

## [IN THE COURT OF CRIMINAL APPEAL]

1953 *Present*: Nagalingam, S.P.J. (President), Gunasekara, J., and Pulle, J.

THE QUEEN v. M. S. PERERA *et al.*

APPEALS 16-17, WITH APPLICATIONS 15-17, OF 1953

*S. C. 48—M. C. Ganpaṇa, 2,682*

*Evidence—Accused person's statement to police—Admissibility—Exculpatory statement—Admission—Previous or subsequent conduct—Evidence in rebuttal—When permissible—Evidence Ordinance, ss. 8 (2), 17 (1), 21, 25.*

The 1st and 2nd accused were charged with robbery, and the 3rd accused was charged with abetment of that offence. The robbery was said to have been committed during the afternoon of the 7th September, 1951. When the 3rd accused was taken into custody he made two statements to the officer in charge of the police station. Evidence of the contents of both these statements was adduced by the prosecution at the trial. According to the police officer's version of the first statement, the 3rd accused gave the police an account of how he spent the afternoon of the 7th September, 1951. The police officer's version of the second statement was that the 3rd accused had refused an invitation on the 31st August to join in a conspiracy with the 1st and 2nd accused to commit the robbery on the 7th September. If the jury believed that the 3rd accused had been invited on the 31st August to join in a conspiracy with the 1st and 2nd accused and that after the robbery he gave the police a false account of how he spent the afternoon of the 7th September, they might well have found in those facts a ground for accepting the evidence of two accomplices implicating the 3rd accused, which they might otherwise have rejected.

It was contended that the statements to the police were inadmissible on the grounds that the one relating to the events of the 7th September was not relevant and that the other was a confession to a police officer and therefore barred by section 25 of the Evidence Ordinance.

*Held* (by the majority of the Court), that the first statement was relevant under section 8 (2) of the Evidence Ordinance, and that the second statement was an exculpatory statement and not a confession, although it was a statement which suggested an inference as to a relevant fact and was therefore an admission as defined in section 17 (1). Being an admission the second statement was admissible in evidence under section 21, to prove as against the 3rd accused that a week before the robbery he had been invited to join the other two accused in a conspiracy to commit that offence.

*Held further*, that evidence in rebuttal should not be permitted except in a case where a matter has arisen *ex improviso* or the evidence was not admissible before the prosecution was closed.

**A**PPLEALS, with applications for leave to appeal, against certain convictions in a trial before the Supreme Court.

1st accused-appellant in person.

*Srimaib B. Lekamge*, for 2nd accused-appellant.

*M. M. Kumarakulasingham*, with *J. C. Thurairatnam*, for 3rd accused-appellant.

*L. B. T. Premaratne*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

June 1, 1953. GUNASEKARA, J.—

The three accused were tried jointly at the Colombo Assizes on an indictment charging the first accused, Solomon Perera, and the second accused, Piyadasa *alias* Banda, with robbery of a bag containing Rs. 12,283·70 in cash from one Dharmasena, and the 3rd accused Jayasoma, with abetment of that offence. All three were convicted, the first and second accused by a unanimous verdict of the jury and the third by a verdict of five to two, and they were sentenced to eight years' rigorous imprisonment each. At the close of the argument we dismissed the appeals of the first and second accused and reserved our judgment on that of the third.

Dharmasena was the manager of a co-operative wholesale store which had a depot in Veyangoda and had its head office at Mudungoda in Gampaha. Goods were sold at the Veyangoda depot on Tuesdays and Fridays, and the money received on each day was taken by Dharmasena on the same day to the head office at Mudungoda. It was his practice to take a train that left Veyangoda at 3 p.m., and he used to carry the money in a bag, in which he carried also a bill-book and two account books. The robbery is said to have been committed on the 7th September, 1951, which was a Friday, when he was taking the day's collection by this train as usual.

Dharmasena and another passenger, Gunawardana, gave evidence about the robbery. According to them, when the train was slowing down at an unprotected level crossing, about two miles from the Veyangoda railway station, the first and second accused, who had got in at that station, set upon Dharmasena and pulled at the bag of money that was in his hands, and the second accused managed to wrest it from his grasp.

Dharmasena released his hold, according to him, after the first accused had struck him a blow on the chest with some weapon that was clenched in his fist. (A doctor who examined Dharmasena on the next day found an abrasion and contusion that could have been caused by such a blow.) Dharmasena stopped the train by pulling the communication cord, but the two accused had already got out and were running along a foot-path. He chased them for some distance but failed to overtake them, and he returned to the train and reported the incident to the guard.

The foot-path falls into the high road at a spot beyond the level crossing, about a third of a mile from where the train was stopped. According to the case for the prosecution, the third accused had arrived at that spot shortly before the robbery in a Morris Eight car driven by one Subasingha and waited for the other two, with the engine of the car running, and as soon as they turned up with the bag of money all of them left together in the car. Subasingha, who gave this evidence, also said that on the way the three accused divided the money among themselves before they got out at their several destinations, and that the third accused gave him Rs. 50 at the end of the trip, saying "Keep this Rs. 50. Don't tell anybody that I travelled in this car." He added that at the third accused's request he secretly threw into the jungle a bag that had been left on the rear seat. The third accused told him, he said, "Throw it into the jungle without letting anybody see you." He did so, but he later pointed it out to the police, and it turned out to be the stolen bag with the bill-book and the two account books still inside it. His evidence about the third accused's share in the arrangement that is said to have been made for the departure of the other two from the scene of the offence was supported by that of another witness, Ebert.

