[COURT OF CRIMINAL APPEAL.]

1941 *Present* : **Howard C.J. and Soertsz and Hearne JJ.**

THE KING *v.* GUNAWARDENE.

10—M. C. Panadure, 8,541.

Evidence—Statement to Police—Statement that conflicts with defence of accused—No inference of guilt—No confession—Evidence Ordinance, s. 17 (2).

The accused, who was charged with murder, made a complaint at the Police Station and in the course of it made the following statement :—

"To-day at about 1 P.M., I was returning home from Batagoda with Jayasena. On the high-road near Gunatilaka's rubber land, one Adiris, (2) John, (3) Aron came from Adiris's house. John had a gun and John shouted to us to stop. We ran. Then John shot at us twice. We were about 50 yards away from them. I received injuries on the left leg. Jayasena also received injuries. We ran a distance and fell down. Later people collected and brought us here."

At the trial, in cross-examination, the accused said that he went to the Police Station and made a complaint. He then proceeded to deny that in the course of the complaint he made a statement.

At the close of the case for the defence the police constable to whom the complaint was made was recalled by the Crown with the leave of Court and gave the actual words used by the accused.

Held, that the statement did not amount to a confession as it did not suggest the inference that the accused committed the offence with which he was charged.

A statement made by an accused person to a police officer cannot be shut out merely because it conflicts with or tends to discredit a defence taken on his behalf.

The King v. Kalubanda (*15 N. L. R. 422*); *Rex v. Ukkubanda* (*24 N. L. R. 327*); *and Rex v. Cooray* (*28 N. L. R. 74*) *referred to.*

APPLICATION for leave to appeal from a conviction by Judge and jury before the 4th Western Circuit.

J. E. M. Obeyesekere (with him *Shelton de Silva* and *V. Thillainathan*), for accused, appellant.—The statement made by the accused amounted to a confession and was inadmissible under section 25 of the Evidence Ordinance. There are serious discrepancies between that statement and the evidence given by the accused in Court. The letting in of that statement definitely prejudiced the defence put forward at the trial.

[SOERTSZ J.—Was not the statement admissible under section 120 (6) of the Evidence Ordinance or under section 122 of the Criminal Procedure Code ?]

Those sections should be read as subordinate to section 25 of the Evidence Ordinance. The ruling in *R. v. Kalu Banda*[1] is directly applicable. "To allow evidence by a police officer of the substance of a statement made to him by an accused from which incriminating circumstances may be inferred would be contrary to the intention of section 25"—*per* Ennis J. See also *R. v. Fernando*[2]. This point was also considered in *R. v. Kiriwasthu*[3] and *R. v. Cooray et al.*[4].

[1] *(1912) 15 N. L. R. 422.*
[2] *(1939) 41 N. L. R. 151.*
[3] *(1939) 40 N. L. R. 289.*
[4] *(1926) 28 N. L. R. 74.*

[HOWARD C.J.—It would appear that the question in the present case is similar to that which arose in the Privy Council decision in *Dal Singh v. King Emperor* [1].]

The Indian Evidence Act does not have a definition of "confession" such as we have in section 17 (2) of our Evidence Ordinance and therefore, the Privy Council gave the word its ordinary meaning. According to our definition it bears an extended meaning.

Nihal Gunasekera, C.C., for the Crown.—The accused elected to give evidence on his behalf. Sections 120 (6), 145 and 155 (c) of the Evidence Ordinance (Cap. 11) are therefore applicable. Section 25 debars proof of a confession. The statement of the accused made to the Police in this case was purely a complaint against certain persons, and cannot be described as a confession. The only authority against this view is *R. v. Kalu Banda.* That case has always given trouble. In that case, the Court was impressed by the fact that the jury might well have thought that the accused had made a confession. In the present case the full statement was before the jury, and there was a proper direction by the Judge regarding confessions. The jury were of opinion that the statement did not amount to a confession.

[HOWARD C.J.—Besides *R. v. Cooray* are there any other cases in which *Dal Singh v. King Emperor* was considered ?]

Yes, in *R. v. Attygalle et al.* [2], *R. v. Fernando* [3] and *R. v. Emanis* [4]. Section 122 (3) of the Criminal Procedure Code would also be applicable—*R. v. Davith Singho* [5].

