[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Gunasekara, J., and K. D. de Silva, J.**

REGINA *v.* M. P. PERERA *alias* K. P. MEDAWATTE

APPEAL NO. 37 OF 1955, WITH APPLICATION NO. 65 OF 1955

S. C. 18—M. C. Galle, 16,220

Evidence—Commission of cognizable offence—Investigation by police officer—Right to continue it after commencement of Magisterial inquiry—Statement of accused to police officer—Right of Crown to use it after close of defence—Mode of proving such statement—Criminal Procedure Code, ss. 153, 155 et seq., 237 (1)—Evidence Ordinance, s. 155.

The appellant was convicted of murder. At the trial he gave evidence on his own behalf. In the course of the cross-examination he was asked whether he made certain statements to the police officer who investigated the circumstances of the commission of the offence. As he did not admit the statements, the prosecuting Counsel, after the close of the defence, sought to impeach his credit by proving that he made those statements. The statements in question were recorded by the police officer after the Magistrate had commenced his preliminary inquiry at the scene of the offence and after he had made order remanding the accused to Fiscal's custody.

Held (by the majority of the Court), (i) that an investigation by a police officer under Chapter 12 of the Criminal Procedure Code does not automatically come to an end upon the commencement of the Magisterial inquiry under section 153, or Chapter 16, of the Criminal Procedure Code.

(ii) that the statements made by the accused to the police officer were admissible under section 155 of the Evidence Ordinance to impeach the credit of the accused by proof of former statements inconsistent with his evidence. *R. v. Thuraisamy* (1952) 54 N. L. R. 449, distinguished.

(iii) that the police officer's evidence in the instant case amounted to his giving oral evidence of the contents of the statement made to him and was therefore unobjectionable. *R. v. Jinadasa* (1950) 51 N. L. R. 529, followed.

Held further (by the whole Court), that even if the appellant was under illegal detention at the time his statement was recorded by the police, evidence of the statements made by him could not properly be excluded on the sole ground that he was illegally detained when he made the statements sought to be proved.

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

Colvin R. de Silva, with *M. M. Kumarakulasingham* and *A. W. W. Gunewardena* (Assigned), for Accused-Appellant.

V. T. Thamotheram, Crown Counsel, for Attorney-General.

Cur. adv. vult.

July 6, 1955. BASNAYAKE, A.C.J.—

At the end of the argument of this appeal we announced that the majority of the Court were of the opinion that the appeal should be dismissed and accordingly dismissed the appeal. We indicated to counsel that we would give the reasons for our decision at a later date.

This is an appeal from a conviction of murder. The appellant, who gave evidence on his own behalf, does not deny that he caused the injuries that resulted in the death of the deceased, but he pleads that he caused the death of the deceased whilst deprived of the power of self-control by grave and sudden provocation.

The appellant is a mechanic and an electrician; the deceased was a nurse. It would appear that the appellant and the deceased had come to know each other about four years prior to this tragedy and had become so friendly that at one time they were contemplating marriage. According to the prosecution about four months prior to the date of this crime the appellant had approached Miss Gunasekara, the Matron in charge of the Nurses' Quarters where the deceased lived, and had confided in her the fact that he was in love with the deceased and that she was trying to give him up and had asked her to intercede on his behalf. The Matron did not agree to do so. According to the appellant the cordial relations between him and the deceased had never been disturbed until this tragic event, and he says that he continued to visit the deceased once a month as he was wont to do and that this tragedy occurred on the day of his monthly visit.

It is common ground that on the afternoon of 23rd November, 1954, the appellant came at about 5 p.m. to the Nurses' Quarters of the Galle Hospital. The versions of the prosecution and the defence differ as to what happened after the appellant entered the building. According to the prosecution, in about two or three minutes after the appellant entered the sitting room the deceased ran out into the front verandah pursued by the appellant. He caught up with her, seized her by the left upper arm, and began to stab her on the back of her chest and kept on stabbing. The deceased endeavoured to get away but the appellant followed stabbing her till she fell, and did not stop even then. The attack on the deceased is described in detail by a witness named Caroline Nona, who deposed as follows :—

"I only saw the accused entering the verandah from the steps. The gentleman (points to the accused in the dock) entered the sitting room in front of the deceased. The deceased immediately got up, and wanted to go into her own room.

To Court.

I know that because I was watching, as I had not seen the accused before, and as he entered the sitting room I was looking to see what he was going to do. As the accused went up to the deceased she moved towards the back door of the sitting room in which direction her own room was situated.

