[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* Pulle, J. (President), K. D. de Silva, J., and Sansoni, J.

REGINA *v.* E. W. BATCHO

APPEAL 21 OF 1955, WITH APPLICATION 32

S. C. 31—M. C. Colombo, 9,899

Confession—Right of Crown to cross-examine accused on it—Evidence Ordinance, s. 25.

Penal Code—Section 294—Proviso 1 to Exception 1—Burden of proof—Evidence Ordinance, ss. 103, 105.

(1) It is contrary to the provisions of section 25 of the Evidence Ordinance to cross-examine an accused person on what are, in effect, the contents of a confessional statement made by him to the Police.

In a prosecution for murder the accused gave evidence and sought to bring his case within Exception 1 to section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. His story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter. He stated that after killing the deceased he went to the Police Station and gave himself up. In cross-examination he answered in the affirmative a question whether he had stated to a single police officer that he was insulted by the deceased. Further, after the close

of the defence, the prosecuting Counsel moved to call in rebuttal the police officer to whom the accused alleged he had made the statement, and the trial Judge disallowed the application.

Held, that the question put to the accused in cross-examination coupled with the application made by the prosecuting Counsel, in the presence of the Jury, to lead evidence in rebuttal amounted to a contravention of section 25 of the Evidence Ordinance.

(2) Exception 1 to section 294 of the Penal Code is subject to the proviso :

" That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person. "

Held, that the proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies.

Held further, that where the evidence led for the defence requires a direction to the jury that the burden is on the Crown to bring itself within the proviso, the failure so to direct amounts to a misdirection.

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

Colvin R. de Silva, with *Daya Vithanage* and *G. F. Sethukavaler*, for the accused appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 31, 1955. PULLE, J.—

The appellant was convicted on the charge that he did on the 6th October, 1954, commit murder by causing the death of one Marlene Ludowyke and was sentenced to death. There can be no doubt, indeed, it is admitted by the appellant, that on the evening of the 6th October, he inflicted with a pointed knife as many as nine stab wounds on the deceased which cumulatively were necessarily fatal. The evidence called for the prosecution left no room for doubt that unless the appellant could prove the existence of mitigatory circumstances the jury had no alternative but to convict him of murder.

The appellant gave evidence and sought to bring his case within Exception 1 to section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. Stated shortly, the appellant's story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

The first point taken on behalf of the appellant is that the learned Commissioner permitted the Crown, contrary to the provisions of

section 25 of the Evidence Ordinance, to cross-examine the appellant on what were, in effect, the contents of a confessional statement made by him to the Police. In the course of his evidence in cross-examination the appellant, after he had repeated what he had stated in the course of his examination in chief, namely, that after killing the deceased he went to the Police Station and gave himself up, was questioned as follows :

" *Q :* Did you tell a single Police Officer that the deceased had insulted you in this way ?

" *A :* Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

" *Q :* I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness ?

" *A :* I told him. "

The cross-examination proceeded and at the end of the re-examination the appellant's counsel closed the defence. Whereupon, *in the presence of the jury,* the prosecuting counsel moved to call Mr. Nathan to give evidence in rebuttal. These proceedings are recorded as follows :

" *Crown Counsel :* I move under section 237 to call Inspector Nathan in rebuttal. That is a matter which I specifically cross-examined the witness on. It arose, I submit, in circumstances which entitle me to lead evidence in rebuttal.

" *Court :* That is with regard to what ?

" *Crown Counsel :* The accused's statement that he told the Inspector that the deceased girl had insulted him and spat at him when near the well. "

At this stage, on the suggestion of counsel for the appellant, the jury retired and the argument was continued at the end of which it was ruled that the prosecution was not entitled to call the Inspector to contradict the appellant.

It is manifest, when one has regard to the state of the evidence at the point of time when the appellant was asked whether he stated to a single police officer that he was insulted by the deceased, the jury must have received the impression that the Crown was seeking to prove that the appellant, in the course of a narrative in which he admitted to the Police that he killed the deceased, did not state the circumstances of mitigation on which he relied at the trial to avoid a verdict of murder. It is true that the prosecution did not in terms prove the confession as was done in *Rex v. Seyadu* [1] but that is not essential in order to give effect to the prohibition contained in section 25 of the Evidence Ordinance. In *Reg. v. Obiyas Appuhamy* [2] evidence was led to the effect that the prisoner volunteered a statement to a police officer, who, thereupon, immediately handcuffed him and took him to the scene of the offence.

[1] *(1951) 53 N. L. R. 251.* [2] *(1952) 54 N. L. R. 32.*

The Court of Criminal Appeal held that evidence was inadmissible on the ground that, if it had been accepted, it would have led to the inference that the prisoner had made a confession to a police officer.

In the present case, although the Police Officer to whom the appellant made a statement was not allowed to be called, yet from what was said by the prosecuting counsel during the cross-examination—" I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness "—and at the time he moved to lead the evidence of Mr. Nathan in rebuttal, the jury may well have come to the conclusion, especially in the absence of a caution by the trial judge, that the appellant's story in mitigation of the crime committed by him ought not to be believed. Viewed in this light the present case is hardly distinguishable from *King v. Kalu Banda* [1]. The observations of Lascelles, C. J., at p. 426 are particularly apposite :

" For so far as the probative effect of the evidence is concerned, there is little difference between a police officer giving the particulars of a statement which is inconsistent with the defence and his stating in general terms that the accused, in his statement to him, did not mention the defence which he afterwards set up. The evidence in either case tells heavily against the accused. In many cases it will turn the scale against him. "

In our opinion the appellant succeeds on the submission that the questions put to him in cross-examination to which exception has been taken coupled with what was said by Counsel when he moved, in the presence of the jury, to lead evidence in rebuttal, amounted to a contravention of section 25 of the Evidence Ordinance.

