

1939

*Present: Soertsz J.*THE KING *v.* FERNANDO.22—*M. C. Panadure, 1937.*

[4th Western Circuit at Kalutara.]

*Evidence—Statement to Police different from evidence in Court—Right of Crown to put the statement to accused—Statement not exculpatory—Evidence Ordinance, s. 25 (Cap. 11).*

The accused, giving evidence, said that he shot in the direction of Peduru, the witness, taking care not to hurt him, when he was on a suriya tree with a katty in his hand and about to leap on to the land of the accused. In his statement to the Police having admitted that he fired a shot, the accused said "I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later, a Police Constable came and told me that I killed a man. Till then I did not know that I had shot anyone".

*Held*, that the Crown was not entitled to cross-examine the accused on the statement as it was obnoxious to section 25 of the Evidence Ordinance.

*Held, further*, that the statement could not be regarded as an exculpatory statement, as it was capable of being construed as establishing a *primâ facie* case against the accused.

*King v. Attygalle* (39 N. L. R. 60) and *King v. Cooray* (28 N. L. R. 4) distinguished.

THE accused in this case was charged with murder before the fourth Western Circuit at Kalutara.

*R. L. Pereira, K.C.* (with him *D. D. Athulathmudali*), for accused.

*E. H. T. Gunasekera, C.C.*, for the Crown.

November 23, 1939. SOERTSZ J.—

Crown Counsel proposes to question the accused on a statement he is said to have made to the Police, in which he does not appear to have said what he now says in the witness box, namely, that he shot in the direction of Peduru, the witness, taking care not to hurt him when he was on a "suriya" tree, with a katty in his hand, and about to leap on

to the land of the accused. Crown Counsel has shown me the statement said to have been made by the accused, and there can be no doubt but that in that statement the accused has given a different version of how he came to fire the gun.

Counsel for the accused objects to his client being questioned on the statement made or said to have been made by him, on the ground that questioning him in the manner proposed is obnoxious, if not to the letter certainly to the spirit of section 25 of the Evidence Act.

Crown Counsel, however, submits that section 25 of the Evidence Act applies to a confession made by an accused person to a Police Officer, and he contends that the statement he proposes to question the accused upon is not a confession, but an exculpatory statement. He relies on the ruling of Akbar J. in the case of *The King v. Attygalle*<sup>1</sup>. In that case Akbar J. ruled that the statement relied upon in that case was not a confession within the meaning of section 25 of the Evidence Ordinance as it was exculpatory in effect. I have read the statement made by the accused Attygalle in that case and if I may say so with respect, Akbar J. rightly described it as an exculpatory statement. As such it falls within the Privy Council ruling in *Dal Singh v. King Emperor*<sup>2</sup>, that a statement which "is in no sense a confession" is admissible against the accused who made it to the Police. Similarly in *The King v. Cooray*<sup>3</sup>, a Divisional Bench admitted a statement made by an accused to the effect, "there your Inspector is killed". That statement does not imply that the accused was present at the killing nor does it suggest the complicity of the accused in any way at all. It is certainly not a confession.

Now, I have carefully examined and considered the statement said to have been made by the accused in this instance and I cannot agree that it is an exculpatory statement, because in the course of the statement the accused admits having fired a shot. He says, "I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later a Police Constable came and told me that I had killed a man. Till then I did not know that I had shot anyone". This, as far as I can make out, is an admission by the accused that as a result of his firing the gun a man was shot and that he died in consequence. Such a statement is capable of being construed as establishing a *prima facie* case against the accused, because the offence of murder is constituted *inter alia* by a man doing an act which is so imminently dangerous that it must in all probability cause death. I must regard the statement from that point of view, and looking at it in that way, to say the least, I am doubtful that it can be properly described as an exculpatory statement.

There is also the Divisional Bench case of *The King v. Kalu Banda*<sup>4</sup>, which I think has a bearing on the point involved in this matter. In that case it was sought to prove that the accused who, at his trial, set up the plea of self-defence, had not set up such a defence in the statement he had made to the Police and Lascelles C.J. in the course of his judgment said, "After hearing the arguments of Counsel, and referring to

<sup>1</sup> 37 N. L. R. 60.

<sup>2</sup> (1917) 86 L. J. P. C. 140.

<sup>3</sup> 28 N. L. R. 74.

<sup>4</sup> 15 N. L. R. 422.

the cases which were cited in argument, I am of opinion that when the headmen were allowed to prove the facts that the accused had made statements to them, and that he had not in these statements set up the plea of self-defence, the headmen were allowed to give evidence of what was in substance a confession by the accused. They were allowed indirectly to disclose part at least of the substance of the accused's statement, the effect of this disclosure being such as to suggest the inference that the defence on which the accused relied was not set up by him at the time when, if true, it would naturally have been set up, and that it was therefore false.

If regard be had to the intention and object of the Legislature in enacting section 25 of the Evidence Ordinance, I think the conclusion must be the same".

In this instance too Crown Counsel declares that his object in eliciting the statement said to have been made by the accused to the Police is to show that the accused did not set up his present defence. The case of *The King v. Kalu Banda (supra)* rules that that may not be done where an inference of guilt is likely to be drawn from this divergence of pleas. In the case before us now the position is worse in that as I have pointed out it is possible to regard the statement as a confession.

Although it is possible for a different view to be taken of the question that arose in *The King v. Kalu Banda* from that taken by the Divisional Bench that decided it, we are, at present, bound by that decision. In India, there is a great divergence of judicial opinion on the point, and, to say the least, if the question whether a statement made by an accused to a Police Officer should or should not be admitted, cannot be answered clearly against the accused, it is safer and more proper to reject it. I, therefore, refuse to allow the accused to be questioned in the manner proposed.

*Objection upheld.*

