[COURT OF CRIMINAL APPEAL]

1970 *Present :* **Sirimane, J. (President), Samerawickrame, J., and Wijayatilake, J.**

M. K. EDWIN, Appellant, *and* THE QUEEN, Respondent

C. C. A. 129 OF 1969, WITH APPLICATION 186

S. C. 121/68A—M. C. Elpitiya, 6496

Trial before Supreme Court—Witness—Summary trial on alternative charges for giving false evidence—Rules applicable—Penal Code, s. 190—Criminal Procedure Code, ss. 155, 439.

After a trial before the Supreme Court was concluded, the witness-appellant was indicted and tried summarily before the same Judge and Jury under section 190 of the Penal Code, read with section 439 of the Criminal Procedure Code, for having given false evidence by contradicting the evidence previously given by him at the inquiry before the Magistrate.

Held, (i) that "the inquiry" contemplated in section 439 of the Criminal Procedure Code is the non-summary inquiry which precedes the trial and which commences under section 155 of the Criminal Procedure Code. Accordingly, the indictment for giving false evidence should not have been founded on any evidence given by the witness at the inquest held by the Magistrate before the non-summary inquiry under section 155 commenced.

(ii) that the highly penal provisions of sections 439 and 190 must be used with great care and circumspection. "They should only be used in such cases where a witness in giving evidence has shown such a contemptuous disregard for the sanctity of the oath that the contradictions are not only on material points, but point to the necessary inference that the witness was *intentionally* giving false evidence." Furthermore, the whole of a witness's evidence must be looked into in deciding whether the contradictory statements are material and intentionally false. A question and answer taken in isolation can be very misleading.

APPEAL by a witness against a conviction for giving false evidence at a trial before the Supreme Court.

S. Gunasekera, with *B. B. D. Fernando* and *Miss C. M. M. Karunaratne* (assigned), for the witness-appellant.

Ian Wikramananayake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 23, 1970. SIRIMANE, J.—

The appellant was indicted under Section 190 of the Penal Code read with Section 439 of the Criminal Procedure Code which provides for the summary trial by jury of a witness who contradicts the evidence previously given by him at the magisterial inquiry, at the trial before the Supreme Court. He was convicted and sentenced to 5 years' rigorous imprisonment.

In the main case, one Jinadasa was charged with the murder of one Podde, and the appellant was the main witness for the Crown. Broadly his evidence was that the deceased had been pursued by Jinadasa and cut on his leg with a sword in the compound of the appellant's house. He then raised cries, people collected, he tied a tourniquet and after some unsuccessful efforts to get a conveyance to take the injured man to hospital he went and informed the Police. His evidence at the magisterial inquiry was, in essence, exactly the same. His cross-examination opened with the suggestion being put to him—no doubt with some dramatic effect—that he was the murderer, and thereafter certain contradictions between his evidence at the trial and previous statements to the Magistrate were put to him.

The learned trial Judge appears to have been greatly impressed by the suggestion made by the defence, for as he later told the jury, though a contradiction "would be of little significance" in certain circumstances, yet against the background of the suggestion "the matter would seem to assume some reality."

When a witness contradicts himself very badly it is usual for Counsel for the defence to make an application to the judge in the absence of the jury, to ask the jury whether they wanted to continue. Sometimes the judge himself may put the question to the jury. In the course of the cross-examination in this case the learned judge asked the Crown Counsel, "Have you got any other material witness?". On receiving an answer in the negative, the learned judge said, "Then there is no purpose in proceeding with the case". He then turned to the jury and asked them, "You have heard the evidence of this witness on whom the Crown relies. Will you consider the matter and let me know?". The answer of the foreman was as one would expect, and the accused in that case was discharged. He then told the appellant that he (the appellant) would be indicted for giving false evidence and added, "I strongly hold that upon your evidence an innocent man has been kept in remand for 18 months". It was against this background that the appellant was tried before the same jury on an indictment which set out six items of contradictory evidence.

The first three are founded on evidence given by the appellant at the inquest held by the Magistrate (when the accused Jinadasa was absent and according to the Police could not be found) i.e., *before* the non-summary inquiry under Section 155 of the Criminal Procedure Code commenced.

Under Section 439 the witness in giving evidence before the Supreme Court, must contradict "the evidence previously given by him *at the inquiry before the Magistrate*". We are of the view that "the inquiry" contemplated in the Section is the non-summary inquiry which precedes the trial and which commences under Section 155 of the Criminal Procedure Code. It does not refer to the inquest. So much of the charge as relates to the first three items of the contradictory evidence must therefore fail.

The other three items are numbered 4, 5 and 6 in the indictment.

