

[IN THE COURT OF CRIMINAL APPEAL]

1963 Present : Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.

THE QUEEN *v.* R. D. ABADDA

APPEAL No. 8 OF 1963, WITH APPLICATION No. 8

S. C. 38/62—M. C. Kurunegala, 13422

Evidence—Confession—Inadmissibility of even an innocuous portion of it—Use of confession to discredit accused—Illegality—Evidence Ordinance, ss. 25, 156 (3).

The question whether a statement made by an accused person to a police officer is a confession within the meaning of section 25 of the Evidence Ordinance is one that has to be decided upon reading the entire statement. If the statement as a whole contains a statement that the accused person committed an offence or that suggests the inference that he committed an offence, then it would come within the prohibition contained in section 25 of the Evidence Ordinance.

Where the accused's statement contains a confession, the prohibition contained in section 25 of the Evidence Ordinance bars the proof against the accused of not only those portions of the statement which admit guilt or suggest the inference that he committed the offence but also those portions of the statement which when taken out of the context by themselves are innocuous. No portion of a confession can be proved against an accused person.

A statement barred by section 25 of the Evidence Ordinance cannot be used under section 156 (3) for the purpose of discrediting the accused.

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

D. G. Jayalath (assigned), for the Accused-Appellant.

Wakeley Paul, Crown Counsel, for the Crown.

May 30, 1963. BASNAYAKE, C.J.—

The appellant was indicted with the offence of murder by causing the death of Gunandawadu Dcelin Soysa Wickremasinghe on 28th March, 1962. He was found guilty of voluntarily causing grievous hurt and sentenced to undergo a term of five years' rigorous imprisonment.

Of the grounds of appeal stated in the Notice of Appeal, learned counsel for the appellant confined himself to two, namely—

“ (1) The learned Judge permitted the Crown to cross-examine the accused on a statement made to the Police Inspector to the effect that the accused had the knife marked P2 in his hand at the time of the incident. The prosecution alleged that this was the knife used to cause the injury. Under the circumstances of this case, it is submitted that the accused's statement was a confession and its reception offended section 25 of the Evidence Ordinance.

(2) (b) In His Lordship's summing up, the position was not made clear that the jury could arrive at a verdict, considering the evidence as a whole. Instead His Lordship conveyed the view to the Jury that

if they disbelieved the accused in his denial of a statement that the police alleged he made, then they must reject the defence and fall back on the evidence of the witness S. A. Jayasena. It is submitted that the Jury, properly directed, may have taken the view that assuming the accused had the knife P2 with him and considering the location of the injury, that he acted in defence."

In support of the first ground learned counsel referred us to the following record of the proceedings while the appellant was under cross-examination:—

"877. Q. That night the police came to your house and arrested you at about 8.30 p.m. ?

A. Yes.

878. Q. On the 29th night ?

A. Yes.

879. Q. And at your house they recorded your statement ?

A. Yes."

Crown Counsel :

"I intend to put a certain passage to this witness. Might the jury be asked to retire, My Lord."

Court : Yes.

Jury retires at 10.06 a.m.

Court : You might show the portions which you wish to put to Mr. Silva.

Passage :

"On 28.3.62 at about 6 or 6.30 p.m. I garaged the lorry No. 22 Sri 3797 at Tingolla as usual in the garage of the owner one Dharmasena. At about 2 or 2.30 p.m. I bought this knife for Rs. 3 from a hawker at Tingolla to be taken home in the evening for use in the kitchen. It was kept in the lorry. When I was coming about 6 or 6.30 p.m. I brought this knife along with me. At Talahingoda I saw Jayatissa driving the car towards Mawatagama. He saw me and stopped the car. I got into the rear seat. Thenna was seated in the front seat next to Jayatissa the driver. This knife was in my hand.

Mr. de Silva : I object to that passage, My Lord.

Court :

Q. On what ground ?

Mr. de Silva :

Under section 25 of the Evidence Ordinance. This would be tantamount to proving a confession. This knife is what the prosecution is trying to place in his hand. It is a statement made to the police, and placing this before the Jury would be tantamount to proving that this man has made a confession.

