

1945

Present: Wijeyewardene J.

JUSTIN FERNANDO, Appellant, and INSPECTOR OF POLICE,
SLAVE ISLAND, Respondent.

57—M. C. Colombo, 41,784.

Evidence—Statement made by accused while in police custody—Statement leading to discovery of a fact—Must relate distinctly to the fact discovered—Confession—Elicited in cross-examination by accused—Admissibility—Evidence Ordinance, ss. 25 and 27.

The accused was convicted on a charge of theft of a Raleigh Popular bicycle from the premises of the City Dispensary.

¹ *5 C. L. Journal 214.*² *45 N. L. R. 551.*

The constable who was called as a witness by the prosecution, said in examination-in-chief that he was inquiring into a complaint of a theft of another bicycle (a *Hercules* bicycle) and the accused was detained as a suspect in connection with that theft. He said that in the course of that investigation the accused gave him some information in consequence of which he visited the house of a carter from whom he obtained parts P 1 and P 2 of a *Raleigh Popular* cycle. In cross-examination the constable was asked by the Proctor for the defence to read the statement made by the accused to him. The constable thereupon stated that the accused told him "that he had stolen a cycle at the City Dispensary and had later sold it to a carter".

Held, that even if a suspect detained by the Police on one charge and giving information with respect to property forming the subject matter of a separate and subsequent charge can be regarded as an accused person in the custody of a police officer within the meaning of section 27 of the Evidence Ordinance, the evidence given by the constable of the confession made by the accused that he "had stolen a cycle at the City Dispensary" was inadmissible as it was not covered by the words "as relates distinctly" in section 27 of the Evidence Ordinance; the cycle in this case was discovered in consequence of the information given by the accused that he sold it to a carter, and the further information that he had stolen a cycle at the City Dispensary did not "relate distinctly" to the discovery of the cycle.

A confession is inadmissible in evidence whether it is elicited from a witness in examination-in-chief or in cross-examination by the defence, if it incriminates the accused; the correct test to be applied is not the manner in which the evidence of the confession came to be placed before the court but the effect of such evidence at the trial of the accused for a criminal offence.

A PPEAL from a conviction by the Magistrate. Colombo The facts appear from the head-note.

Ian de Zoysa for the accused, appellant.

E. H. T. Gunasekera, Crown Counsel. for the Crown, respondent.

Cur. adv. vult.

March 13, 1945. WIJEYWARDENE J.—

The accused was convicted on a charge of theft of a *Raleigh Popular* bicycle from the premises of the City Dispensary, Slave Island.

The constable who was called as a witness by the prosecution said in examination-in-chief that he was inquiring into a complaint of a theft of a *Hercules* bicycle and the accused was detained as a suspect in connection with that theft. He said that in the course of that investigation the accused gave him some information in consequence of which he visited the house of Ragin, a carter, from whom he obtained parts P 1 and P 2 of a *Raleigh* cycle. In cross-examination the constable was asked by the Proctor for the defence to read the statement made by the accused to him. The constable thereupon stated that the accused told him "that he had stolen a cycle at the City Dispensary and had later sold it to a carter through Costa"

Counsel for the accused contended that the evidence given by the constable of the confession made by the accused that he "had stolen a cycle at the City Dispensary" was inadmissible. He argued that section 27 of the Evidence Ordinance did not make that evidence admissible as—

- (a) the statement was not made by the accused when he was an accused in this case and in the custody of a Police Officer.
- (b) the part of the accused's statement that he had stolen a cycle at the City Dispensary did not "relate distinctly" to the discovery of the cycle.

With regard to the first objection the Crown Counsel invited my attention to *Queen-Empress v. Kamalia*¹ and *Queen-Empress v. Babu Lal*². The Bombay case holds that a suspect detained by the Police may be regarded as being in Police custody within the meaning of section 27 of the Indian Evidence Act which corresponds to section 27 of the Evidence Ordinance. The Allahabad case shows that a person arrested on one charge and giving information with respect to property forming the subject matter of a separate and subsequent charge is an accused person in the custody of a Police Officer within the meaning of section 27 of the Indian Evidence Act.

