A

ARJUN SINGH

v.

REGINAM

[SUPREME COURT, 1965 (Mills-Owens C.J.), 20th August, 24th
B September]

Appellate Jurisdiction

Criminal law—evidence—earlier statement by prosecution witness to police possibly inconsistent with testimony—perusal of statement by magistrate—consent of defence counsel—obligations of prosecution.

C *Criminal law—witness—prosecution witness present at view of scene of crime—possible effect on his subsequent evidence.*

At the trial of the appellant on a charge of indecent assault the complainant, in cross-examination, identified a black and white shirt as that worn by the appellant at the time of the assault. The complainant agreed that she had told the police that he was wearing a
D white shirt. Defence counsel applied to the magistrate to be allowed to peruse the complainant's statements, and then consented to the magistrate's suggestion that the magistrate should peruse the statements. The magistrate then informed counsel that there was no material inconsistency except possibly regarding the shirt and clothing of the appellant, read out the relevant passage, and that portion of the statement was handed to counsel to read. The magistrate offered
E to recall the complainant for further cross-examination on this subject but counsel for the appellant stated that he did not wish to have this done.

Held: No complaint could be made with respect to the perusal of the statements by the magistrate and the defence could not be permitted to blow hot and cold by criticising the course to which
F counsel had consented.

Obligations of the prosecution in relation to the statements of witnesses called or tendered by it, discussed.

A police officer who was a prosecution witness was permitted to be present at a view of the scene of the crime.

G *Held:* The value of the evidence of a witness who sees another witness pointing out physical features to which he himself will subsequently be called upon to speak, might be regarded as depreciated.

Cases referred to: *Chalmers v. R.* (1958-59) 6 F.L.R.23: *Mahadeo v. R.* [1936] 2 All E.R. 813: *R. v. Hawes* (unreported) 27/3/1950
H C.C.A.: *R. v. Clarke* (1930) 22 Cr.App.R.58: *Baksh v. R.* [1958] A.C. 167; [1958] 2 W.L.R.536: *R. v. Hall* (1958) 43 Cr.App.R.29: *R. v. Xinaris* (1955) reported (1959) 43 Cr.App.R.30n.

Appeal from a conviction by the Magistrate's Court.

D. N. Sahay for the appellant.

B. Palmer for the Crown.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J. : [24th September, 1965]—

The appellant, who is 26 years of age, a married man with children, appeals against conviction and sentence in respect of a charge of indecent assault on a Fijian female named Kalesi, aged 18 years. The assault was alleged to have been committed on a dark night, at about 9.30 p.m. on a country road leading from tthe village of Naselei to the village of Natogadravu. Initially Kalesi was accompanied by a young female companion, named Laisa. As they walked along the road an incident occurred which had a considerable bearing on the case against the appellant. A taxi drew up or slowed down beside the two girls and they heard the voice of a male passenger in the rear seat addressing them. There can be no reasonable doubt on the evidence, including that of the appellant himself, that this was the appellant and that he was making advances to the two girls. They gave him no encouragement and continued to walk along the road. Some little time later as they were approaching the village of Natogadravu, according to their evidence, they saw the appellant standing under a tree at the side of the road and thereupon ensued the incident in respect of which the appellant was convicted. According to the evidence of the two girls, and there was no substantial point of disagreement in their evidence, the appellant first seized the girl Laisa, but she broke free of him and made off running along the road towards Natogadravu. As she ran she heard the girl Kalesi crying out that "Arjun" was seizing her. The appellant, according to Kalesi, dragged her to a ditch at the side of the road, forcing her to the ground and making determined attempts to remove her clothing; in the course of the struggle her coat came off, her dress was torn, and both she herself and her clothing became considerably mud-stained; a radio which she was carrying fell to the ground and was damaged. She continued to cry for help. Her cries were heard by some Fijian men in Natogadravu Village who immediately set off running along the road towards the scene. On their way they encountered the girl Laisa coming towards them. On arriving at the scene they found the complainant Kalesi alone. According to her evidence the appellant had desisted from the assault and ran off, in the direction of his home, when the Fijian men could be heard running to the scene. The complainant's condition was one of considerable distress and entirely consistent with an attack such as she described. She made an immediate complaint to one of the Fijian men, Charlie, naming the appellant as her assailant. Signs of the struggle were present at the scene. The damaged radio was found nearby on the road. Her coat was in the ditch. As the man Charlie was supporting the complainant a Police Officer, Corporal Naqasima, arrived quite fortuitously at the scene. He took the complainant and her companion Laisa to the Police Station, where the complainant made two statements.

