[COURT OF CRIMINAL APPEAL.]

1943 *Present :* **Hearne, Keuneman and Jayetileke JJ.**

THE KING *v.* PETER PERERA.

5—M. C. Kalutara, 17,274.

Evidence—Answers to questions put by Superintendent of Police—Subsequent criminal charge against witness—Admissibility of evidence—Answer not given under compulsion—Evidence Ordinance, s. 132 (3).

Where questions are put to a witness by a Superintendent of Police in the course of an inquiry, and where the evidence given by the witness is led against him in a subsequent criminal proceeding,—

***Held* that the protection afforded by section 132 (3) of the Evidence Ordinance arises only when it appears that a Court makes a witness understand impliedly or explicitly that he has no option but to answer, in other words, when he is constrained to answer.**

***The King v. Weerasinghe* (8 C. L. Rec. 36) distinguished.**

APPEAL from a conviction by a Judge and Jury before the Western Circuit.

N. Nadarajah, K.C. (with him *B. Jayasooriya* and *H. Wanigatunge*), for the accused, appellant.—The conviction in this case is based entirely on circumstantial evidence. On the facts there was misdirection and non-direction, in the summing-up, in regard to various material points. A judge in summing-up is bound to put every defence, however weak, before the jury—*R. v. Dinnick*[1]. Where a charge depends upon circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, and it is a misdirection to fail to point out to the jury that an alternative innocent interpretation may be put on the proved facts—*Hodge's Case*[2]; *Emperor v. Browning*[3]; *R. v. Vassileva*[4]; *Taylor on Evidence, Vol. I., paragraph 68.* On the evidence the finding is reasonably possible that the deceased was shot by a person other than the appellant.

At one stage of the preliminary inquiry it was one Siyaneris and not the appellant who was charged with the commission of the offence. The Magistrate who conducted the inquiry admits in his evidence that even at that stage he suspected the appellant when the latter gave evidence as a witness. The answers to certain incriminating questions put to the appellant when he was in the position of a witness have been improperly admitted as evidence in the present case (*vide* section 132 (2) of the Evidence Ordinance (Cap. 11)). It is not clear whether it was the Magistrate or the police officer who put those questions. Even if the police officer put the questions he was only doing so on behalf of the Magistrate for, according to section 392 of the Criminal Procedure Code, it was the Magistrate who conducted the prosecution. In the circumstances the appellant was bound to answer all questions. The question of compulsion is one of fact. Before the witness was asked any

[1] *3 Cr. App. R. 77.*
[2] *168 E. R. 1136.*
[3] *18 Cr. L. J. 482.*
[4] *Cr. App. R. 228.*

incriminating question it was the duty of the Magistrate to have warned him as required by section 132 (3) of the Evidence Ordinance—*The King v. Weerasinghe* [1]; *Ganga Sahai v. Emperor* [2]; *The Queen v. Gopal Doss et al* [3]. In India there are some conflicting decisions, all of which have been reviewed in *Reddi v. Reddi* [4]. The position would be different where a witness volunteers to give evidence—*Rex v. Rahiman* [5]. For meaning of "incriminating question" see *The Queen v. Boyes* [6] and *Phipson on Evidence* (8th ed.) 199.

M. W. H. de Silva, K.C., A.-G. (with him *H. W. R. Weerasooriya, C.C.*) for the Crown, called upon to address on section 132 of the Evidence Ordinance.—The terms of section 132 are quite clear. The section is an attempt to reconcile three principles of law. In England the third principle is sacrified for the second. The mere fact that a witness is expected to answer questions does not mean compulsion by Court. A witness is not compelled to answer every question put to him by Counsel. It is only when a witness is definitely compelled by Court to answer that the provisions of section 132 would be applicable—*Emperor v. Banarsi* [7]; *Reg. v. Coote* [8]. The statements made by the appellant to the Magistrate were made voluntarily and in the course of an inquiry under section 153 of the Criminal Procedure Code.

Cur. adv. vult.

September 16, 1943. HEARNE J.—

The appellant was convicted of the murder, on June 5, 1942, of a woman he had married on April 28, about six weeks previously. He has appealed on the law and has sought leave to appeal on the facts.

