[COURT OF CRIMINAL APPEAL]

1969 *Present :* **Alles, J. (President), Wijayatilake, J., and Pandita-Gunawardene, J.**

K. B. MUTTU BANDA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 51 OF 1969, WITH APPLICATION NO. 69

S.C. 170/67—M.C. Kandy, 54133

Evidence—Investigation of cognizable offence—Statement made by a witness to police officer—Omission to mention a material fact—Admissibility of evidence concerning it—Information Book—Power of Court to use it at the trial—Evidence Ordinance, s. 155—Criminal Procedure Code, s. 122 (3).

Where, in a statement made by a witness to a police officer in the course of an investigation under Chapter 12 of the Criminal Procedure Code, the witness omitted to mention a material fact narrated by him in evidence subsequently at the trial, the statement to the police as recorded in the Information Book may be utilised by the Court under section 122 (3) of the Criminal Procedure Code to aid it at the trial in order to discredit the witness.

Decision in *The Queen v. Raymon Fernando* (66 N. L. R. 1) not adopted.

The accused, who was charged with murder, was convicted by a five to two verdict of the jury of culpable homicide not amounting to murder. A material question that arose for consideration was whether the deceased had a gun with him at the time he was attacked by the accused ; if the deceased had a gun, it was not unlikely that the accused struck the deceased with a sword fatally in the exercise of the right of private defence. The two eye-witnesses for the prosecution stated in their evidence-in-chief that the deceased had sent away the gun shortly before the time of attack. In cross-examination also they denied that the gun was with the deceased at the time of the attack. But in their statements to the police soon after the incident, they had made no mention of the fact that the deceased sent away the gun at any stage. This serious discrepancy between their evidence in court and their statements to the police was not brought to the notice of the trial Judge by the Crown Counsel.

Held, that this was a case which required the intervention of the Court in terms of section 122 (3) of the Criminal Procedure Code.

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

Colvin R. de Silva, with *D.H. Balachandra*, *I. S. de Silva* and *W. Justin Perera* (assigned), for the accused-appellant.

J. R. M. Perera, Crown Counsel, for the Attorney General.

Cur. adv. vult.

July 22, 1969. ALLES, J.—

At the conclusion of the argument in this case we set aside the conviction of the appellant and acquitted him. We now set down the reasons for our order.

The accused-appellant, who was charged with the murder of one M.R. Dissanayake was convicted by a five to two verdict of the jury of culpable homicide not amounting to murder and sentenced to 6 years' rigorous imprisonment. It was submitted by learned counsel for the appellant that Crown Counsel had conceded in the course of the trial that he was not asking for a verdict of anything more than culpable homicide not amounting to murder. The learned trial Judge also directed the jury that the only possible verdict was one for a lesser offence. Consequently counsel invited us to hold that the two dissenting jurors could not have been satisfied that the case for the prosecution had been proved beyond reasonable doubt and intended to acquit the prisoner.

The deceased Dissanayake lived with his wife Sumithra Alawatugoda and their children in a house close to which there were other houses. The immediate neighbour of the deceased was his aunt Palingu Menike and at the rear of the deceased's house lived a Police Sergeant called Banda with his family. The main witnesses for the prosecution are Sumithra Alawatugoda and Palingu Menike who purported to have identified the accused as the assailant. Sumithra Alwatugoda states that about 9 p.m. on the night in question the dogs began to bark and the deceased thinking that there might be robbers went out with his gun to the rear of the house and she followed him with a lamp. When they got to the rear of the house she saw Sergeant Banda and Banda asked the deceased "Have you brought the gun to shoot?". The deceased then said "I am not a person who shoots at people like that; I brought it for my protection". Then the deceased said "If there are such misunderstandings please remove it from your head". While this conversation was in progress Palingu Menike came from her house also with a lamp. It would appear that there was an altercation between Sergeant Banda and the deceased and as a result, other persons in the neighbourhood came on the scene. The first person who came there was one Abeyratne, the brother-in-law of Sergeant Banda. Abeyratne came with a club and inquired from the deceased whether the gun was brought to shoot. Then the deceased remarked to his daughter "Daughter, these people have got excited as a result of my bringing this gun" and so saying handed the gun to his daughter Indranee to be taken home. Indranee took the gun from the deceased and went home. Almost simultaneously with the arrival of Abeyratne, according to the evidence of both the widow and Palingu Menike, other persons who were relations of Sergeant Banda arrived on the scene. They were Leelawathie Kumarihamy sister of the accused, Madadeniya a brother of Sergeant Banda, Veerasamy and Nagasena. Madadeniya had a sword. Veerasamy and Nagasena had clubs. Then according to Palingu Menike she said, "why are you trying to quarrel over unnecessary things?" and Sergeant Banda started abusing Palingu Menike in obscene language.

At that stage the accused who was the elder brother of Sergeant Banda and who lived across the paddy field about 500 feet away came running up with a sword and struck the deceased on the head. It is not clear on the evidence whether the deceased sent away the gun before the others arrived on the scene armed. Having regard to the fact that all those who came there armed were living in the vicinity of Sergeant Banda's house and were closely related to him, it seems very likely that they came armed before the deceased sent away the gun. There is evidence that all those who came armed also inquired from the deceased whether he had brought the gun to shoot.

