1933 *Present :* **Dalton S.P.J.**

VAN CUYLENBERG *v.* CAFFOOR.

540—P. C. Colombo, 42,516.

Criminal Procedure—Refusal to answer questions put by Police Officer—Tendency to incriminate—Latitude to witness—Criminal Procedure Code, s. 122 (2), Penal Code, s. 177.

Where a person who was bound to answer questions put to him by a Police Officer, in terms of section 122 (2) of the Criminal Procedure Code, refused to answer them on the ground that they would have a tendency to expose him to a criminal charge,—

Held, that in order to entitle a person to the privilege of silence under such circumstances, the Court must see that there is reasonable ground to apprehend danger to such person from his being compelled to answer.

If the fact of the person being in danger be once made to appear, great latitude should be allowed to such a person in judging for himself of the effect of a particular question, since a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offence to him.

APPEAL from a conviction by the Police Magistrate of Colombo. The accused was charged under section 177 of the Penal Code, that being legally bound under the provisions of section 122 (2) of the Criminal Procedure Code to answer truly the questions relating to an offence, put to him by an Inspector of Police inquiring into the matter, refused to answer them. He was convicted and sentenced to six months' simple imprisonment.

Hayley, K.C. (with him *R. L. Pereira, K.C., H. V. Perera,* and *Ismail*), for accused, appellant.—This conviction is under section 177 of the Penal Code. The requirements of that section are—(i.) The person must be

legally bound to speak the truth; (ii.) He must refuse to answer; (iii.) The question must be one touching the subject on which he is legally bound to answer. The only question in this case was, who was the driver of the offending car? At the identification parade accused was identified as the driver by three persons. At the inquest in the evening the Inspector "produced" him, *i.e.*, probably under arrest. He then told the accused to come to the Police Station in the evening and there put him the two questions. The appellant was therefore either an accused or so nearly an accused that the answers would have tended to expose him to a criminal charge. The word used is "charge" not "conviction", *i.e.*, the possibility of a prosecution. (*Deheragoda v. Alwis.*[1]) The principle of the English law is the same as in this section. The rule was that it was absolutely in the discretion of the witness to say whether the answer would ter d to incriminate him or not unless of course his refusal was obviously frivolous. (*Regina v. Boyes.*[2]) The principle goes only to the extent that the Court may satisfy itself of the *bona fides* of the witness. The widest discretion is given to the witness. This provision is not only for the protection of the guilty but also of the innocent. (*Fisher v. Ronalds*[3]; *Adams v. Lloyd.*[4]) The English law is dealing with evidence where the witness has the assistance of Counsel and the Court. The rule in Ceylon should be stricter where a person has to rely solely on himself to decide whether an answer would tend to incriminate him or not.

Illangakoon, Acting S.-G. (with him *Pulle,* C.C.), for respondent.—A person acquainted with the circumstances of a case is as a general rule bound to answer all questions put to him by a Police Officer. (Section 122 (1) and (2) Criminal Procedure Code.) An exception is provided where a question has a tendency to expose a person to a criminal charge. Burden of proof is on accused to prove he comes within exception. See section 105 Evidence Ordinance. Section 122 (2) embodies maxim "*Nemo tenetur seipsum prodere.*" Various ways in which *onus* could be discharged:—(i.) By stating, on oath, answer to question would criminate. Protection could be sought, if necessary, under section 132 Evidence Ordinance; (ii) by cross-examining prosecution witnesses—procedure adopted in *Deheragoda v. Alwis* (*supra*). English cases lay down the principles which should guide Court in determining whether witness was or was not justified in refusing to answer. Bare possibility of legal peril is insufficient. Substantial grounds must be shown. Objection must be *bona fide* and genuine for witness's own protection and not to save friend. Court has to decide from all circumstances of case. Old rule in England was that it was absolutely within witness's discretion whether to answer or not (*Regina v. Boyes; In re Reynolds* (*supra*)). The refusal to answer in this case was merely to prevent the Police from discovering the real culprit, namely, accused's brother. The two questions the Police asked are not incriminating nor would true answers to them have exposed him to criminal charge. The mere fact that certain witnesses had mistakenly identified accused and hence the Police suspected him would not entitle

[1] *16 N. L. R. 233.*
[2] *30 L. J. Q. B. 301; In re Reynolds (20 Ch. D. 294).*
[3] *(1852) 12 C. B. 762.*
[4] *27 L. J. Exch. 499.*

him to claim the privilege of refusing to answer. Test is not what other people have said or done but whether if witness gave true answer it would have had a tendency to incriminate him.

