1937 *Present :* **Hon. Mr. A. E. Keuneman, Commissioner of Assize.**

THE KING *v.* GABRIEL *et al.*

31—P. C. Avissawella, 12,421.

Statement to Police Officer—Statement challenged by defending Counsel—Correct version given by Police Officer—No contravention of section 122 (3) of the Criminal Procedure Code—Evidence Ordinance, s. 157.

Where a statement made to a Police Officer by a witness was challenged by the defending Counsel in cross-examination of the witness and the Police Officer in the course of his evidence gave a correct version of the statement, refreshing his memory by reference to the recorded statement,—

Held that the use of the statement was not a contravention of section 122 (3) of the Criminal Procedure Code.

Held further, that the statement, in the circumstances in which it was made, was a voluntary complaint made to the Police Officer and not a statement under section 122 of the Criminal Procedure Code and was therefore admissible under section 157 of the Evidence Ordinance.

Rex v. Pabilis (25 *N. L. R. 424*) *referred to.*

[1] *34 N. L. R. 185.*

THIS was an application to state a case under section 355 (1) of the Criminal Procedure Code.

The facts are fully stated in the order of the Commissioner of Assize.

R. L. Pereira, K.C. (with him *R. G. C. Pereira*), for third accused.

M. M. I Kariapper, C. C., for the Crown.

Cur. adv. vult.

June 21, 1937. Order.

This is an application made on behalf of the third accused under section 355 (1) of the Criminal Procedure Code requesting me to state a case on the ground that the statement made by the witness Menthonona to the Police Inspector concerning the third accused was explained by me to the jury, and that the statement could not be used for the purpose of corroborating Menthonona's statement under section 122 (3) of that Code. The facts of the case stated shortly are as follows :—

Seven accused including the third accused were indicted under twelve counts of unlawful assembly, rioting, housebreaking by night, abduction, robbery, and rape. The ninth count charged all the accused with the offence of abducting Menthonona in order that she may be forced to illicit intercourse under section 357 of the Ceylon Penal Code. The twelfth count charged the first, fifth, and sixth accused with committing rape on Menthonona under section 364 of that Code.

Evidence was led by the prosecution to prove an episode about 6.30 P.M. on the night of June 19, 1936, in which the woman Menthonona while leaving Kannatota estate was slapped and dragged by certain of the accused. On this occasion she is said to have been rescued. This episode however was not made the subject of any charge. Evidence was also led to show that later in the night, while Menthonona, Dissanayake (who was keeping her as a mistress), and a servant girl Nelly were in their room with the door bolted, a number of men including some of the accused came to that place, asked the inmates of the room to get out, forced open the door, and insisted on their leaving the estate. Upon this, Menthonona, Dissanayake, and Nelly left the room and were proceeding out of the estate with a lantern, and had gone less than a 100 yards, when they were set upon by a number of men, including some of the accused. Dissanayake was seized and blindfolded, and Menthonona was dragged away and raped, and Nelly had to hide under a tea bush till morning.

Menthonona in her evidence purported to identify the first, third, and sixth accused as being among the persons who were on the verandah of her room as she came out after the door was forced. She also said that at the time of the assault she identified the third, fifth, and sixth accused, and said that the sixth seized her and dragged her away, and was later assisted by the first and fifth accused, that she was taken to a spot where there was jungle and rubber and was raped first by the sixth, then by the first, and then by the fifth accused. She further stated that the fifth and sixth accused then left her in charge of the first accused, who stayed with her through the night, and in the small hours of the morning took her to some abandoned lines, beyond the boundary of the

estate, and there tied her mouth and hands and raped her again. Her bandages were eventually untied, and she cried out for help, and a man Kiribanda came, and after the first accused had gone away took her to his mother's house, where the woman remained in an exhausted condition. Meanwhile Kiribanda went in search of the headman or the Police. Kiribanda met the Inspector on his way and brought him to his house where Menthonona was at the time. Menthonona made a statement to him there and also later at the spot where it was recorded. In cross-examination by Mr. R. L. Pereira who appeared for the first to fifth and seventh accused, Menthonona was questioned with regard to the statement she had made to the Inspector. The cross-examination was based upon a report dated June 20, 1936, made by the Inspector to the Police Court. The relevant paragraph in this report which was read to her by cross-examining Counsel is as follows :—

