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## THE KING *v.* PONNIAH.

*D. C., Batticaloa, 2,278 (Criminal).*

*False evidence—Indictment—Evidence in support of charge—Conviction—Power of Commissioner appointed under Ordinance No. 9 of 1872 to examine witnesses not duly summoned—Proper course of proceedings before the Commissioner.*

A charge of giving false evidence should contain a distinct assertion with regard to each statement intended to be characterized as false; that it was made; that it is untrue in fact; and that the accused knew it was so when he made it.

The recital in an indictment of a lengthy deposition without any allegations how many statements therein contained are false to the knowledge of the accused is much too indefinite and misleading to justify his being called upon to plead.

When a person is charged with giving false evidence, the whole of his evidence should be proved, not merely a portion of it. Where it is alleged that the evidence was given in the course of an inquiry held by a Court or before a Commissioner appointed under Ordinance No. 9 of 1872, all the proceedings ought to be produced to enable the Court to judge of their character.

In the case of evidence given before a Commissioner it must appear that the Commission was read over to the accused; that he was made aware of the nature and scope of the inquiry; and that he was warned that any evidence he gave might be used against him.

The Commissioner cannot exercise any of the powers conferred on him by section 2 of the Ordinance No. 9 of 1872 in respect of any persons who have not been duly summoned.

Section 3 does not limit the Commissioner's power to administer oath only to persons duly summoned before him.

THE facts of this case are fully set forth in the judgment of the Supreme Court.

*Dornhorst, K.C., H. J. C. Pereira,* and *E. W. Jayawardene,* for appellant.

*C. M. Fernando, C.C.,* for respondent.

16th June, 1903. LAYARD, C.J.—

The appellant in this case was charged with the offence of giving false evidence before Mr. W. H. Moor, a Commissioner appointed by the Governor under Ordinance No. 9 of 1872, and was convicted in the District Court of Batticaloa, in that he did in the course of a judicial inquiry before such Commissioner, wilfully give false evidence upon examination on oath, and was sentenced to undergo two years' rigorous imprisonment.

Several objections have been taken to the indictment presented in this case. With reference to the first objection which was

taken, it is contended that to constitute the offence of giving false evidence before a Commissioner appointed under the Ordinance No. 9 of 1872 it is essential that the persons should have been served with a summons under the hand of the Commissioner, requiring such person's attendance before him at a time and place to be mentioned in the summons, and further that such being the case it would be necessary to aver in the indictment that the appellant was duly summoned to give evidence at a fixed time and place mentioned in the summons. Now, the object of the Ordinance No. 9 of 1872, to be gathered from the preamble thereof, is to enable the Governor to obtain information upon any matter which the Governor may think necessary through the means of a Commissioner to be appointed by him to hear evidence and to report thereon.

The first section of the Ordinance, after authorizing the appointment of a Commissioner to inquire and report upon any matter stated in his Commission, provides that " it shall be lawful " for the Commissioner so appointed, by a summons under his hand, to require the attendance before him, at a time and place to be mentioned in the summons, of any person whose evidence shall be material in the opinion of the Commissioner.

The second section gives to the Commissioner all the powers of a District Court in respect of persons who may have been summoned by him for failing to appear, or refusing to be sworn, or to answer questions, or to produce documents called for by the Commissioner. The Commissioner, however, is not allowed to exercise any of such powers before obtaining the sanction of the Governor in manner provided by that section.

So far it seems to me clear that the Commissioner cannot exercise any of the powers conferred on him by section 2 in respect of any persons who have not been duly summoned.

It is contended, however, that he cannot examine any witness who is not so summoned, because the duty is cast upon him by section 1 to issue a summons in manner therein appointed: that the words " it shall be lawful," as they are used in that section, are imperative. Reading the whole of the Ordinance together, it does not appear to me that that would be a proper construction to place on the provisions of section 1. The object of the Ordinance was to enable the Commissioner appointed to obtain evidence on the matters submitted to him for inquiry, and it appears to me that the Commissioner is entitled to examine any person who may voluntarily tender himself as a witness, or who, being asked to give evidence, expresses his willingness to do so. He cannot, of course, deal with such persons under section 2, as that section is

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limited to persons upon whom any summons issued under section 1 has been served.

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The question still remains as to whether he can administer an oath under section 3 to any person other than one duly summoned before him. That section, it will be seen, differs from section 2, and empowers a Commissioner to administer oaths to all persons who shall be examined before him, in no way limiting his authority merely to administer oaths to persons duly summoned in manner provided by section 1, and it further renders every person examined upon oath before such Commissioner, who shall wilfully give false evidence in the course of such examination, liable to be punished for giving such false evidence. I cannot uphold the first objection to the indictment.

