1933 *Present :* **Dalton S.P.J.**

VAN CUYLENBERG *v.* SELLAMUTTU.

571—P. C. Colombo, 42,514.

Refusal to answer questions put by Public Servant—Person questioned under section 122 (2) of the Criminal Procedure—Penal Code, s. 177.

A refusal to answer questions put to a person under the provisions of section 122 of the Criminal Procedure Code may form the basis of a charge under section 177 of the Penal Code.

APPEAL from a conviction by the Police Magistrate of Colombo.

R. L. Pereira, K.C. (with him *H. V. Perera* and *T. F. C. Roberts*), for accused, appellant.

Illangakoon, S.-G. (with him *M. F. S. Pulle, C.C.*), for complainant, respondent.

April 12, 1933. DALTON S.P.J.—

The appellant, Nagendra Sellamuttu, was charged with committing an offence under section 177 of the Penal Code, namely, being a person legally bound under section 122 (2) of the Criminal Procedure Code to answer all questions relating to an offence, namely, an offence under section 298 of the Penal Code relating to the violent death of one W. Podisingho, put to him by the complainant F. A. van Cuylenberg, Inspector of Police, he did on July 15th, 1932, refuse to answer the following question: "Did you take Yusoof Caffoor on the 12th night to

Slave Island in your small car?" put to him by the Inspector, a public servant in the exercise of his legal powers. The appellant has been convicted, sentenced to six months' simple imprisonment, and now appeals from that conviction.

The first ground of appeal urged was that a refusal to answer a question put to a person under the provisions of section 122 of the Criminal Procedure Code cannot form the basis of a charge laid under section 177 of the Penal Code, which it was argued had application to judicial proceedings only. Mr. Pereira referred me to *Samarakkody v. Don James,*[1] as being an authority for his contention. The facts of that case are not set out, but one is able to gather, I think, from the judgment that the accused man there, probably a headman, had failed to report a murder to the authorities, a duty required of him by section 22 of the Criminal Procedure Code. The learned Judge (Withers J.) held he could not be convicted of any offence under section 177 of the Penal Code, there being no refusal to answer questions put by a public servant. The learned Judge also held, but it did not seem necessary for the purpose of deciding the case, that the offence contemplated by section 177 is an offence committed during judicial proceedings. He refers to a dictum of Burnside C.J. in *Pulle v. Goonesekere,*[2] in support of this opinion. I can find nothing, however, in the Criminal Procedure Code (Ordinance No. 3 of 1883) in force at the time of this decision similar to the provisions of Chapter XII. of the present Ordinance, and hence the question, as it arises now, would not have required to be considered.

It is to be noted, however, that the opinions expressed on this point in these two cases are not relied upon in *Deheragoda v. Alwis,*[3] where a charge was laid against a person under section 177 for refusing to answer a question put to him by a Police officer under the provisions of section 122 of the Criminal Procedure Code, exactly as in this appeal now before me. Experienced counsel were engaged in that case, and there was no suggestion by counsel or Ennis J. that a charge would not lie under the circumstances against the accused. Mr. Pereira has failed to satisfy me that section 177 does not apply to a person who under section 122 of the Criminal Procedure Code is bound to answer truly questions put to him and refuses to do so.

The next ground urged was that appellant was not legally bound to answer the question put to him, as being a question which might have a tendency to expose him to a criminal charge.

I have already detailed certain of the facts leading up to the incidents out of which this charge arose in my judgment in *van Cuylenberg v. Caffoor*[4] Colombo, and it is not necessary to repeat them. The Police were in search of the driver of the Hillman car X-1078, said to be responsible for the death of W. Podisingho, and they had cause to suspect it was one of four Caffoor brothers. The appellant is a young man, 20 years of age, described as a business apprentice, and son of a broker, living with his parents. He states he was educated at the Royal College, where he was at school with Mohideen Caffoor, with whose brother Yusoof Caffoor he was also friendly. Inspector van Cuylenberg states that in the course

[1] *(1897) 6 Tambyah's Reports 107.*
[2] *(1886) 7 S. C. C. 206.*
[3] *16 N. L. R. 233.*
[4] *34 N. L. R. 433.*

of his inquiries the appellant's name was mentioned and on July 14th he went to his house to interview him. He was unable to find him at home until the evening of the 15th. Th interview, according to the evidence, seems to have been very brief. "I asked accused for his name and occupation, which he answered. "I then asked him 'did you drive Yusoof Caffoor to Slave Island in your car on the night of the 12th? . . . . Accused replied 'I decline to make any statement'".