The accused seized the deceased by the arm. The deceased released the hold and rushed out to the front of the quarters to the verandah. At that time I did not see the coat which the accused had been carrying on his arm. I do not know what had happened to it. As the deceased ran out the accused ran behind her. Then the accused held the deceased and went on stabbing her. The deceased was running in the direction of the ping pong table. The accused held her by the upper arm from behind and went on stabbing her. I did see the weapon then. Then the deceased fell, and even after she fell the accused stabbed her once. Up to that time he had stabbed her 5 or 6 times. Then the deceased ran. I did not see in which direction she ran as I ran away from the verandah towards the back of the quarters crying out, with the intention of informing the Matron in the hospital quarters. After the stabbing the accused said : 'Don't trouble me, I am going to the Police.' He said that in Sinhalese. Then he got out of the verandah and went out of the front gate."

The doctor who examined the deceased described fourteen injuries. Of these twelve were stab wounds. Three of them were round about the left arm pit, one on the left upper arm, two on the scapula, three on the neck, two on the back near the spine and above the pelvis. The injuries were consistent with the evidence that they were inflicted from behind.

The appellant in his evidence stated that on the fatal day at about 5 p.m. he came to the Nurses' Quarters to see the deceased as usual with a parcel of apples, grapes and chocolates. As there was no one in the verandah he entered the sitting room. He took off his coat as he was used to do and placed it on the settee. As he heard the deceased whispering in a room, he went near it and called her. She came out and they both sat on the settee. She appeared to be pleased to see him. He asked for a cup of tea and after he had drunk it he handed to the deceased the parcel he had brought her. She took it and left it in her room. A little while later he asked her to bring two apples from the parcel and began to peel an apple. While doing so the appellant asked the deceased whether it was true that she was getting married to Franklin Dharmadasa. She then asked him who had given that information and was told that some one who had walked out of those quarters had given him the news. Then the deceased said that the appellant should not interfere with her private affairs and asked him to leave the quarters at once. He then said jocularly that those were not her quarters. Then she started pushing the appellant away. She said she would be getting married to Franklin Dharmadasa on the 28th of November and that she would not allow anybody to see her in those quarters after that. She continued to push the appellant and attempted to pull out from his top pocket a handkerchief she had given him. The pocket was torn in the attempt. She continued to push the appellant out of the hall. The appellant's version of what happened thereafter in his own words is as follows :—

"Then I lost my self-control and I cannot give any further account of what happened. I had the knife and I do not know what I did.

Later I found blood on the blade. I know that we were last together on the verandah and the deceased was clinging to me trying to take the handkerchief from my shirt pocket. When she gave me the information that she was getting married on the 28th November I felt disheartened. I had been looking after her for the last so many years and I lost my head at that moment.

Q. It is reasonable to suppose that you were not pleased by the news that she was going to get married to somebody else ?

A. I was not pleased.

Q. Were you provoked ?

A. Yes

Q. Then ?

A. At that time I have been stabbing her and after a few minutes I saw blood on the blade. Then I knew that my girl had been injured.

Q. You knew having seen blood on the blade that your girl had been injured and you also surely must have known that the injuries must have been inflicted by you. Is that not so ?

A. Yes. "

The plea of causing death while deprived of the power of self-control by grave and sudden provocation was rejected by the jury who returned a unanimous verdict of guilty of murder against the appellant.

Learned Counsel for the appellant submits that the appellant's trial was vitiated by the admission of inadmissible evidence and he invited us either to quash the proceedings and order a re-trial or to substitute for the verdict of the jury a finding of culpable homicide not amounting to murder on the ground that the death was caused by the appellant whilst deprived of the power of self-control by grave and sudden provocation.

It will be convenient at this point to refer to the specific evidence to which exception is taken. In the course of his cross-examination, the appellant was asked whether he had made the following statements to Sergeant Dhrahaman :

(*a*) " The last time I visited was somewhere in June this year. I met the deceased. She spoke to me and asked me to go home and she went into her room. I then told Miss Gunasekera the attitude adopted by the deceased and requested her to speak to the deceased and bring her out. Miss Gunasekera informed me that she has nothing to do with private affairs. "

(*b*) " I then sent a letter of demand through my lawyer Mr. E. P. Rupasinghe of No. 11, Belmont Street, Colombo, dated 28th July, 1954 to the deceased. I have got a copy of the same. "

(c) "I then left to the quarters at about 5.20 p.m. As I entered through the first gate I noticed Lucihamy entering through the other gate of the quarters. She smiled at me. I went into the sitting room with the coat folded in my arm."

