1962 [IN THE COURT OF CRIMINAL APPEAL]

Present: **Basnayake, C.J., (President), Sansoni, J., and Sinnetamby, J.**

THE QUEEN *v.* W. DON WILBERT

APPEAL No. 64 OF 1961, WITH APPLICATION No. 66

S. C. 18—M. C. Colombo, 33882/A

Criminal procedure—Evidence—Cognizable offence—Statement made by accused person to police officer during investigation—Admissibility—Inspection of scene of offence—Procedure—Fresh evidence—Admissibility after case for defence is closed—Evidence for defence—Scope of rule that accused should be called before any of his witnesses—Criminal Procedure Code, ss. 122 (3), 238, 429.

Except for the limited purpose contemplated by section 27 of the Evidence Ordinance, oral evidence of statements made by an accused person to a police officer in the course of an investigation under Chapter XII of the Criminal Procedure Code cannot be proved by the prosecution, even as admissions: they may, however, be used to discredit a witness under section 122 (3), in which case the relevant passages should be put to the witness only after he enters the witness box and the written record should be produced and marked.

The conducting of experiments at an inspection of the scene of offence should be avoided unless it is necessary to do so in the interests of justice. Inspection is permissible provided it is done in the presence of the Judge to clarify evidence already given and is really in substitution of or supplementary to plans and photographs produced in the case.

It is not open to the Court to call or allow fresh evidence to be led for the prosecution after the case for the defence has been closed, unless a matter arises *ex improviso*. (But, where the defence is concerned, a certain degree of latitude is permitted.)

The rule that an accused person, when he wishes to give evidence, should be called first into the witness box before his witnesses are called is not a hard and fast rule.

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

Colvin R. de Silva with *Prins Rajasooriya, Tudor Siriwardena* and *J. V. C. Nathaniel* (assigned), for the Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Crown.

Cur. adv. vult.

February 15, 1962. SINNETAMBY, J.—

The appellant in this case Wijewickrama Don Wilbert was charged at the Colombo Assizes with having on 15th May, 1960, committed murder by causing the death of one Allison Francis Gabriel. The case for the prosecution consisted mainly of the testimony of Monica Pietersz, her father George Henry Pietersz and her uncle A. Victor Pietersz. The deceased was the intended son-in-law of George Henry Pietersz and was betrothed to Monica's sister Therese.

According to the prosecution, on the day in question, there was a christening party in the Pietersz household and among the visitors was the deceased Gabriel. It would appear that shortly after the christening party, Gabriel had gone out on his motor cycle and the family was awaiting his return before sitting down to lunch. At that time, the accused is alleged to have caused some provocation by staring at George Henry Pietersz as he walked past with uplifted sarong : there seems to have been some earlier displeasure also. George Henry Pietersz then went up to him and questioned him. There was an exchange of words followed by a struggle in the course of which George Henry Pietersz was stabbed by the accused to whom his mistress Pathumma had given a knife. George Henry Pietersz was brought into the house and shortly thereafter, Gabriel came back with a friend on his motor cycle. He questioned the witness Monica as to what had happened and then questioned the accused. The upshot of the deceased's intervention was that the accused chased him a short distance and stabbed him near a jak tree just outside the zinc fence of the house. George Pietersz referred to the earlier incident which resulted in his being stabbed and he says that, thereafter, he became unconscious and did not know what happened.

In the course of his evidence, Victor Pietersz said that shortly after his brother was stabbed, his niece Celine Pietersz went to inform the police. These incidents are alleged to have taken place sometime between 1.30 and 2.00 p.m. Celine Pietersz is alleged to have gone to the house of one Edwin Peiris and from there telephoned the police. The police gave evidence of the steps they took. The accused, according to the police evidence, would appear to have gone to the police station and started making a complaint at 2.15 p.m. The police officer who recorded the complaint, police constable Ramalingam, cannot say how he arrived but he saw him come walking into the police station. Celine Pietersz's message to the police was received at 2.18 p.m. and information was given at 2.19 p.m. to Grandpass police station. That message was received by Ramalingam while he was recording the complaint of the accused.

