[COURT OF CRIMINAL APPEAL]

1972 *Present :* **Alles, J. (President), Deheragoda, J., and Rajaratnam, J.**

K. AMARADASA and another, Appellants, *and* THE STATE, Respondent

APPEALS NOS. 157-158 OF 1971, WITH APPLICATIONS 222-223

S. C. 671/70—M. C. Balapitiya, 61319

Criminal Procedure Code—Section 122 (3)—Extent of evidence prohibited by it—Investigation of a cognizable offence—Statement made by witnesses to the investigating police officer—Transpiry therein of names of the accused persons—Reference to it by the Police officer at the trial—Admissibility.

At the trial in respect of an alleged commission of murder, the police officer who investigated the offence stated in evidence that, after his inquiries at the scene of the offence were concluded, he instructed a police constable to search for and arrest the two accused-appellants. He stated in answer to a question put by the Foreman of the jury that he came to know the names of the appellants in the course of his inquiry.

Held, that even if the jury intelligently came to the conclusion that the names of the appellants transpired after the statements of certain witnesses were recorded at the investigation, there was no contravention of section 122 (3) of the Criminal Procedure Code. "What section 122 (3) prohibits is the use of the statement of a witness to corroborate his evidence in Court and this disqualification cannot extend to arrests of suspected persons after the Police inquiries are concluded."

Rathinam v. The Queen (74 N. L. R. 317) distinguished.

APPEALS against two convictions at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *Siva Rajaratnam, G. E. Chitty* (Jnr.) and *L. Jayetileke* (assigned), for the accused-appellants.

Kenneth Seneviratne, Senior State Counsel, for the State.

Cur. adv. vult.

July 18, 1972. ALLES, J.—

The two appellants, who are brothers, were unanimously convicted by the verdict of the jury of the murder of one Jinadasa. The first appellant in addition was convicted of the attempted murder of Jinadasa's wife Gunawathie, and sentenced to 10 years rigorous imprisonment, on that count. At the conclusion of the argument we dismissed the appeals and refused the applications. We now state the reasons for our order.

1 *—A04611—2,808 (01/74)

The deceased Jinadasa was a Police informant. On 30th November Jinadasa made a statement to the Ambalangoda Police and in consequence of this statement Inspector Padiwita gave instructions to Inspector Edwin at about 5 p.m. to arrest Sirisena, the brother of Jinadasa. Edwin arrested Sirisena at about 10 p.m. at his house and he was produced at the Ambalangoda Police Station, soon after midnight on 1st December. Sirisena lived close to Jinadasa's house. The two appellants were brothers-in-law of Sirisena and although their mother lived 9-10 miles away from Sirisena's house, it was elicited in the cross-examination of Josalin, the mother of Jinadasa, who was an occupant of Jinadasa's house that the two appellants were residing in Sirisena's house and that they used to lead the buffaloes from that place for muddying. The suggested motive for the attack on Jinadasa and Gunawathie was that the appellants, having heard that Jinadasa had made a statement to the Ambalangoda Police in consequence of which Sirisena was arrested, took up the cause of their brother-in-law and attacked Jinadasa. Indeed, in answer to a leading question by the Counsel for the appellants Inspector Fernando of the Uragaha Police, within whose jurisdiction the offences were committed, said that he connected the attack on Jinadasa with the arrest of Sirisena by the Ambalangoda Police. Although it was strongly urged by Mr. Chitty that the evidence of motive was inadmissible and based on hearsay, I cannot see anything improbable in the evidence of motive. If Jinadasa was a Police informant and in consequence of any statement by him Sirisena was arrested it is not unlikely that sometime before the fatal attack on Jinadasa, the appellants who, according to Josalin, were in Sirisena's house that day, became aware that Sirisena's arrest was in consequence of Jinadasa's information.

The learned Commissioner referred to this suggested motive by the prosecution and left it to the jury to decide, as judges of fact, whether there was a possibility, as the defence suggested, that the appellants had been falsely implicated.