The learned presiding judge expressed the view that Subasingha and Ebert were accomplices. Upon a consideration of all the evidence we respectfully agree with that view and we do not doubt that it must have been shared by the jury. The case against the third accused depended on the credibility of these two witnesses, while against the first and second accused there was an entirely independent case. Against the first accused there was, besides the evidence of Dharmasena and Gunawardana, the evidence of a man named Karunaratna, who lived in a house by the foot-path and who stated that the first accused was one of the two men who were chased by Dharmasena. The first accused was pointed out by each of these witnesses at an identification parade that was held on the 10th September, 1951. His defence consisted in a statement from the dock to the effect that before the parade a police officer had shown him to the witnesses. He had not made such a complaint before the trial. The second accused was pointed out by Dharmasena and Gunawardana at an identification parade held on the 1st October. He did not give evidence at the trial or make a statement from the dock.

The third accused was an assistant teacher at a Central School at Dewalapola, in the neighbourhood of Veyangoda. On the 7th September, 1951, he left the school at noon, an hour before it closed, with the headmaster's permission, and on the morning of the following Monday he

wired to the headmaster from Colombo asking for a day's leave on the ground of ill-health. In the meantime the police had looked for him in his house at Veyangoda on the night of the 8th and failed to find him. He presented himself at the Veyangoda police station at 1.15 p.m., on the 10th and was taken into custody, and on that occasion he made two statements to Inspector Dickman, the officer in charge of the station.

Evidence of the contents of both these statements was adduced by the prosecution. The inspector's version of the first statement is as follows :

" I do not know anything about the robbery of cash of Rs. 12,000 on Friday. I was at Veyangoda at my house at 2.30 p.m. I went to Minuwangoda Central School Sports ground. I was with Ranatunga a teacher of the school from 3 p.m. to 6 p.m. I then returned home at 6.30 p.m. by bus. I slept at home. On Saturday I was at home and stayed there till Sunday morning. "

Ranatunga, who too was an assistant teacher at the Dewalapola school, gave evidence for the prosecution denying that the third accused had been in his company from 3 p.m. to 6 p.m. He said that he himself had been present at the sports meet of the Minuwangoda Central School from about 3 p.m. till about 5.30 p.m. but he had not seen the third accused there. The third accused giving evidence denied the accuracy of the inspector's version of his statement, although the inspector had not been cross-examined. He alleged that what he had said about Ranatunga was merely that he had seen him, and also that he had not said that he had been at home on Saturday and had been there till Sunday morning.

The inspector's version of the second statement is as follows :

" On Friday the 31st August I went to the Dominion Hotel at about 12 noon and I saw Wilbert the Dominion Hotel Mudalali, Solomon and Banda who were upstairs. I went there to see William as he is well known to me. They were drinking arrack and discussing about some money case. Then Wilbert told me that they were talking about robbing the Co-op manager the following Friday when he takes the money of the Co-op stores to Campaha. He asked me whether I would assist in keeping the money safe and I refused. The two servant boys, one about 7 and the other about 15 who were employed there can testify to this meeting. "

Solomon and Banda are the names of the first and second accused.

If the majority of the jury believed that the third accused had been invited on the 31st August to join in a conspiracy with the first and second accused to rob Dharmasena on the following Friday, that on the 7th September he left the school earlier than usual at a time that would have enabled him to help in the robbery at 3 p.m., and that after the robbery he gave the police a false account of how he spent that afternoon,

they might well have found in those facts a ground for accepting the evidence of Subasingha and Ebert, implicating the third accused, which they might otherwise have rejected. It is contended for the appellants that the statements that are said to have been made to Inspector Dickman are inadmissible, on the grounds that the one relating to the events of the 7th September is not relevant and that the other is a confession to a police officer and therefore barred by section 25 of the Evidence Ordinance. The majority of the court are of the view that the former is relevant under section 8 (2) of the Evidence Ordinance, and that the latter is an exculpatory statement and not a confession, although it is a statement which suggests an inference as to a relevant fact and is therefore an admission as defined in section 17 (1).

Being an admission the second statement was, in the opinion of the majority of us, admissible in evidence under section 21, to prove as against the third accused that a week before the robbery he had been invited to join the other two in a conspiracy to commit that offence, and it was therefore open to the crown counsel to adduce evidence of it before the prosecution case was closed. He did not adopt this course, however, but adduced the evidence only after the close of the case for the third accused. The ground upon which this procedure was permitted appears to have been that the third accused had denied under cross-examination that he had made this statement, and the inspector was being called to rebut the denial with the sole object of discrediting the third accused as a witness. It does not appear to have been appreciated that the mode by which the prosecution sought to discredit him was by proving a relevant fact, namely an admission, which could have been proved before the close of the case for the prosecution. As this court pointed out in the case of *R. v. Thwaites*<sup>1</sup>, to permit such a procedure would be a wrong exercise of the presiding judge's discretion; for evidence in rebuttal should not be permitted except in a case where a matter has arisen *ex improviso* or the evidence was not admissible before the prosecution case was closed. But for the evidence that was improperly admitted in rebuttal the majority of the jury may well have agreed with the two jurors who were not prepared to accept the evidence of Subasingha and Ebert against the third accused. Though not agreed upon the grounds, we are unanimously of the opinion that the conviction of the third accused cannot be sustained; we therefore quash the conviction of the third accused and set aside the sentence that has been passed on him.

We are also unanimously of opinion that the admission of evidence of the third accused's second statement to the inspector caused no prejudice to the other two accused.

*Convictions of 1st and 2nd accused affirmed.  
Conviction of 3rd accused quashed.*

<sup>1</sup> (1952) 54 N. L. R. 449.