One of the matters which required the attention of the jury was whether, having regard to the fact that as Celine Pietersz's complaint made at 2.18 p.m. contained no reference to the stabbing of Gabriel and accused was at the police station making his complaint at 2.15 p.m. it was possible for the accused to be the person who stabbed Gabriel : for accused's statement to be recorded at 2.15 p.m. it is reasonable to assume he arrived there a little earlier.

According to Victor Pietersz, it would appear that Celine Pietersz left the house after George Henry Pietersz had been stabbed and she could not have known anything about the stabbing which occurred shortly thereafter of Gabriel. Nevertheless, in questioning the police witnesses in regard to the message that was received, Crown Counsel

formulated the question in such a way as to suggest that Celine Pietersz's complaint related to the stabbing of Gabriel. It seems to us that if Crown Counsel desired to place before the jury any fact relating to the complaint of Celine Pietersz, he should have called Celine Pietersz because hers was the information they received of an incident—not the actual stabbing of the deceased—which resulted in their making investigations into the actual murder. That, however, was not done. When police sergeant Charles de Silva was examined, he was questioned by Crown Counsel as follows :—

Q. Did you receive information concerning this case that afternoon ?

A. Yes.

Q. At what time ?

A. At 2.40 p.m.

Police sergeant Heenatimulla in the course of the examination in chief stated that he was in charge of the radio car and was questioned as follows :—

Q. That afternoon, did you receive information concerning this case ?

A. Yes.

Q. At what time ?

A. At 2.19.

Police constable Ramalingam was questioned as follows by Crown Counsel :—

Q. While he (accused) was making a complaint, did you receive information concerning this case ?

A. Yes.

Q. Over the telephone ?

A. Yes.

Actually, the information received was that which was given by Celine Pietersz and referred not to the stabbing of Gabriel which was the subject matter of the charge but to the stabbing of George Henry Pietersz. The prosecution should have put the matter right by calling Celine Pietersz and proving the actual complaint.

The jury could very well have thus been misled into thinking that, at 2.18 p.m., Celine Pietersz had given information to the police of the stabbing of the deceased Gabriel. It is, in these circumstances, difficult to understand why Crown Counsel objected to the following question which was put under cross examination to the witness Monica Pietersz :—

Q. Do you now know that your sister had run out of the house and telephoned the police ?

A. No.

Immediately thereafter, the following incident then took place :—

Crown Counsel : I object.

Defence Counsel : Is Crown Counsel calling her ?

Court : Unless Celine is called it will be hearsay.

Crown Counsel : Whether I will call or not I cannot say in advance.

Defence Counsel : If Crown Counsel is not calling Celine, I will call.

Having regard to the objection thus raised at an early stage of the proceedings, the questions referred to earlier put by learned Crown to the police witnesses, who were called later, were likely to give a wrong impression to the jury of Celine's complaint. Learned Counsel for the prisoner was obliged to call Celine in order to establish his case which was to the effect that the accused did take part in the first incident which resulted in the stabbing of George Henry Pietersz but had nothing to do with the stabbing of the deceased. If, however, the stabbing of Gabriel took place some time after Celine left the house, the probabilities are that the accused was not likely to be the offender. The defence case was that if the prosecution case was true, Celine should have known of the injury to Gabriel as Gabriel, immediately after the stabbing, ran round through the back entrance of the house and fell near the kitchen door through which it was that Celine emerged to proceed to Peiris' house.

