[COURT OF CRIMINAL APPEAL]

1970 *Present:* **Alles, J. (President), Siva Supramaniam, J. and Samerawickrame, J.**

P. P. PETERSINGHAM, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 101 OF 1969, WITH APPLICATION 140

*S. C. 124/1969—M. C. Kalmunai, 33832*

*Evidence Ordinance (Cap. 14)—Sections 25, 26, 27 (1)—Scope of s. 27 (1)—" Person accused of any offence "—Criminal Procedure Code (Cap. 20)—Section 122 (1)—Statement made by a person thereunder—Admissibility in evidence although signature was taken.*

The accused-appellant was charged with murder. The case against him depended entirely on circumstantial evidence. An important item of the evidence was the discovery of certain articles by a police officer in consequence of a statement (P 43) made by the appellant and recorded by the police officer when the appellant was under suspicion and in the custody of the police officer. It was only thereafter that the appellant was brought to his house, the charge was explained to him and he was arrested.

It was contended that the statement P 43 was not admissible in evidence because it did not conform to the provisions of section 27 (1) of the Evidence Ordinance since the appellant was not " accused of an offence " at the time he made the statement which led to the discovery of the articles.

*Held*, that, even assuming that evidence under section 27 of the Evidence Ordinance could be led only if the appellant was a person accused of any offence at the time he gave the information, the statement P 43 made by the appellant was relevant and admissible for the reason that, before he made it, he was well aware that a charge of murder was being investigated against him and that he was being accused of the offence.

*Held further*, that the fact that the statement P 43 was signed by the appellant in contravention of section 122 (1) of the Criminal Procedure Code could not make the statement inadmissible.

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

*Colvin R. de Silva*, with *M. L. de Silva*, *I. S. de Silva*, *W. de Silva* and assigned Counsel *G. O. Fonseka*, for the accused-appellant.

*V. S. A. Pullenayegum*, Senior Crown Counsel, with *Lakshman Guruswamy*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

February 2, 1970. ALLES, J.—

The appellant, a police constable attached to the Kalmunai Police, was convicted by an unanimous verdict of the jury of the murder of a fellow constable of the same Police Station called Aiyathurai. Aiyathurai was alleged to have been done to death on the Wesak night of 12th May, 1968 in Kalmunai town. After the fatal assault his body was enclosed in two gunny sacks tied with rope, the mouth of which had been sewn up and the trussed up body inside the gunny sacks was found the following morning by the side of Mahadevan Road, a distance of 994 feet from the house of the appellant.

The case against the appellant depended entirely on circumstantial evidence. It was the submission of Counsel for the appellant that the directions of the learned trial Judge on circumstantial evidence were inadequate ; that his client had been gravely prejudiced by the admission of inadmissible evidence under the provisions of Section 27 of the Evidence Act and finally that even on an acceptance of the entirety of the items of circumstantial evidence relied upon by the Crown, the case against the appellant had not been proved beyond reasonable doubt.

The learned trial Judge very exhaustively dealt with each item of circumstantial evidence and pointedly drew the attention of the jury to the criticisms of the defence in regard to each single item. On the verdict of the jury, however, we must assume that such items of circumstantial evidence which the learned trial Judge placed before the Jury for their consideration were accepted by them in spite of any criticisms by the defence. Briefly the case for the Crown as established on the evidence was to the following effect :—

About 2.20 p.m. on 12th May 1968, the appellant and the deceased came to the house of Excise Inspector Samarasuriya on a bicycle which the deceased had borrowed from one Thangathurai. After consuming a fair quantity of arrack at Samarasuriya's house the appellant and the deceased entered upon a heated argument in the course of which the appellant deflated the tyres of the bicycle. Samarasuriya thereafter, fearing further trouble, took the appellant and the deceased in his car to the Police Station transporting the bicycle in the dicky of the car. The deceased alighted some distance from the station and the appellant got down at the police station about 3.45 p.m. Police Constable Justin Perera was at the Station at the time and testified to the fact that the appellant alighted from Samarasuriya's car, came to the charge room and pulling out a knife from his pocket abused Aiyathurai and stated that before dawn he will be murdered. The appellant appeared to be the worse for liquor. About 6 p.m. the appellant had met Thangathurai and told him that the deceased was a low caste man and advised Thangathurai not to associate with him and warned him that if he gave his bicycle to the deceased hereafter he would damage it. About 7 or 7.15 p.m. the appellant and the deceased again met outside Krishnapulle's tea boutique and according to Krishnapulle they were exchanging words in the "normal angry way". They were seen again together outside

the gate of the appellant's house about 8 or 8.30 p.m. by Vadivelu and the deceased hailed him as " Thamby, Thamby ". There is no evidence however of any trouble between them at that time but on the evidence of Samarasuriya, Justin Perera and Krishnapulle it would appear that there were strained feelings between the parties until late in the evening.

