[IN THE COURT OF CRIMINAL APPEAL]

1960 *Present :* **Basnayake, C.J. (President), Gunasekara, J., and Sansoni, J.**

THE QUEEN *v.* H. JALATHGE

APPEAL NO. 79 OF 1960, WITH APPLICATION NO. 93

S. C. 20—M. C. Tissamaharama, 32462

Evidence—Cross-examination of witness as to previous statements made by him in writing or reduced into writing—Permissibility—Evidence Ordinance, s. 145 (1).

There had been a previous trial which had proved abortive as the jury were divided 4 to 3. At the second trial Counsel for the accused sought to utilise the evidence given at the previous trial for the purpose of contradicting some of the prosecution witnesses.

Held, that under section 145 (1) of the Evidence Ordinance the defence Counsel was entitled to utilise the previous proceedings for the purpose of cross-examining the prosecution witnesses.

APPEAL, with application, against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva*, for Accused-Appellant.

J. G. T. Weeraratne, Crown Counsel, for Attorney-General.

June 9, 1960. BASNAYAKE, C.J.—

In this case the accused was indicted with an offence punishable under section 300 of the Penal Code, for shooting Police Constable No. 889 Carolis. It would appear from the proceedings that there had been a previous trial which had proved abortive. The present trial commenced on 31st March, 1960 and ended on 12th April, 1960. The transcript of the proceedings shows that in the course of the case for the prosecution learned counsel for the accused sought to utilise the evidence given at the previous trial for the purpose of contradicting some of the prosecution witnesses but that he refrained from doing so on an indication from the learned presiding Judge that the trial should proceed without any reference to the previous trial.

This is how the relevant portion of the transcript of the shorthand record reads :—

" *Crown Counsel :* Before I commence my cross-examination I would like to draw Your Lordship's attention to the evidence of this accused at the previous trial.

2——J. N. R 15187—1,995 (1/61)

Court : We will go on with this case without any reference to the previous trial. "

Some time later in the course of the cross-examination of the accused, learned Crown Counsel put the following questions :—

" Q. Can you recall the evidence you gave at the previous trial ?

A. Yes, I remember.

Q. Did you on that occasion tell this Court that the Inspector of Police, Tissa . . . . "

Thereafter the transcript reads as follows :—

" *Defence counsel to Court :* My Lord, I object to my learned friend referring to any evidence given at the previous trial.

Court : But a witness can well be asked about a former statement he made which is inconsistent with his evidence here ?

Defence Counsel : I object because when I tried to question a witness for the prosecution yesterday about his evidence at the previous trial Your Lordship did not allow me to do so.

Court : As far as I remember I merely expressed the view that evidence given at the previous trial should be avoided as much as possible but I did not make an order.

Defence Counsel : On Your Lordship telling me not to refer to the evidence at the last trial, I did not refer at all to it. So that now if Your Lordship allows my learned friend who appears for the prosecution to do so I submit that it will be unfair for the defence and to the accused because I have not had the privilege or advantage of cross-examining the witnesses for the prosecution on the previous trial.

Crown Counsel : Except this, that I have provision to utilise that section with Your Lordship's permission where this accused makes a completely different statement at this trial.

Court to Crown Counsel : I think you had better refrain from doing so because I have got a feeling that Mr. Perera may have a grievance though I do not think I over-ruled any of his questions.

Defence Counsel : Your Lordship definitely told me not to ask any questions on the previous trial because the record was not before Your Lordship's Court. Otherwise I would have cross-examined the witnesses very severely.

Court : What I really felt at the time was that one did not have for ready reference, any particular answer given by a witness at that time. So I merely made a suggestion that it is better if we can go through the evidence in this Court without involving ourselves too much with the evidence given at the last trial.

Crown Counsel : I am prepared to take the answer that he gave because I have with me the evidence given by him on the previous occasion—I have made on my own notes because I prosecuted at that last trial also, but if Your Lordship thinks that there might be an element of unfairness I will certainly drop the matter.

Court : I do have a definite recollection of cautioning counsel on both sides not to get too much involved in the evidence given at the previous trial.

Crown Counsel : My Lord, in that case I will not pursue the matter. As it is, in my view, the accused has said sufficient for the purposes of my case."

It would appear from the passages of the transcript reproduced above that defence counsel was precluded by the trial Judge from utilising the statements made by the prosecution witnesses at the previous trial for the purpose of cross-examining them. Under section 145 (1) of the Evidence Ordinance, defence counsel is entitled to cross-examine a witness " as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved ". That right was denied to the accused in this case, and we think that the learned trial Judge was wrong in not permitting defence counsel to utilise the previous proceedings for the purpose of cross-examining the prosecution witnesses. Of the grounds of appeal the only ground which counsel for the appellant pressed is ground 7 which reads as follows :—

> " It is respectfully submitted that the defence was illegally precluded from utilising the evidence at the previous trial of the prisoner and that this led to a miscarriage of justice. "

That ground is one of substance and must be upheld. We accordingly llow the appeal and quash the conviction.

There remains for consideration the further question whether we should direct a judgment of acquittal to be entered in favour of the appellant or order a fresh trial. This offence was committed two years ago. The accused has had to stand two trials at great expense to himself. The present trial lasted from 31st March 1960 till 12th April 1960. We are of opinion that, in the circumstances of this case having regard to the nature of the prosecution evidence, and the fact that at the first trial the jury were divided 4 to 3, the accused should not be put in jeopardy a third time, and direct that a judgment of acquittal be entered in his favour.

Accused acquitted.