[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J., Moseley S.P.J. and Wijeyewardene J.**

THE KING *v.* KADIRGAMAN *et al.*

1—M. C. Jaffna, 6,734.

Evidence—Contradiction of witness by deposition in Magistrate's Court—Proof of deposition—Crown's right of reply—Evidence Ordinance, s. 80, Criminal Procedure Code, ss. 237 (2) and 296 (2).

Where a witness is asked at a trial before the Supreme Court whether he made a particular statement in the lower Court his reply must be accepted unless the record of the case is produced to contradict him.

The deposition of a witness cannot be used in evidence without formal proof.

The production in evidence on behalf of the accused of the deposition of a witness gives the Crown the right of reply.

The evidence by a witness of a threat, to kill him if he continued to give evidence, uttered by the accused in the course of the trial is admissible.

APPEAL from a conviction for abetment of an attempt to commit culpable homicide not amounting to murder at the Second Northern Circuit.

J. E. M. Obeyesekere, for appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

September 9, 1940. HOWARD C.J.—

This is an appeal by the second accused who was convicted of abetting the attempt to commit homicide not amounting to murder of one Sinnapodian Velupillai, which offence was committed in consequence of such abetment and of thereby committing an offence punishable under sections 300 and 102 of the Penal Code. After conviction the appellant was sentenced by the learned Judge to five years' rigorous imprisonment. The main ground of appeal submitted on behalf of the appellant was

that the evidence did not establish the offence of abetment. Under section 100 of the Penal Code a person abets the doing of a thing who—

(1) instigates any person to do that thing; or
(2) engages in any conspiracy for the doing of that thing; or
(3) intentionally aids, by any act or illegal omission, the doing of that thing.

Section 102 provides that "whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Court for the punishment of such abetment, be punished with the punishment provided for the offence".

The evidence of the injured man, Velupillai, was to the following effect:—On the previous day he met the two accused and a man called Nannian Kandan about 6 P.M. on the road close to the house of the appellant's brother. Velupillai states that he was going along the road singing when the first accused said: "You fellow, why are you singing along the road. I will break your teeth". The appellant said: "You should not come this way singing like this". Velupillai said: "Why, it is I who sang"; on which the appellant replied "Let us see when you come singing hereafter". About 7 P.M. the following day Velupillai went to the boutique of Thambiah accompanied by a boy called Rasiah. Whilst there Nannian Kandan spoke to him and asked him to accompany him. He walked some distance with Nannian, Rasiah being fifteen yards behind holding a hurricane lamp. The two accused were standing near the Vyrava Temple. The appellant seized him round the body whilst the first accused gave him a blow on the head with an iron rod. Velupillai further states that he was pushed by the appellant, given a blow on the nape of the neck by Kandan and then fell down and lost consciousness which was not regained until he had been in hospital.

Medical examination at the hospital indicated a contused wound on the left side of the head with fracture of the bone. The injured man's life was in danger for a week and the injury was consistent with its being caused by an iron rod.

The evidence of Velupillai is corroborated by the boy Rasiah who states that the appellant held Velupillai from a side pinning his arms. The first accused then struck Velupillai with a club or an iron rod, whilst the appellant pushed him and the third man gave him a blow on the nape of his neck with a club.

We agree that on this evidence it would not be possible to hold that the appellant instigated the first accused to attempt the murder of Velupillai. On the other hand there was evidence on which the Jury could find that the case came within paragraph (2) and (3) of section 100. The act of the appellant in holding Velupillai and pinning his arms directly contributed to the commission of the offence by the first accused. Moreover there was evidence that Velupillai was lured by the decoy, Nannian Kandan, to the place where the assault was committed. Nagamuttu, the mother of Velupillai, also testified to events that took place on the previous day which clearly indicated the intention of the two accused to do Velupillai an injury. There is thus evidence that the first accused, the appellant and Kandan were acting in concert. The act of each of them was therefore an intentional aid in prosecution of the common

object. This is not a case of mere presence at the scene of a crime. From the nature and effect of the facility given by the appellant his intentions must be presumed.

