LOTE RATU A

v.

REGINAM

[COURT OF APPEAL—Speight, V. P., Roper, J. A., O'Regan, J. A.] B

Criminal Jurisdiction

Date of Hearing: 23 October, 1986.
Delivery of Judgment: 31 October, 1986.

(Criminal Law—Evidence against accused of witness who had given a prior inconsistent statement—treatment thereof by trial Judge in summing up—no inflexible rule that Assessors to be directed the evidence is unreliable—discussion as to ways Assessors could be directed.) C

Appellant In Person.
Miss N. Shameem for Respondent. D

Appeal by Lote Ratu against his conviction for Robbery with Violence contrary to s.293 (1) *(b)* of the Penal Code.

The victim Lalit Kumar Pala was set upon outside his house and a briefcase containing $1,000 was taken from him by three men who arrived and left the scene of the crime in a taxi. E

The appellant's defence was an alibi. Evidence was given against him by the taxi driver Bas Deo (Deo) as to applicant's direction to him to drive to the scene of the robbery, whereafter the appellant gave him the briefcase and requested him to throw it away. The briefcase was recovered. The trial Judge directed the Assessors that Deo was an accomplice and gave the appropriate direction as to corroboration. He directed them that if the appellant's story about an alibi was a lie, this might be treated as corroboration. The terms of this direction were unexceptionable. See *R. v. Lucas* 73 C.R. App. R. 159. *Archbold's Criminal Pleading Evidence and Practice* 42 Ed. p. 1140. F

Deo had first denied to the police that he had taken the appellant to the scene of the robbery. He had in fact lied to them about the whole incident. Later he returned to tell the truth, admitting that nothing had intervened during the giving of the statement to make him switch from telling lies to telling the truth. The question arose as to the proper direction to be given in such circumstances regarding such witness. G

Held: Where a witness has been shown to have made previous statements inconsistent with his evidence, it is not correct that the jury should be directed that the evidence at the trial be regarded as unreliable or that the previous statements do not constitute evidence upon which they can act. H

A (*R. v. Golder* (1960) 3 All E.R. 457, *R. v. Oliva* 49 Cr. App. R. 298 disapproved). The Court cited *Driscoll v. R.* (1977) 137 CLR 517 where Gibbs, J. with whom other members agreed said inter alia:—

> "For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable. The statement to that effect in *R. v. Golder*, was obiter because in that case the trial Judge had in fact warned the jury that the evidence was unreliable and the court of criminal appeal was concerned only with the judge's failure to direct the jury that they could not act on the unsworn statement".

B

The view expressed by the High Court of Australia rather than that expressed in *Golder* was favoured. It was therefore a matter of nice judgment what the trial Judge in the C circumstances should have said. The statements to the police before trial were not evidence as to the facts they marrated. The trial Judge directed the Assessors—

> "You are therefore entitled to take into account his statement to the police and his explanations in deciding what weight you are to give his evidence."

D The witness was an accomplice. The trial Judge had proceeded to give an appropriate warning which included—

> "Witnesses may lie for various reasons so as to minimise their part in the affair or to earn favour with the police. That is why there is need for extra caution."

E This rendered unnecessary any necessity e.g. to direct the Assessors that unless they regarded the reasons advanced (by the witness) for his earlier falsehood as providing a satisfactory explanation, they might consider his evidence of little value *(R v. Harris* (1927) 20 Cr. App. R. 144 at 147.)

See also *Deacon v. R.* (1947) 3 D.L.R. 772.

F Appeal dismissed.

Cases Referred to:

R. v. Lucas (1987) 73 Cr. App. R 159.
R. v. Golder (1960) 3 All E.R. 457 (1961) 45 Cr. App. R.5
R. v. Oliva 49 Cr. App. R. 298.
G *Driscoll v. R.* (1977) 137 C.L.R. 517
Pestano (1981) Criminal L.R. 397
Deacon v. R. (1947) 3 D.L.R. 772.
R. v. Harris (1927) Cr. App. 144.

O'REGAN, J. A.

H

Judgment of the Court

On 12th March 1986 the appellant was convicted on one count of robbery with violence contrary to S.293 (1) *(b)* of the Penal Code and sentenced to be imprisoned for three years.

