

WIJEWANTHA AND ANOTHER
v.
ATTORNEY-GENERAL

COURT OF APPEAL

H. A. G. DE SILVA, J., ABEYWARDENE, J. AND G. P. S. DE SILVA, J.

C.A. 92-93/81

H. C. MATARA 57/79

NOVEMBER 22, 1982.

Criminal Law — Evidence Ordinance, Section 27 — Confession to a witness — Recovery of weapons.

According to a witness, G (not a police officer) at a murder trial the 1st accused had told him " We have come after killing a man ". The Police Inspector in his evidence had stated he recorded the statement of the 2nd accused and thereafter found a katty in a heap of rubbish in a jungle. He thereafter arrested the 1st accused and recorded his statement. Subsequently he found a knife and a sword under a decayed tree in a jungle. It was not the Inspector's evidence that the accused pointed out where the weapons were or that the discovery of the weapons was by reason of the information received from the accused. It was submitted that the confession to G would have been more readily believed by the jury because of the recovery of the weapons as the judge had failed to warn the jury that they should not draw the inference that the accused had made a confession to the Police Inspector. Whenever a statement which is proved under section 27 of the Evidence Ordinance can reasonably lead the jury to infer that a confession may have been made to a Police Officer, the trial judge should warn the Jury that the law prohibits such an inference being reached.

Held —

In this case no statement of the accused was sought to be proved under section 27 of the Evidence Ordinance. Hence the judge was under no duty to warn the jury against acting on the footing that a confession had been made to a Police Officer. It is only in respect of an accused's proved statement to the Police that such a warning should be given.

Cases referred to

1. *Krishnapillai v. The Queen* 74 NLR 438, 439

APPEAL from judgment of High Court of Matara.

R. K. Sureschandra for accused-appellants.

H. S. Yapa, S.S.C. for Attorney-General

Cur. adv. vult

January 12, 1983

G. P. S. DE SILVA, J.

The two accused in this case were indicted on two charges :—

- (1) That on or about 23rd May, 1976, they committed the murder of one Somapala.
- (2) That, in the course of the same transaction, they committed the murder of one Gunadasa.

By the unanimous verdict of the jury, both accused were found guilty of murder on the first charge and they were both found guilty of culpable homicide not amounting to murder on the second charge. They were sentenced to death on count (1) and on count (2), each of the accused was sentenced to a term of seven years' rigorous imprisonment. Both, the first accused and second accused, have now appealed against their convictions and sentences.

The case for the prosecution rested upon the evidence of three witnesses, namely, Somaweera, Maryhamy and Gunapala. Neither the first nor the second accused gave evidence, nor did they make a statement from the dock.

According to Somaweera, on 23rd May, 1976 at about 11.30 a.m., he along with one Loku Mahathya, the deceased Somapala, and the 1st accused were returning home having purchased cigarettes at a boutique. They were walking along a foot path in single file. The 1st accused was walking behind the deceased Somapala. When they had walked some distance, at the turn-off to the house of the 1st accused, the 1st accused jumped on to the bund of a channel. Somaweera had looked back and seen the 1st accused armed with a pointed knife and the deceased Somapala had a bleeding injury on the back of his chest. Somaweera and Loku Mahathya had asked Somapala to run away. Somapala then jumped into the stream and ran. The 1st accused pursued Somapala and intercepted him. Thereupon, the

2nd accused came on the scene, armed with a sword, and proceeded to strike Somapala several blows with the sword. It was the position of this witness that prior to the attack, there was no exchange of words between either of the accused and the deceased.

The other witness Maryhamy stated in evidence that at about noon, while she was bathing at a tank, she saw the deceased Somapala being chased by the 1st accused who was armed with a knife. Somapala came running to a spot close to the tank and was unable to proceed further. At that stage, the 2nd accused came running with a sword and struck Somapala with the sword. Somapala thereupon fell on the ground and the 1st and 2nd accused ran in the direction of their house. Thereafter, she saw the deceased Gunadasa coming from the direction of his house towards the tank. It was her evidence that she saw the 1st and the 2nd accused striking the deceased Gunadasa with something which had a white-coloured handle and with a sword. On receipt of the blows, the deceased Gunadasa fell on the ground.

Thus it is seen, that the testimony of Somaweera and Maryhamy clearly implicate both accused in the attack upon the two deceased persons, Somapala and Gunadasa. The medical evidence revealed that the deceased Somapala had eleven external incised injuries, two of which were necessarily fatal. Gunadasa, however, had no injuries which were necessarily fatal but had fourteen external injuries, three of which were fatal in the ordinary course of nature. Some of the injuries on the deceased persons could have been caused with a sword while the others could have been caused with a knife or a katty.

Mr. Sureshchandra, Counsel for the 1st and 2nd accused-appellants, did not at the hearing before us, seriously challenge the evidence of either Somaweera or Maryhamy. There is no doubt that upon the testimony of these two witnesses, it was clearly proved that both accused-appellants had participated in the attack upon Somapala and Gunadasa.