It has also been contended on behalf of the appellant that, even if the evidence implicating the appellant indicated that abetment of attempted murder had been committed, it should not have been accepted by the Jury inasmuch as it depended on the testimony of Velupillai alone. In this connection reference was made to that part of the learned Judge's charge in which he directed the jury that they could infer that Rasiah was not an eye-witness, or, if he was an eye-witness, he was not able to identify the assailants. The question of Velupillai's credibility was, however, left for the jury to decide and if he impressed them as a witness of truth they were entitled to act on his evidence alone.

Counsel for the appellant also complained that in the learned Judge's charge to the jury he made two misstatements of fact. He informed the jury (*a*) that the blow was dealt with an iron rod and (*b*) that but for medical aid Velupillai would have died. Although these statements were not absolutely correct, Velupillai did state that an iron rod was used and the medical evidence was to the effect that Velupillai's life was in danger. We are of opinion that these statements even if not strictly accurate did not prejudice the defence of the appellant.

Reference was also made to what is described as an "unfortunate incident". Rasiah on being called upon to resume his evidence on July 9, 1940, stated as follows :—

> "I am afraid to give evidence any further because when the accused were being brought to Court this morning the second accused threatened to kill me if I gave evidence".

The learned Judge after giving both Counsel an opportunity of asking Rasiah any question on this point saw them both in his Chambers. On returning to Court, Counsel for the defence put questions to Rasiah suggesting that this allegation was not true. Rasiah however persisted that he was speaking the truth and maintained that the threat was made in the presence of the Fiscal's peon. The incident was closed by His Lordship in the following words :—

> "I do not think it is necessary to be afraid of this threat. You carry on".

Counsel for the appellant argued that the Judge assumed that the threat was made and such an assumption must have had a prejudicial effect on the mind of the Jury. Before making such an assumption he contends that the Fiscal's peon should have been questioned. We are of opinion that there was nothing improper in Rasiah giving evidence of this alleged threat which was relevant and admissible. It was open to the defence to have rebutted it by calling the Fiscal's peon. An application could, moreover, have been made for the discharge of the jury. Instead of doing this Counsel for the defence participated in the inquiry into the truth of Rasiah's allegation. In these circumstances we do not consider that the appellant has suffered prejudice as the result of this incident.

The only remaining question for consideration relates to a matter of some general importance in regard to criminal trials in the Supreme

Court. At an early stage in the hearing Counsel for the defence wished to contradict what a witness had said in the lower Court. He was informed by the Judge that, if he asked what a witness said in the lower Court, he would be bound by his answer unless he produced the record in the case to contradict the witness. Counsel was also informed that if he produced the deposition it would affect the order of speeches. Counsel then replied as follows :—

"I am only concerned with the question whether I am entitled to use this record to contradict a witness".

Later on Counsel for the defence informed the Court that he was putting the depositions in and was informed that it was not necessary to call the Chief Clerk of the Magistrate's Court to do so. At the close of the case for the prosecution Counsel for the defence stated he did not propose to call any evidence for the defence and that he would address the jury, formally putting in the depositions which had been put to the witnesses. Counsel then read these depositions and addressed the jury. Crown Counsel then addressed the jury.

On this aspect of the case Counsel for the appellant in this Court has raised three contentions as follows :—(1) By reason of sections 237 (2) and 296 (2) of the Criminal Procedure Code the final word with the jury is only lost when evidence other than that of the person or persons charged is called for the defence.

(2) The depositions formed part of the "record transmitted to the Court of trial under section 165E of the Criminal Procedure Code and were therefore under section 80 of the Evidence Ordinance admissible as evidence and in fact were admitted without formal production by a witness ;

(3) The only evidence tendered by the defence in this case was therefore not given by any "person or persons" and hence not within the meaning of this term as employed in these two provisions of the Criminal Procedure Code.

If the argument of Counsel for the appellant that the depositions being part of the record are in evidence by reason of their transmission to the Court of trial, it would follow that all other documents so transmitted with the record are equally admissible. We cannot admit this contention even after taking into consideration the provisions of section 186 (2) of the Criminal Procedure Code which provides that every indictment shall contain a list of the witnesses which the prosecution intends to call at the trial and another list of all documents and things intended to be produced at the trial, which documents and things are herein called "productions". The argument is, moreover, untenable when consideration is given to special provisions of the Criminal Procedure Code providing that in certain circumstances normal and formal proof of documentary evidence is dispensed with. Thus in section 233 of the Criminal Procedure Code it is provided that all statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution. No similar provision for the reception and reading in evidence of the deposition of any ordinary witness taken in a Magisterial Court is to be found either in the Criminal Procedure Code or in the Evidence Ordinance. Hence if an accused

person desires to make use of such depositions under section 145 or 155 of the Evidence Ordinance, we are of opinion that he must prove such deposition and thereby such deposition becomes evidence given by or on his behalf and allows Counsel for the prosecution the right of reply in accordance with sections 237 (2) and 296 (2).

