1934 *Present :* **Akbar J.**

THE KING *v.* ATTYGALLE *et al.*

6—P. C. Kandy, 44,762.

IN THE MATTER OF AN APPLICATION UNDER SECTION 355 OF THE CRIMINAL PROCEDURE CODE.

Evidence—Charge of performing an illegal operation—Statement by accused to Police Officer to the effect that he treated complainant for abortion—Exculpatory statement—No confession—Burden of proof—Direction to Jury—Evidence Ordinance, ss. 106 and 145.

Where the accused who was charged with having performed an illegal operation on a woman gave evidence on his behalf and was cross-examined by the Crown on a statement made by him to a Police Officer to the effect that he had treated her for threatened abortion and had advised her removal to hospital.

Held, that the statement was not a confession within the meaning of section 25 of the Evidence Ordinance, as it was exculpatory in its effect.

[1] *1 Supreme Court Cir. 54.*

Held, further, **that the statement was admissible to test the credibility of the accused under section 145 of the Evidence Ordinance.**

Where the Judge directed the jury that if in opposition to the case based on circumstantial evidence for the Crown the accused's explanation, although the burden was on him under section 106 of the Evidence Ordinance, had the effect of making them not only believe him but even causing a doubt in their mind that any illegal operation was performed, the jury was bound to give the accused the benefit of the doubt.

Held, **that there was no misdirection to the jury regarding the burden of proof.**

THIS was an application under section 355 (1) of the Criminal Procedure Code to reserve two questions of law on behalf of the first and second accused, who were convicted before the Supreme Court, the first accused with having performed an illegal operation on the complainant and the second accused with having aided and abetted the first accused.

Aelian Pereira (with him *D. W. Fernando*), for first and second accused.

Crosette Tambiah, C.C., as amicus curiae.

September 14, 1934. AKBAR J.—

This is an application under section 355 (1) of the Criminal Procedure Code on behalf of the first and second accused who were convicted and sentenced by me, after trial before me and a jury on August 28, 1934, that I should reserve and refer for the decision of a Court, consisting of two or more Judges, two questions of law which it is stated arose on the trial, viz., (*a*) that I was wrong in allowing the Deputy Solicitor-General to cross-examine the first accused when he gave evidence in the witness-box on a statement he had previously made to the Assistant Superintendent of Police, Mr. Gunaratne of the Criminal Investigation Department, Ceylon; (*b*) that I was wrong in directing the jury under section 106 of the Evidence Ordinance that the burden shifted to the accused without calling their attention to the fact that the prosecution must first prove its case.

Mr. Crown Counsel Crosette Tambiah, who was junior counsel to the Deputy Solicitor-General at the trial, appeared as *amicus curiae* at the argument on notice served on the Deputy Solicitor-General and himself. Dr. Attygalle, the first accused, at the close of the case for the prosecution gave evidence on his own behalf, and, after he had been cross-examined for some time by the Deputy Solicitor-General, the latter moved to cross-examine him on a statement which he had made to Mr. Gunaratne, the Assistant Superintendent of Police, Criminal Investigation Department, on April 26, 1934.

On the authority of the latest Full Bench decision in *King v. Cooray et al.*[1] I allowed the Deputy Solicitor-General to cross-examine the first accused on this statement, as it was a statement which was entirely exculpatory. Mr. Pereira argued that I was wrong in doing so, because he stated that the statement was a confession made to the Police, in the sense that certain passages in it suggested the inference

[1] *28 N. L. R. 74.*

of guilt. The Crown case was that the first accused had performed an illegal operation on Miss Maye and removed a foetus from her womb during the hour or three-quarters of an hour during which Miss Maye was put under chloroform by the first accused at a bungalow in Halloluwa road on the morning of April 22, 1934. The Crown case depended on circumstantial evidence entirely and Miss Maye's evidence corroborated by other evidence relating to the incidents before, at, and after this one hour or three-quarters of an hour.