The next witness whose evidence is of an incriminating nature was that of Gunapala who stated that on the day in question, at about 12.30 p.m. or 1.00 p.m., the 1st and 2nd accused came to his house and the 2nd accused asked him for Rs. 2/-. Gunapala had questioned the 2nd accused as to why he wanted Rs. 2/- and thereupon, the 2nd accused had replied that he wanted to go to the Police Station. Gunapala had told him that he had no money. Then, the 1st accused pleaded with him to somehow or other give him the money. According to Gunapala, the 1st accused had also said : " We have come after killing a man." It was also the evidence of Gunapala that the 2nd accused was carrying a knife and a katty.

Mr. Sureshchandra, contended that the evidence that the appellants had made a confession to witness Gunapala was more likely to have been believed by the jury in view of the evidence given by the Police Inspector in regard to the recovery of the knife P1, the sword P2 and the katty P3. It was the submission of Mr. Sureshchandra that the prosecution purported to lead the evidence of the Police Inspector in regard to the " discovery " of P1, P2 and P3 under section 27 of the Evidence Ordinance. Mr. Sureshchandra, relying strongly on the case of *Krishnapillai v. The Queen* (1), contended that the trial Judge failed to warn the jury that they should not draw the inference that the accused-appellants had made a confession to a Police Officer. It was Mr. Sureshchandra's submission that this was a non-direction on a vital matter and therefore, such non-direction amounted to a misdirection which vitiated the verdict of the jury.

In view of Counsel's submission, it is necessary to closely examine the evidence of Inspector Sarathchandra. The Inspector stated that he first took into custody the 2nd accused at about 5.45 a.m. on 24th May, 1976. He explained the charge to the 2nd accused and recorded his statement. The Inspector's evidence is that thereafter he found the katty P3 in a heap of rubbish in a jungle. The Inspector goes on to state that the 1st accused was arrested at 7.00 a.m. on the same day. Subsequently, he found the knife P1 and the sword P2 which were under a decayed tree in a jungle. In cross-examination, the

Inspector stated that he recovered the weapons after he recorded the statements of the two accused. On a scrutiny of the above evidence given by the Police Inspector, I am of the view that it does not warrant a direction by the trial Judge that the jury should not infer that a confession has been made by the accused-appellants to the Police Officer. It is relevant to note that :—

- (a) the Inspector does not state that the accused-appellants pointed out the spot where the weapons were ;
- (b) nor does the Inspector state that the discovery of the weapons was by reason of the information received from the accused-appellants.

In other words, it is not the case for the prosecution that the "discovery" of the weapons was "in consequence of information" received from the accused-appellants. It must be noted that in *Krishnapillai's Case* (supra), the Inspector of Police had stated in evidence that the accused, in the course of his statement, had stated: "I put the knife into the well. The banian and sarong were also burned near the well. I can point out that to the Police." Further, the Inspector's evidence was, "that in consequence of this statement, he discovered a knife in a well, some little distance away from Subramaniam's house and also the remnants of some burnt clothes." (74 NLR 438 at 439). It is in this context that H. N. G. Fernando, C.J., in the course of the judgment, stated :—

"We hold therefore that **whenever a statement which is proved under section 27** can reasonably lead the jury to infer that a confession may have been made to a Police Officer, the trial Judge should clearly warn the jury that the law prohibits such an inference being reached. Since the summing-up in the instant case lacked any directions of the nature which we hold were necessary, there was non-direction which amounted to misdirection. This was a material point, because of the important item of

circumstantial evidence that the accused is alleged to have made a confession to the witness Sivarasa. An unfair construction of, or illegitimate inference from, the **accused's proved statement to the Police**, could well have led the jury too easily into belief of Sivarasa's testimony. " (The emphasis is mine.)

Since no statement was sought to be proved under section 27 of the Evidence Ordinance in the instant case, I am of the view that the principle laid down in *Krishnapillai's Case* (supra) has little relevance.

What is more, in the present case, the learned trial Judge has expressly directed the jury :—

- (a) that there is no connection whatever between the weapons recovered and the accused ;
- (b) that on the basis of the recovery of the weapons, no conclusion whatever adverse to the accused, should be arrived at.

As rightly submitted by Mr. Hector Yapa, Senior State Counsel, this direction was more than adequate to ensure that no prejudice whatever would be caused to the accused-appellants by the evidence of the Inspector in regard to the recovery of the weapons.

For the above reasons, I hold that Mr. Sureshchandra's submission based on *Krishnapillai's Case* (supra), is not entitled to succeed. In the result, the convictions and sentences of both accused-appellants are affirmed and their appeals are dismissed.

H. A. G. DE, SILVA, J. — I agree.

ABEYWARDENE, J. — I agree.

Appeal dismissed.