RANJITH FONSEKA

v.

THE ATTORNEY - GENERAL

SUPREME COURT.
BANDARANAYAKE, J., JAMEEL,J. AND FERNANDO, J.
S.C. No. 54/87 - C.A. No. 123/84 - H.C. NEGOMBO 371/81.
JUNE 8, 1989.

Criminal Law - Jury not directed on confessional item of evidence - Is conviction vitiated?

The Accused - appellant was convicted of murder. The accused had gone to the Police Station and handed over knife to the Police but the knife was not the murder weapon. No direction was given to the Jury on the effect of this item of evidence and it was contended that the Jury may have inferred that this amounted to a confessional statement.

Held :

(1) No evidence was led to the effect that the Appellant had made a statement, let alone a statement which may have been a confession.

(2) A confession is an admission, and an admission is a " *statement*, oral or documentory". The evidence complained of does not amount to evidence of statement. A "Statement" may well include a gesture, such as a nod of assent to a question, or a sign by a dumb person ; it clearly does not include the Appellant's act of handing over a knife. A confession in addition to being an admission must also state or suggest the inference that the Accused committed the offence. Even if the evidence that the Appellant handed over a knife is a "*Statement* " yet it neither states or suggests any reference of a confession, nor operates to inform the Court or create the impression that the Accused had made a statement admitting that he was the doe of the act complained of. The fact that such evidence may have been prejudicial to the Appellant or may have had the effect of strengthening the case for the prosecution does not make it a confession. The evidence was not improperly admitted.

Cases referred to :

(1) *Obiyas Appuhamy v. The Queen - 54 NLR 32, 34.*
(2) *The King v. Kalu Banda 15 NLR 422.*
(3) *The King v. Cooray 28 NLR 74.*
(4) *Regina v. Batcho 57 NLR 100.*
(5) *The Queen v. Victor Perera 59 NLR 185.*
(6) *Regina v. Anandagoda 62 NLR 241 affirmed by Privy Council at 64 NLR 73.*
(7) *De Soysa v. The Queen 75 NLR 534, 541.*

APPEAL from a judgment of the Court of Appeal,

Ranjit Abeysuriya, P.C. with *P. Jayewardene* and *Miss Ayomi de Silva* for the Accused - appellant.

Upawansa Yapa, Deputy Solicitor - General, with *Miss Jayasinghe B. Tilakaratne* SSC for Attorney - General.

Cur.adv.vult.

July 4, 1989.

FERNANDO, J.

The Appellant was found guilty of murder and was sentenced to death, his appeal against the conviction and sentences was dismissed by the Court of Appeal, and he has appealed to this Court, having obtained special leave to appeal. The learned High Court Judge did not direct the the jury not to treat a certain item of evidence as a confession by the Accused - Appellant, and the question of law urged for our determination in this appeal is whether the conviction was thereby vitiated.

The facts relevant to this question may be shortly stated. The widow of the deceased testified that she saw the Appellant stab her husband with a knife at about 12.15 p.m. ; within a few minutes she arrived at the Police Station and made a complaint. The Prosecution elicited evidence, from an Inspector attached to that Police Station, that at about 12.30 p.m. the Appellant had come to the Police Station and handed over a knife to him ; that he had then visited the scene taking the Appellant with him ; and that on his return he had handed over the Appellant to the Reserve. No evidence was elicited suggesting that the Appellant had made a statement. The Inspector also stated that there was nothing smeared on the knife, which he had shown both to the widow and the J.M.O. According to the J.M.O. the knife shown to him was like a table knife, and that the injuries inflicted on the deceased could not have been caused with that knife. The widow stated that the knife, shown to her resembled a knife which she had seen in the Appellant's house used for the purpose of cutting "mallun" leaves, and was quite different to the weapon with which the deceased had been stabbed. It was thus the Prosecution case throughout that this knife was not the murder weapon ; indeed, the inspector testified further that, in consequence of the widow having said that this was not the murder weapon, he had unsuccessfully searched the appellant's house on three occasions in an endeavour to find the murder weapon. There is no complaint as to the manner in which these facts were set out in the summing - up.

Learned President's Counsel relied heavily on the following portion of the judgment of the Court of Appeal :

> " In the present case evidence led may suggest that the statement volunteered by the accused at the Police Station was a confession in view of the fact that the accused accompanied the Police to the scene and on their return had been handed to the Police Officer at the Police Station.
>
> There has been a non-direction as the judge had not directed the jury not to consider this item of evidence as a confession made by the accused to the Police Officer and that it was only evidence that a knife had been handed over to the Police."

He submitted that for the purpose of this appeal we must proceed on the basis that a statement had been made by the Appellant to the Police,

and that the jury may well have inferred that this statement was confessional in nature ; that in the absence of a suitable direction by the learned High Court Judge, the conviction could not stand ; and that in the circumstances, the Court of Appeal erred in applying the proviso to section 334 (i) of the Code of Criminal Procedure Act.

Upon a scrutiny of the relevant evidence, which has been summarized above, it is clear that no evidence was led to the effect that the Appellant had made a statement, let alone a statement which may have been a confession. The Court of Appeal was clearly in error in concluding that there was evidence that a statement had been made by the Appellant. I cannot accept any contention that our decision in this appeal must be on a basis which perpetuates that error.

