[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* Gratiaen J. (President), Gunasekara, J., and Weerasooriya, J.

THE QUEEN *v.* VICTOR PERERA and 5 others

Appeals 3–8 of 1955 with Applications 3–8

*S. C. 12—M. C. Anuradhapura, 17,345*

*Evidence—Confession—Hearsay—Evidence Ordinance, s. 25 (1).*

Evidence given by a police officer, at the trial of an accused person, that the accused was arrested in consequence of a statement made by the accused to the police officer is obnoxious to the provision in section 25 (1) of the Evidence Ordinance that " no confession made to a police officer shall be proved as against a person accused of any offence ".

A police officer's evidence that one of several accused made a statement to him implicating the others is inadmissible hearsay as against the others.

APPEALS against certain convictions in a trial before the Supreme Court.

*C. S. Barr Kumarakulasinghe*, with *J. C. Thuraíratnam*, *G. F. Sethukavaler* and *Noel Silva*, for accused-appellants.

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

*Cur. adv. vult.*

February 28, 1955. GUNASEKARA, J.—

At the close of the argument in appeal in this case we set aside the convictions of the six appellants and the sentences passed on them and directed a new trial upon the indictment as amended at the last trial, and we said that we would give our reasons later.

The indictment, which contains seven counts, charges the appellants with offences of unlawful assembly, house-breaking by night, robbery and murder alleged to have been committed on or about the 31st January, 1954. In its original form it alleged, in the fourth count, that the offence of murder was committed in prosecution of the common objects of the unlawful assembly or was such as the members of the unlawful assembly knew to be likely to be committed in prosecution of those objects. The learned judge directed the jury, who had been provided with copies of the indictment, that they " must delete from that fourth count the words ' was committed in prosecution of the said common objects or ' ", and that their verdict on that count must be " a verdict not on the charge as worded in count 4 of the indictment but with those words deleted ". He then read out count 4 as amended in this manner and went on to discuss the meaning of the count " as amended ". As there was some discussion on this point at the hearing of the appeal we wish to make it clear that in our opinion the indictment must be taken to have been amended by the learned judge in the manner indicated in his summing up.

The case for the prosecution depended on the evidence of an 18 year old young man, named Kapuru Banda, who claimed to have accompanied the appellants to the scene of the alleged crimes and to have been present there when they were committed. This witness, as the learned judge directed in his summing up, it was open to the jury to regard as an accomplice in those crimes if they were not satisfied with the explanation that he gave of his presence at the scene. His evidence is also open to the criticism that it was belated, for according to the prosecution he made no statement until he was questioned by an inspector of police three days after the appellants had been arrested. It was urged on behalf of the appellants, among less substantial grounds of appeal, that the defence was prejudiced by the terms in which the learned judge summed up the evidence of the inspector about the investigations that led to the arrests.

The police began their investigations on the 1st February but, in the inspector's words, they " had nothing to work on " until the night of the 8th, when he came by some information as a result of which he had the 4th accused-appellant brought before him. " 4th accused was brought before me ", he says, " at 3.30 a.m. on 9.2.54 at the Kekirawa police station. I recorded his statement and in consequence of that I took him under arrest and decided to go to Nikawewa Wadiya ". He arrived at this *wadiya* at 7 a.m., accompanied by some other police officers and taking the 4th accused with him, and he arrested the 1st and 3rd accused there and the 6th accused in an adjoining *wadiya*. From there, according to him, the police party went in search of the 2nd and 5th accused. They met the 5th accused about 3 miles from Nikawewa and the inspector arrested him. " I did not know him before ", he says. " He was pointed out to me by the 4th accused. " They went a further mile and a half to Yakkala, arriving there at 8 a.m., and there the inspector arrested the 2nd accused.

Discussing the inspector's evidence the learned judge said in his summing up :

> " Then he says he got down a man called Albert and having questioned that Albert he got down the fourth accused during the early hours of the morning of the 9th February and that after recording the fourth accused's statement the whole investigation gathered a great deal of momentum and events moved swiftly. On the 9th morning the Police party went straight to Nikawewa and arrested the first, third, fourth and sixth accused . . . . On the way back from Nikawewa the fifth accused was seen walking along the bund and he was arrested. They were all handcuffed and taken to the Yakkala bazaar where the second accused who was standing near a boutique was arrested. "

The appellants submit in their grounds of appeal that " the learned judge's reference to the fact that the Police investigations gathered momentum after the 4th accused had made a statement to the Police and that the arrest of the other accused followed immediately after the recording of the said statement, was suggestive of a confession made by the 4th accused and seriously prejudiced the defence ".

The evidence that has been referred to was given by the inspector in answer to questions put by crown counsel in examination in chief. The evidence that the 4th accused was arrested in consequence of his statement to the inspector could, if believed, prove that the 4th accused made a confession to him and it is therefore obnoxious to the provision in section 25 (1) of the Evidence Ordinance that " no confession made to a police officer shall be proved as against a person accused of any offence ". In this respect the present case cannot be distinguished from that of *Obiyas Appuhamy v. The Queen.* [1] The inspector's evidence further suggests that the 4th accused also implicated the other appellants in the crimes in

[1] *(1952) 54 N.L.R. 32.*

question, and therefore contains inadmissible hearsay as against them. It is not possible to say that "no substantial miscarriage of justice has actually occurred," in spite of the admission of these items of inadmissible evidence, and the convictions were therefore quashed.

The evidence in question was not objected to at the trial. The appellants did not give evidence or make statements, either at the trial or before the magistrate, and called no witnesses on their behalf. In ordering a new trial we have taken into account these features in the case and also the consideration that a jury may well be satisfied that Kapuru Banda was not an accomplice in the crimes in question and is a credible witness.

*New trial ordered.*