April 10, 1933. DALTON S. P. J.—

The appellant, Zubayr Caffoor, has been convicted on a charge laid under section 177 of the Penal Code, that being legally bound under the provisions of section 122 (2) of the Criminal Procedure Code to answer truly the questions relating to an offence that concerned the violent death of one W. Podisingho, put to him by an Inspector of Police inquiring into the matter, he on July 13, 1932, refused to answer certain questions put to him by the Inspector, a public servant. The questions referred to in the charge were—

(*a*) Where were you last evening ?
(*b*) Did you travel in either the Hillman or the Vauxhall car ?

The evidence shows that appellant refused to answer the first question, and stated "I reserve my answer", in reply to the second. He has been convicted and sentenced to undergo six months' simple imprisonment, the maximum sentence of imprisonment under the Ordinance.

The facts leading up to the incidents, out of which the charge arises, show that on the evening of July 12 one W. Podisingho received very serious injuries as the result of a motor car collision on the Galle Face road near the Colombo Club, from which he died that night or early on July 13. The complainant, Inspector Van Cuylenberg, went to the spot and found that car X-1078 had collided with car X-371, and that the man named Podisingho had been seriously injured. Car X-1078 was a Hillman car. There is no evidence to show of what make X-371 was, but that happens to be immaterial, for it is not the Vauxhall car referred to in the second question. The Vauxhall car referred to in the second question was one which at the time of the collision was being driven immediately behind the Hillman car X-1078. The Inspector made various measurements and then proceeded with his inquiries as to who was the driver of car X-1078 at the time of the collision. The car was empty when he arrived at the scene, but he obtained statements that night from Yusoof Caffoor and Mohideen Caffoor, brothers of appellant, that they were occupants of the Hillman car at the time of the collision; he also obtained a statement that night from one Podiappuhamy, an employee of the Caffoor family, that he was driving the car X-1078 at the time. Next morning (July 13) Podiappuhamy went back on that statement, denied he drove the car at the time, and stated he was induced "by one of Caffoor's sons" to say he drove, as it was a trivial matter. These sons are four in number, the appellant, Yusoof, Mohideen, and Falil. The Inspector then continued his inquiries as to who was driving car X-1078 at the time of the collision. His information was that the driver was one of Mr. Caffoor's sons. On the afternoon of July 13 he held an identification parade. Appellant was put into the line with others, but the evidence does not show if any of his brothers

were also in the line. At that parade a Police Constable picked out the appellant as the person he saw driving the car that night when he passed him at Chatham street in the Fort. Two other persons also identified appellant as like the person who drove the car that evening. The Inspector at the termination of the parade clearly had reason to suspect that appellant might be the person of whom he was in search, as responsible for the death of Podisingho.