There remains, however, for consideration the second objection raised by the accused's Counsel. It has been settled by a number of decisions that only so much of the information as led immediately to the discovery of a fact is admissible (*vide Queen-Empress v. Nana*³). The cycle in this case was discovered in consequence of the information given by the accused that he sold it to a carter through Costa. The further information given by the accused that "he had stolen the cycle at the City Dispensary" was not necessarily or directly connected with the discovery and should not therefore have been mentioned to court by the constable.

The Crown Counsel, however, argued that the evidence of the entire confession given by the constable was admissible, as it was given in answer to a definite request made by the Proctor for the defence to read the statement made by the accused. He contended that section 25 which should be read with section 27 prevented the proof of a confession of an accused made to a Police Officer only "as against" that person and that, therefore, such a confession when elicited in cross-examination as in this case was not shut out by those sections. This question is not free from difficulty. I think the correct test to be applied is not the manner in which the evidence of the confession came to be placed before the court but the effect of such evidence at the trial of the accused for a criminal offence.

Commenting on section 25 Ameer Ali says in his Law of Evidence:—

"This section only provides that 'no confession made to a Police Officer shall be proved as against a person accused of any offence'. It may, however, be proved for other purposes".

¹ (1886) 10 Bombay 596.

² (1889) 14 Bombay 260.

³ (1884) 6 Allahabad 510.

I have examined the decisions cited by Ameer Ali to illustrate the circumstances in which such a confession could be proved. They do not support the contention of the Crown Counsel. In *Imperatrix v. Pitamber Jina*¹ two persons A and B were tried jointly for murder. A stated to a Policeman, "I have killed a man and the other (B) has run away". It was held that B could prove this confession to prove that he took no part in the murder. In *Queen-Empress v. Tribhovan*², it was held that a statement made to the Police by an accused as to the ownership of the property with the theft of which he is charged, although inadmissible against him at the trial, was admissible as evidence with regard to the ownership of the property at an inquiry held by the Magistrate under section 523 of the Indian Code of Criminal Procedure, 1862, corresponding to section 419 of our Code.

I would also refer in this connection to *Queen-Empress v. Mathews*³. In that case a Policeman on being cross-examined stated that the prisoner when arrested said some Chinese came out with hatchets "at the time of the occurrence". In re-examination he said that the actual words used by the prisoner was not "at the time of the occurrence" but "at the time I struck the deceased". On objection being taken by the defence Counsel to the evidence elicited in re-examination Field J. upheld the objection. In the course of the argument, the defence Counsel desired that the whole statement made by the accused to the Police should be led in evidence. Field J. said—

"I cannot permit it, the law is imperative in excluding what comes from an accused person in custody of the Police if it incriminates him".

For the reasons given above I hold that the confession of the accused that he stole the cycle at the Dispensary should not have been proved against him.

The case against the accused then rests on the evidence of—

- (a) the constable who said that on a statement made by the accused the day after the loss of the cycle he discovered the parts P1 and P2 at the house of Ragin.
- (b) Ragin, the carter, who said that the accused sold him for Rs. 25 a Raleigh cycle the very evening the cycle was lost and that P1 and P2 were parts of that cycle, and
- (c) the owner of the cycle who identified P1 and P2 as parts of his missing cycle, which he valued at Rs. 100.

In assessing this evidence Ragin should of course, be regarded as an accomplice, as his evidence makes it quite clear that he knew the cycle was stolen property. As against this evidence there is only the evidence of the accused who denied the theft of the Raleigh cycle and stated that the only statement he made to the Police the day after the loss of the Raleigh cycle was about a sale of a Hercules bicycle to Ragin four months earlier on a receipt written by a Village Headman.

¹ (1877) 2 Bombay 61.

² (1884) 10 Calcutta 1024.

³ (1894) 9 Bombay 131.

On an examination of the evidence I hold that the admissible evidence led by the prosecution has established beyond reasonable doubt the guilt of the accused.

I dismiss the appeal.

Appeal dismissed.
