[COURT OF CRIMINAL APPEAL]

1951 *Present:* **Nagalingam S.P.J. (President), Gratiaen J. and Pulle J.**

SEYADU, Appellant, *and* THE KING, Respondent

APPLICATION 108 OF 1951

S. C. 10—M. C. Mannar, 12,657

Confession—Meaning of term—Admissibility in cross-examination and in evidence in rebuttal—Severability of the non-confessional portion of a confession—Evidence Ordinance, ss. 17 (2) 25, 145—Court of Criminal Appeal Ordinance, proviso to s. 5 (1).

Under section 25 of the Evidence Ordinance, a confession made to a police officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself. The circumstance that no objection was taken to the reception of such evidence at the time is immaterial.

An " admission " amounts to a " confession " within the meaning of section 17 (2) of the Evidence Ordinance if it purports to admit facts which are capable of being construed as establishing a *prima facie* case against the accused.

If an accused person, in describing a transaction to a police officer, makes certain statements which, though non-confessional, are inextricably interwoven with other statements which are confessional, it would be improper to circumvent the prohibition contained in section 25 of the Evidence Ordinance by isolating the former statements from their context.

In a case where a confession has been improperly admitted, the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should not be applied.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

The accused, who was charged with murder, gave evidence that the knife with which he stabbed the deceased was that of the latter and that he wrested it from the deceased's hand and used it in self-defence in the course of a struggle. It was elicited in cross-examination and in the evidence in rebuttal, without objection from the defence, that the accused made a statement to the Police in which he had stated that the knife which was used was not that of the deceased but his own. It was submitted in the Court of Criminal Appeal that the alleged statement was a " confession " and should not have been received in evidence against the accused even for the limited purpose of contradicting his evidence at the trial.

Mahesa Ratnam, for the accused appellant.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

November 30, 1951. GRATIAEN J.—

This is an appeal against a conviction for murder.

It is not in dispute that on 6th July, 1951, the appellant stabbed the deceased person, a man named Sandanam, causing him grievous injuries one of which was necessarily fatal. There was, however, considerable divergence between the version relied on by the Crown and that spoken to by the appellant as to the circumstances which led up to the incident.

According to the witness Thambipillai, Sandanam was accompanying him along the public highway on the morning of 6th July when the appellant, who had approached them from the opposite direction, drew a knife from his waist and stabbed Sandanam; Sandanam fell down, but the appellant continued to stab him several times while his victim lay injured on the ground. Thambipillai claimed to have no knowledge of the motive for this seemingly unprovoked assault.

The appellant gave evidence on his own behalf. He said that, about nine days before this incident, he had surprised his wife, whom he had not previously suspected of infidelity, in an adulterous association with Sandanam; he assaulted Sandanam and sent his wife away to her parents in Batticaloa. On the morning of 6th July he met Sandanam and the witness Thambipillai on the road, whereupon Sandanam whipped out a knife and atempted to attack him with it. A struggle ensued in the course of which the appellant succeeded in wresting the knife from Sandanam's hand; Sandanam held the appellant by his testicles and the appellant then, acting in self-defence, stabbed his would-be assailant. Upon this version of the incident the pleas of self-defence, sudden fight and provocation prominently arose for the consideration of the jury.

In the course of the cross-examination of the appellant, learned Counsel who appeared for the Crown at the trial sought to discredit the appellant's story that the knife belonged to Sandanam and was not, as Thambipillai had stated, a weapon which the appellant had himself brought to the scene. For this purpose Counsel put the following questions *without objection from the defence*:—

Q. Did you tell the Police about the knife being the deceased's knife ?

A. Yes, I told the Police that the knife was the deceased's.

Q. If the Police had recorded that you told them this, " I stabbed with the knife which I had in my waist " ?

A. I did not make this statement to the Police.

After the case for the defence had been closed, the prosecution—*again without objection from Counsel who represented the appellant at the trial*—called a Police Officer to give evidence in rebuttal. Constable Jayasena, who had recorded the appellant's statement in the course of the preliminary police investigation held under Chapter 12 of the Criminal

Procedure Code, testified that the appellant had said to him " I took the knife which I had in my waist and stabbed him (i.e., Sandanam) with it ".

The only substantial ground upon which the conviction of the appellant has been attacked is that this statement which was alleged to have been made to constable Jayasena was a " confession " to a Police Officer which by reason of the unequivocal prohibition contained in section 25 of the Evidence Ordinance, should not have been received in evidence against him even for the limited purpose (sanctioned by section 145) of contradicting the appellant's evidence at the trial.