The prosecution established that he had a motive for murdering his wife. To that part of the case against the appellant it is unnecessary to refer in detail. It depended in the main not on oral but on documentary evidence, and in our opinion it established that, if the appellant murdered his wife, he certainly had a motive for doing so, inadequate no doubt as any motive for murder must be taken to be.

Opportunity was also proved. The appellant was in close proximity to the deceased at the time of her death and she was shot beyond doubt with a weapon, a shot gun, which had up to the 21st May admittedly been in his possession.

One of the points the Jury had to consider was whether the gun had thereafter passed out of his control or not. It had been kept by the appellant under his bed in a room occupied by him and his wife in the house of Marcelina Cooray. If a thief had entered the appellant's room on the night of the 21st May when the gun was found to be missing, it had certainly passed out of the appellant's control: if, on the other hand, as the prosecution suggested, the appellant had himself removed the gun and there had been no intrusion into his room by a thief, it had not. There were indications that the "burglary" had been faked or "staged" but they were not by themselves conclusive. At no time subsequent to the 21st May had the gun been traced to the appellant's possession. It was not found till after the tragedy which cost his young wife her life.

[1] *(1926) 8 C. L. Rec. 36.*
[2] *A. I. R. (1920) All. 140.*
[3] *I. L. R. (1881) 3 Mad. 271 at 284–5.*
[4] *A. I. R. (1929) Mad. 236.*
[5] *(1905) 9 N. L. R. 71.*
[6] *(1861) 1 B & S 311 at 329–330.*
[7] *25 Cr. L. J. 477.*
[8] *L. R. 4 P. C. 599.*

It was found close, very close to the scene of the crime. There can be little, if any, doubt that the person who placed it there was the person who shot the deceased with it. Was that person the appellant? Ultimately that question can only be answered, not by reference to the circumstances surrounding the "burglary" for they are, at the most, circumstances of suspicion, but by a consideration of the happenings on the night of the 5th June.

It is difficult to refer to these happenings without reference to the sketch. The deceased went into the front compound on the left hand side of Marcelina's house where she and the appellant were living. The latter was on the right hand side of the verandah at the point marked A. From A to X where the appellant had originally said the deceased had squatted to ease herself is 12 feet. Maria, one of the inmates of the house, was in the hall. On hearing the report of a gun or shortly thereafter, as the Judge for reasons he gave suggested was probably the case, she came out on to the verandah and saw the deceased lying fallen and the appellant moving towards her. At the outset of the trial the prosecution theory had been that the appellant had shot the deceased on the verandah when she had returned there after easing herself outside. But as the case progressed and medical evidence was called, it transpired that, although the deceased had a serious injury to her heart, the possibility of her having been shot in the compound and of having walked or run to the verandah could not be excluded.

The Judge told the Jury the exact circumstances of which they would have to be satisfied before they could conclude that the shooting had taken place in accordance with the first theory propounded by the prosecution. That portion of the charge, if we may say so with respect, was unexceptionable and no objection was taken to it.

The argument that was addressed to us was of a twofold nature. In the first place it was argued that, as it was reasonably possible for the deceased to have been shot by a person other than the appellant over the fence on the left hand side of the house close to where she had squatted, the appellant should have been acquitted: and, in the second place, that the Judge did not in fact leave it to the Jury to decide the question of whether it was reasonably possible.

Assuming the deceased had been shot as she squatted at X, 12 feet from the fence, the possibility of her having been shot by a person on the other side of and over the fence is, on the face of it, negatived by the position of the slugs found at M and N as well as by the fact that the muzzle of the gun had been brought, according to the expert evidence, to a distance of one foot from the body of the deceased. It is unnecessary to examine all the data. It is enough to say that if the Jury had acquitted the appellant on the ground that the deceased may have been shot over the fence it would have been in our opinion an unreasonable verdict. On the contrary the conclusion is irresistible that, if she was not shot on the verandah but at X, she was shot by a person close up to, and on the verandah side, *not* the fence side of her. That person could only have been the appellant. If another person had been there, the appellant would have seen him, and he says he saw nobody.

