

1932

Present : Macdonell C.J.

BARTHOLEMEUSZ *v.* KULERATNE.475—*P. C. Kandy, 38,935.*

Identification of accused—Witness in Court denies identification—Evidence of person present at parade admissible.

Where, at an identification parade, the accused was identified by a witness and the latter in the course of his evidence stated that he was not quite certain of the identity of the accused.

Held, that the evidence of a person who was present at the parade was admissible to establish that the accused was identified by the witness.

APPEAL from a conviction by the Police Magistrate of Kandy.

Ranawake, for accused-appellant.

Wendt, C. C., for Attorney-General.

December 23, 1932. MACDONELL C.J.—

In this case the accused was charged, that being an officer of Bogambara Prison, Kandy, he suffered a parcel containing 200 cigars to be thrown or introduced into the prison, thereby contravening section 59 of Ordinance No. 16 of 1877.

The facts alleged are that the accused was seen buying certain cigars from a boutique-keeper in Kandy and that the same indential packet of cigars was found unopened under a saucepan in the gaol kitchen. The identity of the packet of cigars is sufficiently established. The accused is a hospital orderly and works in the gaol kitchen. The circumstances of the finding are to my thinking not quite satisfactory, raising a doubt in my mind of which the accused must have the benefit. The principal witness says he saw the accused buying the cigars and seems to have informed the overseer that "the parcel may probably be thrown over the wall" of the prison. The overseer told the gaoler and the gaoler detailed a guard to "watch the movements of the accused". The principal witness, as I have called him, found the cigars as stated under a saucepan in the gaol kitchen, and he says that the guard detailed to watch told him that "a parcel had been thrown over the walls and that he was looking for it", and he himself went forthwith to the kitchen and found it. But the gaoler says, evidently repeating what the guard detailed to watch told him, that the parcel was found "outside the kitchen". There is thus a contradiction as to the actual finding. The principal witness says he found it, and there is no suggestion that the guard detailed to watch had anything to do with the actual finding. But that guard says as follows: "I searched the kitchen. Later the principal witness joined in the search. I found the parcel in the kitchen." It is difficult to regard this as a satisfactory story as to this all important point of the finding. If it was found in the kitchen, then how did the guard detailed

to watch come to say to the gaoler that it was "found outside the kitchen"? Yet another matter. Was this kitchen the ordinary gaol kitchen where various people in the gaol would have lawful duties, or was it the hospital kitchen where accused as hospital orderly would go but not perhaps the ordinary gaol official? On the whole there is a doubt in my mind as to the circumstances of the finding of this packet of cigars and if so it would not be safe to hold that the accused "introduced" them. It is a very suspicious case, certainly, but I doubt that the evidence is so satisfactory that on it the accused ought to be convicted. The appeal will be allowed then and the conviction set aside.

There is however, a point of law in this case which calls for decision. The seller to accused of the cigars was shown the parcel and identified it and its contents as what he had sold. An identification parade of seventeen prison officials including the accused was thereafter held. The cigar seller says in evidence: "At an identification parade I pointed out the man to whom I sold the cigars". The Superintendent of the gaol says in evidence: "The cigar seller pointed out this accused to me as the person who had bought the cigars. He was perfectly certain it was this accused to whom he sold the cigars". Pausing at this point, one may remark that here there was evidence, undoubtedly admissible, that the man to whom the cigars had been sold was the accused and no other. The cigar seller says he pointed out the man to whom he sold them, and the Superintendent in his evidence makes it definite that the man so pointed out was the accused. But in giving his evidence the cigar seller went on to say: "The man to whom I sold the cigars is not in Court. The man whom I pointed out to the Superintendent, he too is not here (witness rolls his eyes all over the Court but does not look at accused . . .): The man whom I pointed out is like the accused. I cannot say whether it is this accused". It was argued that as the cigar seller had gone back on his previous evidence and had in the Police Court given evidence to show that the man to whom he sold cigars was not the accused, there was no evidence that it was the accused to whom the cigars were sold, and that consequently the evidence of the cigar seller must be entirely disregarded in accordance with the decision in *Rex v. Silva*¹. In that case it was held that a statement made by a witness to a Police Officer and afterwards denied by that witness at the trial, could not be used as substantive evidence of the facts stated against the accused. But on the facts of the present case it can easily be distinguished from *Rex v. Silva (supra)*. In the Police Court the cigar seller admitted that he did point out the man to whom he sold the cigars. Other evidence was given to show the identity of that man. The evidence of the Superintendent shows that the man was the accused. It is quite true that the cigar seller in Court did not say that the accused was the man whom he pointed out or that he was the man to whom he had sold cigars, and his admission could not be used for that purpose. But it could be used to show that on a certain occasion he did identify a particular man as being the person to whom he sold cigars. That is beyond question since he said those words in evidence before the Magistrate. Who was the man whom he pointed out? That

¹ 30 N. L. R. 193.

fact can be established by the evidence of any one present at the identification parade and it was established by the evidence of the Superintendent. I think the facts in this case are quite sufficient to distinguish it from *Rex v. Silva (supra)*, and the evidence of the cigar seller did, when taken with that of the Superintendent, go to prove that the man to whom he sold cigars was the accused and is clearly admissible for that purpose.

For the reasons I have stated above, I do not think the evidence quite sufficiently satisfactory to justify the conviction which must therefore be set aside.

Set aside.
