[COURT OF CRIMINAL APPEAL]

1969 *Present :* Sirimane, J. (President), Alles, J., and Weeramantry, J.

S. RATHINAM, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL NO. 15 OF 1969, WITH APPLICATION NO. 20

S. C. 25/66—M. C. Jaffna, 31328

Criminal Procedure Code—Section 122 (3)—Procedure to be adopted in the use of the Section—Court's overall control over the notes of the Police investigation—Oral statements made to the Police during the investigation—Inadmissibility as corroborative evidence.

Failure of accused to offer evidence—Adverse comment of Court thereon—Scope of Court's power to make such comment.

Evidence—Ballistics expert—His deposition in Magistrate's Court—Hearsay item therein—Inadmissibility of it as evidence at the trial.

Court of Criminal Appeal Ordinance (Cap. 7)—Subsections (1) and (2) of section 5—Scope of the provisos therein.

(i) The accused-appellant was charged with the murder of a person by shooting him from a passing car in which the accused was travelling. When the Police Inspector who conducted the police inquiries immediately after the commission of the alleged offence was giving evidence at the trial, the prosecuting Counsel elicited from him the fact that when he reached the scene of the shooting the chief prosecution witness K made oral statements to him inculpating the accused, which resulted in instructions being given for the arrest of the accused. In the summing-up the Jury were invited indirectly by the trial Judge to accept the evidence of K because it was corroborated by the statement which K promptly made to the Police inculpating the accused.

Held, that the effect of section 122 (3) of the Criminal Procedure Code is to render the use of an oral statement made to a police officer in the course of a Police investigation just as obnoxious to it as the use of the same statement reduced into writing. Neither Counsel for the defence nor Counsel for the prosecution nor even the Court is entitled to elicit, either directly or indirectly, material which would suggest to a jury that the contents of a statement to the Police made either orally or recorded in writing corroborates the evidence given by a witness in Court. In the present case therefore, there was a serious misdirection to the Jury when they were invited indirectly by the trial Judge to accept the contents of K's oral statements to the Police as corroboration of to K's testimony in Court.

" An analysis of Section 122 (3) of the Criminal Procedure Code would seem to indicate that —

(*a*) The statement can only be used for the limited purpose of proving that a witness made a different statement at a different time or to refresh the memory of the person recording it :

(*b*) Any criminal Court *may* send for the statements recorded in a case under inquiry or trial in such Court and *may* use such statements or information not as evidence in the case but to aid it in such inquiry or trial :

(c) Neither the accused nor his agents shall be entitled to call for such statements except as provided for in the recent amendment to the Criminal Procedure Code by Act No. 42 of 1961, nor shall he or they be entitled to see them because they are *referred* to by the Court :

(d) If the statement is *used* by the police officer or inquirer to refresh his memory or if the *Court uses* them for the purpose of contradicting such police officer or inquirer the statement will be entitled to be shown to the adverse party and such party will be entitled to cross-examine the witness thereupon. "

(ii) Where, in a prosecution for murder by shooting, it is alleged by the Crown that the accused alone was the assailant, but the defence suggests that the accused *or another* could have fired the gun, then there is no obligation on the accused to offer any evidence on the point.

(iii) When a Ballistics expert is not a witness at the trial and his deposition in the Magistrate's Court is led in evidence as part of the case, an item of hearsay in the deposition would be inadmissible as evidence.

(iv) The Court would not dismiss on appeal under the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance if it is impossible to say that on the whole of the facts and assuming a correct direction the Jury would, without a doubt, have found the accused guilty upon the evidence led.

(v) In the history of the Court of Criminal Appeal in Ceylon, the power of the Court to order a new trial under the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance has never been used to order an accused person to be tried on a third occasion.

APPEAL against a conviction at a trial before the Supreme Court.

G. E. Chitty, Q. C., with *E. R. S. R. Coomaraswamy, Mano Devasagayam, M. A. Mansoor* and *G. E. Chitty* (Junr.), for the accused-appellant.

T. A. de S. Wijesundera, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

April 26, 1969. ALLES, J.—

The appellant was convicted by an unanimous verdict of the jury with having committed the murder of a young lad called Subramaniam Devendram on the 8th of November 1965 at No. 358 Kankesanturai Road, Jaffna.

The entire case for the prosecution centred round the chief prosecution witness Kandiah Kulasingham. The suggested motive for the crime was that the accused bore ill-will towards Kulasingham for a period of two weeks prior to the offence; that he fired a shot at Kulasingham and that the charge struck the deceased who was seated by the side of Kulasingham on the steps of No. 358, which was the Battery

Service shop of Mahendran. The shooting is alleged to have taken place about 5.30 in the evening in Jaffna town, the shot having been fired from a passing car in which the accused and his companions were travelling along the Jaffna-K.K.S. Road.

