[BOURKE, C. J., and ZEKIA, J.]

ERMIS THEODOROU ANTONIADES, *Appellant*,

v.

THE QUEEN, *Respondent*.

(*Criminal Appeal No.* 2254).

Evidence in criminal trials—Prior statements made by a witness out of Court—Inadmissible—Exceptions to this rule.

Evidence wrongfully received—No substantial miscarriage of justice—Criminal Procedure Law, Cap. 14, *Proviso to section* 142 (1) (*b*).

A witness for the Crown was allowed to say in his re-examination what he had stated in his statement to the Police, apparently with the object of reinforcing the value of its testimony. In the course of a rigorous cross-examination the witness was not asked about any statement he had made to the Police nor was it suggested that he had recently fabricated his story.

Held: (1) With the exception of immediate complaints under section 10 of the Evidence Law, Cap. 15 and of cases where the witness is charged with having recently fabricated the story, prior statements made out of Court, but not admissible *per se*, are inadmissible either on direct examination of the witness to confirm his testimony or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement, or when proved from the mouths of other witnesses.

Secus, Had section 157 of the Indian Evidence Act been applicable in Cyprus.

(2) Since the evidence of the witness in this case does not come within those exceptions, he ought not to have been allowed to say on his re-examination what he had stated in his statement to the Police. Such evidence offends against the rule of hearsay and is, therefore, inadmissible.
R. v. Benjamin 8 Cr. App. R. 146, *distinguished*.

(3) The Court does not think it reasonable to conclude, nor does it entertain any doubt about it, that, were it not for the evidence wrongly received, the Court of trial would have disbelieved the witness or would have had any doubt leading them to a decision in favour of the appellant. Therefore, this is a case in which no substantial miscarriage of justice has actually occurred and in accordance with the proviso to s. 142 (1) (*b*) of the Criminal Procedure Law, Cap. 14 the appeal is dismissed.

Appeal dismissed.

Cases referred to:
R. v. Benjamin 8 Cr. App. R. 146.

1959
Nov. 24,
Dec. 1

ERMIS
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Appeal against conviction.

The appellant was convicted on the 2nd October 1959 at the Assize Court of Limassol (Zannetides, J., Zenon, P.D.C., and Avni, D.J., in Criminal Case No. 7348/59) on two counts of the offences of possessing a firearm with intent to injure contrary to section 89 of the Criminal Code, Cap.13 and carrying a pistol without a special permit of the Governor, contrary to section 3 A (2) (*a*) of the Firearms Law, Cap. 86 as amended by Laws 30 and 32 of 1955 and Law 11 of 1959. He was sentenced to two years imprisonment on each count, sentences to run concurrently.

M. Triantafyllides for the appellant.

R. Simpson for the Crown

Cur. adv. vult.

Only the portion of the judgment which refers to the points set out hereabove is reported.

The judgment of the Court was delivered by:

BOURKE, C.J., who after dealing with certain other aspects of the case went on: In the course of a rigorous cross-examination the witness Vassos Stamataris was not asked about any statement he had made to the Police. Nevertheless in re-examination, and apparently with the object of reinforcing the value of his testimony as to what had been said by the appellant at the time, he was questioned as to whether he had made a statement to the Police on the day of the incident and he replied that he had. Objection was taken to refreshing memory but it was held that the witness might be asked as to matter appearing in the statement. It was ruled that such matter could not constitute legal evidence against the appellant as to the facts but that it could go to the credibility of the witness. The written statement was then put into the hands of the witness and he identified it as having been made by him shortly after the events of the 20th March to which he had already deposed. Oddly enough, the witness was then asked "Will you please refresh your memory by reading p. 3 of this statement?". The witness gave the answer, "In that statement I said to the Police: the accused said: "Let me alone, I will kill him".

It does not appear that the witness ever required to refresh his memory ; and having looked at his statement he did not proceed to testify to the best of his recollection as to what he had heard said by the appellant (as to which he had already given clear and categorical evidence more than once in examination-in-chief and in cross-examination) but he was allowed to read out a portion of the statement. At this stage the objection was pressed again and was overruled on the ground as given in the record that—"The witness is

allowed to say what he stated in his statement on a previous occasion to establish his credibility".

Did section 157 of the Indian Evidence Act apply in Cyprus there might have been some validity in this ruling : that section enables former statements of a witness to be proved to corroborate later testimony as to the same facts and proceeds upon the principle that consistency is a ground for belief in the witness's veracity. But it is not in accordance with the English practice according to which evidence of prior statements is not generally admissible to corroborate a witness (see Woodroffe 9th edn. pp. 1023-6 ; Taylor 12th edn. p. 941) : the English practice is applicable in Cyprus subject to the extension of the rule provided for by s. 10 of the Evidence Law (Cap. 15) governing immediate complaint, which no one suggests is applicable to the circumstances of the instant case. The rule, with reference to ample authority, is given in Phipson, 9th edn. p. 512 as follows:—

> "With regard, however, to statements made out of Court, but not admissible *per se*, special considerations apply. Thus, formerly, the fact that a witness had made a previous statement similar to his testimony in Court could always be proved to confirm his testimony. But afterwards the rule was changed, and such evidence is now generally inadmissible either on direct examination of the witness himself, to confirm his testimony, or on re-examination to re-establish his credit when impeached by proof of a previous contradictory statement, or when proved from the mouths of other witnesses".

It is true that there are exceptions as, for instance, on charges of rape and similar offences against females and as stated in Phipson (*loc. cit.*):

> "Where the witness is charged with having *recently fabricated* the story, *e.g.* from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed".

Reference has been made to this passage in the course of the argument on behalf of the Crown and to one of the cases quoted as authority for the proposition, namely, *R.* v. *Benjamin* 8 Cr. App. R. 146. But it does not appear to us that the present case is one in which the witness was charged with having recently fabricated his story, though as we have said, it was put to him more than once that he was mistaken in what he heard the appellant say before the revolver was discharged. We consider that the evidence as to what the witness had said in his statement to the Police offended against the rule as to hearsay and was inadmissible. It is then submitted on behalf of the appellant that the conviction should be set aside on the ground that the trial Judges allowed this

evidence to affect their minds when they came to consider the credibility of the witness. We have carefully considered this. There was the reiterated and definite evidence of the witness as to the facts of which corroboration is to be found in the evidence of other witnesses present at the scene. The inadmissible evidence is not referred to in the judgment and was not taken as evidence of the facts. It was accepted as a fact that the witness heard the appellant say—"Get away, I will shoot him", which is what he testified to in examination-in-chief and, substantially, in cross-examination. The trial Court was satisfied that the witness was speaking the truth and obviously considered that he was not mistaken. We do not think it reasonable to conclude, nor do we feel any doubt about it, that were it not for the evidence as to what he told the Police, which went to show the consistency of his story as to what the appellant said by way of threat, the Court of trial would have disbelieved the witness or have had any doubt leading them to a decision in favour of the appellant. In the opinion of this Court this is a case in which no substantial miscarriage of justice has actually occurred and in accordance with the proviso to s. 142(1)(*b*) of the Criminal Procedure Law the appeal is therefore dismissed.

Appeal dismissed.