[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

# THE QUEEN *v.* SODIGE SINGHO APPU

*Appeal No. 158 of 1958, with Application No. 196*

*S. C. 30—M. C. Colombo South, 80928*

*Evidence—Relevancy or admissibility—Stage at which the question should be decided—Statements made by an accused person to a police officer—Oral evidence thereof—Admissibility—Admission of irrelevant evidence—Effect—Evidence Ordinance, ss. 5, 6 et seq, 11 (b), 17 (2), 21, 25, 27, 59, 60—Criminal Procedure Code, s. 122 (3).*

The proper stage at which to decide on the relevancy or admissibility of evidence is not at the commencement of the trial but at the time when it is sought to produce the evidence the relevancy or admissibility of which is disputed.

When *Rex v. Jinadasa* [1] laid down that oral evidence may be given of so much of a statement made by an accused to a police officer as is relevant under section 27 of the Evidence Ordinance it meant oral evidence as contemplated by the Evidence Ordinance (ss. 59 and 60). That case does not sanction the proof, in an indirect way, of statements the production of which is prohibited by section 122 (3) of the Criminal Procedure Code.

Under Section 5 of the Evidence Ordinance evidence may be given only of facts in issue and relevant facts. Evidence admitted in disregard of that Section is evidence improperly admitted and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice.

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

*R. R. Crossette-Thambiah, Q.C.*, with *S. C. Crossette-Thambiah* and *Lucien Jayetileke*, for Accused-Appellant.

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

*Cur. adv. vult.*

March 23, 1959. BASNAYAKE, C.J.—

The appellant has been convicted on a charge of murder of one Edmund de Silva Jayasinghe on or about 3rd May 1957 and sentenced to imprisonment for life.

After the jury had been empanelled but before opening his case learned counsel for the Crown applied to the learned Commissioner in the absence of the jury for a ruling as to the admissibility of certain passages in the

[1] *(1950) 51 N. L. R. 529 (Five Judges).*

statement of the appellant recorded by David Rodrigo, Assistant Superintendent of Police of the Criminal Investigation Department. It will be convenient to reproduce from the transcript the submissions of learned Crown Counsel. The transcript reads—

> " I don't know whether Your Lordship has the typed extracts. It is at top page 30 of the typed extracts. Your Lordship would be pleased to see there the second sentence. The accused says, ' *I know driver Sirisena who was employed under Wimalasena Mudalali of Padukka. About four or five months ago on the 3rd of a month I came to Padukka by the 6 o' clock bus in the evening.* '. I will put in that passage. Also, a little later, about two or three sentences after that Your Lordship would be pleased to see : ' *At Padukka junction at about 8.30 p.m. I engaged Sirisena's car EN 8092 to proceed to Nugegoda and left with him. There was none in the car except Sirisena and myself. I was seated in the rear seat with the parcel.* ' Your Lordship would be pleased to see at the bottom of that passage just about four lines from the bottom there is a sentence which reads as follows : ' *I reached Padukka at about 2 a.m. I paid Rs. 15 to the driver and went home.* '
>
> " My Lord, I am prepared to leave it at this point : ' *I was seated in the rear seat.* ' "

Learned counsel for the defence strenuously opposed this application. After hearing the submissions of both counsel the learned Commissioner held that the statements in question were admissible as evidence.

This court has repeatedly stated that under our procedure the proper stage at which to decide on the relevancy or admissibility of evidence is when it is sought to produce the evidence the relevancy or admissibility of which is disputed. Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence the proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening and that issue should be decided at the appropriate moment in the case when it is sought to produce the evidence. The most recent decision of this court on this point is *The Queen v. Nimalasena de Zoysa* [1]. This is the practice in the English Courts too. (See *Rex v. Cole* [2] ; *Rex v. Hammond* [3] ; *Rex v. Zielinski* [4] ; *R. v. Patel* [5]). That the appellant regarded the procedure adopted as being prejudicial to him is borne out by the fact that objection is taken to it in the grounds of appeal.

