[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Gunasekara J. (President), Pulle J. and Swan J.**

V. THURAISAMY, Appellant, *and* THE QUEEN, Respondent

APPEAL 51 WITH APPLICATION 81

S. C. 11.—M. C. Mannar, 13,646

Criminal Procedure Code—Evidence in rebuttal—Section 237(1)—Scope of—Evidence Ordinance, s. 155.

Accident—Burden of proof—Misdirection—Penal Code, s. 73.

Evidence of admissible admissions by the accused that could have been given before the close of the case for the prosecution cannot be given subsequently as evidence in rebuttal to impeach the credit of the accused as a witness.

In a trial for murder by shooting the fact that the accused gives evidence to the effect that the gun went off accidentally does not place on him a burden to satisfy the jury that his version is probably true. The question is not whether there are circumstances bringing the case within the exception of accident but whether the prosecution has proved that the accused fired the gun intentionally, and he is entitled to be acquitted if there is a reasonable doubt on that point.

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

V. S. A. Pullenayagam, for the accused appellant.

J. G. T. Weeraratne, Crown Counsel, for the Crown.

October 15, 1952. GUNASEKARA J.—

At the close of the argument in this case we quashed the conviction of the appellant and ordered a new trial, and we said that we would give our reasons later.

The appellant, a man of 27, was convicted of the murder of a young woman of 17 named Mariyai by shooting her. He was a servant in the employ of a landowner named Soosapillai living in the village of Manalkoddai in Mannar. The deceased too lived in that village with her parents ; and a young man named Subramaniam, to whom she was engaged to be married, lived with them in the same house. At about 8 a.m. on the 20th March last when the deceased was in her garden she was fatally wounded by the discharge of a shotgun which belonged to Soosapillai's father Roche and was in the appellant's hands at the time. Hearing the report of the gun and a cry of distress, Subramaniam ran up from a vegetable plot close by, and the appellant shot at him, wounding him on a leg, and ran away. At the trial the appellant gave evidence to the effect that the gun went off accidentally and wounded the deceased, and that he shot at Subramaniam in self-defence when

the latter came at him with an uplifted mammoty. The main grounds of appeal relate to the admission in evidence of certain statements alleged to have been made by the appellant about his relations with the deceased and about a visit early that morning to Roche's house where Soosapillai was living, and to the presiding judge's directions on the effect and bearing of that evidence and on the burden of proof.

The prosecution closed its case without adducing evidence of any facts constituting a motive for the alleged murder. For proof that the appellant shot the deceased intentionally it relied in part upon evidence to the effect that on the morning of that day, before the shooting, the appellant had taken the gun from Roche's bedroom in the absence of both Roche and Soosapillai from their house. This evidence was given by a woman named Sinnamma, of Pallimunai, who claimed to have been at Roche's house that morning. The appellant denied the truth of this evidence and said that on the contrary Soosapillai himself had given him the gun and three cartridges early that morning and ordered him to go to Soosapillai's fields and see if they had been damaged by cattle and elephants. In cross-examination it was put to him by crown counsel that he had been on very friendly terms with the deceased, that she had promised to marry him, and that two weeks before her death he had asked her to marry him. He denied these suggestions, and also denied a further suggestion that on the 21st March he had made the statements in question to a police officer. After the close of the case for the defence the crown counsel, with the leave of the presiding judge, called a police sergeant named Jayawardene to give evidence in rebuttal of this denial. This witness said that the appellant made a statement to him at 7.35 a.m. on the 21st March in the course of which he said :

> " About 5 or 6 months ago I came into terms of intimacy with deceased Maryai. She promised to come along with me. About two weeks ago I saw her passing my house and I questioned her whether she would keep to her promise and come along with me. I asked this from her because I learn that she is to be given in marriage to one Suppramaniam who is staying in her house. She then told me not to speak of any marriage or intimacy with her. I became hurt and disappointed."

and that later in the statement the appellant also said—

> " The following morning namely the 20th instant about 7 a.m. I went to the house of Soosapillai. He and his wife were not at home, there was only Pallimunai woman. Name not known to me."

The point is taken in the grounds of appeal that the admission of this evidence was obnoxious to the provision in section 25 (1) of the Evidence Ordinance (Cap. 11) that no confession made to a police officer shall be proved as against a person accused of any offence. Mr. Pullenayagam preferred however to base his case upon an argument that even otherwise the use that was made of the evidence resulted in a miscarriage of justice.

If the admission of these statements was obnoxious to section 25 (1) there can be no question that the conviction could not stand. If it was not, then it was open to the prosecution, under section 21, to prove them as admissions of relevant facts, and the question arises whether in view of this circumstance there was a proper exercise of the learned judge's discretion when he granted the crown counsel leave to call a witness to prove them after the close of the case for the defence.

After the defence has closed its case the prosecuting counsel may, in terms of section 237 (1) of the Criminal Procedure Code (Cap. 16), by leave of the judge, call witnesses in rebuttal. The principles upon which a judge should exercise his discretion to grant or refuse such leave, or should of his own motion take any evidence after the close of the case for the prosecution, have been laid down in several cases. It has been observed more than once, as was said by Abrahams C.J. in *Vandendriesen v. Houwa Umma*,[1] " that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution". Evidence in rebuttal should be permitted only in a case where a matter has arisen *ex improviso* (*R. v. Charles*.[2]) or the evidence was not admissible before the prosecution case was closed (*R. v. Ahamadu Ismail* [3]).