The transaction in which Jinadasa received fatal injuries and Gunawathie suffered injuries as a result of burns by acid were deposed to by three eye witnesses—Gunawathie, Josalin and Gunasena. According to Gunawathie, when she was breast-feeding her one month old infant about midnight, the intruders came into the house. She stated that somebody called out to her husband by name and when he opened the door the 1st appellant attacked him with a sword, dragged him outside and both appellants and one Edimon attacked him causing fatal injuries. The appellants then tore her gown and underskirt and the 1st

appellant poured acid all over her body including her private parts, in spite of her pleading. They then struck the furniture, radio and other articles with their weapons and caused damage to them. Gunasena ran away after the incident and concealed himself. According to Gunawathie, the two appellants were dressed in khaki shorts and tunic, while Edimon was wearing a khaki shirt and long trousers. They pretended to be members of the Police.

Information was only conveyed to Inspector Fernando of the Uragaha Police the following morning about 7 a.m. by one Seedin. Inspector Fernando left the station at about 7.30, met Gunawathie on the way being removed in a car to the hospital, recorded a short statement from her and reached the scene at 8.35 a.m. He then made his observations, recorded statements including that of Josalin and conducted inquiries. At about 10 a.m. he instructed P.C. Silva to go and arrest the appellants. P.C. Silva searched the mother's house 9-10 miles away and recovered a blood-stained khaki tunic and a pair of khaki long trousers from there, which he found folded under the mattress. He produced them before Inspector Fernando, and they have been marked as productions P 2 and P 3. The appellants could not be traced and they surrendered to Court a month later.

On the evidence led in the case learned Counsel for the appellants have made three submissions which according to him prejudiced the case of his clients. Firstly, he submitted that there was a contravention of Section 122 (3) of the Criminal Procedure Code when evidence was led of Inspector Fernando having instructed P.C. Silva to search for the appellants at 10 a.m. on 1st December after his inquiries at the scene were concluded. Secondly he stated that the evidence in regard to the recovery of P 2 and P 3 from the house of the mother of the appellants was inadmissible and finally it was his submission that the defence of the appellants had not been put to the jury.

In regard to the first point, Mr. Chitty relied on the recent decision of this Court in *Rathinam v. The Queen*[1] 74 N.L.R. 317 and sought to equate the principles laid down in that decision to the facts of this case. When information of a cognizable offence is given to the Police under Section 121, the Police conduct an investigation under Chap. XII of the Criminal Procedure Code. In the course of their investigations they are not confined to the statements of the witnesses who have given evidence in Court. Their investigations may extend not only to statements

[1] *(1969) 74 N. L. R. 317.*

recorded by such witnesses but to all statements recorded in the course of their investigations. They may even act on their own knowledge and suspicions in arresting suspected persons. If Mr. Chitty's submission is taken to its logical conclusion it may result in the hampering of the Police investigations and it will always be open to Counsel to urge that there must have been an indirect violation of Section 122 (3) of the Criminal Procedure Code because necessarily suspects are arrested on the statements recorded by the Police in the course of their investigations. In this case the questions were pointedly put to Inspector Fernando in the following form by Counsel in cross-examination :—

1146 *Q.* Did you connect, Mr. Fernando, the arrest of that Sirisena by the Ambalangoda Police with the incident that took place in Jinadasa's house on the night of the 30th of November ?

A. Yes.

1147 *Q.* I am suggesting it to you that you rushed to the conclusion that Sirisena and others connected with him would have been responsible for the incident at Jinadasa's house on the night of the 30th of November ?

A. Yes.

1148 *Q.* And I am suggesting it to you that that was how the names of the 1st and 2nd accused transpired ?

A. No.

The questions suggested by Counsel for the defence conceives the possibility of suspects being arrested by the Police on their own suspicions and intelligent anticipation of events.

It was urged that the names of the appellants were disclosed only on the statements recorded by the Police of Gunawathie and Josalin and the questions put by the Foreman would seem to indicate that this was the case because he gave the following answers :—

1198 *Q.* When you went to the house of the deceased after your inquiries, you sent police constable Silva in search of these accused and some others ?