Now, the indictment in this case runs as follows:—

"That on or about the 26th day of May, 1902, at Batticaloa, you, in the course of an inquiry before W. H. Moor, Esq., a Commissioner appointed by the Governor, with the advice of the Executive Council, under Ordinance No. 9 of 1872, did wilfully give false evidence upon examination on oath by stating as follows:— "I am sure I issued all that salt on the 3rd and 4th March (meaning thereby, 3rd and 4th March, 1902). I did not issue any of the 1,025 cwt. afterwards. I am certain I issued to Louis Sinho on the 3rd or 4th March the whole of the 475 cwt. he purchased on the 3rd March. I am certain I did not issue that to him on the 3rd or 4th April (meaning thereby, 3rd or 4th April, 1902). I issued to Muttayah Chetty the 30 cwt. he paid for on the 3rd March on the 3rd or 4th March. I am certain I did not issue that to him on the 3rd April. I issued to Ramasamy the 70 cwt. he purchased on the 3rd March either on the 3rd or 4th March. I am certain I did not keep him waiting for that till April. I issued to Nagappen the 30 cwt. he paid for on the 3rd March to him on the 3rd or 4th March. I am certain I did not keep him waiting till April. I issued the 65 cwt. David Jesu Das paid for on the 3rd March on the 3rd or 4th March. I issued the 30 cwt. Hendrick Appu paid for on the 3rd March to him on the 3rd or 4th March. I issued the 10 cwt. Isanhami purchased all on the date he paid for it. I did not issue 3 cwt. before the Easter holidays and 7 cwt. after the Easter holidays. I did not keep any of the traders who paid for salt on the 3rd March waiting for their salt till April. I am certain of that. The salt then verified (meaning the salt verified by the head clerk of the Kachcheri and the Chief Mudaliyar) was all the salt that had been landed on those days. None of the salt that had been landed on those days (meaning the 2nd and 3rd April, 1902, and subsequent

days) had been issued before this verification. None of it was issued to traders before the verification by the Chief Mudaliyar and the head clerk;'—which statements you either knew or believed to be false, and did not believe to be true, and you have thereby committed an offence punishable under section 190 of the Ceylon Penal Code."

I learn from Crown Counsel that this involved charge was intended to inform the appellant that he had made no less than twelve false statements. I must confess that I was unable to gather by merely looking at the indictment how many statements, or what part of the statements set out in the indictment, were alleged by the Crown to be false. It has been held in India, as pointed out by the appellant's counsel, that a charge of giving false evidence should contain a distinct assertion with regard to each statement intended to be characterized as false; that it was made; that it is untrue in fact; and that the accused knew it was so when he made it. It appears to me that it is only right that when the Crown intends to establish that two or more statements contained in a lengthy deposition are false, it should distinctly set out each such statement separately, and state that it is not true in fact, and that the accused knew that it was so when he made it. The present indictment recites a lengthy deposition and does not allege how many statements contained in it the Crown intends to rely upon as false, and whether the Crown intends to prove that the whole of the salt mentioned in the deposition was not actually delivered to the persons to whom the accused swore it was delivered, or whether a smaller quantity than that alleged was delivered, or whether, as found by the Judge in two instances, the appellant had falsely sworn that the salt was delivered on a different date to that on which it was actually delivered. It must have been as embarrassing to the appellant and his Counsel to meet the vague charge laid against him as it has been to this Court to understand what the Crown intended to allege and prove on this indictment.

In my opinion not only was the indictment not sufficiently precise, but it was absolutely unfair to the accused to call upon him to plead to an indictment which is so indefinite and so misleading. I think the only course open to this Court is to quash the indictment and all proceedings thereunder, including the conviction of the appellant, and I do not hesitate to do so, as I believe there was not sufficient legal evidence before the Court to convict the appellant, even had the indictment been in order.

The appellant has been convicted of giving false evidence when re-examined by Mr. Moor on the 26th May, 1900, at the appellant's

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own house. Mr. Moor states in his deposition that he had examined him previously on the same subject, and that his examination as recorded on the document marked B was only a re-examination of the appellant to see if he would re-consider the statements he had previously made. Assuming that the statement recorded in B could be received as proof of the oral evidence given by the appellant on the 26th May, 1900, there is absolutely no evidence what the appellant said when he was previously examined before Mr. Moor. When a person is charged with giving false evidence the whole of the evidence given by him should be proved, not merely a portion of it, as it is quite possible there may be something in another part of the evidence which materially modifies the words charged as false evidence, so as to show that they are not false. In England it has been decided that if perjury has been committed at the trial of a cause all the evidence given by the defendant relative to the facts on which the perjury is assigned must be proved. (*Reg. v. Jones, Peake 37*, and *Reg. v. Rowley, R. & M. 269*). In this particular case it is most important to know what the original statements were which Mr. Moor thought the appellant ought to have the opportunity of re-considering. It is obvious that it is quite possible that they might materially modify the statement subsequently made. Further, if they did not modify it, it would enable the Court to decide the question whether the false evidence was given on a material point.