"I found the wife of the complainant in the house of one Kiribanda. She had blood on her clothes and injuries on her body. She stated that she had been raped by Gabriel and two other men whose names she did not know but whom she could identify." Gabriel is the name of the first accused. Counsel for the defence made a point of the fact that Menthonona did not mention the name of the fifth accused whom she admitted she knew to be Martin. I do not remember any cross-examination with regard to the absence of any reference to the other persons besides these three who were mentioned, but it was possible to draw an inference from the report that she had only referred to three persons.

The evidence of Dissanayake, Nelly, and other witnesses was also led. When the Inspector (Mr. Schokman) was in the box, Crown Counsel proceeded among other things to obtain from him oral evidence of the statement made to him by Menthonona. No objection was taken then or at any time before the verdict of the jury was given to the admission of this evidence. At an early stage the Inspector asked permission to refresh his memory by referring to his notebook and I thought it reasonable in the circumstances of the case to allow him to do so. Mr. R. L. Pereira thereupon claimed and was allowed the right to examine the Inspector's notebook, and the notebook was in fact handed to him and examined by him.

The Inspector explained that the report of June 20, 1936, was very short, and in some respects incorrect. It had been drawn up in a hurry late at night, owing to a desire of the Proctor for the accused to transfer the prisoners from Police custody to the custody of the Fiscal, with a view to the obtaining of bail. He proceeded to give oral evidence of the full statement of Menthonona disclosing in the course of his evidence, that Menthonona had given the names of two men who had raped her, namely, of Gabriel (first accused) and Martin (fifth accused) and not as stated in the report, only of Gabriel, and had also spoken of her recognition of the third accused among the persons who were present after the breaking down of the door and also at the later assault, and she also spoke to the other incidents of that night.

The Inspector was subjected to a considerable amount of cross-examination with regard to this evidence partly directed to showing discrepancies between Menthonona's statement to the Police and her

statement before me and showing among other things that her alleged description of the sixth accused did not tally with the appearance of the sixth accused, and also with regard to the differences between the Inspector's evidence and his report.

In the course of my address to the Jury, I explained to them Menthonona's statement made on various occasions, including her statement to the Police. I also dealt with the various statements made by the other witnesses on various occasions as elicited in evidence. I warned the jury that the evidence of the witnesses given in the Supreme Court, if believed, was the evidence on which they could act.

By their verdict, the jury found the first, fifth, and sixth accused guilty under counts nine and twelve, and the third accused guilty under count nine of abduction. The verdict was given on the evening of June 17, 1937, and I deferred sentence till the next morning.

On the morning of the 18th Mr. R. L. Pereira appeared in Court and made the application I have mentioned. Up to that time no objection was taken on this ground. I am certainly of opinion that this objection should have been made at an earlier state, but I do not make that a ground for refusing this application.

The relevant section of the Criminal Procedure Code is section 122, sub-section (3).

"No statement made by any person to a Police Officer or an Inquirer in the course of any investigation under this chapter shall be used otherwise than to prove that the witness made a different statement at a different time, or to refresh the memory of the person recording it."

It is to be noted in this case that the statement made by Menthonona to the Police was first brought into question by cross-examining Counsel, who depended upon the Inspector's report to the Police Court, and that this report was used for the purpose of discrediting the witness. The report was a very short statement as far as Menthonona's evidence was concerned, and once an allegation was made that this was her statement, I cannot see any principle of law or justice which can prevent the correct version of the statement from being proved, nor do I think that it can be said that the statement is being used for the purpose of corroborating the witness.