Court :

Not necessarily. It does not necessarily follow that the accused made a confession that he used this knife. The question is whether he made an admission that he had the knife,

Mr. de Silva : Here he says he never had a knife.

Court :

I allow Crown Counsel to put this part of the statement to the accused.

Jury return at 10.12 a.m.

Cross-examination (contd.)

882. Q. You told us your statement was recorded by the police ?

A. Yes.

Court :

883. Q. Who recorded it ?

A. The Sergeant.

Cross-examination (contd.)

884. Q. Are you sure of that ?

A. Yes.

Court :

885. Q. Not by the Sub-Inspector ?

He has said that he recorded your statement. Are you contradicting that.

A. It was the Sergeant who recorded my statement."

Thereafter learned Crown Counsel put the above-quoted passage to the appellant sentence by sentence and he denied some of the statements and admitted others. After he had finished his evidence Sub-Inspector Andrews was called and the passage was proved.

The above passage is a part of a statement made by the appellant to the Police and not his entire statement. It would appear that in his statement the appellant went on to state further—

" Then I came to Mawatagama town and stopped on the Kandy/Kurunegala road in front of Bentara Hotel. I got down from the car with the knife under my left arm-pit with the idea of going home. I asked Jayatissa whether he was going immediately. He told me that he would be a bit late. I did not see Tenne there. At that time I heard Soysa scolding someone in filthy language. I asked Soysa, the deceased, as to whom he was scolding. Then he asked me, ' who is the thug, son of vagina ' and so saying Soysa came and assaulted me with hands on my face once. Then I fell down with the knife in hand. He pushed me again and assaulted with hands. Again when Soysa was assaulting with hands, then one or two others also assaulted me with hands and clubs. Then I waved this knife to prevent Soysa assaulting me. I do not know whether Soysa sustained an injury on his hand when waving this knife. When Soysa and others got behind, I ran with the knife towards Malandeniya to my brother-in-law's place, M. D. Sarana's place. I remained at Sarana's place through fear with this knife. I told Sarana about this incident. Then he advised me to go to the police. I told him that I would come to the police today. Today at

about 5.30 p.m. or so I came with this knife to my house at Rambatte with the idea of surrendering at the police station tonight. In the meantime police came and arrested me. I produced this knife as the police came and requested me as the knife I used when Soysa was assaulting me. I did not see Tenne after I got down from the car at the first occasion and I cannot identify and I do not know who the other two persons who assaulted with clubs. They did this from behind. Soysa assaulted me from the front. I did not see Gunasena. I have pain on my left jaw and back of hip and all over body. I was in hiding through fear of getting assaulted by Soysa's people. I have given charge the shirt and the sarong I was wearing at the time of assault. I also gave charge of the knife to the police immediately the police came to my house. I was not angry with Soysa and he was not angry with me. I used to drink tea from his hotel. Last night he was after liquor. Soysa was worse for liquor. I told my father that I came home to go to the police with the knife. This is all I have to state. Read over and explained and admitted to be correct."

The objection taken to the passage that was put to the accused was that it was tantamount to proving a confession. The learned Judge seems to have thought that that passage did not necessarily show that the accused confessed that he used this knife. He treated it as an admission that he had a knife. The question whether a statement of an accused person comes within the prohibition contained in section 25 of the Evidence Ordinance, namely, "No confession made to a police officer shall be proved as against a person accused of any offence", is one that has to be decided upon reading the entire statement. If the statement as a whole contains a statement that the accused person committed an offence or that suggests the inference that he committed an offence, then that statement would come within the prohibition contained in section 25 of the Evidence Ordinance. The expression "confession" in the context is not confined to the incriminating words. It includes the entire statement of which those words are a part. It is not open to the prosecution to take out of their context what appear, when taken by themselves, to be innocuous sentences and then seek to prove them as admissions. It is relevant in this connexion to refer to the view expressed by the Privy Council in the *Anandagoda* case¹ which contains the following passage:—

"The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider

¹(1962) 64 N.L.R. 73 at 79.

whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is none the less a confession even although the accused at the same time protests his innocence. . . . The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt ? ”

We are in respectful accord with what is stated in the words quoted above, and we are of the view that where the accused's statement contains a confession the prohibition contained in section 25 of the Evidence Ordinance bars the proof against the accused of not only those portions of the statement which admit guilt or suggest the inference that he committed the offence but also those portions of the statement which when taken out of the context by themselves are innocuous. In other words no portion of a statement in the course of which an accused makes a confession to a police officer can be proved against an accused person.