The Inspector never explained the position to the appellant or told him what he had come about, never told the appellant what he wanted of him apart from this one question, and when he refused to answer never told him, as one would have expected him to do, that according to the Inspector's view, he was compelled to answer, and that he was committing an offence in refusing to answer. He does state, however, he had explained on his visit on July 14th to appellant's father why he had come, and what sort of evidence he wanted from appellant.

On July 18th the evidence shows that appellant, having taken legal advice, went of his own accord to the office of the Superintendent of Police and made a full statement to him answering all that was required of him. Under these circumstances, having regard to the youth and obvious inexperience of appellant, one may express some surprise at these proceedings being launched at all. He was nevertheless charged on July 23rd with refusing to answer the question put to him on July 15th, and has been sentenced to six month's simple imprisonment. Whilst supporting the conviction, the Solicitor-General concedes he cannot under the circumstances support the sentence passed.

Appellant gives evidence and purports to explain why he refused to answer the question put to him on July 15th. He states that Yusoof Caffoor came to his home in Rosmead place about 8.15 P.M. on the night of July 12th with another man and wanted to use his (appellant's) car. He lent him the car and drove it himself. Yusoof asked him to go to Slave Island, where he was stopped at the lane. Yusoof and the other man got out, went into the lane, and in a few minutes returned with a man whom the appellant had previously seen driving Yusoof Caffoor's car. Appellant then drove them all to Caffoor Villa where he left them. When he was questioned by the Inspector in the evening of July 15th, he had heard that Yusoof Caffoor's driver had admitted driving car X—1078 on the evening of July 12th, and also that he had gone back on that statement. He also had heard that allegations were being made against Yusoof Caffoor "and party" of fabricating false evidence or similar offences. There is no reason at all to doubt his evidence on these two points. Since he had driven Yusoof Caffoor that night, although he says he was conscious of doing nothing wrong, he states he was frightened at the visit of the Inspector, and he was also afraid that he might be incriminated, not necessarily in the motor car case, but for assisting to fetch a person as the driver, who in fact was not the driver at the time of collision.

The learned Magistrate agrees that if appellant had been suddenly confronted on July 15th with this question by the Inspector, there might have been some excuse for him, but he had known from the previous day that the Inspector was coming and what information he wanted. He states, although appellant does not say so, that he (appellant) was aware

that the Inspector was coming about the accident alone, and in the light of subsequent facts that came to his notice before judgment was given, he interprets the question as being one which could not incriminate him on any charge except that of being responsible for the death of W. Podisingho; he does not, however, deal with appellant's statement that he feared he might possibly be incriminated on another charge, *i.e.*, of fabricating false evidence, apart from merely mentioning it. He comes to the conclusion that the real reason why appellant refused to answer the question was not for fear of incriminating himself, but for fear of incriminating Yusoof Caffoor on a charge of driving the car that caused the death of the man. An examination of appellant's evidence does not show that any such suggestion for his refusal was made to him. In dealing with the effect of his refusal on July 15th and delaying to give the information until July 18 as a result of which the learned Magistrate says very precious time was lost to the Police in obtaining this information, he has overlooked the fact that the Inspector admitted that he had evidence from others before he went to appellant at all that appellant had driven Yusoof to Slave Island on the night of July 12th.

I have set out the law applicable in my judgment in *van Cuylenburg v. Caffoor* (*supra*). I can see no sufficient reason why the evidence of appellant as to his state of mind on July 15th, when questioned by the Inspector, should not be accepted. That there could be no reasonable fear in his mind that he might be incriminated in the motor case I agree, but I see no reason to disbelieve his statement that he felt he was personally in danger from having driven Yusoof Caffoor on the errand to Slave Island to fetch his own driver, which conduct might result in other charges against Yusoof Caffoor as well as himself. It seems to me to be under the circumstances not an unreasonable one in the case of a frightened youth. Was there something here beyond a bare possibility of legal peril? I think there was, and in that event on the authorities considerable latitude must be allowed to appellant in judging of the effect of the question put to him. The priviledge would, as has been stated, be worthless if the person questioned was required at the time to point out how the answers to questions put would tend to incrimate him.

The fact that on July 18th he went to the Superintendent of Police and volunteered all the information that was required of him, after legal advice had been taken on his behalf, and before the arrest of Yusoof Caffoor, is in the circumstances here inconsistent, in my opinion, with any suggestion of complicity between appellant and Yusoof Caffoor such as the learned Magistrate seems to think existed. It seems to me to be the natural sequence after reflection on the prior refusal of an alarmed and frightened youth, who probably never had anything to do with the Police before.

For these reasons I would hold that the question was not one which, under the circumstances, appellant was legally bound to answer, and this ground of appeal must be answered in his favour. The appeal is allowed and the conviction quashed.

Appeal allowed.