[COURT OF CRIMINAL APPEAL]

1967 *Present :* T. S. Fernando, J. (President), Abeyesundere, J., and Alles, J.

L. PIYADASA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 94 OF 1966, WITH APPLICATION NO. 157

S. C. 37—M. C. Balapitiya, 47067

Evidence Ordinance—Section 27—How much of information received from accused may be proved—"Fact discovered"—Statement made by accused from the dock—Summing-up—Non-direction.

(i) When the Police Inspector who recorded a statement of the accused-appellant in the course of his inquiry under Chapter XII of the Criminal Procedure Code was being examined as a prosecution witness, Crown Counsel sought to prove in evidence, through the witness, two sentences (barring the words " close to the spot ") out of that statement (P22), in terms of section 27 of the Evidence Ordinance. The two sentences were :—

" I hid the sword *under some leaves close to the spot*. I can point out the place to the police. "

The trial Judge then directed that the word " sword " should be substituted for the word " place " and that all that should be elicited from the witness were the words " I can point out the sword to the police ".

Held, that, inasmuch as both sentences appearing in document P22 were admissible under section 27 of the Evidence Ordinance, it was not possible to say that the admission of the document, with the substituted word, could have caused any prejudice to the accused.

(ii) In regard to an exculpatory statement made by the accused from the dock, the trial Judge directed the Jury thus :—

" If you take the view—this is important—that his statement is true or at least it is probably true, then the case for the Crown must fail because it must cause a reasonable doubt in your mind. "

Held, that the charge to the Jury in respect of the dock statement of the accused was unduly unfavourable to the accused and constituted a non-direction on a necessary matter. It was capable of leaving in the minds of the jury the impression that even if the appellant's statement raised a reasonable doubt as to the probable truth of the Crown's case, that was not sufficient to enable him to claim a verdict of acquittal.

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

Colvin R. de Silva, with *Nihal Jayawickrama*, *U. de Z. Gunawardena* and *Miss A. P. Abeyratne*, for the accused-appellant.

T. A. de S. Wijesundere, Crown Counsel, for the Crown.

Cur. adv. vult.

January 27, 1967. T. S. FERNANDO, J.—

At the conclusion of the argument upon this appeal we quashed the conviction of the appellant on the charge of murder but, acting in terms of the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, ordered a new trial on the same charge.

Mr. de Silva, on behalf of the appellant, raised three grounds of appeal which may be set out as follows :—

(1) There was an illegal reception of oral evidence of part of a statement made by the appellant which had been recorded under section 122 of the Criminal Procedure Code ;

(2) That even if it was part of the document that was sought to be admitted in terms of section 27 of the Evidence Ordinance, what was actually led in evidence was a part of the recorded statement as revised in accordance with a direction of the trial judge ; and that such revision was not legally permissible ;

(3) That certain directions to the jury relating to the manner in which the appellant could claim an acquittal constituted a misdirection in law.

The first two grounds above set out may conveniently be considered together. When the Police Inspector who recorded a statement of the appellant in the course of his inquiry under Chapter XII of the Criminal Procedure Code was being examined as a witness called by the prosecution, Crown Counsel informed the judge, in the absence of the jury, that he proposed to prove in evidence, through the witness, two sentences out of that statement. These sentences both appear in document P22 and they are reproduced below :—

"I hid the sword under some leaves close to the spot. I can point out the place to the police."

He said he did not propose to elicit in evidence the last four words of the first of these two sentences, i.e. the words "close to the spot". After hearing argument, the learned judge ruled that he would only allow part of these two sentences to be elicited, and directed that all that should be elicited were the words "I can point out the sword to the police ".

Now the words directed to be so elicited were not the actual words used by the appellant. He had said "I can point out the place to the police". The word "sword" which was substituted for the word "place" was one to be found in the earlier sentence which, according to the judge's direction, was not to be admitted. The relevant part of the direction as appearing in the record of the trial was in the following terms :—

"Omit the words from the statement "I hid the sword under some leaves close to the spot"."

After the making of this ruling and the giving of this direction, the questioning of the Inspector and his answers took the following form :—

Q. "What is that portion of the statement which led you to discover the sword ? "

A. "I can point out the sword to the police."

Q. " You produce a certified copy of that marked P 22? "

A. " Yes ".

In view of the learned judge's ruling and the submission of both counsel thereto which must naturally be assumed in the circumstances, we must also assume that, in spite of the text of P 22 as it appears on record, all that was placed in evidence were the words

" I can point out the sword to the police."

