1962 *Present :* **H. N. G. Fernando, J., and Herat, J.**

O. GOONEWARDENE, Petitioner, *and* M. J. DE SARAM, Respondent

S. C. 207 of 1962—Application in revision in D. C. Colombo, 51620/M

Evidence—Statement made by a person to a police officer in the course of an investigation into a cognizable offence—Nature of the prohibition against the admissibility of such statement in evidence—Procedure for use of statement—Presumption of regularity as to the recording of the statement—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, ss. 21, 27, 114, 145 (1), 155, 157—Civil Procedure Code, s. 154.

Interlocutory appeal—Stay of proceedings pending appeal refused by District Court—Right of appellant to seek relief by way of revision.

Where a statement has been recorded by a police officer in the course of an investigation into a cognizable offence, the prohibition as to its use contained in section 122 (3) of the Criminal Procedure Code would apply despite the fact that the person making the statement may have affixed his signature thereto.

The decision of five Judges in *R. v. Buddharakkita et al.* (63 N. L. R. 433), while clearly stating that a statement (whether it be the oral statement or the written record) made to a police officer under section 122 of the Criminal Procedure Code cannot be proved as an admission under section 21 of the Evidence Ordinance, or as " corroboration " under section 157 of the Evidence Ordinance, did not disapprove of the use of the written record for purposes of contradiction. Sub-section 3 of section 122 of the Criminal Procedure Code does not prohibit the use of the written record for purposes of contradicting a witness in terms of section 155 of the Evidence Ordinance, whether in criminal or civil proceedings. *Buddhadasa v. Mahendran* (58 N. L. R. 8), considered.

When a statement recorded under section 122 of the Criminal Procedure Code is proposed to be utilised as a mode of contradicting a witness, there would attach to the record the rebuttable presumption referred to in section 114 of the Evidence Ordinance that an official act has been regularly performed.

Where an interlocutory appeal is filed in respect of an order which goes to the root of a case and it is convenient and in the interests of both parties that the correctness of that order should be tested by an early decision of the appellate Court, it is open to the appellant to move the Supreme Court in revision before the next date of trial if stay of proceedings pending the interlocutory appeal has been refused by the District Court.

APPLICATION to revise an order of the District Court, Colombo.

C. Thiagalingam, Q.C., with *M. Tiruchelvam, Q.C.*, and *G. T. Samerawickreme*, for defendant-petitioner.

H. W. Jayewardene, Q.C., with *C. Ranganathan, S. J. Kadirgamar, K. Viknarajah* and *S. S. Basnayake*, for plaintiff-respondent.

Cur. adv. vult.

2——R 4719—1,383 (9/62)

June 6, 1962. H. N. G. FERNANDO, J.—

The plaintiff is suing in this action for the recovery of damages sustained in an accident alleged to have been caused by the negligent driving of the defendant's car. The defence set up is that the accident is due either to negligence or to contributory negligence on the part of the plaintiff, who was riding a motor scooter.

The plaintiff, in the course of her evidence at the trial, maintained that while she was riding her scooter on the left side of the Havelock Road in the direction Colombo to Nugegoda, the defendant's car approached her on the same side of the road, alleging thereby that the defendant had been driving his car on the incorrect side of the road. According to the plaintiff there was no other traffic approaching her except the defendant's car. The time was about 8 p.m. and the road was slightly wet and she had warning of the approach of the defendant's car because its head lights were on. She stated that she attempted to avoid a collision by moving a little across the centre of the road, but this did not prevent the defendant's car from striking the scooter.

At this stage counsel for the defendant called for the original of the statement which had been made by the plaintiff to a police officer on 26th October 1959, three days after the accident. Objection was taken to the production of the extract from the Information Book containing the statement, on the ground that the statement, having been recorded under section 122 of the Criminal Procedure Code, was not admissible in evidence in order to contradict the plaintiff's testimony at the trial. The learned District Judge at first upheld this objection. It subsequently appeared however that the record made by the police officer had in fact been signed by the plaintiff and contained in addition an endorsement that it had been read over and explained to the plaintiff before she signed it. In view of these matters the learned Judge thought that the statement would be admissible despite the provisions of section 122 (3) on the basis that, although the section prohibits the signature being taken, nevertheless if the record had in fact been "adopted" by the plaintiff, the prohibition in section 122 (3) would not apply. The learned Judge accordingly called upon counsel for the defendant to lead evidence which might satisfy him :

(1) that the statement was read over and explained to the plaintiff,

(2) that it was signed by her, and

(3) she admitted it to be correct.