Dr. Attygalle got into the witness-box and gave evidence denying that he had performed an operation, but admitted that he had put her under chloroform without any suspicion that she was pregnant and that immediately he discovered she was pregnant, he did nothing further. The statement* which the first accused made to the Assistant Superintendent of Police when read by itself, as it should be, is clearly exculpatory, and I cannot see how any one can deduce from it any inference of guilt on the part of the first accused or in other words any inference that Dr. Attygalle performed this illegal operation. The statement is specific that he suspected that she was pregnant even when he examined her on March 18, 1934, at the Mahara Resthouse and that he told the other accused he could do nothing to help her. On the second occasion—he was wrong by one day as regards the dates—the patient was brought to his surgery suffering from a haemorrhage. She was then taken to a bungalow in Halloluwa road when he gave her a hot douche, also a hypodermic injection of morphia and he asked her to rest in bed and warned her not to move about. He was paid Rs. 15. Next morning he was taken again and found a slight improvement in her but the haemorrhage had not ceased. He examined her more minutely, found several large blood clots in the passage which he removed. He gave her a hot douche, also a morphia injection and advised Mr. Fonseka to remove the patient to hospital. He used the speculum and the forceps. He gave the patient a bottle of medicine to be taken every four hours . . . . with a view to stopping the haemorrhage. He received Rs. 10 as fee. He then stated that he diagnosed the case as one of threatened abortion. He further added that one of the other two accused told him that the patient had admitted that the stem of a castor-oil plant had been passed into her womb and that she had also taken some patent medicines. I fail to see how from this statement, which must be considered by itself alone, for the purpose of the point of law, any one can draw the inference that the doctor performed an illegal operation on the second occasion. In this statement he does not even say that he put the patient under chloroform. He says definitely he diagnosed the case as one of threatened abortion and advised her removal to hospital.

Mr. Pereira points to four passages in the statement, viz.—(*a*) that he suspected her pregnancy at Mahara, (*b*) that when going to Halloluwa on the second occasion he took some things including a speculum, forceps, and dressings, (c) that he said he had used the speculum and the forceps, and (*d*) that the diagnosed the case as one of a threatened abortion—and argues that these passages suggest the inference that he had performed an illegal

*For copy of statement, see p. 66.

operation on the second occasion of his visit to Halloluwa. I cannot draw any such inference when the tenor of the whole statement is that he treated her for a threatened abortion and advised her removal to the hospital. The use of the forceps does not to my mind suggest that he removed the foetus, for he said that he removed several large blood clots which he found in the passage. This statement which was made to the Police was a statement made by a doctor, and when a doctor says he diagnosed the case as one of a threatened abortion, and that he gave her medicines to stop the haemorrhage and advised her removal to the hospital, I fail to see how the statement can be construed or twisted to mean that he virtually admitted that he had removed the foetus from Miss Maye.

The statement read as a whole amounts to nothing more than an exculpatory statement by the first accused so far as he was concerned. That being so, I was right in allowing the prosecuting counsel to cross-examine the doctor on this statement, which the doctor himself admitted to his own counsel he had made untruthfully with a view to exculpate himself on the impulse of the moment. In my opinion it was not a confession within the meaning of section 25 or section 26 of the Evidence Ordinance as explained in the Full Bench decision above referred to. Further this statement was not proved as part of the case for the prosecution but was used under section 145 of the Evidence Ordinance to test the credibility of the evidence of the first accused given in the witness-box. In this connection I might mention in passing, although it is not necessary for me in this judgment to give my specific opinion on the point, that under section 120 (6) of the Evidence Ordinance as amended by No. 16 of 1925, a discretion seems to be vested in the Court as to the limits to which the cross-examination of an accused person when he elects to give evidence can be extended or curtailed so far as it relates to credit. In *King v. Cooray* referred to above the case of *King v. Kalu Banda*[1] was considered, and the following are extracts from the *28 N. L. R.* case:—"The law does not prohibit the reception in evidence of admissions to Police Officers so long as they are in other respects admissible in evidence. What is prohibited is the admission in evidence against an accused person of confessions made to police officers."

