[ASSIZE COURT]

1953 *Present :* **Gratiaen J.**

THE QUEEN *v.* M. SATHASIVAM

S. C. 1 Western Circuit—M. C. Colombo South, 38,682

Evidence Ordinance—Sections 8 (1), (2), 11 and 32 (1)—Statements made by a deceased person—Admissibility—Motive—Conduct—Evidence of trifling weight but gravely prejudicial to accused—Propriety of excluding it.

Accused was charged with murdering his wife. The prosecution sought to produce as part of its case a letter which the deceased had, in anticipation of the accused's return to Ceylon from abroad, written to a third party. The letter, however, amounted at best to mere general expressions indicating fear or suspicion of the accused and not directly related to the occasion of the death of the deceased.

Held, (i) that the letter was not admissible under section 32 (1) of the Evidence Ordinance.

(ii) that the letter was not admissible to prove motive for the crime, under section 8 (1) of the Evidence Ordinance, or to prove conduct on the part of the deceased, under section 8 (2) read with section 11, unless, in the former case, there was independent evidence that the allegations in the letter had induced resentment in the accused's mind against the deceased, and, in the latter case, there was independent evidence to support the suggestion that the deceased was apprehensive of danger to her safety after the accused had returned to Ceylon.

Held further, that evidence of trifling weight affecting an accused person, even though technically admissible, ought to be excluded if the potential prejudice which its reception is almost certain to produce will be out of proportion to its true evidential value.

RULING on the admissibility of certain evidence tendered by the Crown in a trial before the Supreme Court.

T. S. Fernando, Solicitor-General, with *Douglas Jansze, Ananda Pereira* and *Vincent Thamotheram,* Crown Counsel, for the Crown.

Colvin R. de Silva, with *T. W. Rajaratnam* and *Ananda de Silva,* for the accused.

Cur. adv. vult.

March 24, 1953. GRATIAEN J.—

In this case the prisoner is charged with having murdered his wife on the morning of 9th October, 1951, at her residence in Colombo. The prisoner had been away in England, while the deceased and their children remained behind in Ceylon, for some months prior to September, 1951. He sailed from London in ss. " Himalaya " which vessel was expected

to arrive, and did in fact arrive, in Colombo on or about 21st September, 1951. Earlier in that month, the deceased had instituted proceedings against him in the District Court of Colombo, for divorce on the ground of malicious desertion.

The direct evidence tendered against the prisoner on the charge of murder will be that of a servant boy named William who claims to have witnessed and in fact assisted in the commission of the crime. Other evidence of a circumstantial nature will be tendered by the Crown to corroborate William whose testimony is necessarily that of a self-confessed accomplice.

The Crown proposes to prove as part of its case that on 17th September, 1951, the deceased, in anticipation of the prisoner's return to Ceylon, wrote the letter (marked P24 in the Court below) to a Police Officer in the following terms :

" 'Jayamangalam ',
7 St. Alban's Place,
Bambalapitiya.
17th September, 1951.

C. C. Dissanayake, Esqr.,
Supdt. of Police, Colombo.

Dear Sir,

I am writing to you, as requested over the telephone, to inform you that I have filed an action in the Colombo District Court asking for a divorce from my husband Mr. M. Sathasivam on the ground of desertion. He has been away in England and the summons though issued has not yet been served. He will be arriving in Colombo per ss. Himalaya on the 21st instant, and I understand from his attorney that he intends to come to this house (which is mine) with his mother and reside here. In view of the pending divorce action this cannot be allowed, and I have been advised to refuse him admittance.

But, from my knowledge and experience of my husband, I have reason to fear that he may attempt to force his way into the house and use violence and cause a breach of the peace.

In this situation I need protection and I therefore request that you will instruct the Bambalapitiya Police to afford me the same if I telephone to them. I have a telephone in the house and the Police Station is close by.

I may mention that I have my four young children in the house with me and I am also apprehensive on their account.

Yours faithfully,
Ananda Sathasivam."

It is also proposed to call certain witnesses to speak to statements of a similar nature which the deceased is alleged to have made to them before the prisoner arrived in Colombo.

