[COURT OF CRIMINAL APPEAL]

1955 *Present:* **Gratiaen J. (President), Pulle J. and Weerasooriya J.**

K. DON GEERIS APPU, Appellant, *and* THE QUEEN, Respondent

APPEAL 13, WITH APPLICATION 19

S. C. 45—M. C. Polonnaruwa, 19,734

Trial before Supreme Court—Failure of prisoner to disclose his defence before trial—Liability to be cross-examined on it—Summing-up—Misdirection—Criminal Procedure Code, s 160,

It is improper to cross-examine a prisoner in regard to his failure to disclose his defence before trial, in the course of the statutory statement made by him under section 160 of the Criminal Procedure Code.

In a trial for murder, the prisoner gave evidence stating that the offence was in fact committed in his presence by one of the witnesses for the prosecution. In spite of protest by his Counsel questions were permitted by Court to be put in cross-examination conveying to the Jury that the defence raised by the prisoner was false by reason of the fact that in his statutory statement he had merely said " I am not guilty " and had not stated that the deceased was stabbed by the witness for the prosecution.

Held, that the cross-examination was improper and that the trial Judge, having failed to uphold the objection against it, should have warned the jury most explicitly, in the summing-up, that the accused was well within his rights in not elaborating his defence at the time he made the statutory statement and that he did not thereby put himself in peril of having his defence rejected.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. B. Perera, with *J. C. Thurairatnam,* for the accused appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 14, 1955. PULLE J.—

The prisoner, K. Don Geeris Appu, was found guilty by a verdict of five to two of having on the 13th July, 1954, committed murder by causing the death of one H. T. Podiappuhamy and was sentenced to death. One of the grounds urged against the conviction was that the learned trial Judge permitted inadmissible questions to be put to the prisoner during his cross-examination, in spite of objection raised by his counsel, on the statement made by him to the Magistrate before commitment under section 160 of the Criminal Procedure Code. It was further submitted that the Judge omitted to tell the jury in his charge that they should not draw any inference unfavourable to the prisoner on that part of the cross-examination and that such omission amounted to

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such a misdirection as to justify the conviction being set aside. At the close of the argument we quashed the conviction and sentence and ordered a re-trial and announced that the reasons for the decision would be put down later in a written judgment.

The question arises as follows : The prosecution relied on the evidence of three witnesses who stated that on the night of the 13th July, 1954, they saw the prisoner stabbing the deceased on the high road leading to a village called Giritale at a spot a short distance away from the boutique belonging to the deceased. One of these witnesses was R. Charles Appuhamy. His version of the incident was that the deceased called at his house at about 8·30 or 9 p.m. As they were engaged in conversation he heard words of abuse being uttered in a loud tone. This apparently was a reference to a part of the incident spoken to by the other two witnesses according to whom the prisoner went up to the boutique armed with a knife and uttered threats that he had come to murder the deceased. The deceased on hearing the shouts left the company of Charles Appuhamy and went towards his boutique, although Charles Appuhamy tried to persuade him to stay back. Then Charles Appuhamy also went in the same direction and he saw the prisoner moving towards the deceased and stabbing him. The prisoner then approached Charles Appuhamy with the knife in hand but the latter ran away. The prisoner admitted his presence at the scene of the stabbing but stated that he saw the deceased being stabbed by Charles Appuhamy. Shortly before, the prisoner was walking on the road on his way home after an unsuccessful attempt to meet the deceased in his boutique. He then heard a talk. It was Charles Appuhamy abusing the deceased in filthy language. He hurried to the spot and then he saw him stabbing the deceased. The deceased leaned on him and fell to the ground. The prisoner then ran away. It was also part of the defence that the prisoner and the deceased were good friends and that, on the other hand, incidents had occurred calculated to create a state of enmity between the deceased and Charles Appuhamy.

The part of the cross-examination of the prisoner to which exception has been taken is recorded as follows and it referred to the prisoner's statutory statement, " I am not guilty ".

" *Q.* You say you are innocent in this case ?

A. Yes.

Q. You were asked in the Magistrate's Court whether you had anything to say in answer to the charge ?

Mr. Pereira : I object to that question.

