P.C.
G 1 - G 2

Judgment
35/1964

IN THE PRIVY COUNCIL No. 24 of 1963.

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL, CEYLON.

B E T W E E N :-

THE QUEEN ... Appellant

- and -

MURUGAN RAMASAMY alias
BABUN RAMASAMY Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from a Judgment of the Court of Criminal Appeal, Ceylon (Basnayake C.J. (President), Tambiah, Herat, Abeyesundere and G.P.A. Silva J.J.) dated the 17th day of December 1962 allowing the Appeal of the Respondent against a conviction upon the 21st day of December 1961 by a Jury in the Supreme Court, Midland Circuit, District of Kandy upon a charge of attempted murder by shooting. pp.163-186. pp.158-9.

2. The principal question raised in this Appeal is whether certain evidence consisting of statements alleged to have been made by the Respondent to a Police Officer were admissible having regard to the provisions of Section 122 (3) of the Code of Criminal Procedure of the Laws of Ceylon.

3. The charge against the Respondent was as follows:- p.2. ll.6-18

> That on or about the 1st of September, 1960, at Nawalapitiya, in the division of Campola, within the jurisdiction of this Court, you did shoot Kammalawattegeders Piyadasa, with a gun with such intention or knowledge and under such circumstances

that had you by such act caused the death of the said Kammalawattegeders Piyadassa you would have been guilty of murder and you did by such act cause hurt to the said Kammalwattegeders Piyadassa and you have thereby committed an offence punishable under Section 300 of the Penal Code.

Section 300 of the Penal Code of Ceylon is in the following terms:-

"Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable to imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine".

4. The proceedings commenced before an English speaking Jury upon the 18th day of December 1961 and on behalf of the Prosecution Dr. Gunaratne deposed that upon the 1st day of September, 1960 he examined a man called Piyadasa. He was suffering from a skin deep lacerated wound in the chest which could have been caused by a pellet from a gun.

pp.5-8

pp.8-36

The said Piyadasa gave evidence that upon that day he was working as a labourer upon an estate with two other men called Heenbanda and Juwanis. About 10.30 a.m. he saw three men, namely, the Respondent, Muthiah and Sinniah. The Respondent had a gun while the others had stones. The Respondent took aim whilst Piyadasa, Heenbanda and Juwanis took shelter. A shot was fired but nobody received any injury. Piyadasa then moved his position. A second shot was fired and hit Piyadasa on the chest. The force of the shot was broken by a diary which Piyadasa was carrying in his shirt pocket. This witness was cross-examined as to his accuracy of the names of the persons concerned in the incident and he admitted that whilst in hospital he had written down the names "Ramasamy, Jayasena and Mendis" which were the names given to him by the occupant of the next bed in the hospital.

p.28.

pp.42-62

5. Heen Banda gave similar evidence as to the shooting as Piyadasa except that he deposed that there was a third shot after

Piyadasa had been hit. It was put to this witness that before the Magistrate he had stated:- p.54 ll.3-12

> "I did not see the first accused and others approaching the place where we were weeding."
> "I saw them only after the first shot."

This witness denied making either of these remarks but on behalf of the Defence, the Clerk of Assize in the Supreme Court Kandy produced the relevant record of proceedings and read out the above-quoted words as having been said by the witness. p.132 ll.10-15

6. Juwanis also gave similar evidence and like Heen Banda he deposed that he heard three shots being fired and that each of them was fired by the Respondent. In cross-examination Juwanis stated that he did not go to the hospital with Piyadasa. It was put to him that he had said the contrary to the Magistrate. This was denied by the witness. The defence also called the Clerk of Assize in respect of this matter, and he confirmed from the record of proceedings that what the defence had suggested was correct. pp.63-85 p.133 ll.1-6

7. Further evidence for the Prosecution was given by Police Sergeant Jayawardene who told the Court that he had taken the Respondent into custody and the Respondent volunteered to make a statement which the witness recorded in his note book. After objections by the defence had been overruled, learned counsel for the Prosecution was permitted by the learned trial Judge to put the following question to which the answer "Yes" was given:- pp.92-96: 108-131

> "Did the accused in the course of his statement tell you 'I am prepared to point out the place where the gun and the cartridges are buried?'" p.112 ll.10-14

The next substantive answer given by the witness was as follows:-

> "I took the accused to Line No. 6 and the accused pointed out a spot to me. He unearthed some rubbish and I discovered the gun broken into three parts and a cloth bag containing 12 cartridges - 12 bore cartridges." p.112 ll.23-28

He also stated that the gun was wrapped in a bag. He did not try to assemble it but he smelt

the barrel and there were signs of recent firing. This witness was cross-examined (inter alia) at
pp.121-2 length about the relationship in time between the alleged statement and the finding of the gun and when the statement was recorded by the witness. Certain manifest contradictions occurred which were commented upon by the Court of Criminal Appeal as appears from paragraph 13 below.

