KING *v.* THEGIS *et al.*

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Evidence—Ordinance No. 14 of 1895, s. 120 (4) and s. 167—"Witness in his own behalf"—Improper rejection of evidence—New trial.

Under section 120 (4) of the "Evidence Ordinance, 1895," an accused in a criminal trial is "a competent witness in his own behalf," which means that he may go into the witness box and give a full account of all that happened, stating who were present and what each did.

Where an accused admitted in the witness box that he inflicted a wound, but pleaded that he did so in self-defence, being single-handed—in the presence of a large party of assailants, and he was asked whether his two co-accuseds were present at the quarrel,—

Held, that that question was one which should have been allowed to be put, and that its rejection by the presiding judge justified a reversal of the conviction and sentence, and the ordering of a new trial, under section 167 of the Evidence Ordinance.

AT the instance of the counsel for the accused (who were tried and sentenced to death for murder), the Attorney-General, acting under section 355 (3) of the Criminal Procedure Code, certified to the Supreme Court as follows:—

"M. Thegis, W. Irishamy, and M. Agris were tried before Mr. Justice Browne at the Supreme Court Extra Sessions held at Galle this year (1901) and were on the 5th day of July last convicted of the offence of murder and sentenced to death.

"During the examination of Agris as a witness in his own behalf, under the provisions of sub-section (4) of section 120 of the Evidence Ordinance, 1895, the presiding judge ruled that he could not give any evidence to show that the other two accused persons were not present at the time and place of the murder.

"The question of law as to the correctness of the ruling not having been reserved by the presiding judge under the provisions of sub-section (1) of section 355 of the Criminal Procedure Code, I hereby certify, under the provisions of sub-section (3) of that section, that in my opinion that question of law ought to be further considered."

It appeared that, after the case for the prosecution had been closed, the counsel for the accused called the three prisoners to give evidence on their own behalf. The first and second accused stated that they were not present at the quarrel, in the course of which the deceased man received the fatal wound. Agris, the third accused, deposed that on the evening in question he and the deceased met on a path and had a quarrel, that the deceased struck him on the rib and fractured it, and that thereupon he used a weapon in self-defence. His counsel then put to Agris the following question: "At the time you and the deceased quarrelled, was either the first or the second accused present?"

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Mr. Justice BROWNE disallowed the question, on the ground that an accused person could give evidence on his behalf only, but not for his co-accuseds.

Mr. Justice BROWNE, after closing the Galle sessions, left Galle for Jaffna on the Northern Circuit, and from there he forwarded to the Registrar of the Supreme Court at Colombo a special case (dated 25th July) upon the point already certified by the Attorney-General. His Lordship said:—

"I refused to allow the question to be put, inasmuch as his answer (which, after their evidence and his that he was coming by himself, might be expected to be that they were not there) would have been evidence in their defence, and in my judgment the third prisoner, under section 120 (4) of the Evidence Ordinance, was allowed to be only 'a competent witness in his own behalf.'

"The question I would reserve for the judgment of the Collective Court is whether the question should have been put to third prisoner and his answer received. If it should have been allowed, there may arise another question whether the exclusion of that testimony necessitates the acquittal of the first and second prisoners.

"I do not know whether the section in question was taken from the Law of Evidence and Procedure in any other country. It is not in the Indian Evidence Act, and section 1 of the Act 61-62 Vict. c. 36 enacts that 'every person charged with an offence .....shall be a competent witness for the defence at any stage of the proceedings, whether the person is so charged solely or jointly with any other person, provided,' &c.

"In my judgment this provision 'for the defence,' coupled with the contemplated possibility of there being more than one accused, enables one accused to give evidence on behalf of a co-accused. But those general words are not in our Evidence Ordinance, nor is that possibility referred to therein.

"It appears to me that the restriction of the capability then first given to an accused to give testimony may have been specially made (1) to prevent an accused, who sees his own acquittal is impossible, being tempted to commit perjury in favour of his co-accused, that he may gain their favour for himself or for his wife and children, &c., in the event of his own execution or incarceration; and (2) although the prosecuting department here generally restricts the charge, especially in cases of capital offences, to those accused who appear to have actually committed the injuries, &c., which caused the offence, to prevent the danger (which I think not at all impossible) of a jury being

induced in mercy to limit their conviction to one of them only who takes the sole responsibility on himself."

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The case came on for argument before LAWRIE, A.C.J., and MONCREIFF, J., on the 31st July.

Layard, A.-G.—I was moved in this matter by the counsel who defended the accused in Galle. They have retained counsel to appear before Your Lordships. When their address is over, I would say a few words.

