1964 *Present :* **Tambiah, J.**

J. D. WIMALADASA and another, Appellants, *and* B. L. M. FERNANDO (S. I. Police), Respondent

S. C. 50-51/64—M. C. Anuradhapura, 34953

Offence of bringing persons into Ceylon unlawfully—Statement made by a person before a Justice of the Peace or a police officer—Admissibility in evidence—Immigrants and Emigrants Act, as amended by Act No. 68 of 1961, ss. 45A, 47D (1), 47D (2) (g), 47 D (4).

In a prosecution for an offence punishable under section 45A of the Immigrants and Emigrants Act, as amended by Act No. 68 of 1961, a statement made by a person before a Justice of the Peace or a police officer in terms of section 47D is not admissible under section 47D (4) unless it has been certified in compliance with the requirement of section 47D (2) (*g*).

APPEAL from a judgment of the Magistrate's Court, Anuradhapura.

Colvin R. de Silva, with *M. L. de Silva*, for accused-appellants.

R. I. Obeysekera, Crown Counsel, for Attorney-General.

February 10, 1964. TAMBIAH, J —

In this case the accused were charged with having transported in lorry No. 22 Sri 1237 on 11.5.63 forty persons knowing that such persons have entered Ceylon or remained in Ceylon in contravention of Immigrants and Emigrants Act and thereby committed an offence punishable under section 45A (1) (*b*) of the said Act as amended by Act No. 68 of 1961. After trial the learned Magistrate convicted the accused-appellants and sentenced the first accused-appellant to a term of five years' rigorous imprisonment and the second accused-appellant to a term of two years' rigorous imprisonment. In appeal one of the main points urged by Counsel for the accused-appellants is that the statements of one Weeramuthu Rasiah and Andi Nadar Suppiah Nadar which have been produced in this case as P6A and P6B are not admissible in evidence, as there is no certificate from Mr. Kandiah to the effect that he had complied with the requirements of section 47 (D) (2) of the Immigrants and Emigrants Act as amended by Act No. 68 of 1961.

Section 47 (D) (1) of this Act enacts as follows :

> " Where any person is accused of an offence under section 45 (1) (*a*), or section 45 (2) in so far as it relates to section 45 (1) (*a*), or section 45A, any other person who is about to leave the Island may, if he so desires, make a sworn or affirmed statement in connection with the offence before a Justice of the Peace, or a police officer not below the rank of an Assistant Superintendent of Police, in the presence of the person accused of the offence ".

Section 47 (D) (2) of this Act imposes a number of duties on the Justice of the Peace or the Assistant Superintendent of Police before whom a statement is made. Such an officer has to record the statement, read over such a statement to the person signing the statement, explain the statement to the accused, afford the accused a full opportunity of asking any questions relating to the statement from the person making the statement, record such answers, secure the signature of the person making the statement to the record of the statement, and certify, if such be the case, that the requirements of this section have been complied with. Section 47D (4) of this Act lays down the conditions under which statements purporting to have been recorded under section 47D may be produced in Court as evidence against any person accused of any offence under section 45 (1) (*a*), or section 45 (2) in so far as it relates to section 45 (1) (*a*) or 45A. It further enacts that such a statement shall be *prima facies* evidence of the facts therein stated.

Statements made by persons to a Police officer not below the rank of an Assistant Superintendent of Police or a Peace Officer normally are not admissible in evidence under the provisions of the Evidence Ordinance or other laws governing the Law of Evidence. This type of statements is only made admissible provided that there is a certificate as contemplated by section 47D (2) (*g*). The provisions of the

Immigrants and Emigrants Act No. 68 of 1961 are very drastic. It was intended to put an end to a growing menace in this country but at the same time the legislature has provided certain safeguards which must be carefully followed.

Mr. Colvin R. de Silva who appeared for the accused-appellants called this Act " a piece of Draconian legislation". It is not necessary to comment on this aspect of the matter but it is sufficient to state that a Court of law should be vigilant in preserving the freedom of the citizen as one of the most fundamental and cherished principles of human rights. Learned Crown Counsel submitted that Mr. Kandiah has made a mistake in stating that he acted under the provisions of section 47 (*d*) (1) when he really intended to state that he acted under section 47 (*d*) (2). I have looked at the certificate which is in the hand of Mr. Kandiah. It categorically states that Mr. Kandiah has conformed to the provisions of section 47 (*d*) (1) of the Act. In the absence of evidence that Mr. Kandiah has made a mistake, this Court cannot presume that a mistake had been made. The learned Magistrate has acted on P6A and P6B in convicting the accused. In doing so he has purported to act on evidence which is not intended by the Legislature to be acted upon. Learned Crown Counsel stated that there is other evidence which is available to the Crown to prove the guilt of the accused in this case, but he conceded that this evidence is not sufficient. Learned Crown Counsel also urged that Mr. Kandiah still can state that he has made a mistake and what he intended was that he was issuing a certificate to the effect that he had conformed to the provisions of section 47 (*d*) (2). In view of the gravity of the offence I do not propose to acquit the accused-appellants in this case but to order a re-trial.

Learned Crown Counsel relied on the ruling of the Court of Criminal Appeal—*Queen v. Wilbert Perera* [1]. In that case the Court of Criminal Appeal held that the failure on the part of the Magistrate to state in the certificate that a confession made by an accused was voluntarily made and that it was read over to him, was held not to be a fatal irregularity. The Court of Criminal Appeal held that such an omission can be supplied by oral evidence by the Magistrate and that the memorandum referred to in section 132 of the Criminal Procedure Code cannot be regarded as a legal condition to the admission of the confession. But a contrary view was taken by the Privy Council in the case of *King Emperor v. Nazir Ahmed* [2] in interpreting the identical provisions of the Indian Criminal Procedure Code. I may respectfully state that I am inclined to follow the ruling of the Privy Council in this case but in this particular case it is not necessary for me to differ from the ruling of the Court of Criminal Appeal since that case can be distinguished from the facts of the present case.

In *Queen v. Wilbert Perera*, the confession of an accused person to the Magistrate was held admissible under the provisions of the Evidence Ordinance. Section 134 of the Criminal Procedure Code merely sets out

[1] *(1957) 61 N. L. R. 142.* [2] *1936 A. I. R. 253.*

the procedure which has to be followed by a Magistrate in recording such statements. Neither in section 134 of the Criminal Procedure Code nor in the Evidence Ordinance is there a requirement that the certificate of the Magistrate is a condition precedent for the admission of such evidence ; but in the instant case a certificate to the effect that the person recording such a statement has conformed to the provisions of section 47 (*d*) (2) is an imperative requirement before the admission of such evidence as evidence against an accused person. I think, the accused are entitled to a re-trial before another Magistrate. Dr. Colvin R. de Silva also raised various other points in this case. It is not necessary to consider them. The accused-appellants are entitled to raise those points at the re-trial. For these reasons I set aside the order of the learned Magistrate convicting the accused-appellants and direct that this case be sent back for fresh trial before another Magistrate.

In view of the order that I have made in this case, Counsel appearing in Application No. 41/64 moves to withdraw the application. I allow his application.

Case sent back for fresh trial.