefore the charge must fail. He cited the case *S. Pedrick Singho et al. v. The King*[1] where the main decision did not however deal with the procedure to be adopted in proving a charge for giving false evidence, nevertheless, it sets out the extracts of the proceedings of the Assizes which show the procedure that had been adopted to prove the charges in the three cases considered in that judgment. It is discernible from the extracts quoted in the said judgment, that the procedure adopted in the said three cases was to mark and produce through the Clerk of Assize the extract of the Magistrate's Court record of the non-summary inquiry and the extract of the evidence of the accused given before the Supreme Court. This procedure in our view not only provided adequate proof of the contradictory evidence given by the accused but also facilitated the Jury to compare the two sets of evidence and arrive at the verdict whether the accused has given contradictory evidence, without having to rely on any opinion expressed by a third party. This in our view, is the appropriate procedure that should be followed in proving a charge of giving false evidence. Otherwise, as it appears to have happened in the instant case, the Jury is called upon to rely on an opinion given by a witness, and not on the actual contradictory items of evidence. This would result in begging the very question from the Jury, which they are called upon to decide.

Therefore, we are of the view that the procedure followed in the instant case has occasioned a failure of justice, and the verdict of the Jury has thereby been seriously undermined. Hence, we set aside the verdict of the Jury and acquit the accused.

PALAKIDNAR, J. (P/C.A.) – *I agree.*

Appeal allowed.