Q. This is the first time that you are coming out with the story that Charles Appuhamy stabbed the deceased ?

A. I told the Magistrate who came to the scene. He told me . . . .

	Q. We do not want what the Magistrate told you. You filed a list of witnesses.
Mr. Pereira :	This is not permitted at all. I can submit the highest authority on the subject. When an accused person exercises a privilege that the law allows him the Crown has no right to comment on it.
Crown Counsel :	He has submitted two lists of witnesses which are part and parcel of the record. The name of the Magistrate is not on either of them. I am entitled to comment on it, on the fact that he is trotting out this story for the first time in this court.
Mr. Pereira :	The failure on the part of an accused to elaborate on his plea of not guilty cannot be the subject matter of comment, much less of interrogation. "

No ruling was given on the objection. The trial Judge was merely content to observe that he would tell the jury that the Crown had to prove the guilt of the prisoner. The point that the prosecution was apparently seeking to make was that inasmuch as the prisoner did not tell the Magistrate that he saw Charles Appuhamy stabbing the deceased his defence should be rejected as false and a verdict found on the basis that the three alleged eye witnesses called by the prosecution should be believed. The learned Judge omitted to advert to this topic in his charge. In regard to the evidence given by the prisoner in cross-examination all he said was,

" Then he was cross-examined and those questions put to him in cross-examination must be still fresh in your memory. Those questions were put only last afternoon. The case itself has gone on from Thursday last week and that is why I marshalled before you the evidence of some of the witnesses so that you might recall their evidence, but the evidence of the accused is too fresh in your memory for me to quote what he said in cross-examination. "

Comments made by Judges to juries on the failure of an accused person to disclose his defence at an early stage, either when cautioned by the Police or in the course of a statutory statement to a committing Magistrate, have been the subject of many decisions of the Court of Criminal Appeal in England. Among them are *R. v. Naylor* [1], *R. v. Littleboy* [2] and the comparatively recent cases of *R. v. Leckey* [3], *R. v. Tune* [4] and *R. v. Gerrard* [5]. A local case is *R. v. Don Robert* [6] in which, among others, *R. v. Naylor* [1] and *R. v. Littleboy* [2] were considered. Although in the present case no comment of any kind was made in the charge to the jury, the propriety and the effect of the questions put to the prisoner regarding his statutory statement must be determined in the light of the principles laid down in those cases.

[1] *23 Cr. A. R. 177.*
[2] *(1934) 2 K. B. 408.*
[3] *29 Cr. A. R. 128.*
[4] *29 Cr. A. R. 162.*
[5] *(1948) 1 All E. R. 205.*
[6] *(1940) 42 N. L. R. 73.*

In *R. v. Naylor* [1] in answer to the statutory question which is identical in form with that in section 160 of the Criminal Procedure Code the prisoner stated, " I don't wish to say anything except that I am innocent ". Commenting on these words the Recorder in his summing-up stated,

" Now you would imagine a purely innocent young man accused of house-breaking and having these words put to him ' Do you wish to say anything ? '—Surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time, and would make his defence then and there. But he says nothing. "

The Court of Criminal Appeal held that these comments were improper and amounted to a misdirection. Hewart, L. C. J., said,

" When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say : ' I do not wish to say anything except that I am innocent ' ".

The principle laid down in *Naylor's* case[1] was followed in *R. v. Leckey* [2] where the trial Judge repeatedly told the jury that they might draw an inference of guilt by reason of the silence of the prisoner on two occasions when questioned by Police officers. In delivering the judgment of the Court of Criminal Appeal Caldecote, L. C. J., said,

" We think this amounted to a misdirection, and it is proper ground on which the verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth in the interests as much of innocent persons, as it is in the interests of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril. "

In our opinion the questions put to the prisoner were improper inasmuch as they were intended to convey to the jury that the defence raised by him was false by reason of the fact that in his statutory statement he did not state that the deceased was stabbed by Charles Appuhamy. In these circumstances it was the duty of the Judge to have upheld the objection. Having failed to do so at that stage, he should

[1] *23 Cr. A. R. 177.* [2] *29 Cr. A. R. 128.*

certainly have warned the jury most explicitly that the prisoner was well within his rights in having stated, " I am not guilty " and that he did not thereby put himself in peril to have his defence rejected. As no ruling was given on the objection there was, indeed, a special duty cast on the Judge to safeguard the defence against the wrong impression which the jury must almost certainly have received during the cross-examination as to the prisoner not elaborating his defence at the time he made the statutory statement. The omission to direct the jury on the lines indicated amounted to a misdirection entitling the prisoner to have the conviction set aside.

Nothing that we have said is intended to qualify or restrict any legitimate comment the prosecution may make to the jury on the statutory statement of an accused person. There is all the difference between asking a prisoner to explain why he did not outline his defence in his statutory statement and, in a proper case, like one in which the defence at the trial is one of *alibi*, in submitting to the jury that if the defence of *alibi* had been raised earlier the prosecution would have had an opportunity of testing it. *Vide R. v. Littleboy* [1] and *R. v. Don Robert* [2].

For the reasons set out in this judgment we quashed the conviction and sentence and ordered that the prisoner be re-tried.

Fresh trial ordered.