MOHAMMED RIASAT alias LOLLY

v.

REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.) 19th April, 4th May]

Criminal Jurisdiction

C

Criminal law—practice and procedure—witness—application to declare witness hostile made at end of cross-examination—extent of discretion of trial judge to make the declaration—Penal Code (Cap. 11) s.307—Common Law Procedure Act 1854 (17 & 18 Vict., c.125) (Imperial)—Evidence Act 1938 (1 & 2 Geo. 6, c.28) (Imperial) s.1(1).

Evidence and proof—hostile witness—applications to declare hostile not made until end of cross-examination—extent of discretion of trial judge—Common Law Procedure Act 1854 (17 & 18 Vict., c.125) (Imperial)—Evidence Act 1938 (1 & 2 Geo. 6, c.28) (Imperial) s.1(1). D

At the conclusion of the cross-examination of a witness for the prosecution counsel for the Crown applied for leave to cross-examine him as a hostile witness. The trial judge granted leave, saying that the witness' general demeanour in the witness box and his evidence in cross-examination when read in conjunction with the general tenor of his written statement were clearly indicative of his intent to turn hostile to the prosecution case on certain material issues. E

Held: 1. The queston whether a witness should be declared hostile is entirely a matter for the discretion of the presiding judge: the discretion extends to the stage of the proceedings at which such a declaration may be made as well as the question whether it ought to be made at all.

2. The trial judge had applied his mind to the appropriate principles in making the declaration. F

Cases referred to :

R. v. Williams (1913) 8 Cr. App. R.133; 29 T.L.R. 188.

Rice v. Howard (1886) 16 Q.B.D. 681; 2 T.L.R. 457.

Holdsworth v. Mayor of Dartmouth (1838) 2 M. & Rob. 153; 174 E.R.246. G

Winter v. Butt (1841) 2 M. & Robb. 357; 174 E.R. 316.

Melhuish v. Collier (1850) 15 Q.B. 878; 19 L.J.Q.B. 493.

R. v. Fraser (1956) 40 Cr. App. R. 160.

Cart-Wright v. W. Richardson & Co. Ltd. [1955] 1 All E.R. 742; [1955] 1 W.L.R. 340.

Appeal against conviction and sentences in the Supreme Court. H

K. C. Ramrakha for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment of the Court

4th May 1971

Judgment of the Court (read by GOULD V.P.) :

The appellant has brought this appeal from his conviction by the Supreme Court of Fiji on the 22nd October, 1970, on three counts of cattle stealing contrary to section 307 of the Penal Code (Cap. 11). The three assessors, after a very short retirement, were unanimously in favour of conviction on all three counts.

Shortly after the night of Sunday the 22nd February, 1970, at Vatukarasa in the District of Nadroga, Mohammed Sakeer, Hayat Khan and Inosi Nabola, residents of that area, each found that two working bullocks which he owned, were missing. Early on the morning of Monday the 23rd February the appellant arrived at Leylands Butchery, Suva on a truck driven by one Mohammed Khaleem, upon which were six working bullocks. These were sold by the appellant to the manager of the Butchery and were slaughtered on the morning of Tuesday the 24th. On the following day, the three complainants went to the butchery in Suva and each identified two bullock hides as being from his two missing bullocks; in addition Hayat Khan identified the two hides pointed out by Mohammed Sakeer as being those of two bullocks which he had recently sold to Mohammed Sakeer. Evidence from the slaughterman and yard foreman at Leylands Butchery, from a meat inspector, and from a cattle dealer from Labasa, who happened to be present, was led to identify the hides pointed out by the three complainants as those of the bullocks brought and sold by the accused.

These were the salient features of the evidence brought by the prosecution. The appellant gave evidence and admitted the transport and delivery of six working bullocks to Leylands Butchery on the date in question, but said they were his own bullocks. He produced three receipts to evidence their purchase by himself, but the learned trial judge found that they were "bogus".