Referring to *Dal Sing v. King Emperor*[2] decided by the Privy Council, which was followed by the Supreme Court, Garvin S.P.J. said as follows in the *28 N. L. R.* case:—"The statement (which was held to be admissible by the Privy Council) though it was in conflict with the defence set up and was used for the purpose of discrediting that defence, was held to be in no sense a confession and admissible against the accused who made it to the police. It was a self-exculpatory statement, not a confession, and it did not cease to be a confession because it was at conflict with the defence later set up and was used for the purpose of discrediting that defence. This decision is fatal to the submission that an admission which is not a confession becomes obnoxious to section 25 if it is found to be at conflict with a defence later set up. This submission, if it is entertained, will lead to the result that an accused person may always

[1] *15 N. L. R. 422.*

[2] *(1917) 86 L. J. 140.*

exclude evidence of an admission made to a police officer by taking up a position which will bring his defence into conflict with the admission."

It will be noticed that in the case which was tried before me the statement was not even proved as part of the case for the prosecution, but was put in under section 145 of the Evidence Ordinance to discredit the evidence given by the first accused. Holding as I do that the statement of the first accused was not a confession, I see no ground for this question being further reconsidered.

I now pass on to the second point argued by counsel for the accused that I was wrong in my direction to the jury regarding section 106 of the Evidence Ordinance. Towards the end of my summing up Mr. R. L. Pereira, K.C., objected to my referring to section 106 as he contended that it only applied to civil cases. I disagreed and said that it did apply to criminal cases as well. It is now admitted by Mr. Aelian Pereira that that section is applicable both to civil and criminal cases. Of this there can be no doubt, for illustration (*b*) to the very section refers to a criminal case. Further, section 105 which speaks of the burden of proof being on the accused in certain cases refers exclusively to criminal cases. Moreover, there are many statutory offences in our Ordinances, where it is stated that in certain events the burden of proof is to be on the accused. This does not mean of course that the presumption of innocence in favour of an accused which is always there in any criminal case has been displaced or that the duty of the prosecution to prove its case is done away with. The effect of such a rule in a criminal case has been explained by Bertram C.J. in the full Bench case of *Attorney-General v. Rawther*[1]. Mr. Aelian Pereira, who unfortunately was not present during my summing up, is quite wrong when he said, if I understood him rightly, that I had directed the jury that under section 106, the burden shifted to the accused without the Crown having to prove its case first. I made it quite clear to the jury repeatedly that in every criminal case the accused was presumed to be innocent and that the Crown must prove its case first, and that in this case it was the duty of the Crown to prove the only issue in the case, viz., that the first accused had performed an illegal abortion on Miss Maye on the morning of April 22, 1934, to the satisfaction of the jury. I further stated that the Crown relied on circumstantial evidence to prove from certain facts beginning from the middle of January till about the end of April which I classified under motive, preparation, opportunity, conduct (before, during and after the time during which Miss Maye was chloroformed) and facts supporting the Crown case, that the only natural and inevitable inference was that the first accused did perform the illegal operation. If the facts led to any other inference, viz., that the abortion may have taken place at any time afterwards, even though the abortion was the result of something done by the first accused to Miss Maye when she was under chloroform, the Crown case failed. I explained at great length that in a case of circumstantial evidence, the jury had first to decide what facts were proved to their satisfaction beyond any reasonable doubt. Having got those facts, they must proceed to draw the correct inference and that in this case the case for the Crown was that the only inference that could be drawn was that an illegal

[1] *25 N. L. R. 385.*

operation had been performed on the morning of April 22 by the first accused. If the chain of facts led to any other inference consistent with the abortion having taken place after the period during which Miss Maye was under chloroform the Crown case failed and the jury must acquit the accused.

I illustrated my remarks by taking a case of circumstantial evidence where a husband is charged with stabbing his wife. If certain facts are proved, for example, a motive for the crime and facts showing that the husband was seen running away from the room where his wife was murdered with a blood stained knife in his hand, the jury before they can convict must first come to the conclusion on the proved facts that the only inference from such facts was that the husband was the murderer. If they could not come to such a conclusion the accused must be acquitted. If the accused husband gave evidence on his own behalf and the effect of his evidence was either to make the jury believe in the truth of his evidence in spite of their initial conviction on the circumstantial evidence that he was the murderer or to cause a doubt in their mind that the husband's version may be the truth after all, they must give the benefit of the doubt to the accused and acquit him owing to the overriding presumption of innocence which was always there in a criminal case.