According to the autopsy the deceased must have met with his death between 8 p.m. and 12 midnight on 12th May. The deceased sent some food to his wife Karunawathie through the witness Thangathurai about 7.30 p.m. with a message that he would come later but he never came home that night. It would however appear from the stomach contents of the deceased that he had partaken of a meal somewhere and probably also consumed more liquor because the Doctor noticed a strong smell of alcohol in the stomach contents. The appellant came to the Police Station about 10.30 p.m. to examine the duty roster. It was suggested by the Crown that he did so after the murder in order to verify the movements of the night patrol, to enable him to dispose of the body without detection, but there is nothing in the evidence to suggest that this was the case. The evidence however establishes that the appellant and the deceased were out of their respective houses at the relevant time. After the deceased was seen outside the house of the appellant at 8 or 8.30 p.m. there was a complete absence of evidence about his movements on the fateful night until his body was discovered the following morning by the side of Mahadevan road.

Karunawathie on hearing of the finding of the body on the morning of the 13th and having learnt from witness Gopalaratnam that her husband had been seen in the company of the appellant the previous evening met the appellant and addresssed him in the following terms— " I have heard that my husband was seen going along on the previous evening with you. Where is he ? ". To this query the appellant gave the following cryptic reply—" He did not come along with me, nor did I see him ". It was the submission of the Crown that this was a false statement which suggested that he did not see the deceased on the 12th while the defence contended that what the appellant sought to convey to the widow was that the deceased did not come along with him in the evening. One would have expected the appellant, on learning of the finding of the body, to at least inform the widow that the deceased was constantly in his company the previous evening. The appellant invited the widow to come into the house and when she wanted to go to the Police Station tried to put her off by saying " What's the hurry ? ".

Apart from this curious conduct of the appellant, the Crown also relied on two other items of circumstantial evidence—the presence of five tiny specks of human blood on the wall of the appellant's house and the presence of several minor abrasions on the back of the appellant's hands, suggesting that his hands had come into contact with some rough surface on the ground when he was attempting to drag a weight.

However the learned trial Judge characterised as the " most important " item of circumstantial evidence the discovery of an improvised carrier and some rope in an abandoned garden not far from the place where the body was discovered. These articles were discovered by the Police in consequence of the statement of the appellant marked P 43 which reads as follows :—

> " I then removed the improvised wooden carrier and the coir ropes and threw it into an empty garden on my left hand side ."

Learned Counsel for the appellant strongly urged that this item of evidence was inadmissible and gravely prejudiced his client and submitted that the finding of these articles was not relevant for the purposes of the case.

The appellant was under suspicion from the morning of the 13th May ; a statement had been recorded from him on the 15th ; he was under constant Police surveillance from the 13th onwards ; his house was searched on the morning of the 13th and a Police guard placed there on duty. On the morning of the 16th Inspector Senevíratne was detailed by the A.S.P. to take over the inquiry and he summoned the appellant and his wife to the Traffic Office, Kalmunai, and commenced to record his wife's statement which took the greater part of the day and then commenced to record the appellant's statement ; the specks of human blood in the house were discovered on the evening of the 16th and according to the Inspector the appellant was taken into custody at 5 p.m. on the 16th but he was not informed of the charge. The appellant's statement to Inspector Seneviratne was recorded from 6.15 p.m. onwards in the course of which the appellant was informed of the matter which was being investigated. In the course of his statement he stated what was contained in P 43 and that night about 12.20 a.m. the appellant took Seneviratne along a sandy lane, turned left at Mahadevan Road and came to the garden of Ahamadu Lebbe from where he picked up the improvised wooden carrier (P. 10), and seven pieces of coir rope (P. 13, P. 14, P. 15 *a* to *e*). The pieces of rope were in close proximity to the carrier. It was thereafter that the appellant was brought to his house, the charge was explained to him and he was arrested. This was 3.45 a.m. on the 17th May.