Before this Court only two substantial grounds of appeal were argued. The first raises a point of law and for its full comprehension further factual details are necessary. The truck driver referred to above, Mohammed Khaleem, was called as a witness for the prosecution. After a certain amount of what appears to be hesitation or evasion, he said he received a message from a son of the appellant at about 5 p.m. on Sunday the 22nd February, and as a result took his truck to the premises of the appellant at about 8 p.m. There, six bullocks were loaded and he drove them to Leylands Butchery, Suva. When he was cross-examined, however, he said that he had made the arrangement with the appellant to perform this service on the previous Friday at the appellant's premises. Furthermore, he said that on that day and on the same occasion he saw at the appellant's premises the six bullocks which he later conveyed to Suva on the Sunday night. If this evidence was credible, it was gravely damaging to the prosecution case, for Mohammed Sakeer testified that he was in actual possession of his bullocks right up to Sunday the 22nd and Inosi Nabola until Saturday the 21st. The witness also said that he had arranged to go to the appellant's premises at 2 p.m. or 3 p.m. on the Sunday, and when the appellant's son came to him at 5 p.m. it was to say that his father was still waiting.

At the conclusion of the cross-examination counsel for the Crown applied for leave to cross-examine the witness as a hostile witness, relying in the main upon a statement made by the witness to the police, claimed to be at variance with his answers in Court as to the situation in which this truck was hired. After hearing argument the learned judge ruled as follows :—

> "This witness' general demeanour in the witness box and his evidence in cross examination when read in conjunction with the general tenor and his written statement are clearly indicatve of his intent to turn hostile to the prosecution case on certain material issues. I therefore, propose to allow the prosecution first to establish the fact that the statement in question was in fact made by this witness and after that is done then the prosecution will be permitted to cross-examine the witness."

There was the following brief reference in the summing up —

> "You will recall the felicity with which he answered questions in cross-examination,"

Later, in his judgment, the learned judge said further on this topic :

> "This witness' initial hesitancy at the commencement of the examination-in-chief raised some doubts in my mind as to his willingness to testify against the accused. These doubts as to his hostility crystallized into certainty when I observed his demeanour and heard his answers in cross-examination. This was especially so after I perused his written statement."

After the learned judge's ruling, which was given in the absence of the assessors, the earlier statement was proved by the witness' own admission and put in evidence. It will be convenient to set out the important passage :

> "I know one Mohammed Riasat alias Lolly s/o Nur Mohammed of Sovi bay well for many years. I haven't conveyed any of his cattles to Suva or any where for selling. But on the late afternoon of Sunday 22/2/70 one of Mohammed Riasat's son arrived home and told me that his father wants my truck to convey his cattle to Suva for selling. I after this, fixed all the gates of the truck and get everything sets for the journey to Suva. All members of our family were at home except my father who was out on some business."

The first ground of appeal is that the learned judge was wrong in declaring Mohammed Khaleem to be a hostile witness. Counsel's argument was directed particularly to the point of time at which this declaration was made. As indicated above, this took place at the conclusion of the cross-examination and, in counsel's submission, the application should have been made during or at the close of the examination-in-chief. It was argued that if the police had fully interviewed the witness, or if counsel for the prosecution had fully examined him the full content of his evidence would have been discerned.

With this last submission we are not in agreement. The passage in Mohammed Khaleem's statement set out above contains no indication whatever that the arrangement then described would later be claimed to be the final stage of an arrangement initiated at a different place and with different attendant circumstances, on the previous Friday. The affirmative answer to the very first leading question in cross-examination (The arrangements to take six bullocks to Suva was made with Lolly on Friday, was it not?) must have come as a bolt from the blue to the prosecution.

Apart from the question of the stage at which it was made there can be no question that the learned judge applied his mind to the appropriate principles when he declared the witness hostile. He based himself upon the witness' initial hesitancy, and his demeanour, as well as the content of his earlier written statement. The description of a hostile witness given in 15 *Halsbury Laws of England* (3rd Edn.) at p.447 is probably as good as any. Not one who is merely unfavourable, but, "one who shows a mind hostile to the party calling him and, by his manner of giving evidence, shows that he is not desirous of telling the Court the truth."