The Commissioner, I understand, was to report upon an alleged defalcation in the salt stores at Batticaloa. It does not appear from the evidence that the appellant was informed of the exact terms of the commission. Assuming, however, he was, it is not clear that the date of the delivery of the salt was material to the inquiry. I presume the point at issue was whether the salt was delivered or not. When I suggested to Crown Counsel that if a witness deposed to a wrong date he would not be guilty of the offence of perjury, he expressed surprise, as he said it was not necessary under the Penal Code that the false evidence should have been given on a material point. I agree with him that under the Penal Code it is not necessary that the false evidence should have been given on a material point, yet the question of materiality has a bearing upon the question as to whether the statement was made intentionally. The appellant might be swearing truly to a very material fact, viz., the delivery of the salt to the individuals named, and yet unintentionally swear that the delivery took place on a wrong date. It is by no means certain that the appellant was aware that the questions put to him were for

the purpose of eliciting from him the date of the delivery. The former examination of the appellant would have been useful for the purpose of enabling the Court to arrive at the conclusion whether the actual date was material or not. Where it is alleged that the evidence was given in the course of an inquiry held by a Court, or, as in this case, before a Commissioner appointed under the Ordinance No. 9 of 1872, all the proceedings ought to be produced to enable the Court to judge of their character (*Reg. v. Carr, 10 Cox, 364*).

I am further doubtful in this case whether the document B was legally admissible as evidence of the statements made by the appellant. On the face of the document B there is nothing to show that it forms part of an inquiry being held by Mr. Moor as Commissioner. It has no head-note, and there is no means of identifying it with any other proceedings held before Mr. Moor. It does not appear that Mr. Moor's Commission was ever read over to the appellant, nor that he was informed that Mr. Moor was a Commissioner duly appointed under the Ordinance No. 9 of 1872, nor that he was made aware of the nature of Mr. Moor's inquiry and what the exact scope of Mr. Moor's inquiry was. If the object of Mr. Moor's inquiry was to establish a defalcation on a particular date of salt in Government stores in the charge of the appellant, before being examined by Mr. Moor he should have been so informed, and further he should have been warned that any evidence he gave might be used against him. This does not appear to have been done. The statements on which the prosecution is founded were oral, and certainly up to the passing of our Evidence Ordinance the evidence of the appellant would have to be proved by the testimony of some person who was present. In this case it could have been proved by Mr. Moor, and he would be allowed to refresh his memory by reference to document B, and that document might be used as corroborative evidence to support Mr. Moor's testimony. Even if Mr. Moor had been a Judge, his notes, prior to the enactment of our Evidence Ordinance, could only be used in evidence to refresh his memory, and they would be otherwise inadmissible (see *Reg. v. Child, 5 Cox, Criminal Cases, p. 197*).

It has been held, however, by this Court that in view of the provisions of section 80 of the Evidence Ordinance, where evidence was recorded by a judicial officer in discharge of his official duties and in the manner prescribed by the Criminal Procedure Code, the Court is bound to presume that the record of the evidence taken purporting to be signed by a judicial officer was genuine, and that the evidence was duly taken, and that the record of such

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officer was the only admissible proof of the evidence so recorded (*Reg. v. Appuwa, 2 N. L. R. 6*). The distinction drawn in that judgment between the English case I have referred to above and the case then under consideration of this Court was that in the English case there was no legal obligation to record the evidence, whilst our minor judiciary are under the obligation by our statute law to record all the evidence given before them. Applying this principle to the present case, the law nowhere enacts that a Commissioner appointed under Ordinance No. 9 of 1872 is to record in writing the evidence taken by him, nor does it prescribe any form in which such evidence is to be recorded. I think, therefore, document B was not rightly received in evidence in this case. Even if B was properly received in evidence, the appellant, in my opinion, has been wrongly convicted. The conviction on the face of it is bad, because, as admitted by Crown Counsel, if the appellant has committed any offence, it is one under section 3 of Ordinance No. 9 of 1872. The District Judge has however, convicted him of giving false evidence in a judicial inquiry, an offence under section 190 of the Penal Code.

Now the appellant did not give evidence in any judicial inquiry, but before a Commissioner appointed under Ordinance No. 9 of 1872, and if he committed any offence he should have been convicted for breach of section 3 of that Ordinance, which would have rendered him liable to the punishment prescribed by section 190 of the Penal Code. I quash the indictment, proceedings, and conviction and discharge the appellant.