The next step is the inquest at the hospital later that afternoon. There, the Inspector says, he "produced" Mohideen, Yusoof, appellant, and Podiappuhamy before the coroner. There is no evidence on record in this case to show what witnesses were examined at the inquest except Podiappuhamy, who repeated his statement that he had been induced by one of Mr. Caffoor's sons to say he drove car X-1078. No name was, however, mentioned. What was the result of the inquest is not stated, but after its conclusion the Inspector asked appellant to come to the Police Station, where he arrived at 6.30 P.M. According to the evidence, without any preliminaries or explanation as to what he was wanted for, the Inspector asked him, "Where were you last evening"? The appellant refused to answer the question. He then asked him whether he was one of the occupants of the Hillman or the Vauxhall car on the night of the accident. To that appellant answered, "I reserve my statement". On this refusal he was bound over under the provisions of section 126 of the Criminal Procedure Code to appear, if and when so required, before the Police Court, be it noted, as a suspected person, not as a witness. At no time did the Inspector call appellant's attention to what he was doing or caution him, or inform him that he was compelled to answer questions, or that he might incur any liability in refusing to do so. There is no reason to doubt, in my opinion, that appellant was at that stage suspected by the Inspector as being the person for whom he was looking, namely, the driver of the car and responsible for the collision, that he was seeking to obtain from appellant information that might assist him (the Inspector) on this point and that appellant was in danger of a charge being brought against him. There is in the circumstances some cause for thinking that at that time the Inspector was himself under the impression that he could not legally insist on obtaining answers from appellant to his questions. Subsequent events proved that he was not the driver, but he knew on July 13 he was suspected, although innocent. It was on July 19 that a charge was eventually brought against Yusoof Caffoor as the driver of car X-1078, on which I am informed he has since been convicted. This charge against the appellant under section 177 was then brought against him on July 23.

The law applicable in a case such as this, where a person being questioned claims the privilege of silence, Mr. Illangakoon agrees is the same as that applicable in the case of a witness claiming the privilege in a judicial proceeding. I need therefore only refer to two of the cases cited on that point during the argument. There appears to have been some uncertainty prior to these decisions as to whether the witness or the

Judge was to decide whether the question to which an answer was sought might have a tendency to place the witness in danger, but the law now is beyond any doubt. In *Regina v. Boyes*[1] Cockburn C.J., in whose judgment Crompton, Hill, and Blackburn JJ. concurred, held that a bare possibility of legal peril was not sufficient to entitle a witness to protection, nor was the witness the sole judge as to whether his evidence would bring him into danger of the law. He continues, "To entitle a party called as a witness to the privilege of silence the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger from his being compelled to answer". He then goes on to point out that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, since a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. The danger to be apprehended, he says, must be real and appreciable with regard to the ordinary operation of the law, not a danger of an imaginary and unsubstantial character, or a mere remote or naked possibility out of the ordinary course of law.

In *Ex parte Reynolds*[2] this view of the law was approved of by the Court of Appeal. There Jessel M.R. says, "That decision (*Regina v. Boyes*) as it appears to me, states the law correctly, and if it were necessary for the Court of Appeal to affirm it, we should I think be doing well and wisely in saying that we do affirm it". He goes on to point out, however, that even the earlier decisions made an exception in the case of *mala fides*. If a Judge thinks a witness is objecting to answer, not *bona fide* with the view of claiming privilege for himself, but in order to prevent other parties from getting that testimony which is necessary for the purpose of justice, the law requires that the witness should answer.

Several defences were put forward by the appellant in reply to the charge, but for the purpose of this appeal I need only consider one, that appellant was not legally bound to answer the questions under the provisions of the section 122 (2) to which I have referred. I regret I am unable to agree with the learned Magistrate when he says, "it is clear" that accused's answers would not have incriminated him. "It is clear", he says, because in fact the appellant has not been charged in the motor car case. He goes on to consider the answers he might have given. "If he said 'No', the Police would have known he could give no help". If he said 'No', it seems to me on the information the Police had on July 13, they might have hesitated to believe him. The Magistrate continues "if he had said 'Yes', they would have known he could help them". If he had said 'Yes', it seems to me, as matters stood on July 13, he might have been at once arrested, and a charge brought against him. The learned Magistrate has misdirected himself on more than one point, and he seems to have assumed that the Inspector required appellant

[1] *30 L. J. Q. B. 301.* [2] *20 Ch. D. 294.*

as a witness only, entirely overlooking the evidence of which the Police were in possession, when the questions were put to him on July 13, that appellant himself was the driver of the offending car.

Applying the law I have set out to the facts of this case, the questions set out in the charge, put to the appellant by the Inspector, were in the circumstances questions which under the provisions of section 122 (2) of the Criminal Procedure Code he was not compelled to answer as being questions which would have a tendency to expose him to a criminal charge. It is not necessary therefore to consider the further grounds of appeal argued.

For the above reason the conviction cannot stand, the appeal being allowed, and the conviction quashed.

Appeal allowed.