It is common ground that the decision whether a witness is hostile or otherwise is entirely a matter for the discretion of the presiding Judge and will therefore not be interfered with by a Court of Appeal except in exceptional circumstances; *R. v. Williams* (1913) 8 Cr. App. R. 133, 139. The earlier case of *Rice v. Howard* (1886) 16 Q.B.D. 681, which refers to an "absolute" discretion may be limited to a specific aspect of the problem, but, however this may be, we see no special circumstances justifying interference in the present case by this Court, unless it is shown that it was not open to the learned judge to make the declaration at the particular stage of the trial.

On this point counsel for the appellant referred to *Holdsworth v Mayor of Dartmouth* (1838) 2 M. & Rob. 153; 174 E.R. 246. It seems that the only effect of that case is that if a witness gives evidence in cross-examination unfavourable to the party who called him, he is not thereby made the witness of the party cross-examining, so as to enable the party originally calling him to cross-examine in turn. It is true that an answer which the original party wished to controvert was given in re-examination, but we think that was not significant. The judge said that "a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence, to call testimony to discredit him". No question of the witness being declared hostile arose.

Winter v. Butt (1841) 2 M. & Rob. 357; 174 E.R. 316, is a rather similar case in which a witness called by the plaintiff gave evidence in cross-examination unfavourable to the plaintiff — she had also been subpoenaed by the defendant. Counsel for the plantiff, in re-examination, proposed to ask her as to a statement she had made to the plaintiff's attorney, but this was not permitted. *Holdsworth v. Mayor of Dartmouth* (supra) was followed.

Melhuish v. Collier (1850) 15 Q.B. 878 is an authority for the proposition that a party may indirectly discredit his own witness by calling other witnesses who give different evidence.

These are cases prior to the passing of the Common Law Procedure Act, 1854 and relate to the question how far at common law can a party impeach his own witness. In *Cross on Evidence* (3rd Edn) p.205 the author deals with the permissible means of discrediting an opponent's witness and then says —

> "The prohibition against a party impeaching his own witness means that there is a general rule preventing a litigant from taking any of the above steps with regard to witnesses called by him. Various reasons have been given for the rule. It is said that a party ought not to have the means of discrediting his witness, or that he guarantees the trustworthiness of the evidence he adduces, or that it would be unfair to subject the witness to two cross-examinations. Whatever its basis may be, the rule seems to work well enough in ordinary circumstances as applied to unfavourable witnesses, but it would be ludicrous to apply it to a hostile witness in its full rigour."

As we have observed, the cases cited above apply generally to this question of impeaching an unfavourable witness, but do not appear to us to apply in a case in which a witness has actually been declared hostile. As a matter of principle it would be our view that an application for such a declaration could be entertained at any stage of a witness' evidence if it were at that stage that his hostility had become apparent. As Erle J. said in *Melhuish v. Collier* (supra) at p.890 —

> "There are treacherous witnesses who will hold out that they can prove facts on one side in a cause, and then, for a bribe or from some other motive, make statements in support of the opposite interest. In such cases, the law undoubtedly ought to permit the party calling the witness to question him as to the former statement, and ascertain, if possible, what induces him to change it."

It cannot be in the interests of justice that such a witness should be permitted to go without challenge merely because his change of heart only became manifest during cross-examination. The re-examination, after all, has something of the characteristics of an examination-in-chief, though limited in its scope, and if a judge at that stage declares a witness to be hostile and permits cross-examination by the party calling him, it would be fully within his discretion to permit further cross-examination by the opposite party also.

Counsel for the Crown referred us to the case of *R. v. Fraser* (1956) 40 Cr. App. R. 160, where the Court of Criminal Appeal said that where a Crown witness gives evidence on oath in direct contradiction of a previous statement made by him, it is the duty of counsel for the prosecution at once to show the statement to the judge and ask leave to cross-examine the witness as hostile. The contradiction took place during examination-in-chief, so the case does nothing to resolve the particular point under discussion.

