[COURT OF CRIMINAL APPEAL.]

Present : **Howard C.J., Moseley S.P.J., and Keuneman J.**

THE KING *v.* PITCHORIS APPU.

84—M. C. Galle, 31,956.

Statement by accused to Police Sergeant—Failure of accused to give evidence Statement admissible as corroboration only—Confession may be proved on behalf of accused—Criminal Procedure Code, s. 122 (3).

The accused who was charged with murder made a statement to a Police Sergeant immediately after his arrest to the effect that he was assaulted by someone and that he stabbed W.

Held, that if the accused had gone into the witness-box and testified on oath that he had been assaulted, the statement to the Police Sergeant would have been admissible as corroboration under section 157 of the Evidence Ordinance.

Held, further, that the statement was not subject to the provisions of section 122 (3) of the Criminal Procedure Code.

Obiter, a confession may be proved to assist a person accused of any offence.

CASE heard before a Judge and Jury at the 2nd Western Circuit.

J. E. M. Obeyesekere and *A. C. Alles*, for accused, appellant, who is also the applicant in the application.

H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

May 11, 1942. HOWARD C.J.—

This case involves an appeal on the law and an application for leave to appeal against the conviction of the accused on a charge of murder on March 24, 1942. The only grounds of any substance raised by Counsel for the accused are (*a*) that the trial Judge's ruling, that the accused's statement to Police Sergeant Nair, immediately after his arrest, to the effect that he was assaulted by someone and that he stabbed Mr. Wijeratne is inadmissable in evidence, was erroneous in law and (*b*) that the trial Judge failed to direct the Jury that, in considering the gravity of the provocation, if any, received by the accused, they could take into account his state of intoxication.

In connection with (*b*), Mr. Obeyesekere referred the Court to the case of *The King v. Punchirala*[1]. In holding that the Court or Jury in determining whether in any particular case the provocation received was grave may take into account the intoxication of the person receiving it, Bertram C.J., in that case, stated as follows :—

> "But, in my opinion, this principle should be applied with caution. It must be borne in mind that, in the first place, there must be 'provocation' of some kind. Provocation is, in my opinion, something which a reasonable man is entitled to resent. In the second place, there must be definite evidence on which the Jury would be justified in finding that the accused's faculties were in fact impaired by intoxication. In the third place, although the term is a relative one, nevertheless the provocation must still be grave."

In the present case, the only evidence with regard to the condition of the accused was that of Dr. Seneviratne, the Judicial Medical Officer, who stated that he smelt of alcohol, that of Sergeant Nair, who stated that he was smelling of liquor but not strongly, and that of Wijetileka, the petition drawer, called by the accused, who stated that the latter smelt of toddy and was somewhat drunk. On this testimony it cannot be said that there was definite evidence on which the Jury would be justified in finding that the accused's faculties were in fact impaired by intoxication. The second condition formulated by Sir Anton Bertram has, therefore, not been fulfilled, and ground (*b*) fails.

With regard to ground (*a*), the learned Judge, in holding that the statement of the accused was inadmissible, stated as follows :—

> "I am of opinion that this evidence is inadmissible. It contains a confession by the accused. It cannot be regarded in any way as an exculpatory statement. The admission of this statement will clearly prejudice the accused. Moreover, it is not a statement in fact, but is an answer to a question put by the Sergeant after the accused was arrested. I may add that Mr. Obeyesekere stated in reply to me in the course of the argument that he did not at that stage intend to call the accused as a witness."

The learned Judge has rejected the statement, first of all because he deemed it a confession and therefore inadmissible by reason of section 25 of the Evidence Ordinance. Mr. Obeyesekere has invited our attention to the phraseology employed in this section and in particular to the words

[1] *25 N. L. R. 458.*

"as against a person accused of any offence". He contends that these words indicate that a confession can be proved to assist a person accused of any offence. Although, for reasons which I shall give, it is not necessary to decide this point, we are of opinion that Mr. Obeyesekere's contention is correct. The Court is also in agreement with Mr. Obeyesekere's further contention that, inasmuch as Sergeant Nair was neither an inquirer nor an officer in charge of a Police Station nor holding an inquiry under Chapter XIX. of the Criminal Procedure Code, the statement made to him by the accused was not subject to the provisions of section 122 (3) of that Code. He argues that it is admissible under section 21 (c) of the Evidence Ordinance. Section 21 provides that admissions are relevant and may be proved as against the person who makes them. They cannot, however, be proved by the persons who make them, except in the cases formulated in paragraphs (*a*), (*b*) and (*c*). Of these paragraphs, Mr. Obeyesekere calls in aid only paragraph (c), which is worded as follows:—

> " (*c*) an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission."

Mr. Obeyesekere asks us to hold that the statement made by the accused to Sergeant Nair is relevant, otherwise than as an admission, under section 3 (1) and section 11 (*b*) of the Evidence Ordinance. Section 3 (1) is worded as follows :—

> " (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. "

The accused desires to put in evidence the fact that he made a statement to Sergeant Nair to the effect that he had been assaulted. The fact that he made this statement does not in our opinion show or constitute a motive or preparation for any fact in issue or relevant fact. The fact that the accused was assaulted would no doubt be relevant as showing motive for the attack on the deceased. It seems to us that the proof of the statement to Sergeant Nair in the manner suggested would be contrary to the principle formulated in section 21 of the Evidence Ordinance that a man shall not be allowed to make evidence for himself. We do not, therefore, think that the statement is relevant under section 8 (1). Nor do we think that the statement is admissible under section 11. The fact that the accused made the statement cannot be said to make the existence of the alleged assault on him highly probable. To hold otherwise would also, in our opinion, permit a person to manufacture evidence for himself. Moreover, to admit such a statement would be acting contrary to the principle laid down in section 60 of the Evidence Ordinance.

The position, as regards the admissibility of the statement to Sergeant Nair, would have been different if the accused had gone into the witness-box and testified on oath to the fact that he had been assaulted. The statement would then have become admissible as corroboration under section 157 of the Evidence Ordinance. The accused did not take this course and hence the statement was quite properly rejected by the learned Judge.

For the reasons I have given the appeal and application are dismissed.

Appeal and application dismissed.

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