

1940

*Present : Howard C.J. and Soertsz J.*THE KING *v.* PERERA.

99—D. C. (Crim.) Colombo, 12,550.

Evidence—Evidence of acts unconnected with the charge—Statements made to Police Officer in course of inquiry—Right to use such statement to contradict witnesses—Criminal Procedure Code, s. 122 (3) (Cap. 16).

The driver of an omnibus belonging to X was charged with committing mischief by intentionally reversing his omnibus so as to collide with an omnibus belonging to Y.

It was alleged by the prosecution that there was rivalry between X and Y and evidence of other incidents of a similar nature was proved. The accused did not participate in those incidents apart from the fact of his employment under X.

Held, that the evidence of incidents unconnected with the charge was inadmissible.

Statements made to a Police Officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code may be used for the purpose of discrediting a witness under section 155 (c) of the Evidence Ordinance.

Dias v. Kiriwanthia (5 C. W. R. 187) followed.

A PPEAL from a conviction by the District Judge of Colombo.

R. L. Pereira, K.C. (with him J. E. M. Obeyesekere), for the accused, appellant.

Nihal Gunasekera, C.C., for the Crown, respondent.

Cur. adv. vult.

February 28, 1940. HOWARD C.J.—

The appellant was convicted on September 15, 1939, in the District Court of Colombo of committing mischief on July 16, 1938, at Peliyagoda by wilfully and intentionally backing his omnibus No. X 4524 and making it collide with omnibus No. Z 3695, property of one G. D. E. Malwana, and thereby caused loss or damage to the said omnibus No. Z 3695 to the amount of Rs. 571.60 and thereby committing an offence punishable under section 410 of the Ceylon Penal Code. The appellant was acquitted of a further charge of committing an offence punishable under section 426 of the Ceylon Penal Code. The two omnibuses concerned in this collision belonged to rival owners, Z 3695 being the property of G. D. E. Malwana, whose buses are called "Siyarata", and X 4524 the property of another owner whose buses are known as "M. J.". The story told by Peter, the driver of bus Z 3695, and the other eye-witnesses called by the Crown was as follows:—Z 3695 left Kurunegala about 8.30 A.M. on the day in question *en route* for Colombo. As Z 3695 approached the Socony Petrol Service Station at Peliyagoda on the new main road to Kandy, Peter saw ahead of him an M. J. bus halted on its left facing the direction of Colombo. As he approached closer he saw another bus belonging to the M. J. Company coming from the direction of Colombo. The oncoming M. J. bus, as it neared the halted M. J. bus, began to decrease its speed and came so close to the halted M. J. bus that there was no room for Z 3695 to pass in between although there was ample room for the oncoming bus to have kept to its

left and permitted Z 3695 to pass between it and the halted M. J. bus. In these circumstances, Peter says, he brought his bus to a halt about thirty feet behind the halted M. J. bus to permit of the oncoming bus to keep to the course it had set itself. - About a minute or half a minute after he had halted his vehicle and, as the oncoming M. J. bus was passing away, the M. J. bus No. X 4524 that was halted in front of him was reversed by the accused who was driving and dashed into him. Peter further says that after the first impact bus X 4524 was driven forward about two or three fathoms and reversed a second time into his bus. At this stage he got down from his bus and saw the operation repeated by the M. J. bus once more. Peter also says that after the first impact he heard someone near the bus say, "Micheal, knock it till it is reduced to matchwood".

