[COURT OF CRIMINAL APPEAL]

1968 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Wijayatilake, J.**

A. KRISHNAPILLAI, Appellant, *and* THE QUEEN, Respondent

C. C. A. 78 OF 1968, WITH APPLICATION 113

S. C. 19/68—M. C. Mallakam, 2577

Summing-up—Evidence Ordinance—Section 27—Scope—Non-direction.

Whenever a statement which is proved under section 27 of the Evidence Ordinance can reasonably lead the Jury to infer that a confession may have been made to a Police officer, the trial Judge should clearly warn the Jury that the law prohibits such an inference being reached.

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

A. H. C. de Silva, Q.C., with *K. Sivananthan*, *S. Sivarajasingham* and (assigned) *L. F. Ekanayake*, for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Crown.

Cur. adv. vult.

November 28, 1968. H. N. G. FERNANDO, C.J.—

The appellant was by an unanimous verdict of the Jury convicted of the murder of one Punithawathy on 4th October 1967, and was sentenced to death by the learned trial Judge.

The evidence upon which the prosecution relied may be briefly summarised as follows :—

(1) The daughter of the deceased woman testified that the inmates of her house were herself, her mother the deceased, and another young girl, and that some days previously the accused and another man had come to the house and had a conversation in the course of which there was some disagreement between the accused and the deceased. This testimony afforded some evidence of motive against the accused.

(2) On the night of 4th October 1967, the inmates had retired to sleep. The mother slept on a bed on the verandah across which apparently was a screen, while the daughter and the other girl were sleeping inside the house. Some little time later the girls were disturbed by some sound which they heard, the daughter

came out to the verandah and saw the figure of a person, who then started to run. The daughter chased that person, who jumped over the gate and got away. At that stage the daughter thought that the person who ran away was the accused because when seen from behind his figure seemed to resemble that of the accused.

(3) A witness, Sivarajah, who apparently had been a friend of the accused, was at the time staying at the house of one Subramaniam. On the night of 4th October, Sivarajah and another young man were studying in a room in the house, when the accused turned up there and asked for a bucket and a towel. The accused then went away taking a bucket and a towel with him, and he returned within half an hour with no clothes, but only wearing the towel. Then Sivarajah realized that the accused had just had a bath. At this stage the accused told Sivarajah "I have come having committed a murder. You need not be frightened. I will tell the police the entire truth ".

The accused slept that night in Subramaniam's house, where he was arrested the next morning, presumably because the police had by that time recorded a statement from the deceased's daughter.

A witness Kandasamy, also a friend of the accused, testified that on the night of 4th October the accused shared with him and some others a meal of venison, and that much liquor had been consumed at this party. Kandasamy further stated that before the accused left this party, he borrowed Kandasamy's tapping knife saying that he wanted it to kill a fowl.

According to the Inspector of Police, he recorded the accused's statement on the morning of 4th October, and in the course of that statement, the accused said " I put the knife into the well. The banian and sarong were also burnt near the well. I can point out that to the Police ". The Inspector's evidence was that in consequence of this statement, he discovered a knife in a well some little distance away from Subramaniam's house and also the remnants of some burnt clothes.

The statement of the accused which is just mentioned was proved in evidence at the trial under s. 27 of the Evidence Ordinance, and was referred to in the summing-up of the learned trial Judge as one item of circumstantial evidence upon which the prosecution relied to prove the guilt of the accused. There was however no direction to the Jury as to the weight which might properly be attached to the accused's alleged statement to the Police, nor was there any direction as to the inferences which may or may not be drawn by the Jury, if they believed that the accused had in fact made this statement. Counsel for the accused has argued that the omission to give any such directions was a non-direction amounting to mis-direction.

At the trial of *Murugan Ramasamy*[1] on a charge of attempted murder by shooting with a gun, it was proved that the accused had stated to a Police officer :—" I am prepared to point out the place where the gun was buried ". The trial Judge in his summing-up referred to this matter in the following terms :—

> " . . . . . Jayawardana took the accused away and according to Jayawardana, the accused made a certain statement to him in the course of which, the accused told him that he could point out the place where the gun and cartridges were buried. If you believe Jayawardena that is a question of fact, you can understand the police not wasting any time thereafter. Jayawardana says he at once took him to line No. 6 and at a certain spot which was indicated by the police, the accused himself dug up the earth and underneath that there was this gun in a gunny bag in three parts and there was another bag containing 14 live cartridges which are productions in this case.
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> Well, the defence has challenged Jayawardana and said he is nothing more than a liar in uniform. That is the suggestion. The defence alternatively argues, even if that suggestion of the defence is not accepted, but Jayawardana is believed when he says that the accused pointed out the gun, the statement of the accused is that he could point out a place where a gun and cartridges are buried. The defence therefore argues, that means nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him. *I did not understand the prosecution as placing the case any higher than placed by the defence counsel himself. The prosecution does not say that it proves anything more than showing a place where a gun and 14 cartridges were buried*, and this was about 3.25 or 3.30 that the cartridges were unearthed ".