A material question that arose for consideration at the trial was whether the deceased had a gun with him at the time he was attacked by the accused. Learned counsel for the defence cross-examined the widow and Palingu Menike on the footing that the gun was with him at the time of the attack. It was suggested to the witnesses that having regard to the fact that the others were armed he would have at least called for the gun again to protect himself. It was pointedly suggested to the widow in cross-examination that the story about the gun being taken away was a fabrication. In view of the suggestion of the defence it was necessary to have this matter probed more fully. We have examined the statements made by the widow and Palingu Menike to the police soon after the incident. In those statements, the witnesses *have made no mention of the fact that the deceased sent away the gun at any stage.* The first intimation that the police had that the gun was sent away before the attack was when they recorded the statements of the daughters of the deceased several days later. There was therefore material in the Information Book Extracts that there was a serious omission in the evidence of the two eye-witnesses as to whether the deceased was armed or not at the time of the assault. If the statements of Sumithra Alawatugoda and Palingu Menike had been brought to the notice of the trial Judge by Crown Counsel I have no doubt that he would have prominently placed this matter before the jury and drawn their attention to this serious discrepancy between their evidence in court and their statements to the police.

If, as it is likely, the deceased did not send away the gun at any stage before he was attacked, especially when he would have needed the gun for his own protection at the time the five others were armed, it may well be that the accused would have been entitled to plead that he acted in the exercise of the right of private defence. The evidence was to the effect that this was a very dark night; that Sergeant Banda's compound was planted with several overhanging trees; that there was a violent altercation between the deceased and Palingu Menike on the one hand and Sergeant Banda on the other which was loud enough to be heard by the accused at his house 500 feet away and if the deceased was armed with a gun at the time, which those present would not have known whether it was loaded or not, it might well be that in attacking the deceased the appellant had a reasonable apprehension that the deceased might have used his gun and therefore was justified in acting in defence of his brother.

In this connection it is also relevant to note that according to the widow this was the first occasion that the deceased went out with the gun and the suggestion of the defence is that he did so on this occasion not with the object of looking for thieves but in order to create trouble with Sergeant Banda with whom he was not on good terms.

The failure of the witnesses to mention in their Police statements that the deceased handed the gun to Indranee before he was attacked is an omission on a vital part of the transaction. In *Queen v. Raymon Fernando* [1] it was held that an omission to mention in a statement a relevant fact narrated by the witnesses in evidence subsequently, does not fall within the ambit of the expression "former statement" in Section 155 of the Evidence Act. How then could this vital matter be brought to the notice of the jury? Under Section 122 (3) of the Criminal Procedure Code it is the Court that has overall control over the statements recorded in the course of a Police investigation and the Court has a right to utilise the statements to aid it at the inquiry or trial. We are of the view that this is a case which required the intervention of the court in the administration of justice. If a police officer who recorded the statement of a witness in the course of a police investigation was asked whether there was any mention in the statement of a material fact and he answered in the negative after refreshing his memory from the written record, we see no reason why the oral evidence so elicited should not be admissible without the necessity of the record being proved and marked. Different considerations would apply if a party wishes to prove the written record. To prevent the defence from discrediting a prosecution witness in such a case would be a serious fetter on the right of cross-examination. Moreover if the statement is used by the police officer for the purpose of refreshing his memory, the defence have a right to cross-examine the witness on the statement. We are therefore, with all respect, not inclined to adopt the decision in the case of *Raymon Fernando.* In that case prejudice was caused to the prosecution by the questions put in cross-examination to the accused being held to be inadmissible. In this case it could have been used properly in the interests of the defence. The proper approach to the cross-examination of witnesses from the statements recorded in the course of a Police investigation is found in the observations of Garvin A.C.J. in the Divisional Bench case of *King v. Cooray* [2] where the learned Judge said—

> "It may indicate lines of inquiry which should be explored in the highest interests of justice, or may disclose to a Judge that a witness is giving in evidence a story materially different from the story told by him to the investigation officer shortly after the offence."

We think therefore, that had this omission been brought to the notice of the jury, it would have materially affected the decision in the case. Two questions arise for consideration as a result of this omission. Firstly it might have affected the credibility of the two chief prosecution witnesses and induced the majority of the jurors to adopt the view taken

[1] *(1962) 66 N. L. R. 1.* [2] *(1926) 28 N. L. R. 83.*

by the dissenting jurors and acquit him and secondly if the presence of the gun in the hands of the deceased was cast in doubt, the plea of the right of private defence would have arisen for the consideration of the jury. The learned trial Judge directed the jury of the defences of a sudden fight and provocation, but quite understandably, in the absence of the omission in the statements being brought to his notice, failed to direct the jury on the right of private defence.

The appellant being the elder brother of Sergeant Banda may have been apprehensive that the deceased at that hour of the night and in the darkness might have used the gun on his brother in the course of the altercation. Although the defence has suggested that this was a case of mistaken identity, it was still open to the jury on the prosecution evidence to consider whether the appellant acted in the exercise of the right of private defence. Since only one blow was dealt and the deceased died several days later we think, having regard to the nature of the weapon which was in the hands of the deceased, the appellant could not be said to have exceeded the right of private defence. We think, that had this defence being placed before the jury, the majority who convicted the appellant of culpable homicide, might well have been disposed, on a reasonable view of the facts, to acquit the appellant on the ground that he acted in the exercise of the right of private defence.

Accused acquitted.