1947 *Present :* **Dias J.**

WALBERT, Appellant, *and* ZOYSA, Respondent.

S. C. 831—M. C. Balapitiya, 58,755.

Maintenance—Illegitimate children—Corroboration of applicant's evidence—Statement by respondent in the course of an inquiry under Chapter 22, Criminal Procedure Code—Admissbility of statement—Section 122 (3), Criminal Procedure Code—Does it apply to civil proceedings ?—Maintenance Ordinance (Chap. 76.), section 6.

A statement by a person recorded under section 122 (3) of the Criminal Procedure Code to the effect that he is the father of the applicant's illegitimate child cannot be used as substantive evidence in a maintenance case against him in order to corroborate the applicant's evidence.

The first sentence of section 122 (3) of the Criminal Procedure Codo is not confined to criminal cases.

APPEAL from a judgment of the Magistrate, Balapitiya.

F. A. Hayley, K.C—(with him *H. W. Jayewardene* and *Vernon Wijetunge*), for the defendant, appellant.

G. P. J. Kurukulasuriya (with him *Conrad Dias*), for the applicant, respondent.

Cur. adv. vult.

[1] *(1894) P. 295.*

November 4, 1947. DIAS J.—

The question for decision is whether the statement of the putative father of two illegitimate children recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code in the courses of an investigation into a charge of house-breaking, is admissible *as substantive evidence* in order to corroborate the testimony of the mother under section 6 of the Maintenance Ordinance, 1889 (*Chap. 76*), when he is sued for maintenance ?

The mother gave evidence to the effect that she had been the mistress of the appellant for several years, that she bore him two children, and that she registered the birth of one child giving the appellant's name as being the father. She also stated that the appellant had maintained both the children until six months previous to the filing of the maintenance case. No attempt, however, was made by her to establish these facts by independent evidence.

There had been an alleged burglary in the applicant's house, and she complained to the police who held an inquiry under *Chapter XII* of the Criminal Procedure Code. In the course of that investigation, the Police questioned the appellant and recorded his statement. This statement P 1 was tendered as substantive evidence by the applicant and admitted by the Magistrate despite an objection to its admissibility on behalf of the appellant. The relevant portion of P 1 reads : " Josaline Jayatissa was my mistress for about eight or ten years. I have two children by her and they are with her . ...After this incident I left Josaline as I learned that she was visiting the house of Victor....."

If the statement P 1 is legally admissible *as substantive evidence*, the case against the appellant is established, because P 1 would be independent corroboration of the mother's evidence by an admission of the father of the illegitimate children. On the other hand, if P 1 is not legally admissible, it is conceded that there bieng no independent corroboration of the mother's evidence, the claim must fail.

Section 6 of the Maintenance Ordinance requires that when a claim for mintencance is made on behalf of an illegitimate child, before liability can attach it is necessary that the evidence of the mother shall be " corroborated in some material particular by other evidence to the satisfaction of the Magistrate ". Clearly, the words " other evidence " means legally admissible evidence. In the case of *Ponnammah v. Seenitamby*[1] a Divisional Court held that the necessity for corroboration of the woman's evidence would be satisfied by any kind of corroboration *which is recognized by law.*

In Sinnatangam v. de Silva[2] a statement made by the mother to the Police who were investigating a charge against her of attempted abortion, was held not to be corroboration of her story in the maintenance case, because it was not a material question at the Police inquiry to ascertain whether the respondent was the father of the child. The question was not raised or decided whether the mother's statement, having been recorded under section 122 (3) of the Criminal Procedure Code, was at

[1] *(1921) 22 N. L. R. 395.* [2] *(1926) 28 N. L. R. 212.*

all admissible. The decision turned on the question whether the statement was admissible as corroboration under section 157 of the Evidence Ordianace. In *Dona Carlina v. Jayakoddy*[1] two statements of the woman recorded in the Police information book under section 122 (3) of the Criminal Procedure Code were relied on as furnishing corroboration of her story. In that case too the question whether such statements were admissible at all in view of the terms of section 122 (3) of the Criminal Procedure Code was not considered. The decision turned on whether the statements came within the provisions of section 157 of the Evidence Ordinance.

In the present case, however, it is not a statement of the mother which is relied on as furnishing corroboration but a statement by the alleged father amounting to an admission that he was keeping the mother as his mistress who bore the two illegitimate children to him. Unless there is some legal bar to the admissibility of the statement P 1, it would supply strong corroboration of the applicant's evidence.

