[COURT OF CRIMINAL APPEAL]

1955 *Present* : **Rose C.J. (President), Gunasekara J. and Weerasooriya J.**

RUPARATNE, Appellant, *and* THE QUEEN, Respondent

APPEAL 10 OF 1955, WITH APPLICATION 13

S. C. 34—M. C. Kurunegala, 8,934

Criminal Procedure—Evidence of accused—Contradictory of previous statement to Police—Right to prove such statement—Evidence in rebuttal—Impeaching credit of witness—Evidence Ordinance, ss. 120 (6), 155 (c)—Criminal Procedure Code, ss. 122 (3), 237 (1).

The accused in a trial for murder gave evidence on his own behalf which differed from a statement that had been made by him to an Inspector of Police to the effect that about a month prior to the deceased's murder the deceased

and his brother had assaulted the accused. Although oral evidence of that statement to the Police could have been adduced by the prosecution as part of its case on the basis that the statement was an admission by the accused relating to a probable motive for the commission of the alleged murder, there were certain circumstances which deterred the prosecution from adducing evidence of it in the first instance. When, however, the accused denied in cross-examination that he had made such a statement, the trial Judge permitted the Crown to call the Inspector of Police to give evidence of the statement for the purpose, as stated by him, of showing that " the witness made a different statement to the Police". The jury were also warned, in the summing-up, that the effect of the evidence of the accused's statement to the Police could not properly be treated as substantive evidence of any fact.

Held (by the majority of the Court), that the trial Judge was not wrong in permitting the Crown, after the case for the defence had been closed, to lead evidence of the statement made by the accused to the Inspector of Police.

" As was pointed out in the case of *Rasiah v. Suppiah* [(1949) 50 N. L. R. 265] the right given to a party under Section 155 (c) of the Evidence Ordinance of impeaching the credit of a witness by proving a former statement which is inconsistent with his evidence is, strictly speaking, not a right to adduce rebutting evidence for which, by leave of the Judge (in the case of a trial before the Supreme Court), special provision is contained in Section 237 (1) of the Criminal Procedure Code. "

Thuraisamy v. The Queen (1952) 54 N. L. R. 449, distinguished.

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

W. E. M. Abeysekera, with *L. F. Ekanayake*, for the accused appellant.

Vincent T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 14, 1955. WEERASOORIYA J.—

The substantial point that was raised in this appeal relates to what is alleged to be an improper exercise of the learned trial Judge's discretion in permitting the Crown to call certain evidence in rebuttal.

The appellant was charged with the murder of one Ran Banda by shooting, and the evidence against him consists in the main of the evidence of an eye-witness Dingiri Appu, supported by certain items of circumstantial evidence.

The prosecution had in their possession a statement which was alleged to have been made by the appellant to the Inspector of Police in which the appellant was recorded as having said that about a month prior to the deceased's murder the deceased and one Dingiri Banda (a brother of the deceased) assaulted him because he had held the hand of their step-sister Kawamma. Although this statement was one which was made to the Inspector of Police in the course of the investigation under Chapter XII of the Criminal Procedure Code it would seem on the authority of the decision in *Rex v. Jinadasa* [1] that oral evidence of it could have been

[1] *(1950) 51 N. L. R. 529 at 540.*

adduced by the prosecution as part of its case on the basis that the statement was an admission by the appellant relating to a probable motive for the commission of the offence with which he was charged.

The prosecution elected, however, in the presentation of its case, to refrain from adducing this evidence, may be for the reason (apart from, perhaps, a reluctance to use a statement by an accused person to a Police Officer as substantive evidence against the person making it) that it was regarded as unlikely that Dingiri Banda, whom it called as a witness to testify to certain other matters as well, would support the allegation of an assault on the appellant by him and the deceased. The evidence given by him in fact negatived such an assault since he stated that although Kawamma had made a complaint to him against the appellant, he took no action on that nor did he know whether "the deceased did anything about it". There was also the evidence of the eye-witness Dingiri Appu, who is the father of Kawamma, that despite her complaint against the appellant he was not angry with the appellant "at any time" and that as far as he knew the deceased and the appellant were not enemies, and the evidence of the mother of Kawamma that the deceased and the appellant were on speaking terms. In the circumstances it seems to the majority of the Court that the prosecution cannot fairly be criticised for not adducing the evidence of the appellant's statement as part of its case in the first instance.