As the appellant did not admit the statements, learned Crown Counsel after the close of the defence sought to impeach his credit by proving that he made those statements. With this end in view he applied for leave to call Sergeant Dhrahaman "in rebuttal". The application was allowed. Police Sergeant Dhrahaman was thereafter examined by Crown Counsel. Under examination he said:

"On the 23rd of November last year, I recorded a statement of this accused at the hospital police post at 10 p.m. (The witness is asked to refer to the statement recorded by him).

Then follows the following questions and answers :—

Q. During the course of that statement, did the accused say "The last time I visited was somewhere in June this year. I met the deceased. She spoke to me and asked me to go home and she went into her room. I then told Miss Gunasekera the attitude adopted by the deceased and requested her to speak to the deceased and bring her out. Miss Gunasekera informed me that she has nothing to do with private affairs"?

A. Yes, he did.

Q. Did the accused in his statement to you also say this: "I then sent a letter of demand through my lawyer Mr. E. P. Rupasinghe of No. 11, Belmont Street, Colombo, dated 28th July, 1954 to the deceased. I have got a copy of the same. On this letter of demand I got a letter from the deceased that she proposes to settle the same in instalments of Rs. 100 a month. I have this letter too with me"?

A. Yes.

Q. Did the accused further state as follows :—"I then left to the quarters at about 5.20 p.m. As I entered through the first gate I noticed Lucihamy entering through the other gate of the quarters. She smiled at me. I went into the sitting room with the coat folded on my arm"?

A. Yes.

I read this statement back to the accused after I had recorded it and he signed it and accepted the statement as a correct record of what he had told me, and I have made a note of that too."

Learned Counsel for the appellant submitted that these statements were inadmissible on the following grounds :—

(a) that they were taken by Sgt. Dhrahaman after the appellant had been remanded to Fiscal's custody and was being illegally detained by the Police;

(*b*) that the statements consisted of non-severable parts of an inadmissible confession taken out of their context ;

(*c*) that oral evidence of statements taken down in writing has been given ;

(*d*) that such evidence is excluded by the decision of this Court in *Rex v. Jinadasa* [1] ;

(*e*) that what Sergeant Dhrahaman in effect did was to give inadmissible secondary evidence of the contents of a document alleged to have been signed by the appellant ;

(*f*) that the appellant had been given no opportunity of dealing with this allegation, which was made for the first time after the defence had closed its case.

The first of the objections taken by learned Counsel for the appellant was not raised in the court of trial. There was therefore no occasion at the trial to elicit all the facts relating to the circumstances in which the statement of the appellant came to be recorded after the Magistrate had commenced proceedings. It would appear from the transcript of the proceedings that the appellant came to the Police Post at the Galle Hospital premises at 5.25 p.m. and that Sergeant Dhrahaman came there at about 6.15 p.m. and began the investigation. Twenty minutes later, Inspector Wickremasinghe who came there continued the investigation. The Magistrate arrived at the scene shortly after 6.45 p.m. and commenced his preliminary inquiry at the Police Post where the appellant was. The charge was explained to him and some evidence taken. At the conclusion of the proceedings the Magistrate made order remanding the appellant to the custody of the Fiscal and adjourned the inquiry for the next day at the Magistrate's Court. The appellant does not appear to have been removed to the remand jail by the Fiscal at all that night. Sergeant Dhrahaman's evidence shows that it was he who took the appellant to the jail at 1.15 a.m. that night or more correctly the next morning and handed him to the jail guard, after recording the appellant's statement on the orders of Inspector Wickremasinghe. It would appear that the statement was long for it took nearly three hours to record it. As the prosecution has not had an opportunity of explaining why the Fiscal did not remove the appellant to the remand jail immediately after the Magistrate made the order of remand we do not think we would be justified in expressing an opinion on the question whether the appellant was illegally detained by the police.

The evidence discloses that, when the Magistrate arrived, the inquiry under Chapter XII of the Criminal Procedure Code had commenced and was in progress. On his arrival it appears to have been suspended and continued after his departure. There is nothing in the Criminal Procedure Code which provides that on the commencement of an inquiry under Chapter XVI an investigation under Chapter XII should cease, nor has Counsel cited any authority in support of that proposition. In the view of the majority of us an investigation under Chapter XII does not automatically come to an end upon the commencement of the preliminary inquiry under section 153 of the Criminal Procedure Code or

[1] *51 N. L. R. 529.*

under Chapter XVI. (The other member of the Bench is of the view that this question does not arise for decision, for the reason that it has no bearing on the admissibility of the evidence.)

