A

MARIKA YALIMAIWAI

v.

REGINAM

B

[SUPREME COURT, 1972 (Grant J.), 24th August]

Appellate Jurisdiction

Criminal law—practice and procedure—statement by accused ruled inadmissible—may not be put to accused in cross-examination—information derived therefrom may be used provided source not disclosed—Penal Code (Cap. 11) s. 347(1) (a).

C

Criminal law—evidence and proof—statement by accused ruled inadmissible—statement not to be put to accused in cross-examination, though information derived from it may be used.

Criminal law—trial—observation by magistrate on veracity of accomplice witness during his cross-examination—possible infringement of principle that justice must manifestly be seen to be done.

D

Once a statement by an accused person has been ruled inadmissible by a magistrate so as to preclude its production as part of the prosecution case, the statement itself should not be put to the accused in cross-examination; though information derived from such a statement may be used for the purpose of cross-examining an accused it must not be revealed that the information stems from that source.

E

An observation by a magistrate in the terms, "I consider him to be a truthful witness", during the cross-examination of an accomplice, could have given rise to an impression that the magistrate had already made up his mind that the appellant was guilty, and offended against the principle that justice should manifestly be seen to be done.

Cases referred to:

F

R. v. Treacy [1944] 2 All E.R. 229; 30 Cr. App. R.93.

R. v. Rice [1963] 1 Q.B. 857; [1963] 2 W.L.R. 585.

Janme Jai Prasad v. Comptroller of Customs Privy Council Appeal No. 46 of 1961 (unreported).

G

Appeal to the Supreme Court from a conviction by a magistrate of receiving stolen property.

V. Parmanandam for the appellant.

G. Trafford-Walker for the respondent.

24th August 1972

H

GRANT J.:

This is an appeal against the conviction of the appellant on the 30th day of June 1972 for receiving stolen property contrary to Section 347(1)

(a) of the Penal Code, the grounds which were proceeded with on the hearing of the appeal being:—

(i) The learned trial Magistrate erred in law in that he was prejudiced during the course of defence counsel's cross-examination of the second prosecution witness when he made a comment to the effect that the said witness was a witness of truth.

(ii) The learned trial Magistrate erred in law and in fact in refusing an application made by defence counsel, after the trial Magistrate had made the comment referred to above, for a trial de novo before another magistrate.

(iii) The learned trial Magistrate erred in law and in fact in allowing the prosecution to cross-examine the appellant on evidence which the learned trial Magistrate had earlier ruled inadmissible.

With regard to the third ground, although it is not shown on the record it would appear from the judgment that the prosecution as part of its case proposed to adduce in evidence a statement made by the appellant which was objected to by defence counsel because the defence had not been supplied with a copy, whereupon the trial Magistrate gave and recorded the following ruling: "I will refuse to admit statement made by accused on grounds that defence has not been supplied with a copy of it might be said that the accused's case was thereby prejudiced". Subsequently, while the appellant was being cross-examined certain questions were put to him by the prosecuting officer apparently designed to elicit that this statement had been made by the appellant and the contents of it, to which defence counsel objected but was overruled.

While the failure of the prosecution to supply the defence with a copy of a statement made by an accused fully entitles the Court to order a copy to be supplied and to give time to defence counsel to take his client's instructions thereon, it is not a sufficient reason for refusing to admit the statement, as was done in this case. Although the Court has a discretion to reject a statement where there are circumstances which would render its reception unfair to an accused this discretion must be exercised judicially and where any possibility of unfairness can be removed by adopting a course of action other than the outright rejection of a statement such means should be employed.

However, once a statement of an accused has been ruled inadmissible so as to preclude its production in evidence as part of the prosecution case, then nothing more should be heard of it and the statement itself should not be put to the accused in cross-examination (*R. v. Treacy* [1944] 2 All E.R. 229 at 236); and although information derived from an inadmissible statement may be used for the purpose of cross-examining an accused it must not be revealed that the information stems from that source (*R. v. Rice* [1963] 2 W.L.R. 585 at 593). Nevertheless, having considered this irregularity, I am satisfied that in the circumstances it did not occasion any miscarriage of justice.

Turning now to the first two grounds, the particulars of the charge were that the appellant and one Jope Ralawa between the 9th and 10th April 1972 at Suva received 170 watches, the property of Salik Ram Sharma knowing the same to have been stolen. The first witness for the prosecution was Salik Ram Sharma who gave evidence of the breaking of his premises and the theft therefrom of various items including watches. The second witness for the prosecution was Jope Ralawa, a particeps criminis who had already been convicted of the offence on his own plea and sentenced to nine months' imprisonment. He was an accomplice on whose evidence it was dangerous to act unles corroborated and in his judgment the trial Magistrate after hearing three more witnesses for the prosecution and the evidence of the appellant, quite properly warned himself of this danger and dealt with the question of corroboration. However while Jope Ralawa, whose testimony implicated the appellant in the offence, was being cross-examined a stage was reached when, according to the record, the trial Magistrate said "I object to continual points being picked without any object other than to see if the witness can be faulted in his evidence. I consider him to be a truthful witness." This was followed by some further cross-examination and by re-examination after which defence counsel applied for a trial de novo in view of these remarks by the Court, which was refused.

As to the trial Magistrate's objection to the form the cross-examination was taking, he would appear to have phrased himself somewhat unfortunately as the primary object of cross-examination is to reveal that the evidence of a witness is faulty. If irrelevant or repetitive questions are asked in cross-examination a Magistrate is entitled to stop them and should do so, and while this may have been the type of question to which the trial Magistrate was referring he does not say so. However this comment on the part of the trial Magistrate would not in itself render the trial irregular, the observation to which exception is taken being the succeeding one, namely "I consider him to be a truthful witness." It may very well be that this was a purely provisional assessment on the part of the trial Magistrate and I appreciate that a judge who sits without a jury (or assessors) may without impropriety give vent to interim expressions of opinion which it would be gravely improper to express in a trial by jury (per Lord Pearce in *Janme Jai Prasad v. Comptroller of Customs* Privy Council Appeal No. 46 of 1961). Nonetheless, this observation was made part way through the cross-examination of an accomplice before any corroborative evidence had been led and before the defence had been heard, and it could give rise to the impression that the trial Magistrate had already made up his mind, on the inculpatory evidence of this witness, that the appellant was guilty of the offence. In these circumstances and on the principle that not only should justice be done but be manifestly seen to be done I have come to the conclusion that it would be unsafe to allow the conviction to stand.

I accordingly quash the conviction, set aside the sentence and order a new trial before another Magistrate of competent jurisdiction.

Appeal allowed.