THE SUPREME COURT OF THE FEDERATION OF MALAYA.

REGISTRAR'S CIRCULAR NO: 8/50.

Muthusamy v. Public Prosecutor

With reference to the last paragraph of the judgment of Mr. Justice Briggs in Jusoh bin Awang v: P.P. (1 M.L.R. 56) where the case of Muthusamy v: P.P. (14 M.L.J. 57) is referred to with approval the relevant parts of the judgment of Mr. Justice Taylor in that case are set out below for the benefit of any Magistrates to whom the report in the Malayan Law Journal is not available. It should be noted that Muthusamy's case was a Malacca case and, therefore, the Criminal Procedure Code therein referred to is the Criminal Procedure Code of the Straits Settlements. Section 124 of that Code, however, is, for the purpose of the judgment in question, identical with section 115 of the F.M.S. Criminal Procedure Code.

Muthusamy v: Public Prosecutor.

Extract from Judgment of Taylor, J.

"I will now try to explain the combined effect of sections 124 of the Procedure Code and 145 of the Evidence Ordinance regarding police investigation statements.

The basic principle is that the Court is to decide the facts on the sworn evidence given in Court. What a witness said on some other occasion is prima facie irrelevant and if unsworn it is prima facie less reliable. But if the witness has given one version of the incident to the police and gives a different version to the Court, it becomes a question whether his evidence can be relied on and therefore the former statement can - by the prescribed procedure - be used to impeach his credit .....

But the Magistrate went a great deal further. He completely misunderstood the principle of using the former statement to impeach credit and took the view that the former statement could be "put in" (it was never properly proved) and that the Court could then choose whether to accept the unsworn police statement, or the witness's sworn statement in Court, as his evidence of the incident. This is utterly illegal. In no case can the former statement become his evidence. If the two are so different on an essential point that the Court cannot accept his evidence, then he is discredited. If he is the only witness to the fact, the fact is not proved and the accused may be acquitted in consequence. It is for the Public Prosecutor to decide later whether in such a case the witness should be prosecuted for perjury.

The proper way to apply the sections is this. On the request of either side, the Court reads the former statement. If there is no serious discrepancy the Court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.

Differences may be divided into four classes :-

(a) Minor differences, not amounting to discrepancies;

(b) Apparent discrepancies;

(c) Serious discrepancies;

(d) Material contradictions.

Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.

If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say at once "The difference is not such as to affect his credit" and hand the statement back.

If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the Court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.

If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

In this trial the witness Usop said :-

"All the present witnesses were there but I did not notice Mansoor ... there were many people there".

In his investigation statement he had said :-

"I saw A, B, C and one Mansoor there".

The general tenor of his statement accorded with his evidence. Now A, B and C, and also Mansoor, had all given evidence and it was not disputed that Mansoor had in fact been present at the incident. Clearly, therefore, this difference was at the most only a difference in recollection as to one of a number of persons and no further explanation was necessary. The police prosecutor ought not to have referred to it. When he did, the Magistrate should not have allowed him to cross-examine on it."

REGISTRAR.

The Federal Registry,
Supreme Court, F. of M.,
K.L. 18th April 1950