The appellant owned a bicycle—P. 20— which had been given to him for his Police duties and according to the Inspector the carrier P. 10, which consisted of four pieces of stick tied at the ends with rope in the form of a square could be attached to the stand of the appellant's bicycle and the gunny sacks containing the body could be rested on it. The carrier and the ropes were found about 60 to 70 yards from the place where the body was discovered and about a ½ mile from the house of the appellant. On the morning of the 13th about 8 or 8.30 a.m. the appellant came riding his bicycle to the Chelvanayagam Service Station and got his bicycle washed down by the serviceman Ranatunga and scrubbed it himself. On being asked by Ranatunga whether it was inspection

day the appellant answered in the affirmative. It is in evidence that in fact the inspection day was fixed for the 16th May. Of the pieces of rope found in the garden one piece P. 13 was similar in thickness and in the nature of the fibres and twist to the pieces of rope P. 11 *a* to P. 11 *d* with which the body was tied, but the Analyst was unable to express an opinion whether it formed parts of the same rope owing to the frayed conditions of the ends. A similar opinion was expressed by the Analyst in regard to a piece of rope P. 12 found in the well of the appellant's garden.

It was strongly urged by Counsel that in the absence of evidence that the appellant used his bicycle on the night of the 12th-13th May or at least that the body was transported on a bicycle, the finding of the carrier and the ropes was irrelevant. I am however inclined to accept the submission of the Crown that in the background of the rest of the circumstantial evidence—the relations between the appellant and the deceased on the night of the 12th, the threat uttered by the appellant, the finding of injuries on the back of his hands and the discovery of human blood in his house this evidence is not entirely irrelevant. The condition in which the body was found inside the gunny bags suggests that the fatal assault occurred elsewhere and that the body was transported to the place where it was subsequently found ; it is very likely that the assailant transported it on a vehicle to avoid detection ; the appellant owned the means of transport on which the gunny bag containing the body could be transported with the aid of an improvised carrier, if it was firmly secured to the carrier with ropes and the appellant, on what appeared to be a false pretext, got his bicycle washed and scrubbed the following morning. In *Queen v. Ramasamy* [1] evidence of the finding of a gun and cartridges on the statement of the accused was held to be relevant although the gun discovered was not proved to have caused the injuries on the victim. The suggestion of the Crown was that the gun and the cartridges could have been used to commit the offence. On a parity of reasoning, on a lesser key, the carrier P10 could have been used to transport the body.

Counsel for the appellant did not contend that the directions of the learned trial Judge on the weight to be attached to the statement of the appellant in P43 were in any manner open to criticism, but it was submitted that the statement was not admissible, because it did not conform to the provisions of Section 27 of the Evidence Act since the appellant was not "accused of an offence" at the time he made his statement which led to the discovery of the carrier and the ropes.

Section 27 (1) of the Evidence Ordinance reads as follows :—

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

[1] *(1964) 66 N. L. R. 254.*

Two views are possible in regard to the interpretation that should be given to the words " person accused of any offence " in the Section. They may be read as referring to and describing the person against whom a statement may be proved. Alternatively, they may be read as indicating that information may be proved against the person only if he was, at the time the information was received from him, a person accused of any offence in addition to being a person in the custody of a police officer."

In *Deonandan Dusadh v. Emperor* [1] the accused who had wounded his wife went to the Police station immediately and stated to a Police officer that he went to a certain room where his wife was sitting and wounded her. In consequence of this information the Inspector arrested him and went immediately to the house and discovered the dead body of the wife. The Patna High Court held that, although the accused was in the custody of the Police, he was not accused of an offence and therefore his statement was not admissible. This view has been followed by the High Court of Andhra in *In re Malladi Ramaiah* [2] and reference is also made in the latter decision to certain decisions of the Lahore High Court which take the same view.