The second ground of complaint is that evidence was improperly led of statements made by the accused to the police. The accused made a statement to the police as stated earlier at 2.15 p.m. That was at a time when there was no charge against him and may be regarded as information given under Section 121(1) of the Criminal Procedure Code. One would have expected the prosecution to produce the written complaint, but for some reason that was not done ; instead, in the course of cross examination it was marked D. 6 by learned Counsel for the accused. It would appear that, thereafter, the accused was examined in connection with investigations into the charge of murder on 16th May, 1961, at about 8.25 a.m. by Oliver de Soysa, who in the indictment is referred to as a sub-Inspector of Police. In the course of his examination in chief, Crown Counsel elicited from him the contents of the statement made by the accused. The defence Counsel objected to the questions that were being put but the learned Commissioner over-ruled the objection on the basis that the decision in *Regina v. Anandagoda* [1] permitted it. Thereafter, the statement of the accused given in the course of this investigation was led in evidence almost in its entirety. This evidence established two facts. First, that the statement in D. 6 to the effect that the accused was riding a bicycle was wrong in as much as in the course of his subsequent statement he said that he was pushing the bicycle ; secondly, that the accused travelled to the police station in a taxi cab; a fact which otherwise would not have been established

[1] *(1960) 62 N. L. R. 241.*

by the prosecution. There was also some reference to parliamentary elections and the side which the accused supported. The two statements, although they were put in as admissions were in fact used by the prosecution to show that some parts of each were contradictory of the other and of the evidence subsequently given by the accused. It was so utilised even by the learned Commissioner in his summing up. This, in our opinion, was altogether improper. If it was intended to contradict the accused under Section 122(3) of the Criminal Procedure Code, the passages should have been put to him only after he entered the witness box and the written record should have been produced and marked.

Having regard to the decision in *Queen v. Mapitigama Buddharakkita Thera, H. P. Jayawardena and Talduwa Somarama Thera* [1] which is not yet reported, statements made in the course of an investigation under Section 122 cannot be used whether they be oral or written except for the limited purpose contemplated by Section 27 of the Evidence Ordinance. Whatever views may have been held prior to the decision of that appeal, it is now clearly established that oral evidence of statements made by accused persons to police officers in the course of an investigation under Chapter XII of the Criminal Procedure Code cannot be proved by the prosecution, even as admissions: they may, however be used to discredit a witness under Section 122 (3).

Apart from that, however, the court should not, in our view, have regarded *Anandagoda's case* as an authority to permit evidence to be led of admissions so closely connected with the subject matter of the charge and which may be regarded as part of the same *res gestae*. The above remarks apply with equal force to questions that were put to police officers with the object of corroborating the evidence of Monica Pietersz and Victor Pietersz. Indeed, in regard to Victor Pietersz's evidence when he was being questioned about the statement he made to the police, learned Counsel for the prisoner objected but Crown Counsel contended that he was entitled to prove it under Section 157 of the Evidence Ordinance on the authority of *Jinadasa's case* [2]. The learned Commissioner permitted that evidence also to be given.

The third matter in respect of which complaint has been made relates to the proceedings that took place after the court had decided that the jury should view the scene of the offence. The view in this particular case took place after the case for the defence had been closed. Section 238 of the Criminal Procedure Code which applies to what has been described as a "simple view" without demonstrations or evidence at the scene, does not place any restriction on the time at which an inspection should be held. The difficulty in this case, however, is due to the fact that the learned Commissioner caused new evidence to be given which evidence tended to support the prosecution case. Although Section 238

[1] *S. C. No. 8 M. C. Colombo 23838A, C. C. A. Minutes of 15.1.61.* [*63 N. L. R. 433*].
[2] *(1950) 51 N. L. R. 529.*

does not expressly permit it, there is no objection to witnesses who have already given evidence attending the inspection and placing themselves in positions in which they say they had been at the material time or to pointing out the positions in which other persons or objects were. That kind of evidence is permissible provided it is done in the presence of the Judge and is really in substitution of or supplementary to plans and photographs produced in the case, vide *Karamat v. Queen* [1] but, where it is sought to have an experiment or a demonstration, then one should keep in mind the following observations made in *Regina v. Arthur Perera* [2] :—

> " Generally speaking, the conducting of experiments at an inspection of the scene is fraught with danger and should be avoided unless it is necessary to do so in the interests of justice."