The second point taken on behalf of the appellant arises out of an alleged non-direction as to the party on whom lies the burden of proving the matters contained in the first proviso to Exception 1 and the extent of that burden. Section 294 states that Exception 1 is subject to the proviso,

" That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person. "

There were broadly speaking three major facts on which the prosecution was able to rely in order to prove that when the appellant went to the house of the deceased he had already formed the intention of killing her and putting an end to his own life.

The appellant had cause to resent the conduct of the deceased in transferring her affections to one Ivor Martinez after encouraging the appellant to believe that she would marry him. Secondly, on the day in question, he paid a visit to the house of the deceased armed with a dangerous lethal weapon which was actually used in killing her, and thirdly, in the letter P2 he had set down his alleged grievances against the deceased and virtually pronounced a sentence of death against her.

[1] *(1912) 15 N. L. R. 422.*

The position taken up by the appellant was that at the time he went to the house of the deceased he did not have the slightest intention of killing her and that the letter was meant merely to frighten her. Admittedly the appellant was in the house for a considerable time, from 1.30 p.m. till about 4 p.m., when the stabbing occurred. He returned a pair of ear studs belonging to the witness Miss M. C. Klyn, then living in the same house as the deceased. The pair of ear studs had by mistake been left behind by Miss Klyn on a visit to the house of the appellant the previous evening. The appellant stated in evidence that the deceased threw a cup of tea at him and that later when he attempted to speak to her in the corridor of the house she burnt him with an iron which she was carrying. On neither occasion did he do anything in retaliation. The letter P2 was delivered to the deceased after she had finished washing her face at the well preparatory to attending a service at Church. According to the appellant when she had read the letter half way she turned to run away with it and he asked her to return it lest if it fell into the hands of the Police he would have to go to jail. There was in the evidence called for the prosecution support for the statement of the appellant that he was burnt in the arm and that after he delivered the letter P2 to the deceased he requested her to return it for fear that he might fall into trouble.

In the earlier portions of the summing up the trial Judge explained to the jury the extent of the burden resting on an accused person who seeks to avail himself of Exception 1. He did not then refer to the first proviso to the Exception. Having reviewed the evidence in considerable detail he again referred to the Exception but this time he added that it was subject to the proviso which he then read out and continued his charge as follows :

" Even if the deceased used those words and they amounted to grave and sudden provocation, and even if the accused was deprived of the power of self-control, still if you find that that provocation had been sought by the accused or voluntarily provoked as an excuse for killing or doing harm to any person, then the accused cannot have the benefit of this Exception, that is, his offence cannot be reduced from murder to culpable homicide not amounting to murder.

" There, again, you will have to consider his letter. Consider that paragraph which I read to you earlier, ' The more I see you the more you appear in my eyes an object of contempt. ' The accused says he did not mean all this, but he gave the letter to this girl, and if the girl read this and if she used those words, the question is if there was any provocation whether that provocation was sought by the accused or voluntarily provoked by the accused. By voluntarily is meant this : ' A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, by means which at the time of employing those means he knew or had reason to believe to be likely to cause it. '

" The accused has written this letter and given it to this girl to read it, but he told you he did not intend all this. Are you going to believe

all this ? Again, if this was going to bring about some sort of reaction on the girl can you say that the accused did not know that that sort of reaction would be likely to result or not, or can you say he had no reason to believe that that would result ? "

It was contended on behalf of the appellant that it was the duty of the trial Judge to have directed the jury that the burden was on the Crown to prove the facts necessary for the application of the proviso and that that burden could only be discharged by proof of those facts beyond all reasonable doubt. Learned Counsel on both sides have told us that they have not been able to find any discussion of this topic in any text book or decided case. We have, therefore, in the absence of any guidance, to apply the ordinary rule enunciated in section 103 of the Evidence Ordinance that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. We hold that once an accused person has adduced evidence which, if believed, would entitle him to ask for a verdict of culpable homicide not amounting to murder under Exception 1 (read without the provisos), he can be deprived of that verdict only upon proof, the burden being on the Crown, of positive averments which would justify the application of the proviso. There is no burden on an accused person to prove the *absence* of circumstances that would render the proviso inapplicable. We are fortified in this view by a consideration of the second and third provisos. We are unable to accept the submission that the Crown has to prove beyond reasonable doubt the facts necessary for the application of the proviso, because proof of that high standard is only required of the ingredients which constitute *prima facie* the offence of murder. The proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies.

In our opinion the evidence, especially that of the appellant, required a direction to the jury that the burden was on the Crown to bring itself within the first proviso. The failure so to direct amounted to a misdirection.

The result of the improper questioning of the appellant in regard to what he is alleged not to have told the Police and the non-direction to which we have just adverted would compel us to set aside the conviction and sentence, unless we act under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, and dismiss the appeal. The Crown argues that this is a proper case for applying the proviso and dismissing the appeal and the appellant asks us to alter the conviction to one of culpable homicide not amounting to murder. We are unable to accede to either request. Upon a consideration of the entirety of the admissible evidence we cannot say in the words of Viscount Simon in *Stirland v. Director of Public Prosecutions* [1] that "a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict." On the other hand the fact that the appellant went to the house of the deceased specially armed with a

[1] *(1944) A. C. 315.*

knife after putting down in writing that his intention was to to kill the deceased and that Miss Klyn, who must be regarded as a disinterested witness, was unable to speak to any abuse or insult or other provocative act on the part of the deceased immediately preceding the attack on her and also the number and severity of the injuries inflicted are sufficient grounds for directing a new trial.

Accordingly we set aside the conviction and sentence and direct a new trial.

Sent back for a new trial.