1961 *Present :* **T. S. Fernando, J.**

THE QUEEN *v.* MAPITIGAMA BUDDHARAKKITA THERO and 4 others

S. C. No. 8/1st Western Circuit, 1961—M. C. Colombo, 23,828/A

Evidence—Confession made by one of several persons tried jointly—Admissibility—Evidence Ordinance, ss. 24, 30—Criminal Procedure Code, s. 134.

(1) By section 30 of the Evidence Ordinance :—

" When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person."

Held, that a confession which can be proved under section 30 of the Evidence Ordinance should not be excluded merely on the ground of prejudice that its reception may cause to the co-accused in relation to a charge of conspiracy.

Evidence—Statements made by an accused to a police officer—Admissibility—Evidence Ordinance, ss. 21, 25—Criminal Procedure Code, s. 122 (3).

(2) *Held,* following the decisions in *Thuraisamy v. The Queen* (54 N. L. R. 451) and *Regina v. Anandagodage* (62 N. L. R. at 252), that it is open to the prosecution under section 21 of the Evidence Ordinance to elicit from a police officer statements made to him by an accused person during the interrogation of the latter if such statements are not obnoxious to section 25 of the Evidence Ordinance.

ORDERS made in the course of a trial before the Supreme Court in a case where five persons were indicted on a charge of conspiracy to murder in consequence of which murder was committed and the fourth of them was, in addition, alone charged with committing murder.

G. E. Chitty, Q.C., with *Ananda Pereira, L. B. T. Premaratne* and *V. S. A. Pullenayegum,* Crown Counsel, and *R. Rajasingham,* for the Crown.

Phineas Quass, Q.C., with *E. A. G. de Silva* and *S. Suntheralingam* (assigned), for the 1st accused.

Phineas Quass, Q.C., with *E. A. G. de Silva* and *F. A. de Silva* (assigned), for the 2nd accused.

K. Shinya, with *U. C. B. Ratnayake, J. Hashim* and *K. Ratnesar* (assigned), for the 3rd accused.

L. G. Weeramantry, with *Annesley Perera, R. L. Jayasuriya* and *M. B. Jayasekere* (assigned), for the 4th accused.

N. Satyendra, with *S. G. Wijesekera* (assigned), for the 5th accused.

(1) March 9, 1961. T. S. FERNANDO, J.—

Some of the evidence which the prosecution relies on to establish the charges in the indictment having been led, Mr. Chitty for the prosecution indicated to me that he proposed next to produce in evidence a statement made by the fourth accused and recorded by a Magistrate in terms of section 134 of the Criminal Procedure Code. Mr. Weeramantry, appearing for the fourth accused, indicated that he objected to the reception of this statement in evidence on the ground that it is a confession which section 24 of the Evidence Ordinance renders irrelevant. Evidence both to establish and rebut relevance having been heard by me in the absence of the Jury, I made order, after a consideration of that evidence, that the statement in question is relevant and admissible.

Mr. Quass, appearing for the first and second accused, thereupon submitted that notwithstanding the relevance of this item of evidence it should be excluded on the ground of prejudice that its reception will cause to the first and second accused. Section 30 of our Evidence Ordinance enacts that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court shall not take into consideration such confession as against such other person. Mr. Quass emphasized that a direction to the jury, however strongly made, that this statement of the fourth accused is not evidence against any accused other than the fourth accused himself will not erase from the minds of the jurors who are laymen the kind of prejudice that must remain in their minds relating to such connection between the declarant and the other persons who the declarant says were conspiring with him in the commission of the offences charged. Mr. Quass further submitted that the prosecution has on the list of witnesses appended to the indictment a number of persons who claim to have seen the fourth accused shoot the deceased, and that the prosecution has been content at the trial to call only a few of that number of witnesses probably for the reason that the witnesses already called are sufficient, in the opinion of the prosecution, to establish the charge of murder made against the fourth accused. For that reason Mr. Quass urged that the prosecution really does not need as against the fourth accused this evidence of a section 134 statement and submitted that the real purpose of the prosecution in leading evidence of this statement was to leave in the minds of the jury an impression that the first and second were in conspiracy with the fourth accused.

In regard to this aspect of the matter Mr. Quass has referred me to the case of *The King v. Christie* (1914 Appeal Cases 545) and particularly to two passages therein. The first contains the observations of Lord Moulton (see page 559) :—

" The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury *which would be out of proportion to its true evidential value* that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable."

The second contains the observations of Lord Reading (see page 564) much to the same effect :—

"Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it."