Kulasingham stated in evidence that the accused and he had been friends ; that the accused was encouraging an affair between his brother-in-law Rasiah and a dancing girl called Rajaluxmi ; that he had found fault with the accused for his conduct, and in consequence the accused was offended with him. It also transpired in evidence that the accused had complained to the Police that Kulasingham had set fire to his boutique, which according to Kulasingham was a false complaint.

Kulasingham was in the habit of frequenting the battery shop where the deceased was employed as a labourer. The manager of the shop was Sharma. According to Kulasingham while he was seated on the steps of the shop about one foot away from the deceased, he saw a car driven by Subramaniam proceeding from the direction of Kankesanturai towards Jaffna. One Shanmugam was seated inside the car. About 10 minutes later the car again came from the same direction travelling slowly about 15 m.p.h. and on this occasion the accused too was seated in the rear seat next to Shanmugam. The suggestion for the Crown was that on the first trip the car was sent to reconnoitre and find out whether Kulasingham was present and that the accused was picked up on the second occasion. As the car passed the shop the second time the accused, who was armed with a gun, fired a shot from the rear window of the car closest to the shop. Kulasingham states that he saw about 18" of the barrel protruding from the window of the car. The shot struck the deceased who rolled off the step. The car then speeded up and proceeded fast. Sharma was at that time inside the shop attending to some accounts and Kulasingham told Sharma that the accused had shot the deceased. Kulasingham stated that the distance between the place where he was seated and the car, at the time of the shooting, was 7½ feet. The steps of the shop were about 4 feet from the edge of the road and on the side of the road towards Kankesanturai there was a projecting wall of the adjoining barber saloon which abutted the road and enabled a person sitting on the steps to see only a distance of about 15 to 20 feet in that direction. The deceased had received the shot on the upper part of the body—the face, neck, chest and upper limbs. There were 22 entrance wounds and 129 injuries and according to the evidence a No. 4 cartridge had been used. Out of the 160 pellets in such a cartridge about a hundred had struck the deceased causing almost instantaneous death. The circumstances clearly indicate a case of deliberate shooting.

Sharma also purported to identify the accused as the assailant but the learned trial judge invited the jury not to accept his evidence of identification " as it would be highly dangerous to act on his evidence." Therefore it must be assumed that the jury acted solely on Kulasingham's evidence of identification in finding the accused guilty of murder.

Learned Counsel for the appellant submitted that his client had been gravely prejudiced by inadmissible evidence of a very damaging nature being led at the trial by the Crown and further that there was a grave misdirection by the trial Judge in regard to the manner in which the Jury were invited to accept Kulasingham's evidence of identification. When Inspector Savundranayagam, who conducted the Police inquiries was being examined by Crown Counsel he elicited the fact that the Inspector reached the scene of the shooting at 6.25 p.m. and was followed by Inspector Aluvihare. Kulasingham and Sharma were at the scene and Savundranayagam questioned them both orally and then sent Aluvihare to arrest the accused, Shanmugam and Subramaniam. The statements of Kulasingham and Sharma were recorded at 7 p.m. The following are the questions put and the answers elicited from Savundranayagam on this point.

994—Q. Before you recorded the statement of Kulasingham you asked Aluvihare to go and arrest the accused.

A. Yes. I asked him to arrest Rathinam, Shanmugam and Subramaniam.

995—Q. Rathinam is the accused ?

A. Yes.

996—Q. Before you recorded the statement of Kulasingham at 7 o'clock you gave these instructions to Aluvihare ?

A. Yes.

997—Q. At that time you had already questioned whom ?

A. Kulasingham and Sharma. After questioning them I instructed Aluvihare to arrest the accused.

998—Q. Did you instruct him to arrest any other person ?

A. No.

It is inconceivable, from the answers to questions 994 to 998 that the jury were not apprised of the fact that before 7 p.m. Kulasingham and Sharma had made oral statements to Savundranayagam inculpating the appellant, which resulted in instructions being given to Aluvihare to arrest the three persons, who according to Kulasingham's evidence, were present in the car at the time of the shooting. This evidence which suggested that Kulasingham and Sharma had mentioned the name of the accused to the Police is clearly in conflict with the provisions of Section 122 (3) of the Criminal Procedure Code, which only permits evidence to be led to contradict a witness and not to corroborate him. This Court has previously deprecated this type of questioning by Crown Counsel (Vide C.C.A. Appeal 87-88/68-SC 91/68 M. C. Colombo 43196/C). Since the judgment of the Privy Council in *Ramasamy*[1] has approved of the decision of the Court of Criminal Appeal in *Buddharakita Thera*[2] which

[1] *(1964) 66 N. L. R. 265.*

[2] *(1962) 63 N. L. R. 433.*

held that "the effect of Section 122 (3) was to render the use of an oral statement to a police officer in the course of an investigation just as obnoxious to it, as the use of the same statement reduced into writing" it should be noted that the use of Section 122 (3) is beset with many a pitfall and one has to tread warily lest one unconsciously contravenes the provisions of this section.

