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13, 1962

IN THE PRIVY COUNCIL No.27 of 1961

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

B E T W E E N:

JAYALAL ANANDAGODA Appellant

- and -

THE QUEEN Respondent

C A S E FOR THE APPELLANT

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1. This is an appeal by Special Leave from a Judgment of the Court of Criminal Appeal of Ceylon dated the 4th August, 1960, dismissing an appeal by the Appellant against a conviction of Murder in the Supreme Court at Anuradhapura, First Midland Circuit, on the 27th day of May, 1960. 62 N.L.R.241 p.1268

2. The Appellant was tried, together with 2 other Accused, upon an Indictment which charged all 3 Accused with 2 offences, viz., Conspiracy to murder, and Murder, in terms as follows:-

(i) That between the 2nd day of March, 1959 and the 15th day of March, 1959, at Timbiriwewa, in the division of Anuradhapura, within the jurisdiction of this Court, and at Kalutara, Kalawellawa, Colombo, Puttalam and other places, you did agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, to wit, the murder of one Adeline Vitharana and that you are thereby guilty of the offence of conspiracy for the commission or abetment of the said offence of murder in consequence of which conspiracy the said offence of murder was committed and that you have thereby committed an offence punishable under Section 296 (Murder) of the Penal Code read with Sections 113B (Conspiracy - punishable as for abetment) and 102 (Abetment) of the said Code. pp.3-4

(ii) That on or about the 14th day of March, 1959, at Timbiriwewa, within the jurisdiction of this Court, you did in the course of the same transaction commit murder by causing the death p.4

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of the said Adeline Vitharana and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

3. The Appellant was the 1st Accused. The indictment against the 3rd Accused, one A.Isiman Silva, alias Sirisena, was withdrawn by the Crown
p.1265 at the close of the prosecution case. Both the
p.1268 Appellant and the 2nd Accused, one T.D.Allis Singho, alias T.D.Podisingho Perera, were found Not Guilty on the first count of Conspiracy by a unanimous verdict of the jury.

p.1268 4. On the second count of Murder the Appellant was found Guilty by a majority verdict of 6 to 1, and the 2nd Accused was found Not Guilty by a majority verdict of 5 to 2.

5. The whole of the evidence against the Appellant on the count of Murder was circumstantial,
pp.1203-6 but included evidence by a police officer of certain oral statements alleged to have been made to him by the Appellant. There was also admitted
p.1127 in evidence a lengthy statement alleged to have been made to a magistrate by the 2nd Accused which was self-exculpatory and sought to cast responsibility for the alleged murder upon the Appellant and the 3rd Accused.

6. The principal grounds upon which the Appellant relies in this appeal are as follows:-

(1) That the oral statements alleged to have been made by him to a police officer constitute a confession within the meaning of Section 17 of the Evidence Ordinance, and were wrongly admitted in evidence contrary to Section 25 of the said Ordinance, which provides that no confession made to a police officer shall be proved as against a person accused of any offence.

(2) That the said oral statements were inadmissible and ought to have been excluded by reason of the general rule, laid down in Section 122(3) of the Criminal Procedure Code, that statements made to a police officer in the course of an investigation under Chapter XII of the Code are not to be admitted in evidence.

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(3) That the statement alleged to have been made by the 2nd Accused implicating the Appellant, copies of which were supplied to the jury, was so highly prejudicial to the Appellant that it must have influenced their verdict against him, although they were directed that it was evidence only against the 2nd Accused.

(4) That by reason of the grave prejudice to the Appellant arising from the said alleged statement by the 2nd accused, the Appellant ought to have been granted a separate trial.

(5) That although both the Appellant and his alleged co-conspirator (the 2nd Accused) were acquitted on the first count of Conspiracy to commit Murder, the Appellant alone was convicted on the second count, which charged them both that they did "in the course of the same transaction" commit the alleged murder.

7. On the 4th April, 1960, at the commencement of the trial, the Appellant by his Counsel applied for a separate trial, on the ground that the 2nd Accused had made the above-mentioned statement to a magistrate, and also on the ground that he had made statements to the police implicating the Appellant and that these might be proved. The learned trial Judge (K.D. de Silva, J.) observed that the jury would be warned that the statements of the 2nd Accused would not be evidence against the Appellant, and refused the application. p.2 p.2

8. In the course of a lengthy trial, in which 110 witnesses were called by the prosecution, the following facts (as set out in the Judgment of the Court of Criminal Appeal) were deposed to :-

