[COURT OF CRIMINAL APPEAL]

1940 *Present:* **Mosley S.P.J., Hearne and Cannon JJ.**

THE KING *v.* JOHN PEIRIS.

80—M. C. Kalutara, 44,433.

Statement to Police Officer—Charge of theft—Investigation made in consequence of statement—Statement not made in course of investigation—Cause of death—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, s. 32 (1).

On information given to the Police that a man engaged in stealing nuts had fallen from a tree a Police Constable was sent to investigate the facts of the case. According to the Constable he found a man lying on the ground with fractured limbs and other injuries from which he died subsequently.

He questioned the man who made a statement to him. There was no reference in the statement to the charge of theft but only a complaint against the accused.

In proceedings against the accused in which the cause of injuries was in question, it was sought to put in evidence the statement made to the Police Constable.

Held, that the statement was admissible under section 32 (1) of the Evidence Ordinance as a statement by the deceased as to the cause of death or as to the circumstances of the transaction which resulted in his death.

Held, further, that it was not a statement made to the Police in the course of investigation into an offence within the meaning of section 122 (3) of the Criminal Procedure Code

APPEAL from a conviction before a Judge and jury at the 3rd, Western Circuit held at Kalutara. The facts are stated in the head note.

H. V. Perera, K.C. (with him *U. A. Jayasundera* and *B. Jayasuriya*), for the first accused, appellant.—P 6 was improperly admitted at the trial for the purpose of corroborating the evidence given by the deceased before the Magistrate. It was a statement made by the deceased to the Police in the course of an inquiry which was commenced as the result of a complaint made by the first accused under chapter 12 of the Criminal Procedure Code. It would be admissible under section 32 (1) of the Evidence Ordinance but for the overriding prohibition under section 122 (3) of the Criminal Procedure Code as reproduced in Cap. 16 of the 1938 edition of the Legislative Enactments. There is a fundamental difference between section 122 (3) as it now is and as it was formerly. The proviso at present attached to sub-section (4) was formerly applicable to sub-section (3) also. Under section 10 (3) of Cap. 1 of the Legislative Enactments, as amended by Ordinance No. 16 of 1939, the present Revised Edition is the sole authentic Statute Book of Ceylon. The accused was materially prejudiced by the admission of P 6 and the comments made upon it by the Judge.

The trial Judge, by directing that it was obligatory on the accused to prove the truth of every defence set up, placed too heavy a burden on the defence.

E. H. T. Gunasekera, C.C., for the Crown.—P 6 was admissible as evidence. If section 122 of the Criminal Procedure Code (Cap. 16) is read with section 10 (3) of Cap. 1, it cannot be said that the figure 4 appearing in the former and the bracket enclosing it are part of "the legislative enactments" of Ceylon. Section 6 (1) of Cap. 1 limited the powers conferred on the Commissioner by section 3 (8). The Commissioner's act of subdividing sub-section (3) of section 122 of the Criminal Procedure Code as it stood before the date of the Revised Edition, was not validated by the proclamation under section 10 of Cap. 1. In *Fernando v. Rex*[1] the question whether the proclamation under section 10 could validate an act done by the Commissioner contrary to section 6 (1) does not appear to have been considered. A Malayan case reported in *Vol. 6 of the Malayan Law Journal, p. 9*, may be cited in appellant's favour, but it is submitted that it was wrongly decided. The proviso attached to sub-section (4) of section 122 should be interpreted as applicable to sub-section (3) also for, otherwise, the reference to section 180 of the Penal Code will have no meaning—*Maxwell on Interpretation of Statutes (7th ed.), p. 198; The Duke of Buccleuch*[2]; *R. v. Wilcock*[3]; *R. v. Strahan*[4].

P 6 was let in with the consent of the defending Counsel. It is not open to the appellant to take objection to it now in appeal—*T. Austin* and *J. B. Davies*[5]. *Sanders*[6].