This Court[2] (64 N. L. R. at p. 444) upheld a submission for the defence that " the repeated reference both in the evidence and the summing-up to *the gun* and *this gun* was gravely prejudicial to the accused ". The ground of the submission was that the Jury might have attached improper weight to the statement, and might have inferred that the accused had himself buried the gun. The ground of prejudice was expressed somewhat more widely when the case was in appeal to the Privy Council[3] (66 N.L.R. 265). It was there argued that the fact that the accused had made the statement in question might have led the Jury to infer that the accused, in his statement to the Police, had not only admitted his knowledge of the place where the gun was buried, but had also admitted that he had himself used the gun. Their Lordships were however satisfied that the directions of the trial Judge concerning the accused's statement avoided the possibility of prejudice to the defence. Their Lordships no doubt had in mind the Judge's remarks which I have underlined in the extract cited above.

[1] *(1962) 64 N. L. R. 433.*
[2] *(1962) 64 N. L. R. at 444.*
[3] *(1964) 66 N. L. R. 265.*

What is important for present purposes is the statement of their Lordships that the trial Judge faced a " difficult problem ", and the fact that they proceeded to consider whether the Judge had correctly handled that problem in such manner as to avoid prejudice to the defence. When a statement such as " I know where the gun is buried ", or " I put the knife into the well ", is proved, the danger of prejudice is two-fold.

Firstly, the Jury might attach to the statement a wider and graver meaning than its actual import. Hence it is the duty of the trial Judge to direct the Jury that such a statement is an admission only of the fact stated and of nothing more. Such a direction was duly given by the trial Judge in *Ramasamy's* case, and the later decision of this Court in *Etin Singho*[1] (69 N. L. R. 353) again emphasised the need for such a direction.

Secondly, when it is proved at a trial that the accused had admitted to the Police some knowledge concerning a weapon, which is proved or alleged to have been used in the commission of an offence, the Jury might quite naturally form the impression that the accused must in addition have admitted in the same statement *that he had in fact used the weapon*— an impression, in other words, that he had made a confession to the Police. For a Court to form and act on such an impression would amount to a violation of the prohibition contained in s. 25 of the Evidence Ordinance. The decision in *Obiyas Appuhamy*[2] (54 N. L. R. 32) is much in point in this connection. We hold therefore that whenever a statement which is proved under S. 27 can reasonably lead the Jury to infer that a confession may have been made to a Police officer, the trial Judge should clearly warn the Jury that the law prohibits such an inference being reached.

Since the summing-up in the instant case lacked any directions of the nature which we hold were necessary, there was non-direction which amounted to mis-direction. This was on a material point, because of the important item of circumstantial evidence that the accused is alleged to have made a confession to the witness Sivarasa. An unfair construction of, or illegitimate inference from, the accused's proved statement to the Police, could well have led the Jury too easily into belief of Sivarasa's testimony.

Counsel for the defence has also referred to passages in the summing-up in which the Jury was told that the witness Kandasamy had in his statement to the Inspector of Police stated that the accused had borrowed a knife from the witness, and also that the witness had identified as his own a knife shown to him by the Inspector. In fact however, the Inspector did not in his evidence testify to either of these matters, nor could he have been permitted to testify to that effect in view of the prohibition contained in s. 122 (3) of the Criminal Procedure Code. We agree that there were misdirections of fact and of law in this connection.

[1] *(1965) 69 N. L. R. 353.*

[2] *(1952) 54 N. L. R. 32.*

Despite the matters to which we have referred, the arguments of Counsel for the defence have not persuaded us that the available evidence would not have justified the return of a verdict against the accused by a Jury acting on proper directions from the trial Judge.

For these reasons, we make order setting aside the verdict and sentence, and we direct a fresh trial of the accused on the same charge.

Case sent back for a fresh trial.