The ground upon which the prosecution was allowed to call a witness in rebuttal in the present case is stated in the learned judge's order as follows :

> " In the interests of justice the court should allow this evidence to be led because the court must see that such evidence as is permissible is led which would promote the cause of justice in seeing that the guilty are punished and the innocent are acquitted."

It seems, however, to be manifestly unjust that the prosecution should have been permitted to adduce at that stage evidence which, if it was admissible at all, could have been adduced before the appellant entered upon his defence : for the prosecution was thereby enabled to withhold until after the close of the case for the defence an important part of its own case, consisting of the whole of the evidence of a motive and a part of the evidence of preparation for the commission of the offence charged. This aspect of the admissibility of the statements in question, as substantive evidence of relevant facts, appears to have escaped the attention of the learned judge when he made this order, and he refers there only to a less important aspect of their admissibility, as evidence admissible under section 155 of the Ordinance to impeach the credit of the appellant as a witness. Had the true character of the statements been appreciated it would have been apparent that it was not possible to deprive them of their evidentiary value as admissions when they were used for the purpose of impeaching the appellant's credit as a witness. This is demonstrated by what the learned judge himself has said in his summing up. He explained to the jury at an early stage

[1] *(1937) 39 N. L. R. 65 at 66.* [2] *(1941) 42 N. L. R. 409.*

[3] *(1940) 42 N. L. R. 297.*

that evidence of these statements " was allowed to be led because that evidence was sought to be led here in order *to impeach the credibility of the accused when he stated that he had nothing to do with that girl Mariyai,* who is the deceased in this case ". He next referred to that evidence as having a bearing on the issue as to whether the appellant fired the gun intentionally :

> " Now how can you find out whether the accused did have a murderous intention or not when he fired this gun ? If you accept the evidence for the prosecution that (then ?) it was *a deliberate act of shooting which the accused committed because of certain reasons which according to the case for the Crown the accused himself had stated to that Police Sergeant Jayawardene.*
>
> The accused denies that there is any ill-feeling between this woman Mariyai and himself. But this part of the accused's evidence the Crown sought to impeach by calling the evidence of Police Sergeant Jayawardene who stated that the accused told him that he has been loved by this girl Mariyai and Mariyai asked him not to have anything to do with her or talk to her. That evidence was led and allowed to be led because the Crown is entitled to do that. *The accused says there is no reason whatsoever and it was a sheer accident on his part.* In order that you may attach the proper weight to that evidence the Crown led the evidence of another witness Police Sergeant Jayawardene *to whom the accused had said something different* soon after his arrest."

There is in this passage a clear direction that there was evidence of an admission by the appellant of facts constituting a motive for the shooting. The same direction is contained in the next reference to this evidence where, in his discussion of the evidence given by Subramaniam, the learned judge says—

> " According to the prosecution he was regarded as a more suitable husband than the accused *who too wanted the girl to go with him and she refused.*"

The only evidence that the appellant wanted the girl to go with him and she refused is his admission. Finally, the learned judge directed the jury that the exception of grave and sudden provocation had not been established ; and what he said involved a direction that the appellant's statement to the sergeant was evidence that the deceased had broken a promise of marriage :

> " Another matter that may just occur to your mind is whether there was any provocation. *The only provocation is that the girl has jilted the accused.* If there was any provocation it must be both grave and sudden provocation. *If the girl had refused to marry the accused two weeks ago,* you cannot say it was a sudden provocation because the only kind of provocation that is known to us which has the effect of reducing what would otherwise be murder to culpable homicide not amounting to murder is grave and sudden provocation. There is no sudden provocation in this case."

In our opinion there has been a miscarriage of justice resulting from a wrong exercise of the presiding Judge's discretion to allow the prosecution to call evidence in rebuttal. The evidence in question, constituting as it did the only evidence of a motive for the alleged offence and corroboration of the evidence of preparation, may well have tipped the scale against the appellant, even if the jury did not infer from all the evidence adduced by the prosecution that he made a confession to the police sergeant.

We also agree with the contention that there has been a misdirection on the burden of proof. Although several passages in the summing-up contain a correct direction it seems to us that the jury may well have been misled by the language used in some of the references to the appellant's evidence that the gun was discharged accidentally. The learned judge said, for instance,—

> " According to section 73 of the Penal Code, a person in the position of an accused is not responsible for any injury caused to another *if it can be proved* that such injury was the result of an accident over which he had no control."

The appellant would have been entitled to an acquittal, however, even if it was not proved that the injury was the result of an accident but there was a reasonable doubt on that point. The question for the jury was not whether there were circumstances that brought the case within an exception but whether the prosecution had discharged the burden that lay on it to prove beyond reasonable doubt that the firing of the gun was not accidental. The learned judge also said—

> " On this question of intention there is a commonsense principle that is always called in by the prosecution in order to prove murderous intention against any prisoner, that is every sane adult is presumed to intend the natural and probable consequences of his voluntary acts—mind you voluntary. *If you accept the evidence of the accused* that the gun went off involuntarily, then of course this principle will not apply."

Again he said, after he had discussed the case for the prosecution,—

> " As against this evidence we must consider the evidence of the accused. In the case of his evidence *he has got to satisfy you on a balance of probability that what he says is true* not beyond a reasonable doubt but on a balance of probability what the accused says is acceptable to you."

As in the case of *R. v. Dionis* [1], it was a misdirection to tell the jury that there was a burden on the appellant to satisfy them that his version was probably true.

New trial ordered.

[1] *(1951) 52 N. L. R. 547.*