J. E. M. Obeyesekere, in reply, cited *Harnam Kisha v. Emperor* [6].

Cur. adv. vult.

February 5, 1941. HOWARD C.J.—

This is an application for leave to appeal from a conviction for murder In a trial before Mr. Justice de Kretser and a jury at Kalutara on December 18, 1940. Although the application was based on the facts, Counsel has also argued a point of law. In regard to the facts he has contended that the evidence of the witness Thenoris in the trial Court contradicted what he told the police in the first complaint with regard to this offence. These contradictions were so material as to vitiate the verdict of the jury which, in the circumstances, Counsel contended was unreasonable. This point was not seriously argued. In our opinion it is without substance. The learned Judge in his charge to the jury invited their particular attention to the contradictions in the evidence of this witness. They could draw any necessary inferences therefrom. Even if they regarded the evidence of Thenoris as unworthy of belief there was ample testimony supplied by other witnesses to justify them in coming to the conclusion they did.

The point of law arises in connection with a statement made by the appellant to the police. In cross-examination the appellant said that he went to the Police Station and made a complaint. He then proceeded to

[1] *I. L. R. 44 Cal. 876.*
[2] *(1934) 37 N. L. R. 60.*
[3] *(1939) 41 N. L. R. 151.*
[4] *(1940) 18 C. L. W. 121.*
[5] *(1936) 37 N. L. R. 313.*
[6] *A. I. R. (1935) Bom. 27.*

deny that in the course of this complaint he made a certain statement. At the close of the case for the defence, the police constable to whom this complaint was made was recalled by Crown Counsel with the leave of the Judge and detailed the actual words used by the appellant. They were as follows :—

"22 years ; of Kesselawawa. To-day at about 1 P.M. I was returning from Batagoda with Jayasena. On the high road, near Mr. Gunatilaka's rubber land, one Adiris, (2) John, (3) Aron came from Adiris's house. John had a gun and John shouted to us to stop. We ran. Then John shot at us twice. We were about 50 yards away from them. I received injuries on left leg. Jayasena also received injuries. We ran a distance and fell down. Later people collected and brought us here."

Counsel for the appellant maintains that this statement amounted to a confession made to a police officer and was therefore inadmissible in evidence under the provisions of section 25 of the Evidence Ordinance. In support of this proposition reliance is placed on the case of *The King v. Kalu Banda* [1]. In fact this case may be described as the sheet anchor on which hangs the whole fabric of the appellant's case. Without it the proposition would be unarguable. In Kalu Banda's case the accused who was charged with having caused grievous hurt to one Balahamy, set up the defence that he was acting in self-defence. The prosecution proved that the accused had made a certain statement to a police officer, and that in that statement he had not charged Balahamy with having attacked or threatened to attack him. It was held that this evidence of the police officer was not admissible and that the police officer was allowed to give evidence of what was in substance a confession by the accused. The statement of the accused was not put in evidence. It was contended on behalf of the Crown that the evidence of the accused being silent with regard to his plea of self-defence was not evidence of a "statement, oral or documentary", that what he said to the headmen did not amount to a confession and that this evidence was of conduct only and therefore admissible under section 8 of the Evidence Ordinance. These contentions were not accepted by the Court. Lascelles C. J. held that the headmen were allowed to give evidence of what was in substance a confession by the accused. That they were allowed indirectly to disclose part at least of the substance of the accused's statement, the effect of this disclosure being such as to suggest the inference that the defence on which the accused relied was not set up by him at the time when, if true, it would naturally have been set up, and that it was therefore false. The evidence was, therefore, inadmissible as it amounted to an admission suggesting that the accused had committed the offence and hence a confession by virtue of section 17 (2). The case of Kalu Banda has been a source of considerable trouble when it has been under consideration in later cases. In *Rex v. Ukku Banda* [2], Bertram C.J. endeavoured to explain it as follows :—

"What I take *Rex v. Kalu Banda* to have decided is this : That if the Crown at the trial of a prisoner tenders in evidence a statement made by the prisoner, whether self-inculpatory or self-exculpatory in

[1] *15 N. L. R. 422.* [2] *24 N. L. R. 327.*

intention, with a view to an inference being drawn from that statement against the prisoner, that statement becomes *ex vi termini*, as defined by section 17 (2), 'a confession' and that, if it was made to a police officer, it cannot be received in evidence."