Further, Menthonona's statement to the Police was in itself the subject of cross-examination by defending Counsel when the Inspector was in the box, and certain portions of that statement were utilized by defending Counsel for the purposes of the defence.

I think the evidence of Menthonona's statement to the Police was admissible in evidence.

There is another reason why I think this evidence may be regarded as admissible. While it is true that the first information of the events of the night in question was given by Dissanayake at the Police Station, on that occasion he only spoke to what he knew. The only information of the carrying away and the rape was that supplied by Menthonona to the Inspector. I am not satisfied that her statement to the Police is one that properly comes in under section 122.

I may refer in this connection to *Rex v. Pabilis*[1]. In this case two young women met a group of six men who were near a tavern. Two of these young men seized the women and carried them off separately to the fields. One of the young women succeeded in escaping and made a formal complaint at the Police Station. When she had finished and the statements of certain other witnesses were being recorded, the other young woman who had yielded to the desire of her assailant appeared at the station and made her statement.

Oral evidence was permitted as regards both the statements and on a case stated the Divisional Court held that both these statements were properly admitted.

In the present case, it is in evidence that Kiribanda was sent to fetch the Headman or Police Inspector, and happened to meet the latter on the way, and brought him eventually to the house where Menthonona was. I think that the statement of the woman Menthonona may be regarded as a voluntary complaint made to the Inspector, and not a statement under section 122 of the Criminal Procedure Code, and that the statement can be admitted under section 157 of the Evidence Ordinance.

One other matter may be mentioned. What is forbidden by section 122 (3) ? Is it the production of the recorded statement of the witness ? Or, is there a further prohibition of any oral evidence given by the recording Police Officer of the statement made to him ? On this point I have been given a number of authorities by defending Counsel (*Hameed v. Kathan*[2], *King v. Cooray*[3], *King v. Soysa*[4], *Wickremasinghe v. Fernando*[5]). These cases are based upon the decision in *Dal Singh v. The King Emperor*[6], which approved of the decision in *Queen Empress v. Mannu*[7]. In all these cases the point turned on the admission of the recorded statement itself.

If we examine the language of section 122 (3) we find that the "statement" shall not be used otherwise than "to prove that the witness made a different statement at a different time or to refresh the memory of the person recording it". The second alternative appears to indicate that the "statement" in question is the recorded statement or writing. There would be no meaning in the recording officer using the verbal statement for the purpose of refreshing his memory.

The only authority I have been able to find on this point is the dictum of Bertram C.J. in *Rex. v. Pabilis* (*supra*). "A difficulty has from time to time arisen with regard to the words 'to refresh the memory of the person recording it'. These words have always seemed to me to imply that an officer recording such a statement may (where the law allows it, *e.g.*, under section 157 of the Evidence Ordinance) give oral evidence as to the terms of that statement, but may not put in the written statement itself. He may only use that statement to refresh his memory, though of course, Counsel for the defence may call for a statement so used under section 161 of the Evidence Ordinance."

[1] *25 N. L. R. 424.*
[2] *4 C. W. R. 363.*
[3] *28 N. L. R. 74.*
[4] *26 N. L. R. 324.*
[5] *29 N. L. R. 403.*
[6] *116 L. T. 621.*
[7] *1 L. R. 19 All. 399.*

This appears in the reference to the Divisional Court but that Court refrained from deciding the point. I have consulted the Indian authorities under section 162 of the Indian Criminal Procedure Code, but they are not exactly in point, as the section in the Code of 1898 only limited the use of the writing and a later amendment prohibited both the statement and the writing.

But at the time when the writing was prohibited, the Indian Courts generally permitted the leading of oral evidence by the recording officer. There were however in a few cases expressions of opinion that even the oral evidence cannot be allowed.

With respect I am inclined to agree with the dictum of Bertram C.J. and think that he sets out a reasonable interpretation of the section.

It is not however necessary for me to give a decision on this point, and had this been the only point, I should have been agreeable to state a case for decision.

The application is refused.

Application refused.