8/1958

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N

52100

DON THOMAS SAMARATUNGA ... Appellant

- and -

THE QUEEN ... ... Respondent

CASE FOR THE APPELLANT

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Record

1. This is an Appeal by Special Leave from the Order of Dr. Henry Wijayakone Tambiah, Q.C., Commissioner of Assize for the Supreme Court of Ceylon dated the 15th June, 1957, whereby the Appellant was summarily sentenced to three months rigorous imprisonment under Section 440(1) of the Criminal Procedure Code for giving false evidence within the meaning of Section 188 of the Penal Code in a judicial proceeding held before the said learned Commissioner. p.24 p.29,ll 10 to 12 and 34 to 39

2. Section 440 of the Criminal Procedure Code and Section 188 of the Penal Code are as follows :-

Summary Punishment for perjury in open Court.

"440.(1). If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding three months or to fine such witness in any sum not exceeding two

hundred rupees; or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this Section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

"(2). Any person who has undergone any sentence of imprisonment or paid any fine imposed under this Section shall not be liable to be punished again for the same offence.

"(3). Any person against whom any order is made by any Court other than the Supreme Court under Sub-section (1) of this Section may appeal to the Supreme Court and every such Appeal shall be subject to the provisions of this Code.

"(4). In lieu of exercising the power given by this Section the Court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by Section 380.

"(5). Nothing in this Section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof."

Giving false evidence) "188. Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give 'false evidence'.

"Wherever in any Ordinance the word 'perjury' occurs, such Ordinance shall be read as if the words 'giving false evidence' were therein used instead of the word 'perjury'.

"Explanation 1 - A statement is within the meaning of this section whether it is made verbally or otherwise.

"Explanation 2 - A false statement as to the belief of the person attesting is within the

meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

"Illustrations ..... "

3. The principal issue to be determined in this Appeal is whether the learned Commissioner misconceived the nature of the powers conferred upon the Court by Section 440(1) aforesaid. In Subramaniam Kadirtamby Subramaniam v. The Queen (1956) 1 W.L.R. 456 the Judicial Committee of the Privy Council laid it down that the summary power conferred by Section 440(1) was one which should only be used when it was clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury, and that it was, in Their Lordships' opinion, never intended that in the exercise of the power under section 440(1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case. In the Appellant's submission the exercise by the learned Commissioner in the instant case of his powers under the section was contrary to the ruling of the Judicial Committee.

It is further submitted that there were no grounds, or alternatively no sufficient grounds upon which the learned Commissioner was entitled to invoke Section 440(1) and that the discretion vested in him by the said section was not judicially exercised, or alternatively was exercised in circumstances which amounted to a denial of natural justice.

4. In October 1955 one Yothan Singho and the Appellant were jointly charged, Yothan Singho with attempting on the 29th August, 1955, to murder one Pieris Singho, and

the Appellant with aiding and abetting him in such attempt. At the non-summary inquiry into the said charges the only evidence against the Appellant was

p.2,l.10, to p.3. l.27. given by one Gunatileke, who on the 6th October, 1955, stated (so far as is material) that the Appellant had given Yothan Singho and himself a bottle of arrack to drink in his kitchen and provided them with a club and told them to go and kill Pieris Singho, between whom and the Appellant (so Gunatileke stated) there was ill feeling because of a dispute about a footpath. At the trial on indictment of the said charges, which was held before the said learned Commissioner, Gunatileke

p.3, l.34, to p.4. l.20. gave evidence on the 21st May, 1957, that he did not drink arrack on the night in question or see Yothan Singho drinking arrack or in possession of a club and that he did not go to the Appellant's kitchen and that so far as he knew there was no displeasure between the Appellant and Pieris Singho. Following the giving of this evidence the learned Commissioner directed that the Appellant be acquitted and that Gunatileke be tried on indictment under Section 439(1) of the Criminal Procedure Code for intentionally giving false evidence. The said Section 439(1) is applicable where a witness has contradicted the evidence previously given by him before a magistrate in the same trial, Section 439(2) providing that it shall not be necessary to prove which of the contradictory statements is false.

p.29. 5. At the close of the trial of Gunatileke for intentionally giving false evidence the learned Commissioner sentenced the Appellant. The indictment

pp.2 to 4. against Gunatileke set out a number of alleged contradictory statements (the chief of which are summarised above) and did not state which of them were alleged to be false. The trial of Gunatileke before

the learned Commissioner began on the 10th June, 1957. Gunatileke, who was represented by proctor, pleaded guilty. The learned Commissioner then said - p.4, l.31.

> "I like to hear some evidence with regard to the background. To have something on record the best thing would be to call the Clerk of Assize. I want some evidence to show that he was employed under this accused, the 2nd accused, who is a rich man, and further I want evidence to show that he was sent away by this man". p.4, l.31, to p.5, l.3.