Van Langenberg for the accused.—The case against the first and second accused was that they were present at the quarrel and assisting the third accused, who delivered the fatal blow. The question of evidence on his own behalf as distinguished from evidence on behalf of his co-accused does not arise here, owing to the nature of the first accused's defence. His defence was that he was alone and had to defend himself against a crowd of assailants, and that he inflicted the wound on the deceased in self-defence. Therefore it was part of his own case to prove that the first and second accused were not there and did not help him. In *D. C., Chilaw, 2,567*, decided by the Supreme Court in appeal on 16th February, 1899, BONSER, C.J., has decided this very point. His Lordship said:—

"Was the District Judge wrong in refusing to allow the counsel for the accused to ask the second accused when giving evidence on his own behalf (under section 120 of the Evidence Ordinance, No. 14 of 1895) whether he had seen the first and third accused at the spot?

"The Ordinance permits an accused to give evidence in the same manner and with the like effect and consequences as any other witness. He may give all the evidence he can to exculpate himself, and the defence may well be that one or the other accused committed the offence. I cannot see how that evidence could be excluded. I see no difficulty in one accused asking another a question tending to exculpate himself, and I hold that the District Judge was wrong to refuse to allow the question to be put."

Another case, *Queen v. Appuhamy* (*1 S. C. R. 59*), is useful here. [LAWRIE, A.C.J.—If we think the question ought to have been put, what would be the result?] The conviction and sentence would fall. The last section of the Evidence Ordinance shows that the improper rejection of evidence may be a ground for a new trial. *Queen v. Buyeappu* (*5 S. C. C. 104*); *Queen v. Juan* (*3 S. C. R. 22.*) [LAWRIE, A.C.J.—What powers have we under the Code?] Under section 355 (2) of the Criminal Procedure Code, to reverse, affirm, amend, or make such other order

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as justice may require. I ask for an acquittal on the authority of *Queen v. Buyeappu.* I do not think Your Lordships will be justified in reading the notes of evidence taken by Mr. Justice BROWNE, in order to see whether, independently of the rejected evidence, there is evidence against the accused. [MONCREIFF, J. —Section 167 of the Evidence Ordinance gives us that power.] But that section applies only to the appellate jurisdiction of the Supreme Court when the record is in due course before it. The present case comes before Your Lordships on a point certified by the Attorney-General, and the case stated by the presiding judge, whose notes of evidence are not before you.

Layard, A.-G.—In England, if in a criminal case evidence is improperly rejected and a conviction ensues, the proper course is to set aside the conviction. Stephen's *Digest of the Law of Evidence*, Art. 143. And this is so, notwithstanding that there was other evidence before the court properly admitted and sufficient to warrant a conviction, *Queen v. Gibson* (*18 L. R. Q. B. 537.*) In India the rule of evidence is the same as in Ceylon. The principle of section 167 of the Indian Evidence Act was applied in *Imperatrix v. Pandharinath*, *I. L. R. 6 Bom. 34*, *and Queen-Empress v. O'Hara*, *I. L. R. 17 Calc. 642*, and the conviction and sentence were reversed. In *Imperatrix v. Pitambar Jina*, *I. L. R. 2 Bom. 61*, it was held that the High Court had power to review the whole case and determine whether the rejection of evidence held to have been improperly admitted should have the effect of varying the result of the trial, so that the conviction should be reversed. The Ceylon Criminal Procedure Code by section 355 (2) gives power to the Supreme Court to reverse, affirm, or amend the judgment, or to make such other order as justice may require. The Courts Ordinance by section 40 empowers the Supreme Court, in appeal or in revision from any of the original Courts, to order a new trial.

Cur. adv. vult.

1st August, 1900. LAWRIE, A.C.J.—

In the course of the trial of three men for murder at the Galle sessions before my brother BROWNE, when the third prisoner was being examined as a witness in his own behalf, his counsel asked him this question: "Were the first and second prisoners there?"

The learned judge refused to allow the question to be put.

The jury found the three accused guilty of murder, and they were sentenced to death, and they are now in jail awaiting execution.

The Attorney-General, acting under section 355 of the Criminal Procedure Code, on Saturday last submitted to this Court a

certificate that he was of opinion that the refusal of the judge to allow the question to be put raised a matter of law which ought to be considered.

Since we received the certificate Mr. Justice BROWNE has sent to us a special case on the same matter of law. My brother is absent holding sessions at Batticaloa, and unfortunately we have not the benefit of his assistance.

I am of the opinion that the question was a proper question. The evidence of the third accused as to the presence or the absence of the other two accused was relevant and should have been admitted. First, because it was relevant to the third accused's defence. His case was that he had been assaulted by several men and had, in the right of private defence, inflicted the wounds of which the man afterwards died. He wished to prove that there was no one near to support or help him, that he was in greater peril of his life or of receiving grievous hurt than if he had the support of the other two prisoners, and so I am of the opinion that the third accused was entitled to give evidence that they were not with him. It was essential to his defence.