In regard to the second point it is true that the Judge did not say to the Jury "it is for you to consider whether the deceased, if she was at X, as the appellant at a very early stage said she was, could have been shot by a person outside and over the fence". But the matter must be looked at realistically. No doubt the defence had been stressed, even if on an examination of it, it appears to be fantastic, and the Judge had told the Jury, not once but at the beginning as well as at the end of his charge, that the appellant was entitled to be acquitted upon *any* hypothesis other than guilt. In fact, in one portion of his charge, he referred to the possibility of an assailant other than the appellant having come into the compound. It is true he discounted this possibility by the fact that the appellant did not claim to have seen anybody, but he went on to say that perhaps the Jury might accept what the appellant had said in Court, viz., that he did not really know where the deceased had been squatting. On this basis another hypothesis (and indeed a more reasonable one than shooting from the fence) consistent with the appellant's innocence was left to the Jury.

In our opinion, in the course of an exhaustive charge the case for the defence was dealt with adequately.

After the deceased had been killed the identical gun which had been stolen from the appellant's room on 21st May, or of which, according to the prosecution theory, he had retained possession, was found on the left hand side of the house beyond the fence to which I have referred. If the appellant had been his wife's murderer he could have thrown the gun as far as the spot where it was found. "The gun bore the mark of the muzzle having struck into the ground". In his charge the Judge said: "A gun if merely dropped muzzle downwards would hardly make a hole two inches deep . . . .". That, however, is precisely what the Government Analyst apparently thought it could do. "A person leaning over the corner of the fence" he said "could have thrown the gun to cause the mark on the ground. It could, however, have been caused by the dropping of the gun by a person when running . . . .". The omission to refer to the Government Analyst's evidence has been described as misdirection. In the passage that was cited the Judge no doubt expressed his own personal opinion and it is to be noted that he told the Jury "they might form an entirely different view". But although in that particular passage no reference was made to the opinion expressed by the Government Analyst it is wrong, I think, to suppose that the possibility of the gun having been dropped was not present to the minds of the Jury to whom the report of the Analyst had been read. In fact, as would appear from another passage in the charge, it was emphasized that there were two views of the matter. The Judge referred to Crown Counsel's remark that "whoever threw the gun to the spot or *placed* it at the spot where it was found had the object of connecting up the shooting with the burglary . . . .". I do not think there was misdirection. It is not for a Court of Appeal so to hold on an isolated passage. The charge must be considered as a whole.

It was further argued that the reception at the trial of the evidence given by the appellant before the Magistrate was illegal and vitiated the conviction. It was stressed that the Magistrate "prosecuted" (section

392, Criminal Procedure Code), that the appellant was bound or at least felt bound to answer all questions put to him and for these reasons his evidence could not be proved by reason of the provisions of section 132 of the Evidence Ordinance.

It has been held in India in a large number of cases that if a witness wishes to prevent his statement from being thereafter used he must object to answer the question put to him. In a case decided by the High Court of Allahabad, however, it was held that "an answer given by a witness in a criminal case to a question put to him either by the Court or Counsel on either side, is within the protection afforded by the section"— *Emperor v. Chatur Singh*[1]. More recently it has been held that "the compulsion contemplated in the section is something more than being put into the witness box and being sworn to give evidence. The compulsion refers to compulsion by Court and not compulsion under the law. The compulsion may be implied or explicit, and in every case it is a question of fact whether there was or was not compulsion". (*A. I. R. 1929 Mad. 236*). If I may say so with respect, this appears to represent the correct view of section 132, Evidence Ordinance. The protection arises only when it appears that the Court makes a witness understand impliedly or explicitly that he has no option but to answer, in other words when he is constrained to answer. In *The King v. Weerasinghe*[2], Maartensz J. held that as the question put to the accused, when a witness, had been put by the Judge, he no doubt felt bound to answer the question. It was accordingly held that he had been compelled to answer. In the present case the appellant had been questioned by the Superintendent of Police and the Magistrate in fact put on questions. In our opinion there was no misreception of evidence:

Arguments were addressed to us on other matters but they are without substance.

The application for leave to appeal is refused and the appeal on the law is dismissed.

Appeal dismissed.