Section 122 is a part of chapter 12 of the Criminal Procedure Code. That chapter deals with investigations into reports of cognizable offences. The information given by the first accused to the Police was, in point of fact, about an accident. Section 122 (3) of Cap. 16 is therefore inapplicable, and P 6 would clearly be admissible under section 32 (1) of the Evidence Ordinance.

H. V. Perera, K.C., in reply.—It was accepted in the Assize Court that the statement (P 6) fell under section 122 of the Criminal Procedure Code. It is too late now to seek to place it under a different section.

Whatever is not evidence cannot be made evidence by means of consent of accused—*The King v. Pila et al.*[7], *The King v. Don William*[8], *R. v. A. T. Ellis*[9], *Mukerji on Trial by Jury, p. 296.*

Cur. adv. vult.

November 13, 1940. MOSELEY J.—

The appellant was convicted on September 30 of the following offences :—

(1) being a member of an unlawful assembly; and
(2) causing grievous hurt on provocation.

He appeals against the convictions on questions of law. He also applies for leave to appeal on grounds involving questions of fact. In regard to the application we are unable to say that the verdict of the jury is unreasonable or that it cannot be supported having regard to the evidence. The application for leave to appeal on the facts is therefore refused.

[1] *(1939) 16 C. L. W. 13.*
[2] *L. R. 15 P. D. 86 at p. 96.*
[3] *(1845) 7 Q. B. 317 at p. 338.*
[4] *(1872) L. R. 7 Q. B. 465.*
[5] *12 Cr. App. R. 171 at p. 174.*
[6] *14 Cr. App. R. 10.*
[7] *(1912) 15 N. L. R. 453 at p. 465.*
[8] *(1920) 2 C. L. Rec. 192.*
[9] *5 Cr. App. R. 41*

Two of the points of law raised were not seriously argued and it is not necessary to refer to them further than to give expression to our opinion that they were without substance. Of the remaining grounds it will be more convenient to deal first with that which appears last in the statement of the appellant and was so dealt with by his counsel. It is a complaint that in the course of his summing-up the learned trial Judge made use of the following words :—

> "Right at the outset of the case there is one question that confronts you, which you must dispose of. It is perfectly true that the defence need not have opened their mouths. They could have said: "Let the Crown prove its case". But if they do open their mouths, and if, as Crown Counsel suggested, a number of false hares were started, well, they will have to take the consequences of having started the false hares. They will have to prove that they are not false theories."

Counsel for the appellant contended that these words are tantamount to a direction that the jury should reject anything put forward by the defence unless it was proved not to be false, and that thereby too heavy an onus was placed on the defence. That contention might well have some force if the offending passage were the only direction given to the jury on the subject of burden of proof. But even earlier in his summing-up the learned Judge had directed the jury on the presumption of innocence which attaches to an accused person and the doubt of which he must have the benefit. Shortly after giving utterance to the words complained of the Judge referred to the theory of accident which had been suggested by the defence. He said: "You must clear the ground of that question, for if you are to think that there is any evidence that the man fell, then of course he could not have been assaulted and we need go no further." The words, with those which follow, appear to amount to an invitation to acquit unless the Crown had proved its case. Again, towards the close of his charge the jury were told: "The question is, have the Crown proved who caused the injury?" and the Judge in his final words reminded the jury that the accused must get the benefit of the doubt.

We are of opinion that, taken as a whole, the direction as to the burden of proof was not unfair to the accused.

The remaining ground of appeal, which was strenuously argued, is as follows :—

> "The inquiry of the Police having commenced on the first information laid with the Police by the first accused, the statement made thereafter by the deceased at the spot to Police Constable Sirisena became a statement made in the course of the inquiry and was improperly admitted at the trial and marked P 6 for the purpose of corroborating the evidence given by the deceased before the Magistrate."