In the Appellant's submission it is clear that by "this accused, the 2nd accused" and "this man" the learned Commissioner was referring to the Appellant, who had been the 2nd accused in the previous trial, and that the learned Commissioner had already decided in his own mind that Gunatileke had been prevailed upon by the Appellant to change his evidence. However, Gunatileke's proctor then said in mitigation that Gunatileke's evidence at the trial before the learned Commissioner was the correct version of what had happened, that Gunatileke had given the evidence which he gave before the magistrate (which coincided with a statement he had made a week previously to the police) because at the time of the attack on Pieris Singho he was in love with and wanted to marry Pieris Singho's daughter, Kusumawathie. Gunatileke's proctor also said that, at or about the time of the attack on Pieris Singho, Gunatileke was employed by the Appellant and when the police came to make enquiries at the Appellant's house Gunatileke had hidden in the kitchen (on the Appellant's instructions) because Pieris Singho had said in his statement that he (Gunatileke) was present at the attack, but that in fact Yothan Singho had gone to attack Pieris Singho by himself and on his own accord and not under the instructions of the Appellant. Gunatileke's proctor further said that

p.6, ll.12 to 14.

p.7, ll.11 to 23; p.10, ll. 32 to 41; p.12 ll.3 to 12.

p.5, ll.13 to 31.

p.19, ll.19 to 44.

p.9, ll.1 to 9

p.9,ll.26 to 43. Gunatileke's statement to the police was in Kusumawathie's handwriting and that Pieris Singho's wife had also written out an account of Gunatileke's evidence before the magistrate and given it to Gunatileke to remind him of it, but that before the trial came on he had fallen out with Kusumawathie and her parents.

p.10,ll.26 & 27.

p.11,ll.6 to 8.

p.12,ll.21 to 23, and ll.44 & 45. The learned Commissioner then directed that Pieris Singho, his wife (Punchi Nona) and daughter (Kusumawathie) and the Appellant be summoned as witnesses.

He said - 10

p.12,ll.16 to 20. "This is a case where he is trying to either falsely implicate or it is a case where he was trying to screen somebody. In either case it is a very serious offence which this Court should take

p.12,ll.24 to 28. cognizance of ..... I am asking all these facts and I should like to hear the evidence of these witnesses before passing sentence in order to understand the background so that I may give an adequate sentence .....

p.13,ll.3 to 10. "I will make up my mind after I hear the other evidence. If I take the view that he was trying to screen this rich man apparently for some small consideration, then this man is coming out with an utterly false version in this Court and the evidence he gave in the Magistrate's Court is true 20

p.13,ll.16 to 28. "Perhaps the documents were given to impress on the jury that this man, an illiterate man, has been given these documents by the injured man's wife and daughter to come out with his falsehood, not with the idea of confronting him but with the idea of making his version more probable. If the other position is found to be correct that the two women had these documents, then it is a case where he tried to implicate an innocent man falsely it is a very heinous offence and much more heinous than screening a man". 30

Following the last of these observations, from which it appears that the learned Commissioner regarded it as his duty to carry out an inquisition in order to decide which of Gunatileke's statements were true and which 40

false, Crown Counsel said -

> "The non-summary inquiry shows that the only evidence against the man (meaning the Appellant) was the evidence of this witness". p.13, ll.31 to 33.

The learned Commissioner replied -

> "It is a scandalous state of affairs that a rich man is able to buy up a witness and defeat the ends of justice". p.13, ll.34 to 36.

It is respectfully submitted that up to that stage and indeed throughout the proceedings there was no evidence that the Appellant had bribed or brought any other pressure on Gunatileke to persuade him to change his evidence. The trial was then adjourned to the 13th June, 1957.

6. At the adjourned hearing Kusumawathie was examined by the Court. She denied that she had asked Gunatileke to give false evidence or written his statement or that they had been in love with each other. When asked if she had seen him before, she said - p.14. p.14, ll.16 to 23.

> "I have seen him in the bungalow of Samaratunga (the Appellant) as he was employed under him". p.15, ll.6 to 8.

Punchi Nona was then examined by Crown Counsel (with the leave of the Court). She stated that she did not know how to write and that she had never consented to or even spoken a word about the marriage of her daughter to Gunatileke. p.16. p.16, ll.8 to 14.

The Appellant was next called into the witness box and examined, at the request of the Court, by Crown Counsel. The substance of his evidence was that Gunatileke had never been his servant and that, apart from seeing him once at a Bazaar, he did not know him and did not know any reason why Gunatileke said he was his servant; that he had heard that Yothan Singho had been going to Pieris Singho's house, but did not know of p.17. p.18, ll.3 to 9. p.18, ll.10 to 20. p.18, ll.32 to 36. p.19, l.41 to p.20.l.3.

p.20,ll.13 to 21. any love affair between Yothan Singho or Gunatileke and Kusumawathie; that he had no grievance against Pieris

p.20,ll.25 to p.21,l. 12. Singho, but that Pieris Singho might have said he was angry with him (the Appellant) because he was entangled with an uncle of the Appellant with whom the Appellant had been involved in an assault case. The proceedings at the conclusion of such evidence are recorded as follows :-

p.23, l.33 to p.24, l. 10.