In support of the charge the prosecution produced evidence of the following facts :—

(*a*) that on 4th May 1957 at about 1 o'clock in the morning the deceased was shot in the head while he lay asleep on a bed near a window at a range of less than a yard ;

(*b*) that he died in consequence of the injury ;

[1] *(1958) 60 N. L. R. 97.*
[2] *(1941) 28 Cr. App. R. 43.*
[3] *(1941) 28 Cr. App. R. 84.*
[4] *(1950) 34 Cr. App. R. 193.*
[5] *(1951) W. N. 258, 35 Cr. App. R 62.*

(*c*) that he was shot by someone from outside the window ;

(*d*) that the injury was necessarily fatal ;

(*e*) that at about 1 o'clock in the morning of 4th May 1957 a peacock blue Ford Prefect EN 8092 with the sidelights on, with a person in the driver's seat, was parked on the side opposite the house of the deceased about fifty or sixty yards away ;

(*f*) that, that car was hired by the appellant at about 8.30 p.m. on the night of 3rd May 1957 at the Padukka bazaar to go to Nugegoda;

(*g*) that the appellant travelled alone in the car in the front seat with a parcel ;

(*h*) that the car stopped near a Cinema Hall in Nugegoda and the appellant went into the compound of the Hall informing the driver that he wanted to meet a woman called Piyaseeli ;

(*i*) that the appellant returned to the car about midnight ;

(*j*) that he asked the driver to drive to a spot near the house of the deceased on the High Level Road and stop his car ;

(*k*) that he got off the car informing the driver that he was going to look for the woman Piyaseeli, and proceeded in the direction of the house of the deceased and entered the compound taking the parcel he had brought with him ;

(*l*) that after he entered the deceased's compound the appellant disappeared from the sight of the driver ;

(*m*) that about an hour afterwards the driver heard the report of a gun from the direction of the house of the deceased ;

(*n*) that immediately after the shot the appellant came running with a gun in hand and got into the back seat of the car without the parcel and said " Let us go quickly " ;

(*o*) that he adopted a reclining posture on the seat as they proceeded ;

(*p*) that he got off at Padukka with the gun and paid the driver his fare of Rs. 15 and proceeded along a jungle path.

After the main evidence for the prosecution had been led learned Crown Counsel called Assistant Superintendent of Police, David Rodrigo, to give evidence. The examination-in-chief proceeded as follows :—

" 1487. Q : You assisted Mr. Kitto in the investigation into this case ?

A : I was in charge.

1488. Q : You had to investigate because the local police had failed to unravel the mystery ?

A : Yes.

1489. Q : You recorded the statements of various people in the course of your investigations ?

A : Yes.

1490. Q : And in the course of that you recorded the statement of the accused himself ?

A : Yes.

*Court* · 1491. Q : When was the C. I. D. called in first ?

A : I got the papers on the 5th June, 1957.

1492. Q : When did you record the statement of this accused ?

A : 2nd October, 1957, at 6.30 p.m. at my office.

*Examination continued.*

1493. Q : Did the accused tell you in the course of his statement ' I know driver Sirisena who was employed under Wimalasena of Padukka '? . . (A)

A : Yes.

1494. Q : Did he say ' about 4 or 5 months ago on the 3rd of a month I came to Padukka by the 6 o'clock bus in the evening and arrived at Padukka junction about 8.30 p.m. I engaged Sirisena's car EN 8092 to proceed to Nugegoda '? . . . . (B)

A : Yes.

1495. Q : Did he also say ' There were none in the car except Sirisena and myself ' ? . . (C)

A : Yes.

1496. Q : ' I reached Padukka at about 2 a.m. I paid Rs. 15 to the driver and went home. I did not go home. I slept in the verandah of one Avis Singho's boutique ' ? . . . . (D)

A : Yes. He said that. "

In appeal objection was taken to the admission in evidence of the above statements of the appellant under the following two main heads :—

(*a*) that they were confessions excluded by section 25 of the Evidence Ordinance ;

(*b*) that the reception in evidence of the statements of the accused made to a police officer and reduced to writing by him in the course of an inquiry was contrary to law.

It would appear from the evidence reproduced above that the police officer concerned reduced to writing under section 122 of the Criminal Procedure Code what the appellant said in the course of his examination by the former. Learned Crown Counsel's submissions to the learned Commissioner at the very beginning of the trial and the way in which he examined the police officer David Rodrigo leave no room for doubt that he was seeking to prove portions of the appellant's statement reduced to writing under section 122. He was clearly not seeking to prove the oral statements of the appellant. The police officer was not asked whether he remembered what the appellant stated at the time he was examined by him. Even if asked, he would not have been able to recall on 11th December 1958, for that is the day on which he gave evidence, what he recorded on 2nd October 1957, the day on which he examined the appellant, without referring to the written record.

Now section 122 (3) of the Criminal Procedure Code declares that no statement made by any person to a police officer in the course of an investigation under Chapter XII shall be used otherwise than to prove that a witness made a different statement at a different time or to refresh the memory of the person recording it. Learned Crown Counsel was not seeking to contradict the appellant because the stage for doing so had not arrived. Nor was the witness using the statement to refresh his memory.