Section 122 (3) of the Criminal Procedure Code provides that " No statement made by any person to a Police officer 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 ". The sub-section goes on to create two exceptions when statements recorded under section 122 (3) can be used as *substantive evidence*, namly, in order to prove a dying declaration under section 32 (1) of the Evidence Ordiannce, or as evidence in a charge under section 180 of the Penal Code.

I cannot accede to the argument of the respondent's counsel that the provisions of section 122 (3) apply only to criminal cases, and that in a civil proceeding (which a maintenance case is) a statement recorded under section 122 (3) can be used as substantive evidence in order to corroborate the person making the statement *or some other person.*

It is true that section 122 (3) appears in the Criminal Procedure Code, and that the majority of instances when that sub-section has come before this Court for consideration are criminal cases. I can, however, find no warrant for restricting the first four lines of section 122 (3) to criminal cases. The fact that the Legislature in the very next sentence refers to a " criminal Court " implies that the general words which preceded it are of general application. It is to be taken as a fundamental principle, standing as it were at the threshold of the whole subject of interpretation, that the plain intention of the Legislature, as expressed by the language employed, is invariably to be accepted and carried into effcet, whatever may be the opinion of the judicual interpreter of its wisdom or justice. If the language admits of no doubt or secondary meaning, it is simply to be obeyed "[2]. Section 122 (3) says in effect that no statement recorded under its provisions shall be used either in a civil, cirminal, or other legal proceedings except in the following cases :

[1] *(1931) 33 N. L. R. 165.*

[2] *Maxwell (6th Ed.), pp. 93–94.*

(*a*) as substantive evidence to prove a dying declaration under section 32 (1) of the Evidence Ordinance or to establish a charge under section 180 of the Penal Code, and (*b*) in order to discredit the maker of such statement under section 155 (*c*) of the Evidence Ordinance or to refresh the memory of the officer who recorded the statement. It is, however, open to a criminal Court to send for and peruse the statements recorded under section 122 (3) not as evidence, but merely to aid it in such inquiry or trial. Except in the two cases specially provided for, a statement recorded under section 122 (3) cannot be used as *substantive evidence* in any proceeding, civil or criminal. Under no circumstances can a statement recorded under section 122 (3) be used *to corroborate* the maker of the statement or some other person, although it can be used *to contradict* the maker of the statement when he gives evidence.

That section 122 (3) can be utilised in a civil action in order to discredit a witness is to be seen in *Chitty v. Peries*[1]. In a proceeding to strike a proctor off the rolls for misconduct, a Divisional Court held that the law prohibits the reception in evidence of statements recorded under section 122 (3) *except for the purposes specified in that section*. In that case because the statement was sought to be utilised for purposes not specified in section 122 (3) the evidence was rejected—*Attorney-General v. Ellawala*[2].

It is a settled rule of evidence that once a statement recorded under section 122 (3) has been utilised in order to impeach the credit of a witness, the force of that statement is exhausted, and cannot thereafter be relied on as substantive evidence in the case—*R. v. Haramanisa*[3], *R. v. Sudu Banda*[4]. No doubt, these are criminal cases, but the principle is of general application. Therefore, the fact that P 1 was put to the appellant under cross-examination and denied by him, cannot make that statement substantive evidence in the case.

In a maintenance case it is not enough for the Magistrate to say "I believe the applicant and I disbelieve the respondent; and I, therefore, find for the applicant". He must be able to say "I believe the applicant, and she is corroborated in some material particular by such and such legally admissible independent evidence". In this case he cannot so hold, because the only independent evidence relied on as corroboration is P 1 ,which is not admissible as substantive evidence in the case. The evidence of the woman, therefore, stands uncorroborated, and the claim must necessarily fail. This appears to be a hardship, but in reality it is not so. If it is the fact that the appellant was openly keeping the applicant as his mistress for a great many years, and was actually maintaining the two children as his own, these facts should have been capable of proof by independent evidence.

The order appealed against is, therefore, set aside and the claim for maintenance is dismissed. As the appellant succeeds on a legal technicality and his case discloses no merits, I direct that each party shall bear their own costs both here and below.

Appeal allowed

[1] *(1940) 41 N. L. R. 145.*
[2] *(1926) 29 N. L. R. 13.*
[3] *(1944) 45 N. L. R. 532.*
[4] *(1946) 47 N. L. R. 183.*