Mr. Chitty in reply to this submission appeared to me to argue that the English practice as to the discretion of a judge to exclude relevant and admissible evidence in the circumstances mentioned in the case of *Harris v. Director of Public Prosecutions* (1952 Appeal Cases 694) is not part of the law of Ceylon. Apart from observing that I am aware that certain judges at the Assizes here have in recent years followed this practice, it is unnecessary in my opinion to discuss whether our law embraces this English practice as I have reached the view that the contention of Mr. Chitty which I am going to refer to immediately is entitled to prevail. Mr. Chitty has drawn attention to the fact that (1) the evidence he is seeking to elicit is not evidence of little value but is evidence of a complete confession in relation to both charges against the fourth accused, and (2) the fourth accused has, by reason of the suggestions made through his counsel to the witnesses so far called by the prosecution, contested the allegation that he shot the deceased and indicated that the shooting was done by another person dressed similarly to himself. In these circumstances Mr. Chitty contends that the statement of the fourth accused to the Magistrate is of real importance to the Crown. The opinion of learned counsel and even my opinion on the question of the credibility of the witnesses so far called are in a sense irrelevant in deciding at this stage whether the Crown has a real need for the introduction of the evidence sought to be led because the jurors remain throughout the sole judges of fact in this case, and it does not appear to me to be right to do anything which may give rise to the view that any question of fact has been prejudged.

Moreover, a confession is not evidence which can ordinarily be said to be of little value in its direct bearing upon the case, and I have reached the conclusion that the statement in question should not be excluded by me from consideration by the jury. The jury have the undoubted right of excluding the confession altogether from their minds if they come to the conclusion that it appears to have been made as a result of an inducement, threat or promise proceeding from a person of the class indicated in section 24 of the Evidence Ordinance.

I was next referred by Mr. Quass to the following observations of Lord Porter in the Indian case of *Walli Mohammad and another v. The King* (1949) A. I. R. (P. C.) 103.

> " The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that however carefully assessors or a jury are directed and however firmly a judge may steel his mind against being influenced against one by the evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other."

An examination of *Walli Mohammad's* case reveals that the only evidence against each accused at the trial which was of two persons on a charge of murder consisted of the contradictory statements made by each before the police implicating the co-accused and exculpating himself but admitting his presence at the scene of the crime. On this point, as Viscount Simon stated in *Harris v. Director of Public Prosecutions* at page 711 (supra) :—

> " It must also be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the Court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances."

It is unreasonable to think that the Judicial Committee intended to say that, where evidence sought to be led is admissible against one or more of the accused but not against the other accused charged together at one trial, such evidence should as a rule be excluded from the jury. The safeguard for such a situation must lie in a clear direction by the trial judge to the jury that in considering the verdict in respect of any particular accused person evidence inadmissible in law against him should be left out altogether. As a further precaution, the trial judge can indicate to the jury what is the evidence led separately as against each accused.

In certain cases undue prejudice may be safeguarded against by a separation of trials. No application has been made before me at any stage for a separation of trials, and I agree with Mr. Quass's observation that even if the charge of conspiracy to murder against the five accused and the charge of murder against the fourth accused had been separated, yet on the charge of conspiracy to murder alone the same question that he has now agitated would have arisen.

(2) April 3, 1961—

The prosecution seeks to elicit from this witness (Inspector Seneviratne) certain statements alleged to have been made to him during his interrogation of certain of the accused in this case. If the matter had been *res* *integra*, it would have been open to me to follow what appears to me to be the correct interpretation of Section 122 (3) of the Criminal Procedure Code. But during the course of the argument, it has been made patent to me that there are two decisions of the Court of Criminal Appeal which apply directly to the point that has now arisen. If these two decisions deal with the point that has now arisen, I must say that I am bound by these decisions and have to follow them and apply the law as interpreted therein.

In *Thuraisamy v. The Queen* [1] it was held that if the admission of statements made by the accused was not obnoxious to section 25 of the Evidence Ordinance, then " it was open to the prosecution under section 21 of the Evidence Ordinance to prove them as admissions of relevant facts." The Court held that the proving of the admissions by way of rebuttal of the evidence of the accused was not a proper exercise of the Judge's discretion as it was open to the prosecution to prove them as part of the case for the prosecution in the first instance before it was closed. The reasoning which led to the decision in *Thuraisamy's case* was followed by the Court of Criminal Appeal in *Regina v. Anandagodage* [2]. In that case the prosecution led in evidence as part of its case certain admissions which were alleged to have been made by the appellant to police officers. The Court held that the evidence was properly admitted and it is sufficient for me to say that I am bound by the judgment referred to above.

Mr. Quass has invited me to hold that I am not bound by the views expressed by the Court of Criminal Appeal as that Court on neither occasion did expressly deal with the point that has now arisen. I regret I am unable to agree with Mr. Quass that these decisions do not expressly deal with the point.

In this state of the interpretation of the relevant law, there is nothing more to be said. With great respect to the Court of Criminal Appeal, however, I should perhaps be pardoned if I permit myself the observation that the interpretation placed in these decisions appears to me to be capable of paving the way in this country for a conviction of an accused person to be furthered by statements made by himself, and not only in the limited circumstances where they can be utilised to prove that he made a different statement at a different time, i.e. in the cross-examination of his evidence from the witness box, without even a safeguard of a caution addressed to him by a police officer who is interrogating him. This procedure thus appears to me to be alien to the spirit both of the Criminal Procedure Code and the Evidence Ordinance. This observation of mine can be of little comfort to the accused in this case because so far as this Court is concerned, the opinion of the Court of Criminal Appeal must prevail and my observations can remain but the idle musings of a single judge.

[1] *(1952) 54 N. L. R. at page 451.* [2] *(1960) 62 N. L. R. 241 at page 252.*