The defence was that whilst an attack such as the complainant described might have taken place, as to which the defence put the prosecution to proof, the assailant was not the appellant. The complainant and her companion expressed themselves in evidence as having no doubt as to the identity of the assailant; the appellant was a person from the same district who was known to them previously and, as they said, they clearly recognised him.

It was argued as a ground of appeal that the defence was prejudiced by the refusal of the prosecuting police officer to allow defence counsel to peruse the statements made by the complainant to the police, and prejudiced further by the Magistrate's perusal of those statements. Defence counsel's request to see the statements came about in the following way. In the course of cross-examination the complainant at one point identified a shirt as the shirt worn by the appellant at the time of the assault. It was produced in evidence and shown to be of a black and white pattern. She agreed that she had told the police that the appellant was wearing a white shirt. She said that this was because it was only the white parts she could see at the time of the assault. On this foundation defence counsel applied to the Magistrate to be allowed to peruse her statements. The prosecuting officer informed the Magistrate that there were no material inconsistencies between the statements and her evidence 'except possibly regarding the shirt'. Defence counsel then consented to the Magistrate's suggestion that he, the Magistrate, should peruse the statements. Having done so, the learned Magistrate informed defence counsel that there was no material inconsistency apart from a possible inconsistency regarding the shirt and clothing of the appellant; he read out a portion of one of the statements, to the following effect:

> "When I came about 3 paces from Arjun son of Pratap, I recognised him to be Arjun. He was wearing black terylene trousers and dark shirt, whitish at places."

The learned Magistrate informed defence counsel that he could have the complainant recalled for further cross-examination but only as to the matter of the appellant's clothing. The relevant portion of the statement was then handed to defence counsel to read. The Magistrate also informed defence counsel of another matter, appearing in the statement, possibly relevant to the complainant's credibility but as to which no point now arises. Defence counsel then stated that he did not wish to have the complainant recalled.

On the appeal, counsel for the appellant, who was also defence counsel at the trial, stated that the learned Magistrate had also informed him that the complainant had said in one of her statements that at the time the taxi drew up or slowed down beside her and her companion, she recognised the man who spoke to them from the back seat as the appellant, which, counsel pointed out, was inconsistent with her evidence that she did not then recognise him. This statement by the Magistrate does not appear in the record, but I accept counsel's assurance on the point (although I am bound to add that it is desirable that the established practice should be followed where counsel wishes to supplement the record, that is to say, the practice

of a written statement of the omitted, or incorrect, matter being prepared and being then submitted, through the Registrar, for the comments of the Magistrate concerned).

As it appears to me, quite clearly, no complaint can now properly be made with respect to the perusal of the statements by the Magistrate. The defence cannot be allowed to blow hot and cold, having sought to gain an advantage at the trial by consenting to a course which might result in an order being made by the Court that the prosecutor disclose the statements and now seeking to criticise the course adopted.

With regard to the 'right' asserted by defence counsel to see statements made by witnesses, *Archbold* (35th Edition) at para. 1374 states:

> "Where a witness whom the prosecution call or tender gives evidence in the box on a material issue, and the prosecution have in their possession an earlier statement from that witness substantially conflicting with such evidence, the prosecution should, at any rate, inform the defence of that fact: *R. v. Howes*, unreported, March 27, 1950, C.C.A. ..... In certain cases, particularly where the discrepency involves detail, as in identification by description, it may be difficult effectively to give such information to the defence without handing to them a copy of the earlier statement: *R. v. Clarke* (1930) 22 Cr. App. R. 58; see also *Baksh v. R.* (ante). Further, there have been cases where, in view of their particular circumstances, judges have ordered the prosecution to hand to the defence statements made to the police by witnesses for the prosecution: see *R. v. Hall* (1958) 43 Cr. App. R. 29 (C.C.C.); *R. v. Xinaris* (1955), reported (1959) 43 Cr. App. R. 29n. In both these last-mentioned cases it is clear that the judge adopted the course only in the circumstances of the particular case, and neither case should be regarded as an authority for the proposition that there is any general duty on the part of the prosecution with regard to statements to the police by witnesses or potential witnesses beyond what is above stated."

In *Chalmers v. R.* (1958-59) Fiji L.R. 23, at p.29, the Chief Justice (Sir George Lowe) referred to the duty of the prosecution in this respect as a 'moral' duty. Reference was also made on the appeal to the case of *Mahadeo v. R.* [1936] 2 All E.R. 813 where their Lordships of the Privy Council strongly criticised the refusal of the prosecution to disclose to the defence the previous statement of a witness. Clearly, in that case, the refusal was calculated to bring about the most serious miscarriage of justice.

Fundamentally, no doubt, statements of witnesses obtained by police officers are the subject of Crown privilege, and there may well be sound reasons for maintaining that position; the statement of the accused person himself is regarded as an exception. It may well be that the limits of the Court's authority in the matter are not yet precisely defined. As I understand, some experienced prosecutors hand over statements as a matter of course. In the particular circumstances of the present case it would, I consider, be open to me to call for the statements in question. I do not propose to do so. As it

appears to me no possible case of a miscarriage of justice has been made out; nor is there any ground for suggesting that anything improper occurred in the conduct of the trial. On the contrary, the learned Magistrate went to great pains to conduct the trial fairly and to satisfy himself of the truth of the charge.

The second ground of appeal argued was that the Magistrate erred in law in accepting and relying on the evidence of Police Corporal Naqasima in view of the fact that he was present at a view held by the Court at the scene towards, the conclusion of the evidence-in-chief of the first witness, the complainant; alternatively that too much weight was attached to his evidence in the circumstances. No authority was cited on the point, but I accept that just as in the case of a witness who remains in court after being required to remain out of court, the value of the evidence of a witness who sees another witness pointing out physical features to which he himself will subsequently be called upon to speak, might be regarded as depreciated. In the circumstances of the present case, however, the point is of little significance. The Corporal was not primarily a witness as to the precise spot where the assault was alleged to have occurred, although he did say that when he came on the scene he saw the complainant's coat in the ditch at a spot which he indicated by reference to a tree pointed out to by her at the view. He was not, however, the investigating officer, and did not even get out of his car, according to the evidence, when he originally came on the scene — that is to say when he came across the man Charlie supporting the complainant. As a police officer attached to the station from which the investigation was conducted, it was probable that in any event he was aware of the prosecution evidence as to the spot where the assault took place. The really damaging feature of the Corporal's evidence, from the appellant's point of view, was his statement that he had seen the appellant walking towards the scene of the assault not long before it occurred. This piece of evidence was to be viewed in the light of the evidence of the appellant's companion in the taxi that he, the appellant, had been dropped off in the village of Natogadravu; so that it appeared, contrary to the appellant's evidence, that instead of going home he had turned back along the road over which he had travelled in the taxi and, when seen by the Corporal, was walking towards the girls to whom he had made advances from inside the taxi, a little earlier. In my view there is no substance in this ground of appeal.

The remaining grounds of appeal were in amplification of the general ground that the verdict was unreasonable, or unsupportable having regard to the evidence. In my view there was a very cogent case against the appellant if the evidence for the prosecution was to be accepted and that of the appellant and his father rejected, as the learned Magistrate found. Accordingly the appeal against conviction is dismissed.

As to the sentence of two years' imprisonment, there can be no doubt that this was a deliberate, and most determined and forceful, assault. It cannot be said that the sentence was manifestly excessive or wrong in principle. Accordingly the appeal against sentence is also dismissed.

Appeal dismissed.