The first ground of appeal was dependent on the criticism that what was placed before the jury was not part of the document forming the record of the statement of the appellant but oral evidence as to its contents. The statement being one required by law to be reduced to writing, its contents could have been proved only by a production of the written document. As to this ground of appeal we are bound to observe that the record shows on its face that P 22 (or that part of it which was allowed) was actually produced in the case as evidence. No doubt, there was a substitution for one of the words ; but that substitution is the subject of complaint in the second ground of appeal to which we could now turn our attention. As to this, Mr. de Silva submitted that what was placed before the jury was part of the appellant's statement in a form that was not employed by the appellant himself. There is some technical merit in this submission, and a trial judge should be careful not to attempt to interpret, or to call upon the jury to interpret, any part of a person's recorded statement except by reference to such other parts of that same statement as may have been admitted in evidence. Moreover, if what an accused person is proved to have stated is to be used against him, it is important to restrict that use to the words actually employed by him and not to embrace other words alleged to be an interpretation of his actual words. In the instant case, however, both sentences appearing in document P 22 were, in our opinion, admissible under section 27 of the Evidence Ordinance, and Mr. de Silva conceded that they were so admissible. In these circumstances we do not find it possible to say that the admission of the document (with the substituted word) could have caused any prejudice to the appellant. The first two grounds of appeal fail.

We note that Crown Counsel, on behalf of the prosecution, expressly informed the judge that he did not seek to lead in evidence the words " close to the spot " appearing in P 22. This was a concession on the part of the prosecution, and our opinion that both sentences in P 22 were admissible under section 27 of the Evidence Ordinance should not be treated at the re-trial as indicating any view on our part that the prosecution is bound to seek to admit them. This concession indicated a fair attitude on the part of the prosecutor, acting within his discretion, and we have no desire to fetter in any way that kind of exercise of discretion.

It would not have been necessary to say anything more here in regard to what took place at the trial in respect of the appellant's statement to the Inspector but for the form (reproduced below) of the question put by Crown Counsel.

Q. "What is that portion of the statement which led you to discover the sword ?"

As we have ordered a retrial, I should like to refer on this occasion also to the observations of the Privy Council in the case of *Kottaya v. Emperor* (1947) A. I. R. (P. C.) at p. 70 in respect of section 27 of the Evidence Ordinance :—

> "The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."
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> "In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this; and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discoverd. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The third ground of appeal relates to a direction by the learned trial judge as to the circumstances in which the appellant could have claimed a verdict of acquittal. The appellant did not give evidence by entering the witness box; instead, he made a statement from the dock in the course of which he related how he surprised the deceased up a coconut tree belonging to the estate of which he was the watcher at this time.

that the deceased came down the tree, pulled out a knife and attempted to stab him whereupon he used a club he had with him to hit the deceased. The blows which proved fatal had been inflicted with a cutting weapon ; the appellant in the course of his dock statement said that these blows had been struck by another man who, he claimed, had turned up in response to cries he raised. In respect of this statement, the trial judge directed the jury thus :—

> " If you take the view—this is important—that his statement is true or at least it is probably true, then the case for the Crown must fail because it must oause a reasonable doubt in your mind."

I may here observe that if the jury thought that the statement was true or probably true, then it must follow that the case for the Crown was false or probably false, not merely that a reasonable doubt was raised in regard to its truth. Moreover, in the form in which the direction was given, we cannot rule out the likelihood of the jury falling into the error of supposing that for a reasonable doubt to arise in regard to the Crown case the statement of the appellant must at least be probably true, the more so in this case where the learned judge did not attempt to explain what constitutes a reasonable doubt except to say that it " must be a real doubt as opposed to a doubt roused by imagination or fancy".

What the learned judge went on to say immediately after the passage reproduced above only served to emphasize what he had already said :

> " You will have to make up your mind whether you can accept it as a truthful statement or as a probably true statement. But if you hold that it is improbable or that it is impossible or that you disbelieve him, then, of course, you must reject that statement."

While there was nothing in this part of his charge that was erroneous in law so far as it went, his direction to the jury did not go far enough. Even if the jury did not consider the appellant's statement to be true or probably true, yet if the statement could have caused them to entertain a reasonable doubt as to the truth of the Crown case the appellant was entitled to claim a verdict of acquittal. There was an omission to give the jury a direction of this nature, a direction which we consider was necessary in the circumstances. Instead, towards the close of his charge, the learned judge repeated himself in the following words :—

> " What is the opinion you form in regard to the statement of the accused ? Do you think it is true or probably true ? If you think it is true or probably true, then you must acquit him because it casts a reasonable doubt on the Crown's case "

The appellant's complaint that the charge to the jury on this point was unduly unfavourable to him and constituted a non-direction on a necessary matter is in our opinion well-founded. It was capable of leaving in the minds of the jury the impression that even if the appellant's statement raised a reasonable doubt as to the probable truth of the Crown's case that was not sufficient to enable him to claim a verdict of acquittal. The ground of misdirection had to succeed and the appeal had therefore to be allowed.

There was a further point arising out of a direction of the learned judge in respect of the defence of person that arose from the appellant's statement. Complaint was made that the judge overlooked the existence in that statement of a reference to what the deceased did with a knife which, the appellant stated, the deceased had with him. Said the judge : "Now, what is the evidence to show that he was exercising the right of private defence of his person ? We know that the deceased had that knife. . . . . One does not know what he did with that knife." This complaint too was well-founded ; but in view of the nature of the order we have made on this appeal it is not necessary to examine further what effect this misdirection on a question of fact was likely to have caused in relation to the verdict.

Case sent back for new trial.