"Late at night on 14th March 1959, the dead body of a woman was discovered lying at Timbiriwewa near the 27th mile-post on the road between Puttalam and Anuradhapura. A post-mortem examination conducted on 16th March 1959 revealed that the woman was between 20 and 25 years of age, that she had been about seven months advanced in pregnancy, and that her body bore numerous injuries consistent with her having been run over by a motor car. 62 N.L.R. 242-4 Record, p.822

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The case for the prosecution was that the dead body was that of Adeline Vitharana, that her death had been caused by a motor car being deliberately driven over her body at least twice, that the consequent injuries were the cause of her death, and that death had occurred between 11 p.m. and midnight on 14th March, 1959. It was not contended on appeal that it was in any way unjustifiable for the jury to decide upon the evidence either that the identity of the dead woman had been proved, or that she had been killed in the manner and at the time and place asserted by the prosecution.

The prosecution called witnesses who deposed to the following matters, inter alia:-

pp.9;20;24; 248-258 (a) That the Appellant had, under a name different to that by which he was ordinarily known, been acquainted with Adeline, an intelligent and attractive young woman, from about November 1956; that he was the father of an illegimate child born to Adeline in August 1957; that he had thereafter promised to marry her, and that he had communicated with her under his assumed name and received letters from her at an "accommodation address" furnished by him.

pp.241-248 (b) That the Appellant had been on friendly terms with a family of better social status than that of Adeline's relatives;

pp.246-248 that he occasionally stayed at the home of that family, and that it was apparent that he proposed to contract a marriage with the young daughter of that family.

p.849 (c) That the Appellant had been the owner of a Fiat car No.1 Sri 6265, and that, although there was a change of registration in January 1959, he had continued thereafter to be the actual user and the virtual owner of that car.

pp.480-481 p.475 (d) That Adeline, on 19th January 1959, after discovering the true identity of the Appellant, wrote to the Headmaster of the

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school at Kalutara at which the Appellant was employed as a teacher, alleging that the Appellant was the father of her child and had promised to marry her, and expressing her intention to represent matters to the Director of Education; that this letter was shown thereafter to the Appellant by the Principal of the School. pp.480-482 p.482

(e) That Adeline left her home at Katugastota on 2nd March 1959, having expressed her intention to see her father and to meet the Appellant at Kalutara in order to obtain some money from him. pp.56-57

(f) That on 2nd March 1959 a young woman, apparently pregnant was seen near the fence of the school at Kalutara, that a message given by the young woman was delivered to the Appellant in the school, and that he afterwards came in a car and took her away; that a young woman identified as Adeline was seen later on the same day at the village of Kalawellawa and had resided for a few days in that village with the family of one Alo Singho; and that the Appellant himself had been seen in his car in that village; at least on one occasion with Alo Singho and on another in the village bazaar. pp.370-372 pp.410-417 p.507 p.508

(g) That the Appellant on one occasion stopped his car close to Alo Singho's house and soundad his horn, whereupon Alo Singho came up to the car and after speaking to the Appellant returned to his house; that shortly thereafter Adeline came to the car dressed in a saree and left in the car with the Appellant and the 2nd Accused, taking with her a black handbag and an umbrella. There was little room for doubt, having regard to his evidence, the the witness who deposed to these facts spoke of an incident which took place on Saturday, 14th March, 1959. pp.509-512 p.634

(h) That the 2nd Accused, a person well-known to the Appellant was a brother of Alo Singho, who has been referred to above. p.684 pp.438-570

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pp.756-759 (i) That the Appellant drove a car similar to the car No.1 Sri 6265 to a petrol station at Horana in the afternoon of 14th March with the 2nd Accused and a woman, and purchased petrol there; that on the night of 14th March at about 9 or 9.30 p.m. the
p.772 Appellant and the 2nd and 3rd Accused had come to a hotel in Puttalam in the company of a young woman dressed in a saree and that dinner had been served to them.

pp.865-874 (j) That the Appellant had, probably on the 12th March 1959, tried to obtain a car
p.897 on rent from a hire service in Colombo for use on the 14th and 15th March, and that because a car was not available for the 14th, he had rented a car for 15th March and used it on that day to make a journey of 277 miles, thus rendering it possible that he could on the 15th have made a trip to the place where the body was found.

p.913 (k) That despite the fact that the Appellant's car had been "serviced" on the 16th March and the undercarriage cleaned with penetrating oil, four hairs similar to (though not shown to have been identical
p.1021 with) Adeline's hair were found adhering to the undercarriage when the car was later examined."