After hearing evidence of the Inspector who recorded the statement, the learned Judge held that although the statement had been signed by the plaintiff he was not satisfied on the police officer's evidence that the plaintiff had indeed adopted as her own the record made by the police officer.

We think that if a statement had been recorded under section 122 of the Criminal Procedure Code, then the prohibition as to its use contained in sub-section (3) of the section would apply despite the fact that the

person making the statement may have affixed her signature thereto. It seems to us that when a person has in fact been examined by virtue of the power conferred by section 122 of the Criminal Procedure Code, the statement then recorded does not lose the character of a satement referred to in the section, and is not freed from the disabilities imposed on its use, merely because in the process of recording it the police officer may have disregarded those provisions of the section which prohibit him from obtaining the signature of the person examined.

Some suggestion was made to us in the course of argument that the statement sought to be used had not been shown to be one recorded under section 122 in the course of an investigation into a cognisable offence. It seems clear however that no such suggestion was made at the trial court; that being so, we are not disposed to act on any basis different from that which was assumed by all parties, namely that a statement recorded by a police officer in the course of an inquiry which has in fact been entered in the Information Book was one recorded under section 122. The question of its admissibility has therefore to be determined on that basis.

The learned trial Judge, in holding that a statement recorded under section 122 cannot be used to contradict the testimony of the person making it, very properly adopted the opinion to that effect expressed by Weerasooriya, J. in *Buddhadasa v. Mahendran*[1] : " quite apart from the restriction imposed by section 122 (3) of the Criminal Procedure Code on the use of that statement in criminal proceedings, such a statement cannot be used even in civil proceedings either to corroborate or to contradict the witness whose statement it purports to be ". The ground as just stated was one of the reasons why in that case Weerasooriya, J. declined to order certified copies of statements recorded under section 122 to be issued to a party engaged in a civil action. If I may say so with respect, the opinion so expressed was justified by certain *dicta* of the majority of a bench of five Judges of the Court of Criminal Appeal in *R. v. Jinadasa*[2], which constituted a severe " disparagement " of the legal and evidential value of a record made under section 122 :

> "Furthermore, upon that construction, if it is sought to contradict a witness by proof of a statement made by him on an examination under section 122 (1), the only evidence that can be tendered in proof of that statement is the record of it made by the police officer or inquirer. It follows that there would be sufficient proof of it, if the authenticity of the record is established, and the witness is identified as the person whose statement the police officer or inquirer has purported to record. There is no requirement of law that it is only by the evidence of the person who has made the report that its authenticity can be proved. Nor is it necessary as a matter of law that the evidence by which a person is identified as a person referred to in the record be the evidence of the person making the record. Therefore, according

[1] *(1956) 58 N. L. R. 8 at p. 13.* [2] *(1950) 51 N. L. R. 529.*

to the view taken in *Harmanisa's* case, a witness can be contradicted by a statement imputed to him in a document to which he was not a party, and which was made by a person who need not himself give evidence, although the statement imputed to him has never been accepted by him as being correct, or even read by him or to him, and which he has not signed. In other words, he can be contradicted by hearsay, even though the person who has alleged that that person made that statement in question may be alive and able to attend the trial and competent to give evidence ."

Apart from the question of legal admissibility, the court in *Jinadasa's* case thought that a police officer's written record of what was stated to him by some person would be valueless as a mode of contradicting the subsequent testimony of that person, the reason for this view being that the record is only a " reporter's account " of what was said by the person examined and not a written statement either written or adopted by that person. But while such a person's written or adopted statement could be of far greater value for purposes of contradiction, it does seem to me that the police officer's record, unsigned though it be by the person examined, is more valuable evidence of what was stated than the officer's recollection of oral answers to questions. If, as *Jinadasa's* case decided, these oral answers can subsequently be proved from recollection, and a " contradiction " thereby established, the written statement would seem to be of greater weight to establish the contradiction.

