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[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* **Basnayake, C.J. (President), Herat, J., and G. P. A. Silva, J.**

THE QUEEN *v.* M. RAYMAN FERNANDO

Appeal No. 66 of 1962 with Application No. 70

S. C. 379/1961—M. C. Colombo South, 12643/N

Evidence—Statement made by accused to police officer—Evidence of omission to mention therein facts subsequently narrated by the accused from the witness-box—Admissibility—Evidence Ordinance, ss. 8 (2), 9. 155,—Criminal Procedure Code, s. 123.

Although, under section 155 of the Evidence Ordinance, the credit of a witness may be impeached by proof of a former statement inconsistent with any part of his evidence which is liable to be contradicted, omission to mention in the former statement a relevant fact narrated by him in evidence subsequently does not fall within the ambit of the expression " former statement ".

In a trial for murder the accused, when he gave evidence, stated that he had acted in self-defence. In cross-examination he was asked whether, in his statement to the police, he had mentioned about self-defence, and his answer was that he had done so. At the close of the case for the defence, the prosecution was permitted by the Court to call the police officer in question to give evidence in rebuttal. In answer to questions put by Crown Counsel, the police officer denied that the accused, in the statement made by him, had made any reference to having acted in self-defence.

Held, that the evidence of the failure of the accused to narrate to the police officer the facts which he narrated from the witness-box was not admissible under section 155 of the Evidence Ordinance. Nor was it admissible under section 8 (2) or under section 9 of the Evidence Ordinance.

2——R 17371—1,855 (4/64)

APPEAL against a conviction in a trial before the Supreme Court.

T. S. P. Senanayake (assigned), for Accused-Appellant.

N. Tittawella, Crown Counsel, for Attorney-General.

October 17, 1962. BASNAYAKE, C.J.—

The appellant was convicted of the murder of Potupitiyage Mariya Isabella Fernando, his mistress.

The evidence for the prosecution was that the accused stabbed the deceased a number of times with a chisel he had. The defence of the accused was that he was on his way to work and that he saw the deceased talking to a man on the pavement and as he approached her the man went off; that he questioned her, "When the child is ill, do you do such a thing and refuse to come also?"; that thereupon she started abusing him in obscene language and afterwards seized him by his male organ and squeezed it. He could not breathe in consequence and stabbed her in defence of his person a number of times.

In the course of the cross-examination of the accused he was asked whether he, in his statement to the police, stated all the facts which he had stated in his defence at the trial, and his answer was that he had stated all those facts. At the close of the case for the defence the learned Crown Counsel moved to call a witness in rebuttal. This was allowed and he called Sub-Inspector Abeysinghe. The following is the evidence given by him :—

"563. *Q :* You already told Court that you recorded the statement made by this accused ?

A : Yes.

564. *Q :* When did you record this statement ?

A : On the 15th of April at 8.15 p.m.

565. *Q :* Did you record the entirety of what he had to say ?

A : Yes.

566. *Q :* Did you omit to record anything that he told you ?

A : No.

567. *Q :* Did you hear what he had to say ?

A : Yes.

568. *Q :* Did you, after recording the statement, read over the statement to him, and explain it to him in Sinhalese ?

A : Yes.

569. *Q :* Did he admit it to be correct ?

A : Yes.

570. *Q :* I am referring to the statement as to what happened on the 15th of April?

A : Yes.

571. *Court :* Read the whole thing first. Never mind taking time, and then answer the questions. Otherwise you might find yourself in difficulty ?

A : Yes.

572. *Q :* Has he mentioned to you that when that man was talking to her and when he came there that man went away ?

A : No.

573. *Q :* Has he also said he questioned his wife why she was talking to people on the pavement when her child was ill ?

A : No.

574. *Q :* Has he also told you that he then went behind her and the deceased had abused him saying ' go and have intercourse with your mother ' ?

A : No.

575. *Q :* Did he tell you in the course of his statement that the deceased held him by his male organ ?

A : No.

576. *Q :* Did he tell you that the deceased squeezed his private parts ?

A : No.

577. *Q :* Did he tell you that he was unable to breathe when the deceased held him by his male organ ?

A : No.

578. *Q :* Did he mention anything about his dropping the hammer and a saw at the scene of the incident ?