The victim of the robbery, one Lalit Kumar Pala, a shopkeeper, was set upon by three men outside his home and robbed of a brief case containing $1,000. The three men arrived at and left the scene of the crime in a taxi driven by one Bas Deo who deposed that he knew the appellant as Pio and had known him for some two months prior to the robbery. He said that it was the appellant who engaged him: that he had offered him $80.00 for the job and in fact paid him that amount subsequent to the robbery; that the appellant sat in the front seat of the taxi and his two companions in the back; that on the instructions of the appellant he drove to Nina Street and there waited until a blue car (in which the complainant was travelling) came by and that again on the instructions of the accused, he followed it. When the blue car reached its destination (which was the complainant's home) the three men got out of taxi—one with the appellant and the other a little later. When they returned, appellant was carrying a bag which later he gave to him and instructed him to throw it away. The bag was subsequently recovered quite near the home of Bas Deo.

Bas Deo was not given immunity from prosecution. The appellant labours under the misapprehension that such was a prerequisite to his giving evidence. Bas Deo, however, was clearly an accomplice. The learned Judge treated him as such and gave the assessors the appropriate warning as to the danger of convicting an accused on the uncorroborated evidence of an accomplice. The learned Judge went on to say that the appellant's evidence as to alibi was capable of being regarded as corroborative if the assessors were sure that it was a lie. In his summing up, he dealt with the matter as follows:

> "However, there is one piece of evidence which can support or as it is called in law corroborate Bas Deo's evidence.
>
> It is the evidence regarding the alibi. The accused has said that he was drinking grog at an Indian Inspector's house at the relevant time. If you are sure about the following, namely, if you are sure that:
>
> (1) That Inspector Lopate was correct there was no Indian Inspector living in Sarosaro Place in March 1985 and that the accused lied about drinking grog there on the evening of 23rd March, 1985.
> (2) That the motive for such lie was because the accused realised his guilt and was afraid of the truth. People tell lies for a lot of reasons and every lie is not because a person is guilty. People tell lies sometimes out of shame or to protect some one's good name, or to hide some disgraceful but non criminal behaviour. Therefore, you must be sure that the accused had no other motive for lying except to hide his guilt.
> (3) And thirdly, you must be sure that the accused's lie was deliberate. In other words it was not a case of mistake or misunderstanding, confusion or forgetfulness.
>
> Only, if you are sure of each of the three things I have just mentioned, can you take the false alibi as supporting Bas Deo's statement. If you are not sure of any of the above, there is no support for Bas Deo's evidence".

We have considered the learned Judge's summing in the light of the principles enunciated in *Lucas* (1981) 73 Cr. App. R. 159 (as to which see Archbold 42 Ed. at p.1140) and in our view it was a proper direction.

The appellant in his notice of appeal submitted that he was the victim of mistaken identity. He said that he used the name Pio as a ring name in his role as a professional boxer. He has stated that there is another professional boxer whose name is Pio who bears "complexion build and description" similar to his. In his evidence at his trial the appellant made no mention of these matters and he did not examine or cross-examine any of the witnesses as to them. He had made complaints also as to the propriety of the identification parade at which Bas Deo picked him out. He states that Bas Deo was at the scene of the parade when he was brought to it and complains that whereas the persons who were in the parade were neatly and tidily dressed, he was wearing dirty clothes which he said he had worn for the two previous days whilst he had been confined in a police cell. He said he asked for but was refused a change of shirt. Again, no such complaints were made before the learned Judge and the assessors and no cross-examination was directed to the police officers on those matters.

There was thus no material to this effect before the learned judge and the assessors of which they could take cognisance. And so it is with us.

As to identification, whilst it is true that the appellant was picked out by Bas Deo at an indentification parade, Bas Deo had recognised him as a person previously known to him just before and during the commission of the crime. It is implicit in his conviction that the assessors accepted the evidence of Bas Deo—without it there was little or no evidence against him—and it follows that they must have accepted the evidence of recognition. The fact that he had been recognised takes the sting out of the complaints he has to the adequacy and propriety of the identification parade.

The submission advanced as to the inadequacy or insufficiency of indentification are rejected.

The appellant in his notice of appeal and in the written submissions which he put in at the hearing of his appeal made reference to a statement which the witness, Bas Deo, made to the police, which was inconsistent not only with his sworn testimony at the trial but also with a second statement he made to the police, and he questioned the propriety of the statements being introduced at the trial and submitted that the descrepancies raised gave doubts as to the credibility of the witness.