In the instant case it is submitted that the statements in question were used under section 156 (3) of the Evidence Ordinance for the purpose of discrediting the appellant. A statement barred by section 25 of the Evidence Ordinance cannot be proved even for that purpose.

We are of opinion that this evidence has been improperly admitted. The improper admission of evidence by itself is not ground for quashing a conviction, but in the instant case the evidence improperly admitted appears to have influenced the jury to accept the evidence of the eye-witness in preference to the version given by the accused.

In regard to the second ground urged by learned counsel it is sufficient to quote the following passage from the learned Judge's summing-up :—

“ As I told you, you have to reject the accused's version as false before you convict the accused of any offence. In deciding whether the accused's evidence is false or not, you are entitled to take into account the matters I have referred to earlier. One of them is his statement to the police regarding the knife. It is an important matter because if as the accused states he had no weapon at all then it makes it more likely that he did not injure the deceased, but in his statement to the police he had been questioned about the knife which was found in his house. It was a brand new knife and I suppose the Police Inspector who searched the accused's house on the following day and came across this knife, would have questioned him about this knife because apparently that was the only likely weapon that was found in the accused's house and he had already recorded the statement of Jayasena as to how the deceased came to be injured. Therefore the Inspector had to question the accused and the accused said that he had purchased this knife that very day at Tingolla and he brought it with him, that he had this knife with him when he got into Jayatissa's car and when he got out of Jayatissa's car intending to go home he had

the knife with him. *Of course, you cannot from this admission that he had the knife say that the accused is admitting that he cut the deceased. These are two entirely different things. You will be grievously wrong if you regard this as an admission that he cut the deceased as well, but you have to consider the statement in relation to the evidence in regard to the knife and that is a matter that affects his credibility. Here he says that he never had a knife with him, that he never made this statement, but the officer who recorded the statement has been recalled and his evidence before you is that such a statement was made and a copy of that statement has been placed before you. Is there any reason for the Sub-Inspector to give false evidence against the accused or are you quite satisfied that the accused did make such a statement and if he did make such a statement, how does it affect his credibility on his evidence on that point? If you reject his evidence on that point, on a point which is material, have you any reason to accept his evidence on other points? Of course you need not necessarily reject his evidence on other points, but you will consider the evidence bearing in mind that he has given false evidence on a material point. His evidence here is also contradicted by the Sergeant. According to the accused he ran away from the scene in order to escape further injury when he was attacked by some two or three persons. He ran home which is a short distance away from this place, he had his meals, he told his home people what had happened and he slept and he got up only the next morning when he only for the first time came to hear that the deceased had died . . . I may say that if a number of people attacked him and he inflicted an injury on one of his assailants he was acting in the right of private defence, and he should be acquitted. If you reject his evidence to the extent of holding that he was the person who cut the deceased, then I should think that you will have little difficulty in rejecting his further evidence as to how he came to be attacked by a number of people and the question whether the accused was acting in the exercise of private defence, or whether he had been offered grave and sudden provocation are matters which you will consider on the basis of the prosecution evidence alone."*

The learned Judge's directions—

- (a) that the appellant's statement to the Police regarding the knife should be regarded as proving the falsity of his evidence on oath,
- (b) that because his evidence is contradicted by the Sergeant the appellant must be regarded as giving false evidence,

are wrong in law, and this is a further ground on which his conviction should be quashed. The appellant is entitled to succeed on both grounds.

We quash the conviction and direct that a judgment of acquittal be entered.

Accused acquitted.