A : He stated he had his carpentry tools with him.

579. *Court : Q :* Has he said anything about the hammer and saw ?

A : Yes.

580. *Q :* Did you find a hammer and a saw at the scene ?

A : No.

581. *Q :* Did he complain of any pain in his private parts ?

A : No.

582. *Q :* If he had complained of any pain would you have taken him before a doctor ?

A : Yes."

It was submitted by the learned counsel for the appellant that the above questions should not have been allowed as there is no provision of the Evidence Ordinance which permits them. Omission to state a fact deposed to in evidence does not fall within the ambit of the expression " former statement ". Under section 155 of the Evidence Ordinance the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The questions put to the witness are not admissible under that section. Section 155 or any other section of the Evidence Ordinance lends no authority for the course adopted by Crown Counsel. Learned Crown Counsel sought to call in aid sections 8 (2) and 9 of the Evidence Ordinance on the ground that it was proof of conduct. The former provision reads—

> " The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue of relevant fact, and whether it was previous or subsequent thereto."

and the latter reads—

> " Facts necessary to explain or introduce a fact in issue or relevant facts, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

In the instant case the failure of the accused to narrate to the Sub-Inspector the facts which he narrated from the witness-box cannot be said to be " conduct which influences or is influenced by any fact in issue ". This evidence given by the Sub-Inspector was not relevant under section 8 (2) or under section 9 of the Evidence Ordinance.

The learned Commissioner in the course of his charge to the jury emphasised the failure of the accused to state to the police the defence which he sought to place before Court thus :

> " His suggestion is that this was a clandestine affair, because, on seeing him, that man quietly slipped away. Then if that be so, would you expect the accused to inform the Police about it ? He says he told the Police, but you have the evidence of the Inspector, Sub-Inspector Abeysinghe, that the accused did not mention that fact to him. Has the Sub-Inspector any reason to omit to record such a thing if the accused had told him this ? The accused himself admits that he can assign no reason for the Police to omit to record it if he

had mentioned it. He also tried to tell you that the Inspector may not have heard it. Did this Inspector strike you as a person who is deaf? He has given evidence in this Court. He may have a little voice which may not carry very far but is he deaf—that is the Inspector? That is the question."

The learned Commissioner later on in his charge reverted to the same topic and stated—

" Then the accused says that he related to the Police all this about the man, what that woman did to him, about the use of indecent words and also her holding him by the testicles and squeezing, but you have heard Sub-Inspector Abeysinghe's evidence that even those matters were not mentioned by the accused to the Inspector. Were these not important matters which he should have mentioned? He says that he mentioned them. Are you prepared to accept this man's evidence in preference to that of Sub-Inspector Abeysinghe who has no reason to omit to record these things? Then, is this all false or an invention, as submitted by the Crown, in order to raise a defence of an exculpatory or mitigatory plea? That is a question for you. If you disbelieve the accused, when he says that these things happened on this day before the incident, then, of course, he is not entitled to the benefit of any of the exceptions pleaded by him, either the general exception that he acted within the rights given to him by law of acting in the exercise of the right of private defence, or of exceeding the right of private defence, or acting under grave and sudden provocation, or acting in the course of a sudden fight."

We are unable to hold that the jury were uninfluenced by so forcible a direction as to the effect of the evidence illegally admitted.

Apart from the fact that it is doubtful whether an accused person may be examined by an officer inquiring into an offence under Chapter XII an accused person is not bound to make a statement in the course of an investigation under Chapter XII. Section 123 expressly provides—

" No inquirer or police officer shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement with reference to the charge against such person. But no inquirer or police officer shall prevent or discourage by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will."

Were it not for the wrong direction, it was open to the jury to accept the version of the accused. If they were given the correct direction and the jury were allowed to return their verdict on such a direction,

the verdict might have been one of culpable homicide not amounting to murder. We accordingly substitute a verdict of culpable homicide not amounting to murder for the verdict of murder.

In view of the ferocity of the attack on the deceased, we think nothing short of 12 years' rigorous imprisonment would meet the ends of justice and we accordingly substitute for the sentence of death the sentence of 12 years' rigorous imprisonment.

Verdict altered.