Unfortunately, there is only one stenographer attached to the Assize Court and it is impossible for one man to take verbatim the whole of a Judge's summing up, especially if it lasts for some hours, without any relief. The stenographer's recognized duty so far has been to take down the evidence, which it is not difficult for one man to do, in view of the fact that most of the evidence is given in the form of question and answer and they have to be interpreted. It is unfortunate that this state of affairs should continue and I hope it will be remedied soon by the addition of more shorthand-writers. I asked the Court stenographer to take down as much of my summing up as he could. He was able to take down parts of my summing up and I attach a copy* of the relevant portions submitted to me by the stenographer, which bear out my own notes and my own recollection. I was glad to see from the Crown Counsel's reply that his recollection too was also to the same effect. I referred to section 106 as in my opinion that is the law, and I am quite clear in my mind that I referred to it because as a matter of fact Dr. Attygalle, the first accused, did give evidence, trying to prove that he did not perform any illegal operation at all on Miss Maye but that he put her under chloroform and when he used the speculum and discovered her pregnant condition he did nothing further. I pointed out to the jury that if in opposition to the case based on circumstantial evidence for the Crown, the doctor's explanation, although the burden was on him, had the effect of making them not only believe him but even causing a doubt in their mind that any illegal operation was performed that morning, and that the abortion may have taken place later, the jury was bound to give the benefit of any doubt to the accused and acquit all the three accused. I also emphasised certain points in favour of the doctor's explanation which must be reckoned by the jury when weighing the Crown case against the defence, viz., the

* Not reproduced.

absence of any volcellum marks on the cervix by Dr. Tillekeratne and the apparent impossibility of a doctor allowing a woman to leave her bed two days after such an operation.

Mr. Aelian Pereira has submitted two extracts from my summing up by a newspaper reporter to support his argument. But even if they were correctly reported (the reporter himself says he cannot vouch for its accuracy as he could not hear me distinctly) the whole of my charge which went before and after the extracts, was not shown to me. As I have already said, Mr. R. L. Pereira, at the end of my summing up objected to my reference to section 106 as it only applied to civil cases. I differed and ruled that it did apply to this case. That although it applied the Crown had still to prove its case. Owing to this rule of law there were three positions. If the jury thought that the burden had been discharged by the accused in opposition to the Crown case the accused had to be acquitted. If the burden was not discharged, there were two positions. They could convict if they thought that his defence was absolutely false. (It will be noticed that the newspaper reporter has misreported me here.) If the jury could not say that the explanation of the first accused was either true or false or in other words was left in doubt, the benefit of the doubt had to be given to all the accused and they were to be acquitted.

In my opinion the two points of law fail and I do not think I will be justified in reserving them for consideration by a Bench of Judges.