When the appellant gave evidence on his own behalf at the trial he took up the position that the deceased was his "best friend". This evidence, it will be seen, is not inconsistent with the evidence already adduced by the prosecution and referred to in the preceding paragraph as regards the relations that existed between the deceased and the appellant. Under cross-examination the appellant was confronted with his statement to the Inspector of Police and questioned whether he had made it. The appellant denied that he had made such a statement. After the case for the defence was closed learned Crown Counsel made an application to be permitted to lead evidence of this statement by calling the Inspector of Police. Although objection was taken by the defence to this application the learned Judge overruled it and permitted the evidence to be led for the purpose, as stated by him, of showing that "the witness made a different statement to the Police".

In his charge the learned Judge warned the jury as to the effect of this evidence and explained that it could not properly be treated as substantive evidence of any fact, and it was conceded by learned counsel for the appellant that this warning was an adequate one. But he submitted that in a case of this nature where in the proof of the charge against the appellant the prosecution had to rely mainly on a single eye-witness the effect of this evidence might well have been prejudicial to the appellant in that, despite the warning, the jury may have improperly regarded that evidence as proof of a motive for the appellant to have killed the deceased, and that in the circumstances the learned Judge should not have permitted the prosecution to adduce the evidence in question even for the limited purpose stated by him.

It seems, however, to the majority of the Court that this is not a submission which can be accepted. As was pointed out in the case of *Rasiah v. Suppiah* [1] the right given to a party under s. 155 (c) of the Evidence Ordinance of impeaching the credit of a witness by proving a former statement which is inconsistent with his evidence is, strictly speaking, not a right to adduce rebutting evidence for which, by leave of the Judge (in the case of a trial before the Supreme Court), special provision is contained in s. 237 (1) of the Criminal Procedure Code. In the present case no objection was taken by the defence to the cross-examination of the appellant nor did the learned Judge himself, despite the power given to him under s. 120 (6) of the Evidence Ordinance to limit the cross-examination relating to the credit of the appellant, choose to interfere when the appellant was questioned whether he had not made a statement to the Inspector of Police which was inconsistent with his evidence as to the relations that existed between himself and the deceased. Possibly one reason why the learned Judge chose not to interfere at this stage was that had the appellant answered that question in the affirmative his reply could not have been excluded as inadmissible. It does not appear to the majority of the Court that the learned Judge wrongly exercised his discretion in this instance. That being so, it would be seen that when the prosecution made the application to adduce evidence of the statement which the appellant is alleged to have made to the Inspector of Police there was no ground on which it could have been refused. Had the application been refused, counsel for the appellant may well have complained (notwithstanding that the application was objected to by the defence at the trial) of the prejudice that could have been caused to the appellant by it having been brought to the notice of the jury in the course of the cross-examination of the appellant that he had made an inconsistent statement to the Inspector of Police, and that the refusal of the Judge to allow the Inspector of Police to be called in effect prevented the defence from cross-examining him on the basis that the statement imputed to the appellant was never in fact made.

The majority of the Court consider that this case can be distinguished from that class of cases in which according to the following observations of Lord Du Parcq in *Noor Mohamed v. The King* [2] evidence which could be prejudicial to an accused should be excluded :

> " In all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge would be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there must be some tenuous ground for holding it to be technically admissible. The decision must then be left to the discretion and sense of fairness of the Judge."

[1] *(1949) 50 N. L. R. 265.*

[2] *(1949) A. C. 182 at 192.*

In the present case it cannot in the view of the majority of the Court be urged that the evidence in question was of trifling weight in so far as it could have been legitimately used as a test of the credibility to be attached to the evidence of the appellant, or that the learned Judge should not have permitted it to have been led on the ground of the possibility that the jury, despite the adequate warning given by him, would *improperly* use it as substantive evidence of the facts to which it relates.

The majority of the Court are also of the opinion that the present case is distinguishable from the case of *Thuraisamy v. The Queen* [1] where the learned trial Judge fell into the error of directing the jury that certain evidence which had been adduced to contradict the evidence of the appellant in that case could be treated as substantive evidence of the facts deposed to.

As to the remaining points raised at the hearing of the appeal, we are of the opinion that there was sufficient evidence to enable the jury to return the verdict which they did. The appeal and application are, therefore, dismissed and the conviction and sentence affirmed.

Appeal and application dismissed.