Since there appears to be some doubt in regard to the procedure to be adopted in the use of Section 122 (3), we think it desirable to lay down certain fundamental principles for the guidance of Counsel and the Court. Section 122 (3) and its legal implications have been the subject of controversy since 1924, when Bertram C. J. delivered the judgment of the Court in *R. v. Pabilis* [1] and the history of the Section and its gradual development upto its present form has been set out fully by Viscount Radcliffe in *Ramasamy's* case. In the concluding portion of the judgment dealing with the legal implications of the Section he has remarked that the Criminal Procedure Code though "not primarily concerned with the rules of evidence at all but containing regulations for the special procedure of investigation under Chapter XII and manifesting a clear general intention based on the peculiarities of procedure" was intended "to keep material produced by it out of the range of evidence to be used when a trial takes place". It would therefore appear that the Court must be extremely cautious to ensure that material is not elicited either directly or indirectly which would suggest to a jury that the contents of a Police statement made either orally or recorded in writing corroborates the evidence given by a witness in Court. An analysis of the Section would seem to indicate that—

(*a*) The statement can only be used for the limited purpose of proving that a witness made a different statement at a different time or to refresh the memory of the person recording it :

(*b*) Any criminal Court *may* send for the statements recorded in a case under inquiry or trial in such Court and *may* use such statements or information not as evidence in the case but to aid it in such inquiry or trial :

(*c*) Neither the accused nor his agents shall be entitled to call for such statements except as provided for in the recent amendment to the Criminal Procedure Code by Act No. 42 of 1961, nor shall he or they be entitled to see them because they are *referred* to by the Court :

(*d*) If the statement is *used* by the police officer or inquirer to refresh his memory or if the *Court uses* them for the purpose of contradicting such police officer or inquirer the statement will be entitled to be shown to the adverse party and such party will be entitled to cross-examine the witness thereupon.

[1] *(1924) 25 N. L. R. 424.*

It will be noticed from the above analysis that it is the Court which has overall control over the notes of the Police investigation when it is intended to contradict the witness from the written record. It is the Court which calls for the notes of the Police investigation and has a discretion whether it should be used to aid it at the inquiry or trial and no reference by the Court entitles the defence to have access to the statements. As Garvin A. C. J. observed in the Divisional Bench case of *King v. Cooray* [1]—

> "A Court is entitled to use the Information Book to assist it in elucidating points which appear to require clearing up and are material for the purpose of doing justice. The Information Book may show that there exists a witness, whom neither side has called, able to give material evidence which a Judge may think should be placed before a jury. It may indicate lines of inquiry which should be explored in the highest interest of justice, or may disclose to a Judge that a witness is giving in evidence a story materially different from the story told by him to the investigating officer shortly after the offence."

Although it sometimes happens that the defence have in their possession statements recorded in the course of an investigation and proceed to cross-examine the witnesses on their police statements and although there can be no objection to such a course in view of the provisions of the Evidence Act, the defence is not legally entitled to call for the statements, particularly as Section 122 (3) prohibits the defence from having access to such statements. The manner in which the statements can be used is a matter entirely within the discretion of the Court and no doubt the Court will always exercise its discretion in the interests of justice. Be that as it may, neither Counsel for the defence nor Counsel for the prosecution nor even the Court is entitled to elicit evidence from the Police statements which corroborates the evidence of the witness in Court. Reference has already been made to this lapse on the part of Crown Counsel in the questions put to Inspector Savundranayagam but learned Counsel for the defence, inadvertently no doubt, has also been guilty of this same lapse when he elicited from Kulasingham that he told the Police officer that Rathinam, Subramaniam and Shanmugam came in a car and fired. It may be that Counsel's object was to indicate to the Jury that Kulasingham in his police statement stated that all three persons fired, whereas in Court he stated that only the accused fired, but the questions and answers unfortunately resulted in placing before the Jury, that part of Kulasingham's statement which implicated the appellant. In the same connection, learned Counsel for the appellant complains that the directions of the trial Judge in regard to the credibility to be attached to Kulasingham's evidence were faulty because in Counsel's submission, the directions, in effect, invited the