The case for the prosecution is based on the ground that as the result of inter-bus rivalry, there was an organized conspiracy on the part of employees of the M. J. firm to harass the Siyarata buses and this conspiracy culminated in the wilful damage inflicted on bus Z 3695 as the result of the deliberate backing of X 4524 by the accused. It is suggested by the prosecution that the shutting in of Z 3695 between the oncoming M. J. bus from Colombo and the stationary X 4524 was deliberately planned. As additional proof of such a conspiracy a whole mass of evidence has been tendered by the prosecution of events which are alleged to have happened on the Kurunegala-Colombo road not only on the day in question but also on the two previous days, the 14th and 15th. This evidence seeks to establish that M. J. buses were continually harassing Peter, the driver of bus Z 3695. in the course of his journeys to Colombo on these particular days. Not only has evidence of the facts of these harassings been tendered, but also complaints made by Peter to the police and to his master with regard to what happened. I am unable to understand the relevancy of this evidence in relation to the charge against the accused. It has not been established that the accused was a party to such a conspiracy on the part of M. J. employees. There is no proof that he participated in the harassings that are alleged to have taken place earlier in the day and on the two previous days on the Kurunegala-Colombo road. The only connection between the accused and these happenings is the fact that he, like the persons who are alleged to have been responsible for them, is an employee of the M. J. firm. That fact in itself is in my opinion insufficient to permit the admission of such evidence in a criminal charge against the accused. All this evidence was clearly inadmissible. Perusal of the judgment of the learned District Judge indicates only too clearly the extent to which he has been influenced by this evidence in coming to a decision. Thus he refers to a few facts with regard to the bus rivalry which he regards as furnishing the background to the incidents that form the subject-matter of the charge. He also states that the motive behind the commission of the offence would seem to be to wreck the newly started bus service by Malwana and to force him to keep off the road. The whole judgment of the learned District Judge is coloured with the idea of a planned attempt on the part of the M. J. firm to harass and injure their rivals. In these circumstances it is

obvious that for no reason other than the improper admission of this evidence the conviction cannot be allowed to stand.

Apart from the improper admission of evidence to which I have referred there are other grounds for allowing this appeal. Counsel for the appellant sought in the District Court to cross-examine the witness Appuhamy on an alleged statement made by him to P. C. Wambeek. This cross-examination was disallowed by the District Judge under section 122 (3) of the Criminal Procedure Code. P. C. Wambeek when tendering evidence for the defence was asked a question with regard to something Appuhamy had told him. An objection by Crown Counsel the question was disallowed. It seems to me that these questions were disallowed as the result of an erroneous interpretation of section 122 of the Criminal Procedure Code. Statements made to officers conducting inquiries under Chapter XII of the Criminal Procedure Code can be used to prove that a witness made a different statement at a different time. Such statements may be legitimately used for the purpose of discrediting a witness under section 155 (c) of the Evidence Ordinance. In this connection I would refer to *Dias v. Kiriwanthia*¹. In my opinion the questions to Appuhamy and P. C. Wambeek which Counsel desired to put with the express purpose of discrediting the former should have been allowed.

As distinct from legal questions affecting the admissibility of evidence I am of opinion that the evidence taken as a whole falls far short of the standard required for the conviction of the appellant on a criminal charge. The story put forward by the prosecution was of a most improbable character. It presupposes that those engaged in the conspiracy had selected this particular spot for their nefarious design. If such a design was planned, it is highly improbable that this particular locality would have been selected. The road was wide, the traffic was voluminous and moreover it was contiguous to a police station. Foot passengers must have been numerous. The locality does not seem to lend itself for such an object particularly as, according to the case put forward by the prosecution, ample opportunities were available earlier in the morning when Z 3695 was being hemmed in by M. J. buses all the way from Kurunegala. For its success the plan required that the stationary bus X 4524 and the oncoming bus from Colombo should conduct their manœuvres at this spot at the very moment when Z 3695 arrived at the locality. It is impossible to imagine that such accurate timing of the movements of the three buses could have been planned. If the probability of the story of the prosecution is to be judged by ordinary standards of common sense, it is highly improbable even allowing for intensive bus rivalry that the owners of M. J. buses would risk the injury to X 4524 by an operation of this nature.

I have not only to consider the probability of the story put forward by the prosecution, but also the weight of evidence. It seems to me that the learned Judge has not fully appreciated the evidence of the Motor Engineer, Mr. Beven. His evidence is to the effect that the tyre marks are indicative of the brakes of Z 3695 having been applied whilst this bus was in motion. This and the position of the two buses suggest that

¹ 5 C. W. R. 187.

Z 3695 ran into X 4524, and thus the whole fabric of the case for the prosecution as built up falls to the ground. This theory is also supported by the fact that Z 3695 was not found pulled up parallel to the road, but was straddled across the road at an angle.

The learned District Judge has not only failed to distinguish between the inherent probabilities of the two stories and to give due weight to the technical evidence, but has also failed to take into consideration the fact that only two out of the twenty-four passengers in the bus have testified on behalf of the prosecution. I think the verdict was clearly contrary to the weight of evidence and, in the circumstances, the appeal must be allowed and the conviction set aside and the appellant discharged.

SOERTSZ J.—I agree.

Set aside.
