[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Nagalingam A.C.J. (President), Gunasekara J. and Pulle J.**

OBIYAS APPUHAMY, Appellant, *and* THE QUEEN, Respondent

Appeal 11 with Application 14 of 1952

S. C. 17—M. C. Kanadulla, 7,229

Confession to police officer—Inadmissibility—Not restricted to actual terms of the statement—Evidence Ordinance (Cap. 11), ss. 8 and 25 (1).

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.

Held, that such evidence was inadmissible. It is not solely evidence of the actual terms of a confession that can be obnoxious to section 25 (1) of the Evidence Ordinance, but also any evidence which if accepted would lead to the inference that the accused made a confession to a police officer would be inadmissible.

[1] *(1945) 46 N. L. R. 313.*

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

J. G. Jayatilleke, for the accused appellant.

R. A. Kannangara, Crown Counsel, for the Crown.

Cur. adv. vult.

March 17, 1952. GUNASEKARA J.—

This appeal raises a question as to the admissibility of certain evidence regarding a statement made by the accused appellant to a police officer and the propriety of a direction given to the Jury about that statement.

The appellant was convicted on a charge of murder which was based on circumstantial evidence and evidence of admissions alleged to have been made by him to two persons, Aron and Velun, to the effect that he had shot the deceased. According to the case for the Crown, the deceased, a man named William, had been shot dead at about 4 p.m. on the 8th May, 1951, in the neighbourhood of a watch hut on a coconut estate, and on the evening of the same day a sub-inspector of police found a spent cartridge in a vegetable garden behind the watch hut. It was alleged that the cartridge was found in consequence of a statement which was made to the sub-inspector by the appellant who was then in his custody at that place, and that the statement was that the appellant " threw it into the vegetable garden which is behind the watch hut " and which he pointed out to the sub-inspector.

Before the sub-inspector gave this evidence the Crown Counsel had elicited from him that the appellant came to the police station at about 6 p.m. and made a statement, which he recorded and the appellant signed, and that he then took the appellant to the scene of the shooting in view of the statement that he had made. Having referred to certain investigations that he made there he added that he " recorded another statement from the accused the same day ". After some further questions about his investigation he was asked by Crown Counsel—

" In connection with this case did you take anybody into custody ?"
and he replied

" I took the accused into custody. "

The counsel for the defence then objected to the question.
Thereupon, according to the transcript of the shorthand note of the proceedings, the witness was further examined as follows :—

" (*Court* : When did you take accused into custody ? .... At the police station.)

Examination continued.

Q. At what time ? .... After he made his statement to me at 6 p.m. and thereafter I brought accused to the estate.

(*Court* : How did you bring him ? ....By car.)

Q. Was he handcuffed ? .... I cannot say.

Q. Look at your notebook .... I handcuffed accused immediately accused made a statement.

Q. Immediately he made a statement to you you arrested him? .... Yes) ".

The effect of the sub-inspector's evidence as to what happened at the police station at 6 p.m. is that the appellant turned up there and volunteered a statement to him and he immediately handcuffed him and took him to the scene of the shooting. This evidence clearly suggests that the statement volunteered by the appellant at the police station was a confession.

Section 25 (1) of the Evidence Ordinance (Cap.11) 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.

There is support for this view in the decision of a Bench of three Judges in *R. v. Kalu Banda*[1], the effect of which, as summarised by Garvin A.C.J. in *R. v. Cooray*[2], is " that the prosecution may not invoke the aid of section 8 to enable a police officer to state what an accused person had not told him under circumstances which gave rise to the inference that the statement made to him was a confession ". He also pointed out that in that case " the prosecution did not seek to give the statement of the accused in evidence presumably because it was thought to be inadmissible " ; and that " the view of the Court seems to have been that the method they adopted was calculated to produce exactly the same effect as if a statement containing a confession had been placed before the jury ".