Before dealing with these we would like to make some general observations. The evidence of witnesses, more often than not is interpreted and not recorded in the language in which it is given That was the case here. Some inaccuracies are bound to creep in as it is seldom that two interpreters employ the same phrascology. There is also the fact that witnesses give evidence in the Supreme Court long after they have done so at the inquiry (in this case the trial took place nearly a year and a half after the inquiry) and the witnesses' memory on some point may be faulty. Witnesses often give answers in language which is inaccurate or imprecise,

or answer long questions with a "yes" or "no" without understanding their import. They themselves do not use the language in which the question is framed and which appears on the record as part of a narrative. So that, there is hardly a case in the Assizes in which the defence fails to mark some contradiction. The highly penal provisions of Sections 439 and 190 must therefore be used with great care and circumspection. They should only be used in such cases where a witness in giving evidence before a Court of Law has shown such a contemptuous disregard for the sanctity of the oath that the contradictions are not only on material points, but point to the necessary inference that the witness was "*intentionally* giving false evidence". We also think that the whole of a witness's evidence must be looked into in deciding whether the contradictory statements are material and intentionally false. A question and answer taken in isolation can be very misleading.

The contradictory evidence in item No. 4 is this :— At the magisterial inquiry the appellant had said, "I knew Podde for the last 12 or 13 years". In his evidence before the jury he had said at one stage that he knew Podde for about a year.

Now, at the magisterial inquiry the suggestion had been made in cross-examination that the deceased was intimate with the appellant's wife, and further that he was keeping as his mistress the appellant's cousin. Both suggestions were vehemently denied. In re-examination, apparently in order to refute the suggestion that the appellant was angry with the deceased he had been asked how long he knew the deceased and he had said for the last 12 or 13 years, and that he had not "fallen out" with him. The evidence given by the appellant in the Supreme Court is before us and was a production in the case, and we find that when the question, "How many years prior to the incident did you know Podde?" was put to him, he answered, "For about 7 or 8 years I am there". The obvious implication is that from the time he came to the village about 7 or 8 years prior to the incident he knew Podde in the sense that he was aware of his identity. When the question was repeated apparently with some emphasis on the word "Know", he answered, "About one year". Then this question was put immediately afterwards : Q. "It would not be correct to say that you knew Podde well?"—A. "I knew Podde well for about one year".

Is there then a material difference in the evidence? It is not as if the witness referred to "10 or 12 years" before the suggestion of intimacy with his wife was made, and was now trying to reduce the period to meet the suggestion. The evidence makes it clear that what the witness says is, that he knew the deceased for a fairly long period of time, but knew him well only for a period of about a year. The learned judge in his charge did not refer to the evidence that witness has said that he knew Podde in the village for 7 or 8 years.

I have already set out the material evidence of the appellant both in the Supreme Court and at the magisterial inquiry, viz., that the deceased was pursued by Jinadasa and cut in his compound, that he raised cries and people collected thereafter. The first person he met was one Premadasa. In cross-examination in the Magistrate's Court he had been asked whether he told " the people ", meaning obviously the people who collected there, that it was the accused Jinadasa who had cut the deceased. *In this context* he is recorded as having said " I told the people that the accused had cut Podde. Premadasa was there but Wijedasa was not there. There were about 10 or 15 people at the time Podde was cut by the accused. There was a crowd." Surely, he was referring to a time shortly after the alleged cutting, when he used the words "At the time Podde was cut by the accused ". When, in cross-examination in the Supreme Court it was suggested that he had said that the cutting of Podde had taken place in the presence of 10 or 15 people, he denied having said so. A consideration of the entire evidence indicates that there was no real contradiction at all.

The last item of contradictory statements consists of two denials by the appellant of statements made before the Magistrate :

(*a*) " I am aware that the accused and the deceased are friendly."

and

(*b*) " I am ill-disposed towards Podde, not that I am angry with Podde, but he does not associate with me."

These were denials made in the course of a very lengthy cross-examination in the Supreme Court. But in the course of the same cross-examination the witness had also said :

(*a*) " I knew of no animosity at all between Podde the deceased and the accused." and

(*b*) that he knew Podde " a little ", that he had never come to his house and that he had spoken to him 7 or 8 times in the course of a year.

Even in the light of the suggestion made the contradictions can hardly be said to be material. The failure of the trial judge to tell the jury not to look at the contradictions isolated from the rest of the evidence, and his failure to draw the attention of the jury to that evidence which was produced in the case, is in our view a non-direction which would amount to a misdirection.

The learned trial judge as stated earlier told the jury in regard to the discrepancy between 10 or 12 years and one year, that it was of significance because the defence alleged that the appellant was the killer. He also told the jury with reference to other discrepancies in the evidence at the inquest : " This is a material contradiction having regard to the defence position that it was this accused who killed the deceased."

And again, "You will appreciate that in the light of the defence suggestion in the earlier case that it was this accused who did the deceased to death, in that case, the question.....would be a circumstance of great importance."

Having thus laid emphasis on the suggestion that the appellant was a murderer, we think he should have cautioned the jury that it was only a suggestion, and that they should not act on the footing that he was in fact responsible for the murder of the deceased. This again, in our view is a similar non-direction.

Having regard to the evidence, we were of the view that the verdict of the jury, was unreasonable, and therefore quashed the conviction and acquitted the appellant.

Appeal allowed.