9. The Appellant submits that the evidence summarised above constitutes the whole of the relevant evidence admissible against him, that the same amounts to no more than evidence of motive and, possibly, opportunity, and that it is insufficient to justify a verdict of guilty of
p.1265 murder. The Appellant gave no evidence and called no witnesses.

10. In addition to the said evidence, the
pp.1193-1218 Prosecution adduced evidence by a police officer, one Inspector Dharmaratne, who said that the
p.1203 Appellant made certain admissions to him while in his charge at Anuradhapura police station on the
pp.1203-5 22nd March, 1959. The evidence of the Inspector on this point is as follows:-

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"Q. And at about 10.10 a.m. on the 22nd March the first accused (i.e. the Appellant) made a statement to you? p.1203

A. Yes.

Q. Did the first accused tell you his relationship with Adeline Vitharana?

(Mr. Saravammuthu (Counsel for the Appellant) objects. Over-ruled).

A. Yes, he told me that Adeline Vitharana was his mistress for about 2 or 3 years and she has a child by him.

Q. Did he tell you anything about any request made to him by Adeline Vitharana? p.1204

A. Yes. He said that Adeline was insisting that he should get married to her but he was putting it off.

Q. Did he tell you what Adeline Vitharana's attitude to him after that was?

A. He said that Adeline Vitharana was disgracing him and that she was an unbearable nuisance to him.

Q. Did he tell you anything of what happened on the 2nd March 1959?

(Mr. Saravanamuthu: I object on the ground that it is a leading question.

Court: Q. I do not think it is. I over-rule that objection).

A. He said Adeline Vitharana came and saw him at Kalutara on the 2nd March and that he took her to Kalawellawa on that day and left her in the house of Podisingho. No. I am sorry. (Mr. Saravanamuthu: I object to the reference to the book.

Court: Q. How can you object?)

A. He said he left her at a place at Kalawellawa.

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Q. Did he tell you where he was on the 14th of March, 1959?

A. He told me that on the 14th March he started in his car with Adeline Vitharana, the second Accused Podisingho for Anurahapura via Puttalam. They reached a Muslim hotel at Puttalam between 8 and 9 p.m.

Q. Did he tell you what he did on the 15th March?

A. Yes. He said he got a red Vanguard from Avis motors and came to Anuradhapura via Puttalam with his watcher Sirisena.

Q. Did he tell you where he was about 3 or 3.30 p.m. on the 15th March?

A. Yes. He said he passed the scene of murder. (Mr. Saravanamuthu objects).

p.1205 Q. That is the place where the body was?

A. Yes.

Q. Please refresh your memory?

A. He said that he passed the body of Adeline Vitharana and that he slowed down and noticed people and police officers there."

11. The Appellant submits that the said admissions were wrongly admitted in evidence, because they give rise to an inference or inferences prejudicial to the Appellant, or suggest the inference that he committed the offence of which he was found guilty, and they therefore constitute a confession or confessions within the meaning of the relevant provisions of the Evidence Ordinance, namely:-

"Section 25. No confession made to a police officer shall be proved as against a person accused of any offence."

"Section 17. (1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

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(2) A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence."

In construing the said statutory provisions, the Appellant relies inter alia upon the Judgments of the Supreme Court (Crown Case reserved) in The King -v- Kalu Banda, 15 N.L.R. 422, and the Judgment of the Supreme Court in Weerakoon -v- Ranhamy, 27 N.L.R. 267.

12. The statement alleged to have been made by the 2nd Accused, which inter alia described an alleged journey in the Appellant's car, with the Appellant, the 3rd Accused and a lady, included the following passage (wherein the Appellant is referred to as "Mr.Anandagoda" and the 3rd Accused as "Mr.Sirisena"):-

"We drove on. I do not know where. The car was driven somewhat faster now. Mr.Anandagoda kept glancing at his wrist watch again and again. We proceeded for about 22 or 23 miles. We stopped at a junction. Mr. Anandagoda got down. I also did so. He pointed his finger at something that appeared to be a light about a quarter of a mile away and asked me to see what it was, I walked up a culvert a distance of about 15 yards. I saw a fire and I thought it was a fire near some dwelling.