A Special Bench of the Patna High Court consisting of three Judges in *Santokhi Beldar v. Emperor* [3] overruled the decision in *Deonandan Dusadh v. Emperor* (supra) and held that in similar circumstances when a person states he has done certain acts which amount to an offence he accuses himself of committing the offence, and if he makes the statement to a Police officer, as such, he submits himself to the custody of a Police officer and any statement made in such circumstances which lead to the discovery of any fact would be admissible under Section 27. This view had been adopted earlier by the Calcutta High Court in *Legal Remembrancer v. Lalit Mohan Singh* [4] and had been followed subsequently by the High Court of Bombay in *State v. Memon* [5]. In the latter case after reviewing the authorities the Court held that the words " information received from a person accused of an offence " in Section 27 cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person at the time when that statement is sought to be received in evidence against him. Finally there is the decision of the Supreme Court of India in *State of Uttar Pradesh v. Deoman* [6], which has relied upon by Crown Counsel and which contains the observation of Shah J. who delivered the main judgment—

" that the expression 'accused person' in section 24 and the expression 'a person accused of an offence' in section 25 have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The expression 'accused of any offence' in section 27 as in section 25, is also descriptive of the person

[1] *(1928) A. I. R. Patna 491.*
[2] *(1956) A. I. R. Andhra 56.*
[3] *(1933) 34 Cr. L. J. 349.*
[4] *(1922) A. I. R. Cal. 342.*
[5] *(1959) A. I. R. Bombay 534.*
[6] *(1961) 61 Cr. L. J. 1504.*

against whom evidence relating to information alleged to be given by him is made provable under section 27 of the Evidence Act. It does not *predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.*"

I agree with Counsel for the appellant that this observation of the learned Judge is obiter because the main question for determination in the case was whether there was such a discrimination between persons in custody and persons not in custody which offended Article 14 of the Indian Constitution, but this observation coming as it does from very high authority is entitled to the most weighty consideration.

In his judgment in the same case Hidayatullah J. at p. 1525 adopted a different approach. He said—

"It would appear from this that S. 27 of the Indian Evidence Act has been taken bodily from the English law. In both the laws there is greater solicitude for a person who makes a statement at a stage when the danger in which he stands has not been brought home to him than for one who knows of the danger. In English law, the caution gives him the necessary warning, and in India the fact of his being in custody takes the place of caution which is not to be given. There is, thus, a clear distinction made between a person not accused of an offence not in the custody of a police officer and one who is."

There are thus conflicting decisions in the Courts of India as to the meaning that should be given to these words in S. 27.

The words "person accused of any offence" appear in Section 25 and as section 27 is a proviso to section 25 as well as section 26, according to the trend of judicial decisions, there is no reason why the interpretation of the words in section 27 should be any different from the construction that could be reasonably placed on the words in section 25. In section 25 there is an absolute ban on information made to a police officer at any stage and therefore it is reasonable to argue that the words "person accused of any offence" in section 27 does not necessarily mean a person against whom a formal accusation for an offence is made. On the other hand, this section is identical with section 27 of the Indian Evidence Act and it appears that prior to the enactment of the Indian Evidence Act provision was made in respect of the same matter by an amendment to section 150 of the Criminal Procedure Code of 1861 by Act No. 7 of 1869 and the section as amended read :—

"Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, *or* in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered may be received in evidence."

In that provision the words " person accused of any offence " must mean a person accused of any offence at the time the information was received from him. If they are read to refer to or describe a person against whom evidence is sought to be led the alternative condition in the provision would be rendered meaningless and nugatory.

We do not think it necessary to decide in this case which interpretation of these words in section 27 is correct. For, even assuming that evidence may be led only if the appellant was a person accused of any offence at the time he gave the information, we are unable to take the view that the statement made by him should have been excluded. All the circumstances in this case point to the fact that a charge had been made against the appellant before he made his statement, part of which has been proved in evidence. It is true that sub-inspector Senevíratne purports to speak to " arrest " and " taking into custody " but the statements made by this youthful and over-enthusiastic police officer, who was handling his first investigation in a murder case, in regard to matters which involve mixed questions of fact and law, are not in our view entitled to much weight. Even if there is absence of proof that the appellant was in the position of a person accused of an offence at the time he made the statement, we are unable to take the view that it is anything other than a matter that is purely technical. The appellant was a police officer and was aware of the procedure that is adopted in the course of an investigation. He was aware that the investigation related to the murder of Aiyathurai and that in that investigation his house had been searched and his statement recorded. He was therefore well aware that a charge of murder was being investigated against him and that he was being accused of the offence.

