COURT OF CRIMINAL APPEAL.

1942 *Present* : **Soertsz, Hearne and de Kretser JJ.**

THE KING *v.* G. PUNCHIMAHATMAYA.

33—M. C. Balangoda, 33,768.

Statement by accused in course of inquiry—Other than statement under ss. 160 and 165—Crown is not bound to put them in—Criminal Procedure Code, s. 233.

Where statements are made by an accused person in the course of an inquiry other than under sections 160 and 165 of the Criminal Procedure Code it is open to the Crown or the accused to decide whether to make use of them or not, if they are relevant or admissible.

It is in regard to statements made under section 160 that the Crown is bound to put them in and to read them in evidence as part of its case in accordance with the provisions of section 233 of the Criminal Procedure Code.

APPEAL from a conviction by a Judge and Jury before the Midland Circuit.

O. L. de Kretser (Jr.), for the appellant.

H. W. R. Weerasooriya, C.C., for the Crown.

Cur. adv. vult.

December 8, 1942. SOERTSZ J.—

The appeal from the conviction entered in this case was based on several grounds set forth in the original notice of appeal and on several others advanced in a supplementary statement tendered on a much later date.

Mr. de Kretser, who appeared for the appellant, confined his argument to only a few of the questions raised. After examination of all the matters submitted to us, we reserved our judgment in order to consider the objection taken in ground (1) of the original notice, for that appeared to us to be the one substantial question for our decision.

That question was whether it was incumbent on the Crown to put in evidence the statement made by the appellant to the Magistrate on May 19, 1942, and whether if the Crown was bound to do that, its failure in that respect was material in the circumstances of this case.

The statement in question was a statement that came to be recorded in this way. On May 19, the Magistrate, on receiving information from the Ratnapura Police that a case of suspected murder had been reported to them, went to the scene of the alleged offence. After the Magistrate made his inspection, the Police Sergeant informed him that the accused, who was present in custody at the scene, desired to make a statement. The Magistrate thereupon questioned the accused, and he admitted that he desired to make a statement. The Magistrate told him that he is not bound to make a statement, and that if he did make one it might be read in evidence against him, and that he need not make it if he had been induced to make it. The Magistrate went on to tell him that "if he was prepared to make his statement later, after he had time to consider about the matter", he would record it.

The Magistrate then placed the accused in the charge of the Interpreter Mudaliyar and proceeded to record the "available evidence". After he had taken the evidence of three witnesses, including the Sub-Inspector of Police, he gave the accused information of the charge as required by section 156 of the Criminal Procedure Code, and recalled the two witnesses other than the Inspector whose evidence had been taken and read over that evidence to the accused, and gave him an opportunity to cross-examine those witnesses. At this stage the accused again said that he desired to make a statement. The Magistrate then questioned the accused and satisfied himself that the accused was going to make "a purely voluntary statement", and recorded it on the appropriate Form as a statement made under the provisions of section 134 of the Criminal Procedure Code. If the statement so recorded is, unequivocally, one made under section 134 of the Code, it is clear that it is not within section 233 of the Code and the Crown was under no obligation to put it in evidence. But Mr. de Kretser submits that although this statement, P 17, purports to have been recorded under section 134, it is not, strictly, such a statement as is contemplated by that section for the reason that it cannot properly be regarded as a statement recorded *before* the commencement of the inquiry in view of the rulings given in the case of *The King v. Weerasamy* [1], to the effect that an inquiry commences when the charge is read to the accused under section 156 of the Criminal

[1] *42 N. L. R. p. 152 and ibid p. 207.*

Procedure code. That had been done in this case before the statement in question was recorded. The statement cannot, therefore, be regarded as one properly taken under section 134 of the Code. In our opinion, the Judge of Assize rightly ruled that it was not competent to the Crown to put in evidence as such a statement.

But Mr. de Kretser contends that this statement was a statement of the accused recorded "in the course of the inquiry" in the Magistrate's Court, and relying upon section 233 of the Criminal Procedure Code, he said that the Crown was bound to put it in and read it in evidence before the close of the case for the prosecution.

Section 233 enacts that :—.

> "all statments of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution."

The question then is what are the statements contemplated in that section. Chapter 16 of the Criminal Procedure Code contains the provisions regulating an inquiry into a case such as this. So far as those provisions go, the only sections that refer to statements by an accused in relation to their being recorded or not are sections 156, 160 and 165. Section 156 refers to such a statement, only to direct the Magistrate *not* to record it and to provide that any reply made by the accused shall be inadmissible against him. Section 160 deals with that stage of the case at which the examination of the witnesses called on behalf of the prosecution has been completed and it directs the Magistrate to read the charge and to explain it to the accused and to ask him whether he wishes to say anything in answer to it, and after cautioning him in the manner indicated in the section, to record it in the manner provided by section 302. Section 165 directs the Magistrate when he commits the accused for trial to the Supreme Court to require him to state orally the names of persons whom he wishes to be required to give evidence at his trial and to prepare a list in the manner indicated.

From these facts it emerges clearly that there are two occasions on which the accused must be given an opportunity to make a statement, and one occasion on which he is in effect forbidden to make one. The opportunity contemplated in section 160 may, however, recur more than once in the course of an inquiry, for a charge may be altered under section 172 (3) of the Code at any stage of the inquiry.

The next question is whether, apart from the occasions referred to in sections 160 and 165, an accused may not make a statement and ask the Magistrate to record it. As I have already observed, there is one occasion on which he is not entitled to do that, and that is the occasion referred to in section 156 of the Code. But for that, there is certainly no express prohibition and there does not appear to be any good reason why, an accused may not make a statement at some other stage of the inquiry and ask the Magistrate to record it.

For instance, he may desire to withdraw a statement made by him under section 160 or 165 and to make a different statement or to name other witnesses and he should be allowed to do that. That was the view taken in the case of the *The King v. Weerasamy* (*supra*) and the Divisional

Bench Ruling in the case of *The King v. Wellavan Sittambaram* [1] in regard to unsworn statements made by accused persons, seems to support that view.

In regard to the point that the word "statements" in the plural in section 233 suggests that statements other than that made by an accused under section 160 "shall be put in and read in evidence" by the Crown that does not seem to follow necessarily. The word "statements" in the plural was necessary in section 233 for, in addition to the statement under section 160, there is the statement under section 165 and, what is more, there may be several statements made under each of these sections.

The sole question that remains is whether it was incumbent on the prosecution to put it in and to read it in evidence as a part of its case. We do not think it was. The statements contemplated by section 233 are statements made under sections 160 and 165. Indeed, in regard to statements under section 160 the accused is given the assurance that they shall be taken down and shall be given in evidence at the trial.

In regard to other statements made in the course of the inquiry, it is open to the prosecution or to the accused to decide whether to make use of them or not if, of course, they are relevant and admissible.

In this case the proceedings show that the accused was offered every facility for putting the statement in question in evidence if he desired to do so, but his Counsel decided not to avail himself of that opportunity.

For these reasons we are of opinion that the appeal fails. It is dismissed.

Appeal dismissed.