I came back to the car and told Mr. Anandagoda that it seemed to be a fire near a house. When I came back Mr.Sirisena was seated in the car. One of his legs was outside the car. The lady was stretched out on the rear seat. Her legs lay on Mr.Sirisena's legs. Mr.Anandagoda was holding her feet near her ankles. Her head was where she had been seated. Mr.Sirisena's hand was placed under her neck. The door of the car was open and Mr. Anandagoda asked me to hold it. I held it open. The two of them lifted the lady out and went behind the car and came round it and stopped near the other rear door. She was placed under the car, close to the wheel. The legs were underneath the car and the head was out. Mr.Anandagoda got into the car started it moved it forward and stopped. Mr.Sirisena got into the front seat I got in behind. The car was

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reversed. I felt the car bump. It was moved forward again. I felt another bump. We went forward about a fathom and reversed for about a quarter of a mile and turned about and stopped. The two of them drank out of a bottle of brandy they had brought. I was given some too. Mr. Sirisena threatened me saying "You know I am from Paiyagala. If you breathe a word of this to any one the people of my village will know what to do to you". Mr.Anandagoda said that if I gave out what had taken place and if they were taken into custody they would implicate me too. If they went to jail, he said, they would kill me on their return. I asked them to kill me there if they suspected me and promised to keep what had happened a secret."

The Appellant submits that the said alleged statement by the 2nd Accused must have affected the minds of the members of the jury, when considering the case against the Appellant, notwithstanding directions which they were given by the learned trial Judge that it was in no way admissible against the Appellant.

p.1268 13. The Appellant further submits that the verdicts in the case are mutually inconsistent and indicate that the jury were confused. The prosecution case appears to have been based throughout p.3 upon the alleged conspiracy mentioned in the first count of the Indictment, and it is submitted that p.4 the wording of the second count shows that this was so. In view of the fact that both the Appellant p.1268 and the 2nd Accused were found Not Guilty on the first count, and the 2nd Accused was found Not Guilty also on the second count, it is submitted that the Appellant should also have been found Not Guilty on the second count.

14. The Appellant's grounds of appeal against his said conviction included the following :-

4. An application was made for separation of trial in view of the fact that the statement of the second accused to the Magistrate under Section 134 of the Criminal Procedure Code and his admission to the Police would prejudice the case of the Appellant.

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The Learned Judge was not justified in refusing the application. If the Appellant had been tried alone he would have been acquitted.

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7. It is clear that all the three accused were illegally detained by the Police contrary to the Provisions of the Criminal Procedure Code. It was contended on behalf of the Appellant and the other accused that the Police conspired against the accused to implicate them falsely in this case. Hence the learned Judge should not have admitted in evidence the so-called admission of the Appellant.....

8. In the circumstances of the present case some of these admissions are implied confessional statements to the Police and should have been excluded from evidence.

9. The following items of evidence amounts to a confession to the Police Officer.

> "Inspector Dharmarathe stated that the Appellant told him that during the afternoon of the 15th of March 1959 he had passed the scene of murder and had stopped there and viewed the body of the deceased. "This item of evidence has prejudiced the case of the Appellant.

. . . . . .

13. In view of the fact that the second accused was acquitted on both counts of the indictment the verdict against the Appellant is unreasonable.

14. The Learned Judge should have told the Jury that if they acquitted the accused on the charge of conspiracy they had to view the rest of the evidence with suspicion.

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15. That Learned Judge failed to tell the Jury that there was no evidence of the actual killing against the Appellant. In this connection the Learned Judge should have told the Jury that the evidence of the actual killing is supplied by the statement of the second accused to the Magistrate under Section 134 of the Criminal Procedure Code and that this statement cannot be used against the Appellant. The learned Judge should have high-lighted this position.

. . . . . .

85. The learned Judge should have told the Jury that in the examination of the case of one accused if a reasonable doubt arises in their minds regarding the truth of the case for the Crown the benefit of that doubt should be given to the other accused also. The Learned Judge should have told the Jury that if they disbelieved the case against one accused then it was not safe to convict the other accused on that evidence.

62 N.L.R.241 15. In the Court of Criminal Appeal (Basnayake, C.J., Sansoni and H.N.G.Fernando J.J.) the only ground of appeal which was considered was that based upon the contention that the alleged admissions by the Appellant to the Police Inspector were led in evidence in contravention of Section 25 of the Evidence Ordinance. The Court considered a number of authorities bearing upon the construction of Sections 25 and 17(2) of the Ordinance, and held:-

62 N.L.R.246 (a) That the broad construction of the word "confession" in these sections, which would include any statement permitting an inference prejudicial to the accused, is not justified, because the ground of exclusion indicated in

62 N.L.R.250 The King v. Kalu Banda (above) and Weerakoon Ranhamy (above) is no longer valid; and

62 N.L.R.250/4 (b) That the admissions made by the Appellant to the Police Inspector were not such as to suggest the inference that he had committed the offence charged, and are therefore not such as should have been excluded under Section 25.