Counsel further submitted that the statement was inadmissible because it was signed by the appellant in contravention of section 122 (1) of the Criminal Procedure Code. I do not think such an irregularity in procedure can make the statement inadmissible. As Crown Counsel remarked if for instance an oath had been administered—a matter which was also prohibited under the section—it would not have made the statement inadmissible. Similarly if the appellant, who in this case must be presumed to be quite familiar with a police investigation under Chapter XII, chose to adopt his statement by affixing his signature to it, it can hardly be said to affect its admissibility. In *The King v. Landy* [1] this Court held that such an irregularity did not prejudice the maker and did not occasion a failure of justice.

We are therefore of the view that the statement P 43 was properly admitted into the case and that the contents thereof were relevant. The learned trial Judge correctly directed the Jury that this statement only established that the appellant had knowledge of the fact that the improvised carrier and the ropes were in the abandoned garden of Ahamadu Lebbe.

[1] *(1941) 42 N. L. R. 317.*

I shall now deal with the submission of Counsel for the appellant that the directions of the learned trial Judge on Circumstantial Evidence were inadequate. It was his complaint that the trial Judge did not pointedly draw the attention of the jury that each single item of Circumstantial Evidence on which the Crown relied had to be proved beyond reasonable doubt, although the jury were in fact directed that they should consider the cumulative effect of the proved facts in deciding whether the Crown had established its case. While it may have been better if the attention of the jury had been drawn to this matter when the Judge was dealing with Circumstantial Evidence, we do not think that in the instant case his omission to do so has occasioned a failure of justice. Before he gave his directions on Circumstantial Evidence he directed the jury on the burden of proof and told them " that if they were left with any reasonable doubt in regard to any matter which the prosecution must prove it becomes your duty in law, it is indeed the right of the accused to demand at your hands that you give him the benefit of the doubt. " Again after dealing with each single item of Circumstantial Evidence at the conclusion of his charge he repeated that the jury " must be satisfied beyond reasonable doubt in regard to each matter which the prosecution must prove. " The case for the prosecution being entirely dependent on Circumstantial Evidence, these directions can only mean that each item of Circumstantial Evidence must be proved beyond reasonable doubt.

Finally there was the submission of Counsel, that even accepting the entirety of the prosecution case, the circumstantial evidence only amounted to a case of grave suspicion. We are unable to agree. In our view the cumulative effect of the proved facts, in the absence of an explanation was quite sufficient to rebut the presumption of innocence and establish that the appellant was at least one of the assailants. It is unnecessary to detail, these facts which have been set out fully in the earlier part of this judgment.

It remains for us to only consider whether the verdict of murder should be permitted to stand. The learned trial Judge adequately directed the jury on the possible verdicts in the case but the jury, as they were entitled to do, came to the conclusion that a murderous intention had been established.

The learned trial Judge invited the jury to draw an inference as to whether or not the appellant had a murderous intention from the injuries that were found on the deceased. There was also evidence that on the previous evening the appellant had uttered a threat that he would murder the deceased before the following morning. This threat had been uttered when the appellant was under the influence of liquor and was staggering drunk. The evidence of police constable Perera who deposed to the fact that the threat was uttered by the appellant, had been attacked by the defence and the learned trial Judge dealt at length with the considerations put forward by the defence why that evidence should not be accepted. The evidence of the threat, even if it was accepted by the jury, had still to be assessed and evaluated and the jury had to consider whether, having

regard to the circumstances in which the threat was made, it was a real threat to kill or whether it did no more than reveal animosity towards the deceased. There was evidence that later in the evening the appellant and the deceased were seen together talking to each other in what may have been an angry way but no evidence of any violence or even attemptod violence directed by the appellant against the deceased has been led. It was therefore necessary in our view for the learned Judge to have given a direction to the jury as to how this evidence and the threat uttered by the appellant should be considered with reference to the question of intention. In the absence of such a direction, we do not think it safe to allow the conviction for murder to stand. In any view of the matter however, the appellant was guilty of the offence of culpable homicide not amounting to murder. We therefore substitute a verdict of culpable homicide not amounting to murder for the verdict of murder and sentence the appellant to ten years rigorous imprisonment. Subject to these variations the appeal is dismissed and the application refused.

*Verdict altered.*