Secondly, if the question was put as part of the defence of the first and second prisoners, I see no good objection to it. An accused on his trial by our law is a competent witness in his own behalf, but that does not mean that he is to say nothing about others. His right to give evidence on his own behalf involves the right to give a full account of what happened, to give every detail, to mention the names of every one present, to state what each man did. If, in the course of giving that evidence in his own behalf, he states some fact which may tend to inculpate or to exculpate others, the evidence must, I think, be received. If what he says amounts to a confession affecting himself and some others jointly tried with him for the same offence, the Court is reminded by section 30 of the Evidence Ordinance that it shall not take into consideration such confession against the other accused, but the whole evidence and confession must be received and recorded and must go to the jury.

The Ordinance further enacts that a prisoner giving evidence in his own behalf shall give it in the same manner and with the like effect and consequence as any other witness. It cannot, I think, be doubted that the question "were the first and second prisoners there?" might have been put to each witness called by the Crown; to each witness called by the accused; and if it was legitimate evidence, if given by other witnesses, I cannot see why it should be held to be inadmissible evidence when given by one of the prisoners.

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Holding as I do that the question was a proper one, I am bound to set aside the conviction and judgment of the Court. The 167th section of the Evidence Ordinance enacts that the improper rejection of evidence shall not be ground of itself for a new trial, or reversal of any " decision in any case, if it shall appear to the Court before which such objection is raised that if the rejected evidence had been received it ought not to have varied the decision."

It is impossible to hold that, if the evidence rejected at this trial had been received, it ought not to have varied the decision.

If the third accused had answered the question in the negative with such a ring of truth that the jury believed him, if he had in examination and cross-examination given unshaken testimony that he was alone and unprotected, and that the other two men had nothing whatever to do with the quarrel which ended in the man's death, the verdict might have been one of acquittal.

Having decided to set aside the judgment, it became our duty carefully to consider whether the order now to be made by us should be an order acquitting the prisoners, or should be an order for a new trial.

The time at my command has been short. I have not been able very carefully to consider the evidence, but I have read the report of my learned brother, and I am satisfied that a strong case was made against these three prisoners—a case so strong that the judge called on the accused for their defence. The evidence so impressed the jury that they returned a unanimous verdict of guilty.

I therefore think it would not be right to acquit them. The proper course is to order a new trial, I will not say necessarily on the same indictment. The Attorney-General, having the record of the evidence taken at the trial before my brother BROWNE, will consider whether these three accused ought again to be tried together; whether the charge against all should be one of murder. Indeed, while I think the proper order to make is an order for a new trial, I do not wish to fetter the hands of the Attorney-General, on whom vests the responsibility of deciding whether he will again present an indictment against these prisoners.

The prisoners shall remain in custody until released by order of a competent authority.

MONCREIFF, J.—

When we speak of a party to a suit giving evidence on his own behalf, or of a witness giving evidence on his behalf, the ordinary meaning of the expression is that the party puts himself in the box and gives such evidence as he thinks fit on his own side, and

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that he calls his witness for the purpose of strengthening his case. That is to say, to call a witness to give evidence in your behalf is simply to put him in the box. It may be that the evidence of the party or his witness is very adverse to his own contention, and possibly it may be in favour of somebody else, or even of the other party in the suit. But it is not therefore excluded as evidence, and questions may be put, and the answers of an adverse character elicited by them are admissible. It is true that in England a party may not cross-examine his own witnesses unless hostile, but section 154 of our Evidence Ordinance has released him from that restriction. I do not think there is anything in the circumstances of this case, or in the language of section 120 of the Evidence Ordinance, to show that any subtle meaning was to be attached to the words "giving evidence on his own behalf." I therefore think that the question should have been allowed.

The 167th section of the Evidence Ordinance forbids us to reverse a decision or to order a new trial if we think that the evidence, even if it had been admitted, ought not to have varied the decision of the jury. In order to be satisfied on that point we must be satisfied also that the jury could not reasonably have altered their view if the rejected evidence had been admitted. How we are to do that in some cases I do not clearly understand: it may be difficult to say how that question is to be answered. We do not know what the answer might have been if the question had been put, and we cannot say to what results that answer might have led in the course of the further examination of the witness.

I am therefore of opinion that the exclusion of this evidence justifies us in setting aside the verdict of the Jury. And inasmuch as we have, in my opinion, power to set aside the decision or, if we think fit, to acquit, and inasmuch as the evidence in the case is such as the Chief Justice describes it to be, I agree to the order he has indicated.