8. When objection was made to the evidence about to be given by Sergeant Jayawardene, reliance was placed by the prosecution upon Section 27 (i) of the Evidence Ordinance. The following sub-sections are relevant to the present case:-

> "25(1) No confession made to a police officer shall be proved as against a person accused of any offence."
>
> "26(1) No confession made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."
>
> "27(1) Provided that, when any fact is deposed to is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

p.108 l.13 It was contended by the defence that the evidence given by Inspector Perera disclosed that the Respondent was taken into custody as a result of another matter and therefore the alleged statement was not made in pursuance of the case being tried. This was overruled by the learned trial judge on the ground that it is sufficient
p.109 ll.30-1 if the statement was "relevant to the case that is being investigated at the trial." Further argument took place regarding whether the gun was "discovered" by the Police Officer which the
pp.110-1 learned trial judge held it was.

9. Apart from the evidence of the Clerk of Assize to which reference has been made in paragraphs 5 and 6 above, no other evidence was called for the defence. The learned trial judge in the course of his summing-up reviewed the evidence and indicated that in his opinion, which he had earlier

stressed was not binding upon matters of fact, the verdict would turn upon the evidence of the three eye-witnesses namely, the Respondent, Heen Banda and Juwanis. The evidence of Sergeant Jayawardene was also referred to and the Jury were reminded that he had been challenged by the defence. The learned trial judge summed up the attack on this witness as being a suggestion that he was "nothing more than a liar in uniform" but no directions or suggestions were made to the Jury about the consistency of this witness as a guide to the reliability of his evidence. The evidence relating to the alleged statement by the Respondent was dealt with as follows:- p.149 ll.46-9 p.151 ll.42-5

> Shortly after 3 o'clock after the accused was produced before Ekenayake by Jayawardene, Jayawardene took the accused away and according to Jayawardene, 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 Jayawardene, that is a question of fact, you can understand the police not wasting any time thereafter. Jayawardene said 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 production in this case. Now, the prosecution says that if the accused did point out that gun, which according to the Analyst could possibly have caused the injuries (with this gun you can fire SG slugs) the accused has pointed out that because he knew where that gun was. p.151 ll.17-41

The learned trial judge then reminded the Jury that the defence had argued that this evidence meant no more than "that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him" and the learned trial Judge went on to indicate that he understood that the Prosecution did not put the matter any higher than that.

The Respondent respectfully submits that a more detailed direction to the Jury was required indicating the extent of the exceptional

basis upon which a statement (even if admissible under Section 27) made by an accused to a Police Officer was allowed to be given in evidence and the limits of the use which the Jury should make of such statement.

p.159. 10. The Respondent filed a Notice of Appeal upon the 1st day of January, 1962.

pp.161-3 Twelve grounds of appeal were set out but the principal matter urged upon the Court of Criminal Appeal was that the verdict should be set aside on the ground that the statement alleged to have been made by the Respondent to Sergeant Jayawardene was in law inadmissible.

11. The Judgment of the Court of Criminal Appeal was delivered upon the 17th day of December 1962 pp.164-186 by the learned President, Basnayake C.J., who pp.166-8 after reciting the facts, set out in extenso the relevant evidence relating to the disputed statement and declared that the most important submission made on behalf of the Respondent (then Appellant) was that since the statement was made to a Police Officer in the course of an enquiry under Chapter 12 of the Criminal Procedure Code it came within the prohibition contained in section 122(3) which is in the following terms:-

> "Section 122(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145 as the case may be, shall apply."