Both counsel and judge seem to have assumed that if the statements A to D above were not confessions they were relevant as admissions by the appellant under section 21 of the Evidence Ordinance. They seem to have proceeded on the assumption that *Rex v. Jinadasa* [1] authorised the proof of the statements. We are unable to agree that that case authorises what was done. A number of cases in which *Rex v. Jinadasa* (*supra*) has been misapplied have recently come up for hearing before us. This court will not be friendly towards any attempt to extend the application of that decision to cases not covered by it.

When it laid down that oral evidence may be given of so much of a statement made by an accused which is relevant under section 27 of the Evidence Ordinance it meant oral evidence as contemplated by the Evidence Ordinance (ss. 59 and 60). That case does not sanction the proof of the contents of the written record made under section 122 of the Criminal Procedure Code in the indirect way in which it has been sought to prove them in this and other cases that have come up here. The admission of the statements in question is improper and constitutes a violation of section 122(3) of the Criminal Procedure Code.

Learned counsel's main contention was that the statements were inadmissible as they were confessions made to a police officer. In support of it he referred us to the cases of *King v. Kalu Banda* [2], *King v. Ukku Banda* [3], *Rex v. Cooray* [4], and *King v. Gunawardene* [5]. He claimed that these cases hold that in determining whether a statement is a confession or not the court must look not at the bare statement but at the statement

[1] *(1950) 51 N. L. R. 529.*
[2] *(1912) 15 N. L. R. 422.*
[3] *(1923) 24 N. L. R. 327.*
[4] *(1926) 28 N. L. R. 74.*
[5] *(1941) 42 N. L. R. 217.*

in the light of the evidence in the case. The proper approach to the question that arises for decision is to examine the relevant provisions of the Evidence Ordinance first. A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed the offence (s. 17 (2) ) and an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances mentioned in the sections that succeed section 17 of the Evidence Ordinance. Admission is the genus and confession the species. Every confession is an admission but every admission is not a confession. Section 21 permits the proof of admissions against the person making them. An admission not barred by section 17 (2) of the Evidence Ordinance as a confession may be proved under section 21 only if it suggests any inference as to any fact in issue or relevant fact. The facts in issue in a criminal trial are the facts which the prosecution must establish in order to prove the charge, in other words the *facta probanda*. Now the question that arises for consideration in the instant case is—Do the facts in the statements A–D suggest any inference as to the *facta probanda ?* In our view they do not. Then do they suggest any inference as to any relevant fact ? Section 6 *et seq.* of the Evidence Ordinance declare what facts are relevant. If the statement B had not been so vague but had definitely fixed the date of the journey as 3rd May 1957 it would have established the presence of the appellant in the town in which the crime was committed at or about the time of the commission of the offence and would, taken together with statements C and D, have come within the ambit of section 11 (*b*).

The result is that the Crown has not only produced in evidence statements the production of which is prohibited by section 122 (3) of the Criminal Procedure Code but it has also led irrelevant evidence which was bound to have prejudiced the appellant. We cannot escape the conclusion that these statements when taken with the evidence of the driver Sirisena must have created in the minds of the jury the conviction that it was the appellant who murdered the deceased especially as the learned Commissioner of Assize directed the jury that these statements corroborated the driver Sirisena.

The Evidence Ordinance lays down strict limits within which evidence may be given in any suit or proceeding. Evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared by the Ordinance to be relevant and of no others (s.5). Evidence admitted in disregard of section 5 is evidence improperly admitted and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice.

It is unnecessary to discuss learned counsel's arguments in regard to the applicability of *King v. Kalu Banda* (*supra*) as we have formed the view that on other grounds the statements have been improperly admitted in

evidence. Nor is it necessary for the purpose of this case to deal with learned Crown Counsel's submission that *King v. Kalu Banda* (*supra*) has been impliedly over-ruled by *King v. Cooray* (*supra*).

In the instant case, the statements produced in evidence being statements the use of which section 122 of the Criminal Procedure Code prohibits except for the purposes specified in that section, the question whether they were confessions becomes a matter of importance only if the prohibition in that section does not apply to them. We have above expressed the opinion that the statements come within the ambit of that prohibition, and are also not confessions.

The question that next arises for consideration is whether independently of the evidence objected to and admitted there is evidence sufficient to justify the conviction. We are of opinion that there is, independently of the evidence objected to, evidence which, if believed, establishes the case against the appellant. But having regard to the fact that the material evidence in this case was discovered nearly six months after the offence and the fact that an attempt was made to force the appellant to make a confession to the Magistrate and having regard to the other circumstances of this case we cannot with confidence affirm the conviction.

We accordingly allow the appeal, quash the conviction and order a new trial.

*Appeal allowed.*