The defence has strongly objected to the reception of the letter P24 or of the explanatory oral evidence as part of the case of the Crown.

The learned Solicitor-General at first claimed that these statements are relevant and admissible under Sec. 32 (1) of the Evidence Ordinance. In addition, he argued that they were relevant at least (1) to establish a suggested motive for the crime under Sec. 8 (1), and/or (2) to prove conduct on the part of the deceased lady under Sec. 8 (2) read with Sec. 11.

Can it be said that, in the facts of this particular case, P24 contains any statements " as to the circumstances of the transaction which resulted in " the deceased's death on 9th October, 1951 ? Even if one gives those statements a meaning which is most favourable to the Crown, they amount at best to mere " general expressions indicating fear or suspicion of (the prisoner) and not directly related to the occasion of (her) death ". Evidence of that kind has expressly been ruled to be inadmissible by Lord Atkin in the course of his judgment in *Narayana Swami v. Emperor*[1] where the Judicial Committee of the Privy Council had occasion to make an authoritative pronouncement as to the limits within which the application of Sec. 32 (1) of the Evidence Ordinance must be confined. The circumstances to which the deceased's statements relate must, said Lord Atkin, " have some proximate relation to the actual occurrence ". Following this principle, I am satisfied that the reception of the proposed evidence under Sec. 32 (1) would not be justified. It is but fair to place on record that the learned Solicitor-General, at the closing stages of his argument, very properly withdrew his application to have the evidence admitted under the provisions of this section.

The Crown contends, nevertheless, that the proposed evidence is relevant under sec. 8 (1) and also, or at any rate in the alternative, under sec. 8 (2). It is therefore necessary to consider each of these submissions. The learned Solicitor-General was content, he said, to place this evidence before the Jury on the clear understanding that the truth of the allegedly incriminating statements contained in P24 should not be assumed.

With regard to sec. 8 (1), evidence of a motive for the commission of the alleged crime would without doubt be relevant, but, if it be alleged, it must be strictly proved. The learned Solicitor-General has indicated the position of the Crown on this part of its case against the prisoner. The evidence for the prosecution, he suggests, will prove that, after the prisoner returned to Ceylon, he came to know of the contents of P24 at some unspecified point of time before the alleged murder was committed ; this knowledge led, so it is suggested, to strong resentment ; and the ensuing resentment provided the motive for the crime. By this means, it is proposed to place before the Jury not merely the bare fact that P24 was written to a police officer but also the general expressions of fear contained in it.

It will be essential for the Crown, if it relies on this suggested motive, to prove that the prisoner had in fact resented the allegations made against him. I therefore enquired whether there was any independent evidence which, if believed, would justify a finding by the Jury that the

[1] *A.I.R. 1939 P.C. 47 at 50.*

prisoner did bear or even give expression to his alleged resentment. I understood the learned Solicitor-General to reply that he could not at this stage undertake to lead such independent evidence at the trial; he suggested, however, that the Jury might well infer that a man would in all probability have resented allegations of the kind contained in P24, and especially so if they were untrue; he therefore argued that, upon the basis of such assumed resentment, the Jury could properly proceed to consider whether or not, in their opinion, there was sufficient proof of a motive for the murder. With great respect, this line of reasoning is unacceptable to me. Had there been evidence, independent of any statements made by the deceased lady, which would prove that her allegations had induced resentment in the prisoner's mind against her, the position might well have been different. In *R. v. Buckley* [1], for instance, a man was charged with the murder of a police officer who had shortly before given evidence against him on a charge of larceny. *After his conviction for larceny, he was heard to mutter threats of vengeance against the constable over the part taken by him in the earlier prosecution.* In those circumstances, the evidence given by the constable at the earlier trial was admitted at the subsequent trial to prove motive for the alleged murder.

Should evidence of this kind be forthcoming during the progress of the present trial, the Crown may, if it so desires, renew its application to tender P24 for the purpose of establishing a link in the chain of the evidence on the issue of motive. For the time being, I must assume that no such independent evidence will be available. I, therefore, rule that P24 and the oral evidence connected with it cannot at this stage be received in evidence against the prisoner.