The judgment in *Jinadasa's* case has recently been construed in the unanimous decision of another bench of five Judges in *R. v. Buddharakkita et al.* [1] as authority only for the proposition that section 122 of the Criminal Procedure Code does not render inadmissible proof of statements of the description specified in section 27 of the Evidence Ordinance and the recent decision does not follow or approve the distinction made in the *Jinadasa* judgment between the oral statement and the written record in point of either admissibility or value. Even earlier, in *R. v. Aladin* [2], three Judges of the Court of Criminal Appeal appear to have assumed that the appropriate mode of contradiction would be to use the written record, first showing to the witness, in terms of section 145 (1) of the Evidence Ordinance, those parts of the statement intended to be used for the purpose of contradiction. In fact despite the observations in the *Jinadasa* judgment, this mode of contradiction which is often utilised at the Assizes on behalf of the defence, has not subsequently been criticised in appeal, the only clear opinion being that expressed by Weerasooriya, J. But that opinion was not adopted in my own brief judgment in the same case (*58 N. L. R. at page 14*). Indeed, although in that case this court declined to make an order for the furnishing of certified copies of statements recorded during an investigation made under Chapter XII of the Code, there is now statutory provision in Acts Nos. 42 and 43 of 1961 which would at the present time entitle a party to a civil action to obtain certified copies of such statements.

[1] *(1962) 63 N. L. R. 433.* [2] *(1959) 61 N. L. R. at p. 15.*

The five Judges who decided the *Buddharakkita* appeal, while clearly stating that a statement made under section 122 cannot be proved as an admission under section 21 of the Evidence Ordinance, or as " corroboration " under section 157, did not disapprove of the use of the written record for purposes of contradiction. That such an use is not prohibited by section 122 (3) is at least the first impression created by the words in the sub-section " except to prove that a witness made a different statement at a different time ". *Prima facie* this would appear to mean that when a witness gives his testimony the record of a former statement made by him to a police officer can be used for the purpose referred to in section 155 of the Evidence Ordinance. If such an use of the written record is not permitted, then the words of the exception clause in sub-section (3) would now have no effect at all. If, as laid down in the *Buddharakkita* judgment, the statement (whether it be the oral statement or the written record) cannot be utilised under section 21 or section 157 of the Evidence Ordinance and if in addition it is also assumed that the statement cannot be used for purpose of contradiction, then there will be no occasion whatever to show that a witness made a different statement at a different time. Even the narrow construction placed on this clause by Weerasooriya, J. could not then apply : for if a police officer can speak neither to an admission, nor to a former corroborative statement, nor to a former inconsistent statement, then no occasion can arise for a police officer to give any testimony (as to a previous statement made to him), which needs to be contradicted and accordingly also no occasion to show that his own prior record is in conflict with evidence given by him. Accepting as I confidently do the correctness of the view that a statement under section 122 cannot be proved as an admission or in corroboration, I am satisfied that adherence to the plain meaning of the exception clause is necessary since in that way alone can one avoid a construction which would deprive the clause of any effect. I would hold therefore that even in criminal proceedings the written record can be proved in terms of section 155 of the Evidence Ordinance.

This is not to say however that any variation between a testimony of a witness and the record of his previous statement will conclusively establish the falsehood or incorrectness of his testimony. Not much force remains in the criticisms contained in the observations in the *Jinadasa* judgment which have been cited above, when one takes account of the fact that the court must in each case determine in the light of all the circumstances the value to be attached to a report, whether rendered from recollection or in the form of a record, of what a witness is alleged to have stated on a former occasion.

Among the circumstances relevant in this connection there would be included such matters as the honesty, credibility and efficiency of the officer by whom the statement was recorded, and if those matters are satisfactorily established the stage will be reached for consideration intrinsically of the content of the statement alleged to have been made by the person examined.

2*——R 4719 (9/62)

In view of certain proceedings which took place at the trial at the present action it is useful to consider what procedure should be adopted when it is sought to use a statement recorded under section 122 for the purposes of contradicting a witness. The normal mode adopted both in civil and criminal courts is that the witness is in terms of section 145 (1) of the Evidence Ordinance referred to those parts of the statement which are to be used for contradiction and generally speaking this is done before the record itself is formally proved. Indeed such formal proof may in the event become unnecessary if the witness admits having made the statements imputed to him. Section 154 of the Civil Procedure Code (in the last paragraph of the explanation) does appear to contemplate that a document can be marked and used even before the court decided to admit it, a practice commonly referred to as " marking subject to proof ". While I do not say that the learned Judge was in error when he required counsel for the defendant to lead evidence as to the circumstances in which the plaintiff's statement came to be recorded as a condition precedent to admitting the statement in evidence, and while such a requirement may in some instances be rightly considered necessary in the discretion of the court, I do not think that ordinarily such a requirement need be imposed when a statement recorded under section 122 is proposed to be utilised as a mode of contradiction. The statement is one required by the section to be reduced into writing and there would in my opinion attach to the record the rebuttable presumption referred to in section 114 of the Evidence Ordinance that an official act has been regularly performed. It is unfortunate that in the instant case the learned District Judge commenced his consideration of the question of admissibility without regard to this presumption. The learned Judge appears also to have formed the opinion, prematurely, that the record had not been read over to the plaintiff before she signed it, and also that because she is alleged to have been under sedation the statement as recorded was of no value. But the stage for forming opinions with respect to such matters had not yet been reached. If in fact the record does show that the plaintiff's previous statement differs from her testimony in court, the burden will fall on the plaintiff to explain both any apparent contradictions, as also her conduct in volutarily affixing her signature to the record. Whether sedation *per se* is a sufficient explanation of all alleged inaccuracies in answers to police inquiries, is a matter which might arise for consideration.