We have come to the conclusion that this objection is sound. Indeed, we do not doubt that if, upon objection taken by the defence, the authorities on the point had been brought to the notice of the learned Presiding Judge, he would not have permitted the questions in cross-examination referred to by me to be put to the appellant or the evidence in rebuttal to be led against him.

In *The King v. Kiriwasthu* [1] a Divisional Bench of the Supreme Court, dealing with a precisely similar objection, upheld the submission that, in the present state of the law of this country, the prohibition contained in Section 25 of the Evidence Ordinance is absolute. The unanimous opinion of the Court was that " a confession made to a Police Officer is inadmissible as proof against the person making it *whether as substantive evidence or in order to show that he has contradicted himself* ".

The word " confession " has received a statutory definition in Section 17 (2) of our Evidence Ordinance, and in that respect the provisions of the local enactment differ from those of the Evidence Act, 1872, of India. *Vide* the observations of Lord Atkin in *Narayana Sami v. Emperor* [2]. The prohibition contained in Section 25 extends therefore to an admission made at any time to a Police Officer by a person accused of an offence " suggesting the inference that he committed the crime ". We agree that a non-confessional admission made by an accused person cannot be regarded as " confessional " in character merely because it comes into conflict with a defence which is later set up at the trial. *The King v. Cooray* [3]; *The King v. Attygalle* [4]. The test of whether an " admission " amounts to a " confession " within the meaning of Section 17 (2) must be decided by reference only to its own intrinsic terms. But in the present case the statement alleged to have been made by the appellant to Police Constable Jayasena was inadmissible because, at the very lowest, it purports to admit facts which are " capable of being construed as establishing a *prima facie* case against the accused ". *The King v. Fernando* [5].

We do not doubt that if, in the course of making a " confession " to a Police Officer, an accused person makes certain additional statements which do not fall within the ambit of Section 25, the reception in evidence of those latter statements would not be objectionable provided (*a*)

[1] *(1939) 40 N. L. R. 289.*
[2] *A. I. R. (1939) P. C. 47 at p. 52.*
[3] *(1926) 28 N. L. R. 74.*
[4] *(1934) 37 N. L. R. 60.*
[5] *(1939) 41 N. L. R. 151.*

that they are otherwise relevant and admissible, *Rex v. Vasu* [1], and (*b*) that, in the context in which the statements relied on were made, they are demonstrably separable from those parts which were " confessional " in character, so that their contents may be made known without indirectly revealing the confessional character of the remaining parts. This latter test should be cautiously applied, and if the Court be left in doubt as to whether the " confessional " and the " non-confessional " statements to a Police Officer can reasonably be described as independent of one another, the non-confessional evidence should also be rejected. One should not forget that even in England where the reception of evidence of a voluntary confession is permissible in law, the whole account given by the prisoner of the transaction must be placed before the Court. *Archbold (32nd Edition) page 400.* The same analogy applies in the converse case, so that if an accused person, in describing a transaction to a Police Officer, makes certain statements which, though non-confessional, are inextricably interwoven with those statements which are confessional, it would be improper, we think, to circumvent the prohibition contained in Section 25 by isolating the former statements from their context. We mention these facts because there was some discussion in the course of the argument as to whether in the present case some portion, at least, of the evidence of constable Jayasena might have been led in some other form which was unobjectionable. We are not disposed to give a decision on this hypothetical question without examining the entire statement recorded by the Police Constable, and we are content, therefore, to indicate what, in our opinion, are the general principles which should guide the prosecution and the Presiding Judge in such cases.

It remains to consider whether the conviction of the appellant should be affirmed under the proviso to Section 5 (1) of the Court of Criminal Appeal Ordinance notwithstanding the reception of the evidence which Mr. Wijemanne concedes was inadmissible. We have come to the conclusion that this is not a case in which the proviso can safely be applied. The inadmissible evidence tendered by the prosecution was of an extremely damaging character, and, in the form in which it was received, it virtually destroyed the defences relied on by the appellant. As Abrahams C.J. said in *Kiriwasthu's case* (*supra*), it would obviously be dangerous to expect a jury with a confession before them, no matter how much it was emphasised in the summing-up that the confession was not to be taken as true, not to draw the ordinary inference one draws from an admision of guilt. Adopting in this case the same language which was employed on that occasion, we are of the opinion that " the jury not only may have been, but very probably were, influenced against the appellant, considering what the terms of the confession were. That in such circumstances the conviction cannot stand is obvious ".

For the reasons set out above, we quash the conviction of the appellant, and direct that he should be tried afresh on the indictment for murder.

Retrial ordered.

[1] *(1941) 27 C. L. W. 16.*