It is important to realise in this connection that, on the one hand, the evidential value, if any, of P24 standing by itself is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial. I confess that this is a circumstance which weighs very considerably with me. *Vide* the observations of Lord Moulton in *D. P. P. v. Ritchie* (1914) A.C. 545.

The relevance of P24 as evidence of the deceased lady's " conduct " under sec. 8 (2) seems to me to be even more remote. The suggestion is that her request for so-called " police-protection " constituted conduct on her part which was influenced by a state of fear, and that this alleged state of fear has some bearing on the evidence which indicates that the deceased and the prisoner, notwithstanding the pendency of the divorce proceedings, were apparently on terms of intimacy up to the moment of her death. The suggestion, as I understand it, is that the appearance of cordiality on her part was feigned, having been influenced by her fear of the man. But here again, apart from all other considerations, is there any independent evidence to support the suggestion that she was apprehensive of danger to her safety *after the prisoner returned to Ceylon?* Until such evidence is forthcoming, the question whether sec. 8 (2) applies will not arise. I remind myself in this connection that the Crown concedes

[1] *13 Cox. 293.*

that the truth of the allegations contained in P24 cannot be assumed. I rule P24 out for the present, but subject once again to any fresh application which the Crown may hereafter make for its reception at a later stage.

The Crown has relied strongly on a decision of the Indian Courts in *Golak Behari Takal v. The Emperor* [1]. In that case a number of persons were convicted of conspiracy to murder the deceased during the period August to October, 1935 ; the indictment also alleged that the murder was in fact committed in pursuance of that conspiracy. The Appellate Court ruled that the contents of a petition addressed by the deceased to some official source on 23rd September, 1935—the date is important—were properly admitted at the trial. McNair J. took the view that sec. 32 applied. I must therefore presume that the document, though not quoted in the judgment, did contain statements relating to certain circumstances of a transaction which, in the ultimate result, led to his death ; and I note in particular that his complaint was made during the crucial period when the alleged conspiracy was still in progress.

McNair J. also ruled that in any event the contents of the petition were admissible under sec. 8 (2) of the Evidence Act as evidence of the deceased's conduct which had been influenced by his fear of injury at the hands of the conspirators. McNair J. states as follows in this connection :

> " The complaint to the Police is the conduct, and the reference to section 32 in illustrations (*j*) and (*k*) to section 8 make it clear that such conduct may be proved, whether the person whose conduct is alleged to be proved is alive or dead."

I have examined the illustrations referred to by the learned Judge, and I find that in each case the complaint which was held to be admissible in evidence was a complaint *that the particular crime under investigation had been committed.* In this respect, the present case can readily be distinguished.

In considering the proposed reception of evidence of this kind, I conceive it to be my duty as presiding Judge to bear in mind the fundamental rule of judicial practice in criminal cases referred to by Lord Du Parcq in *Noor Mohamed v. The King* [2].

> " In all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. *If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge would be right to exclude it.* To say this is not to confuse weight with admissibility. The distinction is plain, but *cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there must be some tenuous ground for holding it to be technically admissible.* The decision must then be left to the discretion and sense of fairness of the Judge."

[1] *42 C.W.N. 129.*

[2] *(1949) A.C. 182 at 192.*

These observations were quoted with unqualified approval by Viscount Simon very recently in *Harris v. D. P. P.* [1], where he said :

> " This proposition flows from the duty of the Judge when trying a charge of crime *to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused.* If such a case arose the Judge may indicate to the prosecution that *evidence affecting the accused, though admissible, should not be pressed because its probable effect would be out of proportion to its true evidential value.*"

I do not doubt that the learned Solicitor-General, for whose sense of fairness I entertain so much respect, will bear these considerations in mind before he decides whether or not to renew his application for the reception of P24 as evidence at the present trial. Once it is conceded, as it has been, that the truth of what was said in this document must be proved by independent evidence, justice requires that there should be very cogent reasons for admitting the document in its entirety for some remotely relevant purpose which is disproportionate to the potential prejudice which its reception is almost certain to produce.

Objection as to the reception of certain evidence upheld.