[1] *(1926) 28 N. L. R. 74 at 83.*

Jury to accept the evidence of Kulasingham because it was corroborated by the statement which he promptly made to the Police. Very early in the summing up he directed the Jury in the following terms :—

> " Now, one of the tests we would advise you to apply is, how soon was this complaint made after the incident ? Because you will realise that the sooner a statement is made, the less chance there is for fabrication. In this instance, you will remember that this incident happened at 5·45 p.m. in the evening approximately. The Inspector says that he was at the scene by 6·25 p.m. He questioned both Kulasingham and Sharma and by 7 p.m. he says he was recording the statement of Kulasingham. So then that will be a matter for you to take into consideration as to how promptly the statements were recorded. You will see that Kulasingham's statement was recorded at 7 p.m. but he had been questioned earlier before his statement was recorded. The incident happened at 5·45 p.m. and by 6·25 p.m. the Police were at the scene. At 7·40 p.m., the other statement was recorded. That gives you some idea of the promptitude of the recording of the statements ."

It was submitted on behalf of the defence that the invitation to act on the evidence of Kulasingham because of the promptness with which his complaint was recorded, can only reasonably mean that the matter which the Jury were asked to take into consideration was that Kulasingham had mentioned promptly the name of the accused as the assailant, negativing the possibility of fabrication.

Later, in dealing with Kulasingham's evidence, the learned Judge gave the following directions :—

> " Now, take on the other hand the evidence of the man Kulasingham. If you are satisfied that he had the opportunity of seeing, and there is no suggestion made that he was so old he could not have seen. Of course, the suggestion is made, broadly that in that little space of time you could have made a mistake, you could have done this, you could have done that. Well, here is a man who tells you ' I made out that man, seated in the very front of the boutique on the step, I could have seen '. Then, is there any reason to disbelieve him ? Then you are disbelieving him because you think he has a motive to falsely implicate this person and for no other reason. If you are satisfied that he was in a position to see, then you are disbelieving him because you think that he has a grudge and is falsely bringing this man in.
>
> Now, in regard to that matter, as I told you, by 6·25 p.m. the Police are there and sometime between 6·25 and 7 *he has told the Police* and by 7·00 his statement is recorded. Then apparently according to what he has said, he has told Sharma immediately and Sharma does not deny that it is possible that he did say it. Then what is this conspiracy ? That within that short space of time he has decided to implicate this man not having seen the man who fired. If that is the view you form, the accused must be acquitted straightaway."

Learned Counsel for the appellant submits, with some justification, that when the Judge in the passage dealt with the possibility of a conspiracy to implicate the accused on a false charge and proceeded to remind them of the times at which the Police came and recorded Kulasingham's statement, it can only mean that what he told the Police was that the accused was the assailant. Counsel further submits that the reference to the information being given to Sharma soon afterwards can only mean the same thing.

Finally, there is the following passage, towards the end of the charge :—

> " The evidence is purely that of Kulasingham because you may have reason to doubt Sharma. Do you think it is possible for Kulasingham between 5·45 p.m. and 6·25 p.m., when the Police arrived, to have persuaded Sharma to falsely implicate another man in a murder case. That is the suggestion that Sharma was willing to fall in line with Kulasingham for Kulasingham's own wicked design."

In these passages, the learned trial Judge has, quite unconsciously indicated to the Jury that Kulasingham had told the Police at the earliest opportunity that the accused was the assailant. We are therefore in agreement with the submission of Counsel for the appellant that there was a serious misdirection to the Jury when they were invited indirectly by the trial Judge to accept the contents of Kulasingham's Police statement as corroboration of his testimony.

Counsel for the appellant also submitted that the learned trial Judge was in error when he asked them to consider the application of Lord Ellenborough's dictum in *R. v. Cochrane*[1] (1814) Gurney's Reports 479 to the facts of this case. It would appear from the Judge's charge that Counsel for the defence suggested that Shanmugam might have been the assailant while the accused who was seated by his side may have been only holding the barrel of the gun. Dealing with this suggestion the trial Judge said—

> " If he was holding the gun and then a shot rang out, if this accused is not the person who fired the gun, that is a matter which is within the knowledge of the accused and nobody else.
>
> Then gentlemen if this is the position, the Crown has proved it to the point of saying that the lethal weapon was in the hands of this person, in that position, when the gun was fired. He was holding the gun. If somebody else fired the gun, who knows ? Can anybody else know other than the accused or the person who fired the gun ?"