In *Rex v. Cooray*[1] the accused were charged with the murder of an Inspector of Police. At the trial the Judge called a witness who it was alleged had heard the accused call to a police constable, travelling in a passing bus: "There, your Inspector is killed". When the witness denied that he heard such a statement, the Judge read out the statement made by him and recorded in the Police Information Book. It was held that the statement did not amount to a confession within the meaning of section 25 of the Evidence Ordinance. And that an admission, which is not a confession, does not become obnoxious to section 25 merely because it is found to be at conflict with a defence set up later. In *Rex v. Cooray*, Counsel for the accused relied on *Rex v. Kalu Banda* and argued that any statement by a person accused of an offence which suggested an inference adverse to the defence set up by him is a confession. Having regard to the explanation of the dcision in *Kalu Banda* by Bertram C.J., in *Rex v. Ukku Banda*, such interpretation was clearly maintainable. The Court, however, constituted by three Judges, as it was in Kalu Banda's case, refused to accept this argument. In his judgment Garvin A.C.J., stated that the effect of the judgments in *Kalu Banda* was that the prosecution may not invoke the aid of section 8 to enable a police officer to state what an accused person had not told him under circumstances which gave rise to the inference that the statement made to him was a confession. He stated further that the view of the Court in Kalu Banda's case was that the method adopted by the prosecution was calculated to produce exactly the same effect as if a statement containing a confession had been placed before the jury. The Court also held that the case of Kalu Banda was complicated by other circumstances and did not raise the issue in a simple form as in *Rex v. Cooray*. Garvin A.C.J. then proceeded to consider and apply the case of *Dal Singh v. King Emperor*[2]. In that case Dal Singh who was indicted for murder was the first person to give information to the police. He made a long and detailed statement, complaining that he had been assaulted by Mohan and Jhunni as a result of which he became unconscious. Certain of his servants, he said, came to his rescue, whereupon his assailants ran away, while he himself was carried to his house. He added that Jhunni and Mohan had beaten "their old woman" and were making preparations to bring a false case against him. This statement was given in evidence against Dal Singh at his trial for the murder of this woman. Lord Haldane, who gave the judgment of the Court, stated as follows:—"The statement is at several points at complete variance with what Dal Singh afterwards stated in Court. The Sessions Judge regarded the Document as discrediting his defence. He had to decide between the story for the prosecution and that told for Dal Singh". The statement though it was in conflict with the defence set up and was used for the purpose of discrediting that defence was held to be in no sense a confession and

[1] *28 N. L. R. 74.*

[2] *(1917) 86 L. J. P. C. 140.*

admissible against the accused who made it to the police. It was a self-exculpatory statement, not a confession, and it did not become a confession because it was at conflict with the defence later set up and was used for the purpose of discrediting that defence. In following this decision Garvin A.C.J. in *Rex v. Cooray* (*supra*) stated that the law of India though without a definition of "confession", as in Ceylon, is the same inasmuch as it is being stabilized on the basis of a definition in accordance with that term in the Ceylon Ordinance. He also held that, if the plain words of the Ordinance are to be the decisive test of whether or not a statement amounts to a confession, the statement made to the policeman in *Rex v. Cooray* did not come within its terms.

If the decision in *Kalu Banda* (*supra*) has the far reaching effect accepted by Bertram C.J., in *Rex v. Ukku Banda* (*supra*) and contended for in this case and in *Rex v. Cooray* it can, having regard to the decision in *Dal Singh v. King Emperor* (*supra*), no longer be regarded as good law. The statement made by the appellant in this case to P. C. Christians did not suggest the inference that he committed the offence with which he was charged. As in *Dal Singh v. King Emperor* this statement was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge against John for shooting at the appellant. As such, the statement is proper evidence against him. If the contention put forward on behalf of the appellant is correct and every statement made by an accused person to a police officer is to be shut out because it conflicts with or tends to discredit a defence taken on his behalf, then no admission by an accused person to a police officer may be given in evidence against him. This involves the extension and application to admissions of the rule of exclusion which the Legislature has limited to confessions.

For the reasons given in this judgment we are of opinion that the application must be dismissed.

Application dismissed.