In the present case, the learned Commissioner caused the clerk of assize to time the journey between the Grandpass police station and the scene and, thereafter, caused the clerk of assize to give evidence of the actual time so taken. This clearly is new evidence given by a witness of something in respect of which that witness had not earlier, before the case for the prosecution and the defence had been closed, given evidence. The learned Commissioner, in his summing up, made use of that evidonce to invite the jury to accept the prosecution suggestion that the accused could have proceeded from the scene to the police station at 2.15 p.m. after having stabbed the deceased and that the journey should not have taken more than a few minutes. It is to be noted that the clerk of assize was not a prosecution witness and his name did not appear on the back of the indictment.

The main question for decision in the case, as the learned Commissioner himself has observed, was " whether the incident of the stabbing of Gabriel took place at a time when the accused could have taken part in it or whether the accused was at that time at the police station." That was the most important question which confronted the jury. The evidence of Celine was that her complaint related to only the stabbing of her father. That message was received by the police at 2.18 p.m. Celine has given an explanation for that delay. The jury has to decide whether that was acceptable. The accused's case was that he rushed to the police station immediately after the incident in which George Henry Pietersz was stabbed. If Celine did not mention the stabbing of Gabriel in her statement, could it be that the stabbing as suggested by the defence was done by somebody else ? Even without this additional evidence, the jury would have been justified in concluding that the accused had actually taken part in the murder and then rushed to the police station but this additional evidence was led to strengthen the case for the prosecution after both the prosecution and defence had been closed.

[1] *1956 Appeal Cases 256.* [2] *(1956) 57 N. L. R. 318.*

Generally speaking, however, the rule in regard to this matter is as stated as follows by Lord Chief Justice Hewart in *Rex v. Liddle* [1] approved and followed in *Rex v. Day* [2]:—

> " Nothing has suddenly emerged which required the calling of witnesses, and the circumstances in which the witnesses were called were such as gravely to imperil the defence and put the defence at an unfair disadvantage. "

It makes no difference that such evidence was called by the Commissioner and not by the prosecution. It was only when a matter arises *ex improviso* that evidence in regard to it may be given in rebuttal. That is not what happened in the present case. In *Regina v. John Owen* [3], Chief Justice Lord Goddard made the following observation :—

> " Now we do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed, where it becomes necessary to rebut matters which have been raised for the first time by the defence " . . . . and
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> " The theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given, and that where it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex. v. Browne* [4], the calling of a fresh witness. "

This rule in regard to the calling of fresh evidence is strictly observed only when such evidence is intended tc support the prosecution case but where the defence is concerned a certain degree of latitude is permitted and in *Andrew John Sanderson* [5] the Court of Criminal Appeal referred to *Owen's case* but permitted evidence to be called after the summing up by the learned Judge and distinguished it from *Owen's case* on the ground that here the extra " leave and liberty was extended to the defence ". In *Queen v. Mendis Appu and another* [6] the Court of Criminal Appeal in Ceylon held that Section 429 of the Criminal Procedure Code which authorises the court to examine a person at any stage of the judicial proceedings should be used with caution and the court should take care not to leave any room for an impression that it is using its powers under that section to help the prosecution to discharge the burden that rests upon it. In the present case, it was obvious that the learned Commissioner in creating and leading this fresh evidence was helping the prosecution to discharge its burden.

One other point remains to be considered. In the course of the cross examination of the witness Police Sergeant de Silva, he stated that before he left for the scene of the offence the accused had been taken

[1] *21 Cr. Appeal Repts. 3.*
[2] *(1940) 1 Appeal Cases 402.*
[3] *(1952) Q. B. 362.*
[4] *29 Cr. Appeal Repts. 106.*
[5] *37 Cr. Appeal Repts. 32.*
[6] *60 C. L. W. 11.*

into custody at the police station. The learned Counsel for the defence then put the following question :—

Q. If Ramalingam says he recorded this man's statement at 2.15 p.m.....

He was interrupted by Court and the incident detailed below took place.