The learned President pointed out that there

were certain express exceptions to this sub-section and that no further exceptions could be made by adding the provisions of section 27 of the Evidence Ordinance. It is respectfully submitted that the Court of Criminal Appeal was correct in deciding that the two statutes could not be read together and that section 27 is only applicable in such cases where Section 122(3) is not applicable. The Court stated that they were following the decision in R. v. Mapitigama Buddharakkita Thera 63 N.L.R. 433 which they approved and the Court declined to follow the decision of R. v. Jinadasa 51 N.L.R. 529 which they stated was not to be regarded any longer as binding. The latter decision admitted oral statements made to the Police but excluded written ones. This was a majority decision of a Court of five Judges of the Court of Criminal Appeal. The former case declared that the use of oral statements made in such circumstances was "obnoxious". p.170 ll.19-29

Thirdly the Court referred to The Queen v. O.A. Jinadasa 59 C.L.W. 97 which had been cited by the Crown. The Court thought that different questions arose for decision in that case but in so far as any passage might be in conflict with the decision of the Court in the instant case, that that case must be regarded as overruled." It is respectfully submitted that the Court of Criminal Appeal was not only correct but competent to follow the substance of Buddharakkita's case which was the latest authority where the relevant issue had been discussed and in so doing they were entitled to distinguish and/or overrule any prior authorities to the contrary. p.171 ll.10-18.

12. The learned President indicated that a similar problem of construction had occurred as a result of legislation in India and that the decision of the Court in the instant case was consistent with Indian decisions and with decisions of the Privy Council. Whilst not citing all the Indian decisions or referring to specific passages in the accepted commentaries upon the Indian Evidence Act, reliance was placed particularly upon Narayana Swami v. Emperor (1939) A.I.R.(P.C.) 47 at 52 and Kottaya v. Emperor (1947) A.I.R. (P.C.) 67 and also upon the fact that the matter had subsequently been resolved by the legislature in India by making s.27 (which corresponded to the Ceylon pp.171-7

Section 27) an exception to the corresponding provision of s.122(3).

p.177 l.48 13. The Court of Criminal Appeal then considered whether, having accepted the submission, it would be right to set aside the conviction or whether the verdict should remain undisturbed on the ground that no substantial miscarriage of justice had actually occurred. It therefore reviewed the evidence of Sergeant Jayawardene in considerable detail and upheld the submission that the repeated reference in the summing-up to the gun discovered being the identical gun which was allegedly used to commit the crime was gravely prejudicial. The Court then dealt with the consistency of the story told by the sergeant which it set out in extenso and concluded that it was so manifestly contradictory and unreliable that a warning to the Jury was required by the learned trial Judge to this effect which had not been given. In these among other circumstances the Court considered that there was no question but that the conviction should be quashed.

pp.180-2

p.186 ll.28-32

It is respectfully submitted that the Court, having regard particularly to its knowledge of local conditions, was correct in not invoking the proviso to Section 5(1) of the Court of Criminal Appeal Ordinance in view (inter alia) of the importance in the administration of justice of the reliability and integrity of Police Officers.

14. Against the Judgment of the Court of Criminal Appeal, Ceylon, this Appeal to Her Majesty in Council is now preferred, Special Leave to Appeal having been granted by Order of Her Majesty in Council dated the 11th day of April 1963 upon certain conditions as to costs.

pp.187-8.

The Respondent humbly submits that this Appeal should be dismissed with costs for the following among other

R E A S O N S

(1) THAT the Court of Criminal Appeal, Ceylon was correct in holding:-

(a) That the statement alleged to have been made by the Respondent to Police Sergeant Jayawardene was inadmissible in evidence having regard to the

provisions of Section 122(3) of the Criminal Procedure Ordinance.

(b) That Section 27 of the Evidence Ordinance is not to be construed as an exception to the said section 122(3).

(2) THAT the Court of Criminal Appeal correctly decided not to invoke the proviso to Section 5 (1) of the Court of Criminal Appeal Ordinance and that such decision, which was a matter of discretion, ought not to be interfered with.

(3) BECAUSE in any event the exceptional appellate jurisdiction of the Judicial Committee to interfere in Criminal cases ought not to be exercised merely because the Board disagrees with the opinion of the Court of Criminal Appeal that there has been a miscarriage of justice.

E.F.N. GRATIAEN

JOHN A. BAKER.

IN THE PRIVY COUNCIL

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CASE FOR THE RESPONDENT

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