us that the learned Judge used those words with reference to what he said in the preceding paragraph. It must be noted that in the course of the trial he ruled that the prosecution could not lead evidence to prove an improper attachment between the appellant and the deceased. That ruling seems to us to be unduly favourable to the appellant. We think that evidence that the attachment of the appellant to the deceased was an improper one was admissible under sections 8 and 14 of the Evidence Ordinance. Under section 8 evidence can be led to prove a motive for any fact in issue or relevant fact, and under section 14 evidence of a previous conviction can be given if it will throw light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter. (Ameer Ali on Evidence, 9th Edition, p. 216.) It was under these sections that the learned Judge allowed the prosecution to prove that the appellant was convicted for disorderly behaviour on the road.

The only other question is whether P38 was properly admitted in evidence. There is no evidence that it is in the handwriting of the appellant or that it bears his signature. Simon said that the handwriting looks like that of the appellant. We are of opinion that it should not have been admitted in evidence. It was produced to prove that the appellant was greatly attached to the deceased. On that point there was a large volume of evidence and its production could not have caused any prejudice to the appellant.

For the reasons given above we would dismiss the appeal and the application.

Appeal and Application dismissed.

1949 *Present :* **Wijeyewardene C.J.**

KUMARESU *et al.*, Appellants, *and* THE DIVISIONAL REVENUE OFFICER, VAVUNIYA, Respondent

S. C. 1,390–1,392—M. C. Vavuniya, 21 374

Criminal procedure—Procedure when investigation of offence cannot be completed in twenty-four hours—Unlawful detention for a period exceeding fifteen days in all—Escape from custody—Power to pursue and re-arrest—Penal Code, s. 220A—Criminal Procedure Code, ss. 35 and 126A (2).

An accused who has been irregularly ordered under section 126A (2) of the Criminal Procedure Code to be detained for a term exceeding fifteen days in the whole may yet be guilty of escaping from lawful custody if, at the time he escapes, the period of fifteen days contemplated by the section has not expired.

The right given by section 42 of the Criminal Procedure Code to pursue and re-take a person escaping from lawful custody should be exercised immediately. An arrest made after an interval of time after an immediate but unsuccessful pursuit would therefore be unlawful.

Section 35 of the Criminal Procedure Code contemplates an arrest at the time of the commission of a cognizable offence or immediately afterwards and not some time afterwards.

APPEAL from a judgment of the Magistrate, Vavuniya.

K. C. Nadarajah, with *M. Markhani*, for the first accused appellant.

N. Kumarasingham, with *V. Ratnasabapathy*, for the second and third accused appellants.

T. S. Fernando, Crown Counsel, with *L. B. T. Premaratne, Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

February 15, 1949. WIJEYEWARDENE C.J.—

There are three counts in this case. On the first count the first accused was charged under section 220A of the Penal Code with "intentionally offering resistance to the lawful apprehension of himself by S. Manickam, Fiscal's Officer, upon a warrant of detention issued by the Magistrate's Court of Chavakachcheri in Case No. 25,604". On the second count the second and third accused are charged under section 220A with "rescuing the first accused from the custody of S. Manickam, Fiscal's Officer" in whose custody the first accused was lawfully detained. On the third count all the three accused are charged under section 323 with voluntarily causing hurt to S. Manickam and S. Thambyah, Fiscal's Officers, "with intent to prevent the said public servants from discharging their duties as public servants, to wit, in re-arresting" the first accused. On September 15, 1947, a Police Officer made a report to Court informing the Magistrate that the first accused and another obstructed two Police Constables who went to arrest an accused in M. C., Chavakachcheri 25,041 and caused hurt to the two constables. The first accused was brought to Court by the Police Officer and the Magistrate acting under section 126A (2) of the Criminal Procedure Code remanded the first accused to Fiscal's custody till September 19. The first accused was produced in Court on September 19 and remanded again to Fiscal's custody till October 3, 1947. The Magistrate signed the warrant of detention between noon and 1 p.m., and the Chief Clerk of the Court who is also the Fiscal's Marshal and had the first accused in custody entrusted him to S. Manickam. At about 3 p.m., the first accused told Manickam that he wanted to go out for a call of nature. Manickam removed him from the cell and was taking him out when he escaped. Manickam pursued him immediately and searched for him in a jungle towards which he ran. Failing to find him Manickam reported the matter to the Fiscal's Marshal about 5 p.m., when the latter handed him the warrant of detention and asked him to search for and arrest the first accused. Manickam accompanied by Thambiayah, another Fiscal's Guard, and Panchadcharam, a labourer employed in the Courts, continued the search and ultimately found the first accused on September 23 at Omanthai, in a railway waggon used as a waiting room. In spite of the resistance offered by the accused, Manickam and Thambiayah put a handcuff on each hand of the accused. The second accused stabbed Manickam on being instigated to do so by the third accused who said: "There they are handcuffing Kumaresu (first accused). Why are you looking on. Stab him". The first accused bit both Manickam and

Thambiayah and all the accused ran away. When they went to arrest the first accused on September 23 neither Manickam nor Thambiayah was wearing his uniform as a Fiscal's Guard.