A. Yes, in the course of my inquiries.

1199 *Q.* At the time you set out on inquiry you did not know the name of the accused ?

A. That is so.

1200 *Q.* In the course of your inquiries you came to know the names ?

A. Yes.

But even if the Jury intelligently came to the conclusion that the names of the appellants transpired after the statements of Gunawathie and Josalin were recorded I cannot see how there can be a violation of Section 122 (3). What Section 122 (3) prohibits is the use of the statement of a witness to corroborate his evidence in Court and this disqualification cannot extend to arrests of suspected persons after the Police inquiries are concluded. *Rathinam's* case can clearly be distinguished on the facts from the facts of the present case. In that case the Police officer's evidence clearly indicated that he obtained the name of the suspect from the main witness for the prosecution and that he promptly ordered his subordinate officer to arrest him. To make matters worse the learned trial Judge invited the Jury to act on the Police statement as corroborative evidence of the witness' testimony. No such situation arises in the present case.

In regard to the finding of P2 and P3 the evidence disclosed that the appellants were the only able bodied male inmates of their mother's house. True it is that the articles could not be related to each appellant separately, but the finding of blood stained khaki clothes was admissible in the light of Gunawathie's evidence, even if the long trousers belonged to the discharged accused Edimon. Mr. Chitty submitted that the learned Commissioner had misdirected the jury in referring to the weight to be attached to the evidence. He made it perfectly clear in dealing with the evidence of the three eye witnesses, that the entire case depended on identification. He then dealt with P2 and P3 in the following terms:—

> "One other matter, I could not refer to, gentlemen, as far as the facts are concerned, that is, as far as P2 and P3 are concerned the submission has already been made to you—that is about the khaki shirt and the khaki longs. I don't think I need dwell on that at length. Well, it is the position of the Constable that he did find them under the mattress in the house of the 1st and 2nd accused. Crown uses that to corroborate its case, and it says: these people who entered the house were wearing khaki, they have been identified as the 1st and 2nd accused, and a black fat man; on the next day when search was made, the khaki trouser and coat were found in the house of the 1st and 2nd accused with blood stains. The Crown uses that to say that it has corroborated its case; of course that corroborates its case provided you accept the identification that it was the 1st and

> 2nd accused who entered the house that night; but if you are not satisfied on the evidence that it was the 1st and 2nd accused who entered and who were identified, then of course P2 and P3 does not carry the case any further."

It seems to me that what the learned Commissioner was stating to the Jury in this passage is that the burden of proof on the question of identification is on the prosecution and that identification had to be established by the prosecution beyond reasonable doubt on the lines suggested by him earlier when he was dealing with the burden of proof that lay on the prosecution to prove its case, but these two items could further strengthen the prosecution case if the Jury were satisfied on the evidence of identification. I am inclined to take the view that there is no misdirection in the above passage.

Finally there was the point made by Mr. Chitty that the learned Commissioner did not draw attention to the negative evidence that no finger prints of the appellants were found at the scene. There is no evidence that the appellants touched any of the articles in the house. Their finger prints and palm prints were taken in Court and the prints of the inmates of the house were also taken by the Police but these fingerprints were not forwarded to the Registrar of Finger Prints for report. The fingerprints found at the scene may therefore well have been those of the inmates. The absence of finger prints of the appellants does not necessarily mean that the appellants were not present at the time of the transaction and there was no obligation on the part of the trial Judge to draw the attention of the jury to the absence of finger prints.

The learned Commissioner stressed to the jury on more than one occasion that the entire case depended on identification and he concluded his charge in the following terms:—

> "So gentlemen, I would once again tell you that it is for you to decide on facts. As counsel has stressed, the question of identification is paramount. It is only if you are satisfied on identification then you need consider the case further. If you are not satisfied on identification then you must acquit the accused"

It is clear from the verdict of the jury in acquitting the 3rd accused Edimon that they proceeded on the basis of the credibility of the identifying witnesses—The identification of Edimon was not satisfactory and presumably the jury gave the benefit of the doubt to the 3rd accused and acquitted him.

Appeals dismissed.