Court : Are you calling Ramalingam ?

Defence Counsel : If my learned friend is not calling him, I will call him, My Lord.

Crown Counsel : My learned friend cannot put statements made in the lower court. My learned friend is giving evidence from the bar. I will have to cross examine him.

Court : You will have to recall this witness if Ramalingam is giving evidence.

The observations of the Court make it quite clear that the Court was quite willing at that stage to permit the defence Counsel to recall police sergeant Silva after Ramalingam had given evidence. This, it had a right to do under Section 429 of the Criminal Procedure Code. It seems to us, however, that cross examination of the kind which the defence Counsel contemplated is perfectly legitimate and permissible when it touches the credibility of a witness, particularly when an undertaking is given that Ramalingam would be called. In cross examination, a certain amount of latitude is permitted which latitude would not be permitted in examination in chief or re-examination, *vide Amir Ali's comments under Section 60 of the Evidence Act (9th ed.) page 515.*

In any event, Ramalingam was subsequently called but when learned Counsel reminded the Court that sergeant Silva had to be recalled so that the question he intended to put earlier may now be put to the witness, the Court made a curious order. It stated that sergeant Silva would now be a witness for the accused and he should be called only after the accused had given evidence. In other words, sergeant Silva ceased to be a prosecution witness and had to be recalled only as a defence witness. In our opinion, this ruling was incorrect. Sergeant Silva was a prosecution witness and he should have been recalled before the prosecution was closed, particularly, in view of what transpired earlier. There may be instances when the defence may find it necessary to call or recall a witness whose name appears on the back of the indictment but in this case the learned Commissioner having expressly told Counsel for the defence that he may recall him after Ramalingam had given evidence, there was no justification for refusing the application of the learned Counsel to continue the cross examination of the witness.

When the learned Counsel for the defence opened his case, in view of the earlier ruling by the learned Commissioner, he was obliged to call the accused first, even before sergeant Silva. It is no doubt correct that the accused person ought to be called first into the witness box before supporting witnesses who testify to the same facts are called ; otherwise, his evidence will be of very little value. This ruling was

given by the Court of Criminal Appeal in *Queen v. Tennakone Mudiyanselage Appuhamy* [1] wherein My Lord the Chief Justice quoted the observations of Lord Alverstone in *Stinie Morrison* [2] to the following effect:—

> "In all cases I consider it most important for the prisoner to be called first. He ought to give his evidence before he has heard the evidence and cross examination of any witness he is going to call."

These observations were made by Lord Alverstone in the course of argument when Counsel for the appellant was referring to the evidence of an alibi which the defence sought to prove by the testimony of other witnesses. The Lord Chief Justice inquired from Counsel how those witnesses were called before the prisoner himself gave evidence and then made the observations referred to. It did not form part of the judgment subsequently delivered and was intended to apply to the facts of that case and not as a hard and fast rule. One can conceive of cases where in the course of evidence given by witnesses for the defence the need to call an accused person, which did not earlier exist, may suddenly arise. In such a case to refuse him the right to give evidence would amount to a denial of justice. His evidence, no doubt, would be subject to the obvious infirmity that he is in a position to shape his evidence according to what he has already heard and it may be of very little value. A Judge would be entitled, in appropriate cases, to so direct a jury, but we do not think an accused person should be denied the right to give evidence altogether in such a situation. Indeed, if his evidence is on matters with reference to which his witnesses have not testified at all, it would make no difference whether he gave evidence first or not. The general rule, however, is for the accused to give evidence before his witnesses.

We are satisfied, having regard to the matters to which we have adverted, that the verdict should not be allowed to stand. We accordingly set it aside and order a new trial.

New trial ordered.