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It is respectfully submitted that the Court of Criminal Appeal were wrong in so holding. In particular it is respectfully submitted that the principle indicated in the two cases mentioned above is good law and ought to be followed.

16. The Judgment of the Court of Criminal Appeal contains the following passage relating to the construction of Section 17 of the Evidence Ordinance:- 62 N.L.R.241

"Subsection (1) defines an admission as a statement suggesting any inference (i) as to any fact in issue or (ii) as to any relevant fact. The illustrations to section 5 show that on a charge of murder the facts in issue are only whether the person charged did a particular act, whether that act caused the death, and whether that act was done with a murderous intention. Hence it is reasonable to assume that the first kind of statement referred to in subsection (1) of section 17 is an admission of one of these facts, and of no other. When subsection (2) is then examined, it becomes clear that the law declares to be a confession, only that kind of statement which is an admission of one of the self-same facts or an admission suggesting the inference that one of the self-same facts is correct. An admission by an accused of facts which can establish motive, or opportunity, or knowledge of a death, does not suggest an inference that the offence was committed by him; the inference which such a fact suggests is only that he may have had a reason or an opportunity for, or knowledge as to the commission of, the offence. They are only relevant facts and are not facts in issue, and (to use the language of the judgments in The King v. Fernando and Seyadu) are not facts the intrinsic terms of which are such as to be capable of establishing a prima facie case. If then each of the admissions of the Appellant, considered by itself, was relevant and admissible, all taken together were equally admissible." 62 N.L.R.253/4

The Appellant submits that the construction of Section 17 indicated by the said passage is erroneous, and that a confession may include an admission of

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relevant facts and is not confined to an admission of facts in issue.

62 N.L.R.254 17. The Court of Criminal Appeal expressed agreement with an observation by the Acting Solicitor-General, who appeared on behalf of the Crown, that the Crown had ample evidence with which to prove its case, even if evidence of the challenged admissions had not been received, and said:-

> "The testimony, of which a summary has been set out at the commencement of this Judgment, was quite sufficient to justify the conviction of the Appellant."

It is submitted that this view of the evidence is erroneous, for the reasons stated above in paragraph 9.

18. It is further submitted that the Appellant's oral statements to the Police Officer ought not to have been admitted in evidence by reason of the provisions of Section 122 of the Criminal Procedure Code.

19. Special leave to appeal from the said Judgment of the Court of Criminal Appeal was granted on the 12th June, 1961.

20. The Appellant humbly submits that by his said Conviction and the said Judgment of the Court of Criminal Appeal he has suffered a substantial and grave injustice, and that this Appeal should be allowed with Costs, for the following, amongst other

R E A S O N S

1. BECAUSE the oral statements alleged to have been made by him to a police officer constitute a confession within the meaning of Section 17 of the Evidence Ordinance and were wrongly admitted contrary to Section 25 of the said Ordinance.

2. BECAUSE the Court of Criminal Appeal misconstrued the said Section 17.

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3. BECAUSE the Court of Criminal Appeal misconstrued and misapplied the said Section 25.

4. BECAUSE the admission of the said statements was an improper circumvention of the provisions of the said Section 25.

5. BECAUSE the principle indicated in The King v. Kalu Banda, 15 N.L.R. 422 and Weerakoon v. Ranhamy, 27 N.L.R. in relation to the construction of the said Sections 17 and 25 is right.

6. BECAUSE on a proper construction of the said Section 17 "confession" within the meaning of that Section includes any Statement permitting an inference prejudicial to the accused.

7. BECAUSE the alleged admissions by the Appellant were such as to suggest the inference that he had committed the offence charged.

8. BECAUSE on a proper construction of the said Section 17 "confession" includes an admission as to relevant facts and is not confined to an admission as to facts in issue.

9. BECAUSE the said oral statements by the Appellant to a police officer ought not to have been admitted by reason of the provisions of Section 122 of the Criminal Procedure Code.

10. BECAUSE the evidence without the alleged statements is not sufficient to justify the said conviction.

11. BECAUSE the alleged statement by the 2nd Accused was so highly prejudicial to the Appellant that the same ought not to have been admitted in evidence in the trial of the Appellant.

12. BECAUSE the Appellant ought to have been granted a separate trial.

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13. BECAUSE in view of the verdicts on the first count of the indictment and the verdict in favour of the second Accused on the second count, the Appellant ought not to have been convicted on the second count.

14. BECAUSE on the evidence properly admitted the said Conviction is wrong and cannot be justified and ought to be set aside.

RALPH MILLNER

No. 27 of 1961

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

BETWEEN

JAYALAL ANANDAGODA Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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