He thereafter proceeds to cite the well known quotation from *R. v. Cochrane* and in regard to the failure of the accused to give an explanation concludes by saying—

> " So, in a case of shooting, if the prosecution can prove it to this point, that this man was seen with the gun in his hands, with the barrel protruding and at that moment a shot fired would that not at least

[1] (1814) Gurney's Reports 479.

show a suspicious circumstance to which he alone holds the key ? Please remember, I am not saying that he has to prove anything; that is for the prosecution. The prosecution has to prove the case. Lord Ellenborough is only saying how you could deal with these particular circumstances of suspicion."

Although in this passage the learned trial Judge did remind the Jury correctly in regard to the burden of proof it seems to us that the citation from Lord Ellenborough's dictum was not apposite in the particular circumstances of the case and may have tended to confuse the Jury. If the defence had taken up the position that Shanmugam may have been the assailant and the accused was only present and holding the barrel (probably to keep it away from him) there was no obligation on his part to give an explanation of his presence in the car. The accused was not charged on the basis of common intention and the prosecution case was that he alone was the assailant. In a case where, on the evidence led by the prosecution, the defence suggests that the accused *or another* could have fired the gun, then the accused is not called upon to offer any evidence on the point and the dictum has no application. In the words of the Court of Criminal Appeal in *Seetin v. The Queen*[1] there was no obligation on the accused in this case "*to offer evidence which was* in his power to offer" when the defence suggested that it was Shanmugam and not the accused who was responsible for the shooting.

In view of these misdirections the question arises firstly, whether this is a fit case to which the proviso to Section 5 (1) of the Court of Criminal Appeal Ordinance would be applicable. Can it be said in the words of the House of Lords in *Stirland's* case[2] that in spite of the misdirections in regard to the provisions of Section 122 (3) of the Criminal Procedure Code and the inadmissible evidence led by Crown Counsel a reasonable jury after being properly directed would on the evidence of Kulasingham *without a doubt* have convicted the appellant ? Learned Counsel for the appellant submitted that it was impossible for the Jury to have inevitably come to that conclusion in view of three vital matters—the fact that the motive was double edged, the absence of injuries on Kulasingham and the evidence of the Ballistics expert in regard to the range of fire. On the question of motive it is obvious that even if Kulasingham did not identify the accused he had every reason to implicate the accused as the assailant. In regard to the absence of injuries on Kulasingham, it is indeed remarkable that he escaped unscathed, although he was seated in close proximity to the deceased and the absence of injuries is not inconsistent with the defence suggestion that he arrived on the scene after the shooting. In regard

[1] *(1965) 68 N. L. R. 316 at 321.*

[2] *(1913) 30 Cr. App. R. 40.*

to the third matter, the Ballistics expert was not a witness at the trial and his deposition in the Magistrate's Court was led in evidence as part of the prosecution case. In that deposition he expressed the opinion that the spread on the body 17″ × 17″ would correspond to a firing distance of approximately 40 feet from a 16 bore No. 4 cartridge fired from a gun of average barrel dimensions. He stated that he was shown the position of the car from where the shooting took place—an item of inadmissible hearsay—and considering the spread and the distribution of the waddings and position of the car he thought the shot could have been fired from the position indicated with a No. 4 cartridge from a gun with a short barrel. The most that can be said about this evidence is that it is not necessarily inconsistent with Kulasingham's evidence that probably a short-barrelled gun was used. The evidence however that a short-barrelled gun was used was of an extremely tenuous nature and depends entirely on the evidence of Kulasingham that the shot was fired from distance of 7½ feet and that he only saw about 18″ of the barrel protruding from the window. This however does not exclude the possibility of the barrel being concealed inside the car. We therefore agree with the submissions of counsel that this is not a case to which the proviso to Section 5 (1) can properly be applied. In the words of the Court of Criminal Appeal in England in *R. v. Haddy*[1] "the Court may apply the proviso and dismiss the appeal only if they are satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty ". It is impossible for us to say that on the whole of the facts and assuming a correct direction the Jury would, without a doubt, have acted on Kulasingham's evidence and found the accused guilty.

Finally there is the question whether we should order a new trial under the proviso to Section 5 (2). This is the second trial which the appellant has faced. At the first trial too he was convicted of murder by a divided verdict of the Jury but that verdict was set aside in appeal. In the history of the Court of Criminal Appeal in this country an accused person has never been tried on a third occasion. We are therefore not disposed to act under the Proviso to Section 5 (2) and order a new trial. In fact learned Crown Counsel made it quite clear that he was not making such an application. The conviction is therefore quashed and the accused acquitted.

Accused acquitted.

[1] *(1944) K. B. 442.*