It was the alternative submission of learned President's Counsel that from this evidence it could be inferred that the Appellant had made a statement, and also that such statement was of a confessional nature. He relied on *Obiyas Appuhamy v. The Queen* (1) in which evidence was led that the accused volunteered a statement to a police officer, who thereupon immediately handcuffed the accused and took him to the scene of the offence :

> "Section 25 (i) of the Evidence Ordinance provides that no confession made to a police officer shall be proved as against a person accused of any offence. It is not solely evidence of the actual terms of a confession that can be obnoxious to this provision, but any evidence which if accepted would lead to the inference that the accused made a confession to a police officer and so 'prove' such a confession. " (per Gunasekara, J.)

This decision is not applicable here for the reason that the Prosecution scrupulously refrained from leading any evidence, or even suggesting, that the Appellant made a statement. I respectfully agree that the mere fact that a statement was made, without any reference to its contents, can be repugnant to section 25 (i) in appropriate circumstances ; and that evidence of other acts and events from which inferences can be drawn as to the confessional nature of such a statement is also inadmissible. However, Gunasekara, J., neither held nor suggested that section 25 (1) precludes evidence of such acts and events in the absence of any evidence that the accused made a statement to a Police Officer. Further,

while a reasonable inference can be drawn by a jury from the act of handcuffing the accused, that his statement in some way implicated him in the offence, such an inference can hardly be drawn from the act of handing over a knife which was not the murder weapon.

No decision was cited in which evidence of such acts and events was *per se* held to amount to a confession. Counsel cited *the King v. Kalu Banda* (2) *the King v. Cooray* (3), *Regina v. Batcho* (4) and *The Queen v. Victor Perera* (5) none of which involved this question. I am dispensed from the need to analyse these decisions, as the entire series of decisions dealing with the scope of sections 17 (2) and 25 of the Evidence Ordinance were exhaustively analysed by H.N.G. Fernando, C.J., in *Rejina v. Anandagoda* (6) affirmed 64 N.L.R. 73, P.C. and I am in respectful agreement with his conclusion that the decisions of our Courts pronouncing upon the inadmissibility of statements made to Police Officers, and of evidence concerning such statements, fall into the following categories :

(i) A statement directly admitting that the accused was the doer of the act charged. It makes no difference if, in addition to an admission of the act charged, there is also exculpatory or mitigatory matter, because the admission would prove the Prosecution case and the burden of proving what is exculpatory or mitigatory is on the accused.

(ii) A statement which, though not an admission that the accused was the doer of the act charged, contains admissions, the intrinsic terms of which suggest the inference that he did the act, is inadmissible.

(iii) Evidence of Police Officers, or questions in cross - examination and / or statements by prosecuting counsel, which operate to inform the Court or create the impression that the accused had made a statement admitting that he was the doer of the act charged, is inadmissible.

(iv) In a case where the prosecution has the burden of proving possession by the accused of a stolen article, a statement that the accused had in fact been in possession thereof, is inadmissible. Similar statements admitting possession in cases where

possession is an essential ingredient of the offence charged may probably fall into this category.

A confession is an admission, and an admission is " a **statement,** oral or documentary". The evidence complained of does not amount to evidence of a statement ; while I recognise that a " Statement" may well include a gesture, such as a nod of assent to a question, or a sign by a dumb person, it clearly does not include the Appellant's act of handing over a knife. In all the cases falling under category (iii) above, there was evidence that a statement was made, and I see no justification for extending the scope of category (iii) to situations where there was no such evidence. A confession, in addition to being an admission, must also state or suggest the inference that the accused committed the offence. Even if, contrary to my view, the evidence that the Appellant handed over a knife is a "statement" yet it neither states or suggests any such inference, nor " operates to inform the Court or create the impression that the accused had made a statement admitting that he was the doer of the act charged". The fact that such evidence may have been prejudicial to the Appellant - and the possibility that he was seeking to mislead the investigators was adverted to - or may have had the effect of strengthening the case for the Prosecution, does not make it a confession. That evidence was not improperly admitted.

Learned President's Counsel finally contended that even though the impugned evidence did not amount to a confession, and even if it could not reasonably have been so considered by the jury, there was nevertheless a possibility that the jury might have thought that the Appellant had made a confessional statement, and that it was therefore the duty of the learned High Court Judge to direct the jury that it was not a confession. Whether or not, as a counsel of perfection, that might have been done, there was certainly no duty to do so, and the failure to do so did not result in any illegality or prejudice to the Appellant. Our system of criminal justice rightly imposes on the Judiciary an onerous duty of fairness to the accused, but this duty cannot be exalted into a barrier which would obstruct the administration of justice, to the detriment of the victims of crime as well as the community at large.

It is thus hardly necessary to scrutinise the contention that the proviso to section 334 (1) was wrongly applied. The Court of Appeal referred to *de Zoysa v. The Queen* (7).

" .... if, as we confidently think, the jury did accept as true the prosecution evidence on the material points, then the further wrong instruction could have contributed little tothe jury's ultimate verdict,"

and took the view, which I share, that there was strong and convincing evidence as to the Appellant's guilt, and that any direction regarding the impugned evidence would not have changed the verdict of the jury.

The appeal is therefore dismissed.

BANDARANAYAKE, J. – I agree.

JAMEEL, J. – I agree.

Appeal dimissed.