Counsel for the appellant relied upon the provisions of section 122 of the Criminal Procedure Code as it appears in Cap. 16 of the Legislative Enactments of Ceylon, and particularly upon sub-sections (3) and (4) thereof. In the Code as enacted in 1898 (Ordinance No. 15 of 1898)

the present sub-sections (3) and (4) appeared in one sub-section numbered (3). At the end of that sub-section was a proviso as follows :—

> "Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32 (1) of "The Ceylon Evidence Ordinance, 1895," or to prevent such statement being used as evidence in a charge under section 180 of the Ceylon Penal Code."

The Commissioner, to whom was entrusted the task of preparing the revised edition, presumably purporting to act in the exercise of power conferred upon him by section 3 (8) of Ordinance No. 19 of 1937 (now Cap. 1 of the Laws) divided the sub-section as indicated above, with the result that the proviso appears to apply only to sub-section (4). Counsel for the appellant argued that, this being so, the statement P 6 was inadmissible since it was not sought to use it for either of the purposes mentioned in sub-section (3). He conceded that it was a statement falling within the provisions of section 32 (1) of the Evidence Ordinance, but contended that it is also a statement made by a person to a Police officer in the course of an investigation under Chapter XII. of the Code, and that the proviso to sub-section (4), does not effect the bar to admissibility imposed by sub-section (3).

In our opinion it is unnecessary to discuss the majority of the arguments, which took a wide range, advanced by both counsel as to the effect of the revised version of the section and the failure of counsel for the accused at the trial to object to the admission of the document. It does not seem to us that the document comes within the ambit of section 122. The objection to its admission in evidence is based upon the footing that it is a statement made to a Police officer in the course of an investigation, that is to say, that an investigation into an offence was on foot in the course of which the statement recorded in P 6 was made to a Police officer. It seems to have been assumed that the information which the appellant, by his statement recorded in a document marked D 3, conveyed to the Police, was the information which prompted them to commence an investigation into the charge in this case in accordance with the provisions of section 121 of the Code.

Crown Counsel contended that D 3 does not constitute an information relating to the commission of a cognizable offence since it purports merely to be the report of an accident, namely the alleged fall of the deceased man from a coconut palm. It does, however, as counsel for the appellant pointed out, contain a vague suggestion that the deceased was engaged in stealing nuts, which is of course a cognizable offence. While there is a strong inference that the police constable proceeded to the scene to investigate a case of a fall from a coconut palm, it may be assumed for the purposes of this appeal that the document D 3 does contain information relating to a cognizable offence and that upon receipt of the information a constable was despatched "to the spot to investigate the facts and circumstances of the case, 'that is, the allegation of theft' and to take such measures as may be necessary for the discovery and arrest of the offender" as provided by section 121 (2). According to the constable's evidence, he found the deceased on the ground with fractured limbs and other injuries. He questioned the

deceased as to what had happened and recorded his statement P 6 then and there. It seems to us that, even assuming that the constable's mission was to investigate a charge of theft, his questioning of the deceased must have been prompted by the condition in which he found him and that, for the time being at least, the investigation into the alleged theft was put aside. The document P 6 contains no reference to a charge of theft and begins with a complaint against the second accused and the appellant. The statement then becomes nothing more than a statement by the deceased as to the cause of his death or as to the circumstances of the transaction which resulted in his death and as such is admissible under section 32 (1) of the Evidence Ordinance. It constitutes the information upon which the Police began their investigation into a charge in this case. Since we are of opinion that it is not a statement made to a Police officer in the course of an investigation of that charge, the provisions of section 122 (3) of the Criminal Procedure Code do not affect its admissibility. It is unnecessary therefore to consider the effect, if any, on sub-section (3) of the proviso to sub-section (4).

It is observed that when Crown Counsel sought at the trial, to have the document read in evidence he invoked the aid of section 32 of the Evidence Ordinance and it is only in appeal that it is suggested that it comes within the purview of section 122 of the Code. Once the document is excluded from the operation of the latter there can be no objection to its admission in evidence. We therefore hold that it was properly admitted.

The appeal is dismissed.

Appeal dismissed.