** Copy of Statement of Dr. J. W. S. Attygalle of Kandy.*

Dr. J. W. S. Attygalle lives at Wewelpitiya road, Kandy, present, states:—

Some time between March 20 and 25, 1934, two gentlemen came in a car at about 4 P.M. and asked me what I would charge to see a case about 50 miles away. I told them that I would charge Rs. 150. Then one of them said that he would give me Rs. 100. I agreed. They gave me their names as Perera and Fonseka from Colombo. I asked them to give me an advance. Mr. Fonseka then gave me cash Rs. 25. Perera and Fonseka came in a private car. When Fonseka paid me an advance of Rs. 25 I asked them to give me half an hour to get ready. They then said they will go out and come back in half an hour's time. I then got into a rickshaw and went home. I got my suit case ready, left some money with my people at home and went back to the dispensary. I asked them what was the matter with the patient. Fonseka said it was a complicated case and they were consulting me to get my advice. I returned to the dispensary about 4.30 P.M. and I found the two gentlemen seated in the car and waiting for me. I put my suit case into the car, went inside my dispensary, took hyperdermic injections syringe, stethoscope, a small case of knives, dressings, and several tabloids to make lotions and got into the car. Mr. Fonseka drove the car to Mahara Resthouse. We reached Mahara Resthouse about 7.30 P.M. They offered me some refreshments. I asked them where the patient was. Fonseka said that the patient will be coming and so saying they left the Resthouse in the car asking me to wait. About two hours later they returned and entered my room. Fonseka said the patient is come and requested me to come and see her. I was taken into a room where the patient was. She was lying in bed. I drew a chair close to her, sat down and questioned her. She answered all my questions. I asked her whether she was married and had any children. She said she was married but had no children. She said her menses were very irregular and used to stóp at various periods. I then asked her whether she would allow me to

make an internal examination. She consented. After that examination I washed my hands and took Fonseka out of the room. Perera was not in the room when I examined her. I told Fonseka that my journey was a useless one and that I was of no use as I could not do anything for her. He asked me why. I said I suspect pregnancy. I then went into the dining room and Fonseka went into the patient's room. The patient said her name was Maye. I asked the boy to prepare my dinner. Perera who was in the verandah then came in and asked me where Fonseka was. I said he went to the patient's room. On hearing that he also went in that direction. I then had my dinner. While I was having dinner both Fonseka and Perera came up to me and Fonseka asked me "are you sure you can't help us?" I said "absolutely". They then sat down at the same table, ordered some refreshments and left in the car with the patient. When they sat at the table Fonseka pulled out his pocket book and handed me cash Rs. 75. I then told him what about the resthouse charges. He inquired how much it will be. I inquired from the boy. He said it will be about Rs. 12.50. Fonseka then paid me cash Rs. 12.50. After dinner I went to bed. Following morning I took train from Ragama and returned to Kandy. I do not keep a fee-book.

Last Sunday, April 22, 1934, about 5 P.M. Fonseka and Perera saw me at my dispensary. I asked them "whats up now". They said they were out for a week-end and travelling about with the patient. The patient was in the car. Fonseka said the patient started a haemorrhage that morning and as they were close to Kandy they thought of coming to me. I asked them to bring the patient in—I put her on the couch. She had a napkin on. It was soaked in blood. I said I could not do anything in the dispensary and that she must be taken somewhere where she can be dressed and attended to. Then one of them asked me to get into the car. I took the necessary things, viz., douche can, hyperdermic syringe, necessary injections, and solutions. I also took a bottle of lysol. Fonseka drove us to Halloluwa road, Fonseka took us to a house in the garden. The house was one which had been rented out by Nurse Weerakoon of the Matale Hospital. She was not in the house at the time we got the patient into a bed. I then gave her a hot douche, also a hyperdermic injection of morphia and told her that she must rest herself on bed and warned her not to move about. I waited a few minutes more. Fonseka paid me cash Rs. 15 and Perera drove me back. Next morning April 23, 1934, Fonseka and Perera came and fetched me. I took the same things including a speculum, some forceps and some dressings. When I got there I found that there was slight improvement but the haemorrhage had not ceased. I practically did the same thing over again and was able to make a more minute examination. I found several large blood-clots on the passage which I removed, gave a hot douche, also morphia injection and advised Mr. Fonseka to remove the patient to hospital. I used the speculum and the forceps. On Sunday night I gave Perera a bottle of medicine to be given to the patient every four hours. I gave her ergot, calcium salts mixed with some carminatives with a view to stopping the haemorrhage. I received my fee of Rs. 10 in cash. I had a little breakfast with them and returned. I did not see them after that. I diagnosed the case as one of threatened abortion. At breakfast in conversation one of the two gentlemen said on my questioning them that he was told by the patient that "endaru stem" was passed by some one into the womb and also that she had taken some patent medicines. The occupants of the Halloluwa house were a man, his wife and a servant boy.

I wrote my name in the resthouse book at Mahara. I think the others also wrote their names in the book.

April 26, 1934.

Application refused.