The learned Judge adverted to these facts in his summing up. He said:

> "Bas Deo admitted that in the first part of his statement to the police he had lied to them about the whole incident and had denied taking the accused and his companion to Riley Street. In fact he denied knowledge of the whole affair. He later then went to tell the police the truth he says. The reason he said he did this was because he was afraid of telling the truth at first because of the treat the accused and his companions had given him. He admitted that nothing had intervened during the giving of the statement to make him switch from telling lies to telling the truth. I must tell you that statements made out of court are not evidence. They are introduced merely to assess the credibility of the witness. You are, therefore, entitled to take into account his statement to the police and his explanations in deciding what weight you are to give to his evidence in court.

The question arises whether or not the foregoing passage was an adequate direction in the circumstances of the case. A

In *R. v. Golder* (1960) 3 All ER 457 at p.459, the Court of Criminal appeal said:

> "....when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence at the trial should be regarded as unreliable, they should be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act". B

That statement was cited with approval by the Court of Appeal in *Oliva* 49 Cr. App. R.298.

In *Pestano* (1981) Crim. LR. (CA) the Court held that the evidence was for the jury to consider subject to a proper warning from the judge as to the weight which could be attached to it. The learned authors of Archbold 42 Ed. at p.402 make the comment that this decision "clearly modifies the all or nothing" approach exemplified in *Golder*. C

The High Court of Australia (Barwick C.L. Gibbs Mason Jacobs & Murphy J.J.) in *Driscoll* (1977) 137 C.L.R. 517 expressed the unanimous view that:

> "it cannot be accepted that in a case where a witness had made a previous inconsistent statement there is an inflexible rule of law or practice that the jury should be directed that the evidence should be regarded as unreliable". D

After citing the passage from *Golder* set out above Gibbs J, with whose judgment the other Judges concurred on this point, p. 63 said:

> "The whole purpose of contradicting a witness by proof of the inconsistent statement is to show that the witness is unreliable. In some cases the circumstances might be such that it would be highly desirable, if not necessary, for the judge to warn the jury against accepting the evidence of the witness. From the point of view of the accused this warning would be particularly necessary when the testimony of the witness was more damaging to the accused than the previous statement. In some cases the unreliability of the witness might be so obvious as to make the warning on the subject almost superfluous. It is possible to conceive other cases in which the evidence given by a witness might be regarded as reliable notwithstanding that he made an earlier statement inconsistent with his testimony. For these reasons I cannot accept that it is always necessary or even appropriate to direct a jury that the evidence of a witness who has made a previous inconsistent statement should be treated as unreliable. The statement to that effect in *R. v. Golder*, was obiter because in that case the trial Judge had in fact warned the jury that the evidence was unreliable and the court of criminal appeal was concerned only with the judge's failure to direct the jury that they could not act on the unsworn statement". E F G

Similar view was expressed in *Deacon v. R.* (1947) 3 D.L.R. 772.

We favour the view expressed by the High Court of Australia in *Driscoll* and having accepted it hold that it is a matter of nice judgment by the trial judge as to what, if anything, in the circumstances, should appropriately be said. In the present case the learned Judge after a clear warning that the statements were not evidence and an explanation of the purpose for which they were introduced, merely said: H

"You are therefore entitled to take his statement to the police and his
A explanations in deciding what weight you are to give to his evidence".

In many cases that would not have taken matters far enough and it would have been necessary for the assessors to be warned that, unless they regarded the reasons advanced by the accused for his having given sworn evidence at variance with his previous statement as providing a satisfactory explanation, his evidence was of little value—see *Harris* (1927) 20 Cr. App. Rep. 144 at 147 per Lord Hewart C.J. In this case,
B however the appellant was an accomplice and shortly after the passage cited above the learned judge embarked upon the requisite accomplice warning which included the following passage:

"accomplices may lie for various reasons so as to minimise their own part in the affair or to earn favour with the police. That is why there is a need for extra caution".

C All in all, we think this coupled with what had gone before adequately met the situation and with the assessors so warned, they were entitled to accept the evidence of the witness if they thought fit.

The appeal is dismissed.