Mr. Kannangara sought to base on an observation in the judgment of this Court delivered by Howard C.J. in *R. v. Gunawardene*[3] a contention that the decision in *Kalu Banda's case* can no longer be regarded as good law. That observation relates, however, to a decision on a different point, namely, as to the meaning of the term "Confession". On that point Bertram C.J. had said in *R. v. Ukku Banda*[4]:—

> " What I take *Rex v. Kalu Banda* (supra) to have decided is this : That if the Crown at the trial of a prisoner tenders in evidence a statement made by the prisoner, whether self-inculpatory or self-exculpatory in intention, with a view to an inference being drawn by the Court from that statement against the prisoner, that statement becomes *ex vi termini*, as defined by section 17 (2), a ' confession ', and that if it was made to a Police officer it cannot be received in evidence. "

Referring to that view Howard C.J. said that if the decision in *Kalu Banda* had the far reaching effect accepted by Bertram C.J. in *Rex v. Ukku Banda* it could no longer be regarded as good law. This Court did not dissent from the decision formulated above in the words of Garvin A.C.J. although that formulation of it is quoted in the judgment.

[1] *(1912) 15 N. L. R. 422.*
[2] *(1926) 28 N. L. R. 74 at 80.*
[3] *(1941) 42 N. L. R. 217 at 221.*
[4] *(1923) 24 N. L. R. 327 at 333.*

The evidence given by the sub-inspector of police, to the effect that the appellant volunteered a statement to him at the Police Station and he thereupon immediately took the appellant into custody and in view of what he had stated set out with him to the scene of the shooting, is inadmissible for the reason that if believed it would prove as against the appellant that he made a confession to the sub-inspector.

Under cross-examination the sub-inspector gave some particulars of this confession. He said, according to the shorthand note—

> " The accused came to the station and he made a complaint in which he stated ' then he rushed towards me and I fired again with my gun '. William had arrived according to this statement at 4.30 p.m., and they met somewhere near about the main gate. When the accused asked him to go out of the estate, he said, William rushed towards him. "

This evidence could have been admissible as part of the case for the defence only if the appellant himself had given evidence and it was sought to prove the statement alleged to have been made by him to the sub-inspector as a corroborative statement admissible under section 157 of the Evidence Ordinance : *R. v. Pitchoris.* [1] He did not give evidence, however, and the statement was therefore inadmissible as evidence on his behalf. It was also inadmissible against him, for the reason that it amounted to a confession made to a Police officer notwithstanding that the admission of the incriminating fact is qualified by a plea of exculpation : *R. v. Ranhamy* [2].

The learned Judge in his summing-up drew the attention of the jury to the circumstance that the appellant failed to give evidence substantiating the plea of exculpation alleged to have been set up in that statement. " You may ask yourselves ", he said, " what is the value of that statement —the man did not get into the witness-box and substantitate it ". But he also directed the Jury that there was before them evidence that the appellant admitted to the sub-inspector that he had shot the deceased. He said—

> " In this case the Crown also relies on the admission alleged to have been made to Marthelis or Aron that he shot the deceased. Well, sometimes an admission like that is the strongest evidence against a man, and sometimes it is the most miserable evidence that you can possibly put forward. It all depends on the person who speaks to this alleged confession or admission. If you believe Aron or Marthelis with regard to this accused's alleged admission, then that is evidence against him. And of course in this particular case his own Counsel with regard to the shooting has elicited from the Inspector the fact that when the accused came to the police station that day he said that the deceased man rushed at him and he shot him in self-defence. That is an admission of the shooting. That is not an admission of the circumstances in which he shot the deceased man. As a matter of fact that piece of evidence was elicited by Mr. Obeysekere in order to satisfy you that this was not a cold-blooded murder but it was preceded by something which the witnesses for the Crown are unable to put before you so as to complete the picture. You will bear that in mind. "

[1] *(1942) 43 N. L. R. 347.* [2] *(1940) 42 N. L. R. 221.*

Although in this reference to the alleged confession the learned Judge stressed the accompanying exculpation, the Jury were at the same time directed that it was open to them to base on the confession a finding that the appellant shot the deceased. This was a misdirection in view of the provisions of section 25 (1) of the Evidence Ordinance.

It is impossible to say how much of the legally admissible evidence in the case would have been believed by the Jury if they had not been misdirected on this point or if the confession to the police officer had not been admitted in evidence. We are therefore unable to say that no substantial miscarriage of justice has actually occurred. We set aside the conviction and sentence and we order a new trial.

New trial ordered.