The majority of us are therefore of the opinion that the recording of the appellant's statement by Sergeant Dhrahaman was not illegal for the reason that it was done after the commencement of the Magisterial inquiry. We are all agreed that even if the appellant was under illegal detention at the time his statement was recorded evidence of the statements made by him cannot properly be excluded on the sole ground that he was illegally detained when he made the statements sought to be proved. We are not aware of any previous case in which this very question has been decided nor has either counsel cited any such case. But there are numerous decisions of this Court which hold that the mere fact that evidence is obtained in the course of a search in which the officers making the search fail to comply with the provisions of the law governing such search is no ground for excluding evidence so obtained if such evidence is otherwise admissible. The majority of those cases are decisions under the Excise laws. It is sufficient here to refer to the cases of *Rajapakse v. Fernando* [1] and *Peter Singho v. Inspector of Police, Veyangoda* [2]. Learned Crown Counsel has drawn our attention to the recent Privy Council decision of *Kuruma, son of Kaniu v. The Queen* [3], where on a trial on a charge of unlawful possession of ammunition evidence of the search and the finding of the ammunition by an officer who by virtue of his subordinate rank had no power to search was held to be admissible. We should not be taken as laying down the broad proposition that evidence illegally obtained would under all circumstances and in every case be admissible. Cases in which a Court of law may properly exclude such evidence are conceivable.

The next question that arises for decision is whether the evidence of the appellant's statements to Sergeant Dhrahaman has been properly given. Learned Counsel for the appellant strenuously argued that in the circumstances of this case the learned Trial Judge was wrong in allowing Sergeant Dhrahaman to be called in rebuttal under section 237 (1) of the Criminal Procedure Code. He contended that Dhrahaman's evidence included evidence of admissions alleged to have been made by the appellant about the state of his relations with the deceased in June and July 1954, and about the prosecution witness Lucihamy's presence at the tragedy; that the facts so alleged to have been admitted were in issue at the trial; and that if the Crown relied on these admissions the Crown could, and therefore should, have led evidence of them before the appellant entered upon his defence. The decision in *R. v. Thuraisamy* [4] was relied upon in support of this contention. Rebutting evidence is evidence which is given by one party in a case to explain, repel, counteract or disprove evidence produced by the other party. In the instant case Crown Counsel was not seeking to introduce new evidence to meet the evidence given by the appellant and what he sought to do was in fact to exercise the right he had under section 155 of the Evidence Ordinance to impeach the credit of the appellant by proof of former statements

[1] *52 N. L. R. 361; 45 C. L. W. 6.*
[2] *42 C. L. W. 15.*
[3] *(1955) 2 W. L. R. 223.*
[4] *(1952) 54 N. L. R. 449; 47 C. L. W. 105.*

inconsistent with his evidence. The majority of the Court are of the view that the learned Trial Judge was right in permitting Sergeant Dhrahaman to be called in order to prove former statements of the appellant inconsistent with his evidence. Our view gains support from the decision of this Court in the case of *Rasiah v. Suppiah* [1].

Alternatively he submitted that if it was not the written statement that was proved oral evidence of the contents of a document had been given when under the Evidence Ordinance such evidence is excluded.

We now come to the submission of learned Counsel that what Crown Counsel in effect did was to adduce oral evidence of the contents of a written statement alleged to be signed by the appellant and to contain what the appellant said in answer to Sergeant Dhrahaman. The majority of us are unable to uphold this submission. In the case of *Rex v. Jinadasa* (*supra*) it has been held by this Court that a Police Officer or Inquirer may give oral evidence of a statement made to him. This is what Sergeant Dhrahaman did. He was asked by Crown Counsel to use the written statement for the purpose of aiding his memory but it is not clear from the transcript whether he used it for that purpose. In support of his argument that it was the written statement that was proved learned counsel for the appellant relied strongly on Sergeant Dhrahaman's evidence that he read the statement back to the appellant after he had recorded it and that the appellant signed it and accepted it as a correct record. It is unfortunate that Sergeant Dhrahaman should have gone on to say this. But the majority of us are unable to regard this evidence as amounting to the production in evidence of the statement itself.

Appeal dismissed.