There is one case which was not quoted by counsel but to which we consider it necessary to refer, which does tend to support what we have given as our view on the question of principle. It is *Cart-Wright v. W. Richardson & Co. Ltd.* [1955] 1 All E.R. 742, a civil action decided in the Queen's Bench Division. At the stage of re-examination it was sought to introduce a previous statement of the witness under the provisions of sectiton 1(1) of the Evidence Act, 1938. That section rendered admissible

in civil proceedings any statement made by a person in a document tending to establish a fact of which direct oral evidence would be admissible. We take the following passage from the judgment, at p.743 —

> "Now I do not think that the Evidence Act, 1938, overrules the ordinary rules of procedure applicable in the trial of civil actions. Counsel for the defendants has, very rightly, not invited me to treat Mr. Joyce as a hostile witness. Having seen Mr. Joyce, and having heard his evidence, it would have been impossible for me to have acceded to any such invitation had it been made.
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> In those circumstances, Mr. Joyce not being an adverse or hostile witness, I do not think that the provisions of the Evidence Act, 1938, assist counsel for the defendants in any way. The only purpose of introducing this statement is to show that on an earlier occasion some portion of the account of the accident given by Mr. Joyce was differently described by him. If such evidence were admissible that might have the result of shaking the faith of the court in the evidence given by Mr. Joyce in the witness-box. That does not seem to me to be proper use of the provisions of the Evidence Act, 1938. Except in the case of an adverse witness I do not think that the fact that he made a previous contradictory statement is a fact which is admissible in evidence in re-examination, and in those circumstances I am not prepared to agree to the statement being put in evidence or being put in as a document as evidence of any fact, having regard to the very full description of the facts which has been given by Mr. Joyce and which could not be improved on but only varied if this were allowed to be admitted."

The witness there was obviously not hostile, but the last sentence in the passage quoted indicates with some clarity that the learned judge would not, in the case of a hostile witness, have considered the re-examination stage an inappropriate one to permit cross-examination as to a previous inconsistent statement. The earlier part of the report indicates that the unfavourable evidence emerged during cross-examination.

This dictum may be of no great weight, but it is at least consistent with what we conceive to be correct in principle, namely that both the question whether a witness should be declared hostile, and the stage at which that declaration may be made, are matters entirely within the discretion of the judge, who will have in mind the interests of justice and of the parties to the proceedings.

In our judgment this ground of appeal cannot prevail.

The second ground relates to a question of fact. Counsel pointed to numerous passages in the evidence in which the three claimants had said that their bullocks were clearly marked with brand marks, but only a very small proportion of these could be pointed out on the hides in Court. There were weaknesses and discrepancies in the evidence concerning ear tabs said to have been on the bullocks of Inosi Nabola. There was an onus on the Crown to make a positive identification and the summing up, in counsel's submission, should have been in these terms. We were not referred to any specific passages of the summing up.

Perusal of the record of the trial shows clearly that the brand marks constituted only one of a number of factors which went to the question of identification. Perusal of the summing up reveals it as meticulous and careful, containing full directions as to onus, with specific references to identification of the hides beyond reasonable doubt, and frequent references to discrepancies. We are entirely unable to agree that the summing up was inadequate in any respect and the assessors were left to consider the evidence after full and proper directions. This ground of appeal also fails.

There is an appeal also against the sentence of $3\frac{1}{2}$ years imprisonment imposed (concurrently) on each count. This is a substantial sentence but the learned judge gave the matter detailed consideration, evidence was given of the circumstances and history of the appellant, who had no previous convictions involving dishonesty. The evidence included, however, the fact that from January to October, 1970, there had been about thirty-eight reports of cattle theft to the Sigatoka Police Station. The crime was obviously carefully organized and executed. In these circumstances the learned judge, we think rightly, placed some emphasis upon the deterrent aspect of the punishment, and we do not find it to be a case in which this Court should interfere with the sentence he imposed.

The appeals against conviction and sentence are occordingly dismissed.

Appeals dismissed.