It was argued by the Counsel for the appellants that the first accused was not in "lawful custody" on September 19, as the Magistrate had no power under section 126A (2) to extend the detention of the first accused till October 3, 1947. That section authorises "the detention of an accused in the custody of the Fiscal for a term not exceeding fifteen days in the whole" and the Magistrate who had already made an order detaining the first accused from September 15 to September 19, could not make a further order detaining him till October 3. But in spite of that, the first accused was, in my opinion, in lawful custody at the time he escaped on September 19. The period of fifteen days contemplated by section 126A had not expired then and the order of detention made by the Magistrate had the effect of making Manickam's custody a lawful custody on September 19, though the detention of the first accused in Fiscal's custody after the expiry of fifteen days from September 15 would have been unlawful. Moreover, the Magistrate had not made an order under section 126A (3) and the first accused was, in any event, in the lawful custody of the Court at the time of his escape. In escaping from such lawful custody the first accused committed an offence punishable under section 220A of the Penal Code. He has been charged for that offence in another case and convicted.

The question has to be decided whether the attempted arrest of the first accused on September 23 is lawful. The arrest is referred to in the first count as "an apprehension by S. Manickam, Fiscal's Officer, upon a warrant of detention". No doubt section 42 of the Criminal Procedure Code empowers a Fiscal's Officer to pursue and arrest a person escaping from his custody. But the section requires that such Fiscal's Officer should "immediately pursue and arrest" such person. It is true that in the present case Manickam pursued the first accused immediately after he escaped. But that pursuit proved fruitless. Then Manickam returned to the Fiscal's Marshal, took the warrant of detention and, on the directions of the Fiscal's Marshal, made a complaint to the police "between the 19th and 23rd". Up to the 22nd Manickam was "going all over in search of the first accused" and on the 22nd he got some information which led him to Omanthai. Manickam searched for the first accused in several places in Omanthai and found him last in the railway waggon. I am unable to hold that this arrest is the kind of arrest contemplated by section 42. It was argued on behalf of the Crown that, as the escape from lawful custody was a cognizable offence, Manickam could have arrested the first accused in his capacity as a private person. This, of course, is somewhat different from the position set out in the first count which speaks of an arrest upon a warrant of detention. But apart from that, I do not think the reasoning of the Crown Counsel is sound. The Crown Counsel relies on the words of section 35 of the Criminal Procedure Code which enacts "Any private person may arrest any person who in his presence commits a cognizable offence". The section does not state that any private person may arrest any person who in his presence has committed a cognizable offence. This section

contemplates an arrest at the time of the commission or immediately afterwards and not some time afterwards and certainly not four days afterwards.

There is no doubt that Manickam acted in good faith in attempting to arrest the first accused. The first accused knew Manickam very well as the Fiscal's Guard from whose custody he escaped on September 29. Manickam who had the power to pursue him immediately and arrest him exceeded his authority in attempting the arrest on September 23. That attempted arrest could not have caused the first accused a reasonable apprehension that he would be killed or grievously hurt if he did not resist the arrest. In these circumstances section 92 (1) of the Penal Code is applicable to him. I find him guilty of voluntarily causing hurt.

The second and third accused cannot be said to have known Manickam as the Fiscal's Guard from whose custody the first accused had escaped. I think they may claim to have exercised the right of private defence. However, in stabbing Manickam they have exceeded the right of private defence and I find them guilty under section 325 of the Penal Code.

I set aside the convictions appealed against. I convict the first accused under section 314 and sentence him to three months' rigorous imprisonment. I convict the second and third accused under section 325 and sentence each of them to one month's rigorous imprisonment.

Conviction altered.

1948 *Present :* **Canekeratne and Nagalingam JJ.**

MARJAN *et al.*, Appellants, *and* BURAH *et al.*, Respondents

S. C. 38—D. C. Inty. Tangalla, 198

Charitable trust—Muslim Intestate Succession and Wakfs Ordinance—Application under—Governed by summary procedure—Misjoinder of parties and causes of action—Cap. 50—Sections 15 and 16—Civil Procedure Code, ss. 373, 374, 376.

Jurisdiction—Power of Court to set aside its own decree—Judgment in rem—Absence of notice to party interested—Right of such party to impeach the judgment.

(i) The Muslim Intestate Succession and Wakfs Ordinance creates a class of cases in regard to which the procedure should be what is designated by the Civil Procedure Code as summary procedure.

Each distinct trust must form the subject of a separate application and two or more separate trusts cannot be combined in one application.

(ii) When a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularities in procedure.

(iii) A judgment which is in the nature of a judgment *in rem* cannot be sought to be set aside by a party interested in it on the mere ground that no notice, actual or constructive, was given to him concerning the proceedings which terminated in the judgment. Where, however, the judgment is obtained by fraud or collusion and by virtue of such judgment certain property belonging to a third party is removed in his absence, such third party can, without bringing a separate action, apply to have the judgment set aside in the same proceedings.