[COURT OF CRIMINAL APPEAL]

1969 *Present:* **Sirimane, J. (President), Samerawickrame, J., and Weeramantry, J.**

H. M. HEEN BANDA, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 1 OF 1969, WITH APPLICATION No. 2

S. C. 118/68—M. C. Polonnaruwa, 1930

Summing-up—Evidence Ordinance—Section 27—Scope—Non-direction.

Where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.

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

L. F. Ekanayake (assigned), for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 13, 1969. SIRIMANE, J.—

According to the case for the prosecution, the witness Perera, a game ranger, together with the deceased, one Razaak, and two other game watchers, were on patrol in the jungle at Polatuwela in the Polonnaruwa district on the night of 10.10.67. About 9.15 p.m. they noticed a torch being flashed at a distance of about a hundred yards, and advanced within thirty to forty yards of that light, when it was suddenly switched off.

Perera then flashed his own torch, and says that he saw a man who had covered his head with a cloth pointing a gun towards them. He (Perera) immediately switched off his torch, when a shot rang out which injured the deceased and caused his death.

Razaak gave somewhat similar evidence, and both of them purported to have identified the appellant as the man with the gun, though they admitted that they had only a glimpse of him.

In their statements to the police made next day, neither of them had mentioned the name of the appellant, or that they had known or seen the assailant before that date. It was established in cross-examination that Razaak had seen the appellant several times before this, and knew the village in which the appellant lived. The witness Perera had, in the course of an inquiry held earlier into the alleged shooting of an elephant, questioned the appellant in his office. The defence marked as D 3, a part of a statement made by Perera to the Magistrate where he had said, " I had not seen the person who fired before that day ".

It could be seen, therefore, that the evidence of identification was, to say the least, unreliable.

The prosecution also led evidence to show that in the course of their investigations the police found a gun P1 in the hollow of a tree. The owner of this gun was unknown. They also led in evidence part of a statement made by the appellant to the police where he is alleged to have stated, " I can point out the tree in which I placed the empty cartridge " in consequence of which the police found the empty cartridge P2. The Government Analyst expressed the opinion that P2 could have been fired from the gun P1.

In *The Queen v. Krishna Pillai* [1] (S. C. 19/68—M. C. Mallakam 2577) H. N. G. Fernando, C. J. pointed out the dangers inherent in a statement of this nature, admitted under section 27 of the Evidence Ordinance. Unless cautioned, juries are prone to attach undue importance to such statements, and are too ready to infer that the person on whose statement some fact was discovered, had also in that statement confessed to the commission of the crime. It was pointed out in that case that the trial Judge should clearly warn the jury that the law prohibits such an inference.

In his summing up, the learned Commissioner referred to the fact that a cartridge was found on the appellant's statement,—but he said nothing more.

The prejudice caused to the appellant as a result of this non-direction became apparent when the jury returned after deliberating for nineteen minutes. When asked whether they were agreed upon their verdict, the Foreman wanted to know whether the single cartridge traced was found on a statement made to the police by the accused. The learned Commissioner answered the question in the affirmative. Once again he

[1] *(1968) 74 N. L. R. 438.*

failed to explain to the jury that the finding of the cartridge had very little, if any, evidentiary value. In a space of two minutes after this, the jury returned a verdict against the appellant on the capital charge.

It is fairly clear that the jury must have been in doubt in regard to the direct evidence of identification referred to earlier, and that it was the finding of the cartridge on a statement made by the appellant that tipped the scales against him.

When part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance as was done in this case, it is the duty of the trial Judge to explain to the jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more.

The failure to explain to the jury the inference that they may properly draw from the discovery of the cartridge, was a non-direction, which, in our view, amounts to a mis-direction. Had the jury been properly directed on this point, it is impossible to say that they would have brought in a verdict against the appellant.

Having regard to the nature of the other evidence in the case, we did not think it was fair to place the appellant in jeopardy a second time. We, therefore, quashed the conviction and sentence and acquitted the appellant.

Accused acquitted.