The only point remaining for decision is the question as to the manner of proof required by law of a deposition tendered by the defence in the circumstances specified. It has been contended by Counsel for the defendant that a deposition being a memorandum of the evidence of a witness given in a judicial proceeding can under section 80 of the Evidence Ordinance be handed in by Counsel and thereby becomes evidence without formal proof. Formal production by a witness, so it is contended, is unnecessary. We are of opinion that section 80 does not go to the extent of rendering formal production unnecessary. It merely provides that the Court shall make certain presumptions on the production of a document to which the section applies. Those presumptions are as follows :—

(1) That the document is genuine, that is to say in the case of a deposition that it is a record of evidence given and that the signature appended is that of the Judge or Magistrate by whom it purports to be signed ;

(2) that any statements as to the circumstances under which the document was taken purporting to be made by the person signing are true. If it is stated that the deposition was read over to the witness it must be presumed that this is so ;

(3) that the document was duly taken, that is to say that all the conditions required by law have been fulfilled.

Section 80 allows these presumptions and on the strength of them dispenses with the necessity of proving by direct evidence what it would otherwise be necessary to prove. Thus in *Queen Empress v. Viran*[1], it was held that section 80 of the Indian Evidence Act which is similar to section 80 of the Ceylon Evidence Ordinance merely gives legal sanction to the maximum *omnia praesumuntur rite esse acta* with regard to documents taken in the course of a judicial proceeding. In *Reg. v. Shivya*[2], it was held that the fact that the accuracy of the record, the presence of the Magistrate and the voluntary nature of a confession were stated on the face of the document, permitted the Court under section 80 as to draw the presumption of their having occurred and dispensed with their proof by direct evidence.

In *Empress v. Zawar Rahman*[3], Counsel for the accused contended that he was entitled to read to the jury the depositions of witnesses taken before the committing Magistrate for the purpose of showing that their evidence in the Sessions Court was contradictory to that given before the Magistrate, and he tendered those depositions after the case for the prosecution had closed. The Court composed of five Judges held that the contention of Counsel for the accused was not correct and Henderson J. stated in his judgment that it seemed to him that until depositions in the Court below are tendered and received in evidence or under section 288 of the Code of Criminal Procedure are treated by the Presiding Judge as

[1] *I. L. R. 9 Mad. 224.* [2] *I. L. R. 1 Bom. 219.* [3] *I. L. R. 31 Cal. 142.*

evidence they cannot be used as evidence in the case. Section 288 of the Indian Criminal Procedure Code is worded as follows :—

> "The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII. may in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872 ".

This section enables the Judge to use a deposition as part of the evidence in the case for all purposes subject to the provisions of the Indian Evidence Act. No formal proof is therefore required. A provision similar to section 288 of the Indian Criminal Procedure Code is not to be found in the Ceylon Criminal Procedure Code. In these circumstances we are of opinion that, if the deposition of a witness is to be used as evidence, it must be produced on the sworn evidence of a witness. This witness in producing the document should having regard to the presumption referred to in section 80 of the Evidence Ordinance merely testify to the fact that it comes from proper custody. Hence any officer of the Supreme Court connected with the custody of the record of the case will suffice for this purpose.

From a perusal of the English cases of *Regina v. Hallett* [1]; *Regina v. Riley and another* [2]; *Regina v. Wright* [3]; and *Regina v. Hearn* [4], it would appear that English law requires the proof of a deposition if the defence proposes by such evidence to contradict the evidence of a witness. It is not, however, necessary in such circumstances to call as a witness either the Magistrate who took the deposition or his clerk.

For the reasons given in this judgment we are of opinion that the appeal should be dismissed.

Appeal dismissed.