> "Court: To Witness: In my view you are deliberately lying in this Court. You are contumaciously lying. You have no respect for this Court. You have come here to this box and come out with a string of falsehoods with a view to deceiving this Court. Unfortunately I have formed that view and I propose to deal with you for that.
>
> Witness: I spoke the truth.
>
> Court: Have you any cause to show why you should not be dealt with for contempt of Court by giving false evidence?
>
> Witness: I spoke the truth.
>
> Court: In my view you have given false evidence. The evidence given by Kusumawathie and her mother shows that you had employed this man.
>
> Witness: Never.
>
> Court: I sentence you to 3 months R.I. for contempt of Court by giving false evidence in this Court. In my view you have been lying contumaciously in this Court".

p.24. 7. That although the learned Commissioner referred to "a string of falsehoods" it appears from the following passages in the formal Order made by him on the 15th June 1957 that the only "false evidence" for which the Appellant was sentenced was his denial that he had ever employed Gunatileke -

p.24, ll.20 to 38.

> "Don Thomas Samaratunga who was a witness in this case whom I noticed was also indicted with aiding and

abetting Yothan Singho to commit the said attempted murder. Yothan Singho and this accused were employed by Mr. Samaratunga according to the statement made by this accused. Mr. Samaratunga was called by me in order to ascertain whether that was the fact. I am sorry to say that Samaratunga was contumaciously lying on this point.

"Kusumawathie who has given evidence before me whose evidence I accept, has stated that this accused was employed under Mr. Samaratunga at the time her father was assaulted. Kusumawathie stays about 200 yards from Samaratunga's house on the adjoining land. I accept her evidence with confidence. This accused himself through his Counsel admitted, whilst his Counsel was pleading in mitigation, that he was employed under Samaratunga at the point of time this assault took place. This accused even went to the extent of saying through his Counsel that Samaratunga was hiding him when the Police came to enquire into this offence. I have no hesitation in taking the view that Samaratunga has come here and contumaciously lied on this point ..... p.25,ll.1 to 6.

"It is with regret that I have to deal with Mr. Samaratunga under Section 440(1) of the Criminal Procedure Code. The way and the manner in which he gave evidence was such that he gave me the impression that he was speaking absolute falsehoods when he said that he did not employ this accused at all and that he had only seen this accused in the bazaar on one occasion. As I have stated earlier, I accept Kusumawathie's evidence with confidence, and even this accused must have been taken by surprise when Samaratunga gave his evidence, because through his Counsel he has taken up the position that he was employed under Samaratunga, and even in the Assize Trial before me, which ended in the discharge of Samaratunga, he stated that he was employed under Samaratunga. p.29,ll.10 to 39.

"Although he had gone back on various other statements, on this particular point that he had been employed under Samaratunga he has always been consistent. I think people of Mr. Samaratunga's standing should know better than come to Court and lie. They must know to speak the truth. It seems to me that it was not only a case of lying but a case of contemptuous lying which calls for the censure of this Court. I regret I have to deal with him in this summary manner but I have no

other alternative but to adopt this course, both in the interests of Justice and also in preserving the dignity of this Court. I sentenced Samaratunga to three (3) months rigorous imprisonment".

8. The Appellant respectfully submits that the aforesaid Order and sentence should be set aside and that this Appeal should be allowed with costs throughout for the following among other

R E A S O N S

1. That contrary to the rule laid down by the Privy Council in Subramaniam v. The Queen (1956) 1 W.L.R. 456 the learned Commissioner purported to set on foot under Section 440(1) of the Criminal Procedure Code in the course of a criminal trial a subsidiary criminal investigation not against the prisoner charged but against the Appellant.

2. That contrary to the rule laid down in Subramaniam's case (above) the learned Commissioner purported to exercise his powers under the said Section 440(1) in circumstances in which it was not clear beyond doubt that the Appellant in the course of his evidence had committed perjury.

3. That the discretion vested in the learned Commissioner by the said Section 440(1) was not judicially exercised, or alternatively was exercised against the Appellant in circumstances which amounted to a denial of natural justice.

4. That there were in fact no grounds, or alternatively no sufficient grounds, upon which the learned Commissioner was entitled to hold that the Appellant had given false evidence within the meaning of Section 188 of the Penal Code.

5. That the learned Commissioner was not entitled to hold that the Appellant had given false evidence within the meaning of the said Section 188 merely because he had denied employing Gunatileke, when the only evidence to the contrary was a statement made by Gunatileke through his proctor and the statement made by Kusumawathie (quoted above).

6. That if it was proposed to find the Appellant guilty of giving false evidence on the basis of statements made by Gunatileke and Kusumawathie, the Appellant should have been allowed an opportunity of cross-examining them on such statements and as to their credit and of being legally represented.

Dingle Foot Q.C.

Joseph Dean.

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