Counsel for the defendant has before us referred with the utmost respect to the fact that the learned District Judge has already formed opinions unfavourable to the authenticity and value of the Inspector's record. But I can have no doubt that when the trial is continued in compliance with the order we propose to make, the circumstances and the manner in which the record was in fact made will, if disputed, be investigated afresh without regard to any impression formed when the same matters were previously considered in a somewhat different context.

We are invited in these proceedings to give effect to our view that the plaintiff's statement should have been admitted in evidence for purposes of contradiction. I realise that an order to this effect would be unusual

having regard to the fact that the action is pending and that the application for an order comes up by way of revision and not through an interlocutory appeal. There is the further feature that the view which my brother and I have formed on the question of admissibility is opposed to that expressed by Weerasooriya, J., which latter the learned District Judge was entitled and perhaps even bound to follow. Accordingly it seems necessary to state briefly reasons for the decision to intervene at this stage.

The case of *Girantha v. Maria* [1] is of considerable assistance, though not directly in point. There the plaintiff had been cross-examined on the basis that she had on the occasion of an inquiry into a petition concerning a land dispute stated to a Police Inspector " that she had not been in possession of this land for the last ten years ", but the plaintiff denied having made such a statement. After the case for the plaintiff was concluded, and before the trial was resumed, the proctor for the defendants filed an additional list of witnesses citing the Inspector to give evidence and to produce his official report in which apparently the plaintiff's alleged statement was mentioned. The learned District Judge however upheld an objection to this evidence being taken on the ground that the Inspector's name did not appear on the list of witnesses filed on the original trial date. An appeal was taken against this interlocutory order and the District Judge stayed proceedings pending the appeal. It is sufficient for me to quote without comment the following passages from the judgment of Gratiaen, J. :

" A preliminary objection was raised on behalf of the plaintiffs that the appeal was wrongly constituted and should not be entertained on the ground that an interlocutory appeal does not lie against an incidental order of this nature. Counsel argued that the defendants should have proceeded with the trial notwithstanding the order appealed from, and raised the question thereafter, if necessary, in the form of a final appeal to this court. Counsel referred us to certain observations of Keuneman, J. and Poyser, J. in *Balasubramaniam v. Valliappa Chetty, 39 N. L. R. 553* in support of his contention.

" The correct view appears to be that although this court undoubtedly has *jurisdiction* to entertain interlocutory appeals of this nature, the attitude of the court in disposing of such appeals must necessarily depend on the circumstances of each case. The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense. On the one hand therefore this court would always ' discourage appeals against incidental decisions *when an appeal may effectively be taken against the order disposing of the matter under consideration at a final appeal.* ' (per Bertram, C.J. in *Fernando v. Fernando 8 C. W. R. 43*). I do not think that either Keuneman, J. or Poyser, J. in *Balasubramaniam v. Valliappa Chetty* (*supra*) intended to lay down any principle of wider application than this.

[1] *(1948) 50 N. L. R. 519.*

" Cases may well arise, however, where the point involved in an incidental order goes to the root of the matter, and it is both convenient and in the interests of both parties that the correctness of that order should be tested at the earliest possible stage in an interlocutory appeal. Indeed as Sampayo, J. pointed out in *Arumugam v. Thambiah, 15 N. L. R. 253*, an early decision of the appellate tribunal on the point in dispute might well obviate the necessity of a second trial. In such a case this court would not refuse to entertain an interlocutory appeal against an incidental but far-reaching order of the trial Judge. " (at page 521.)

The order in the present case which excludes the statement certainly goes to the root of the matter, for the learned Judge has stated in one of the orders referred to during the argument that " the purpose for which the defendant seeks to admit this document is vital to it ". Moreover, it is both convenient and in the interests of both parties that the correctness of this order should be tested at the earliest possible stage, and it is also the case here that an early decision of the appellate tribunal on the point in dispute might well obviate the necessity of a second trial. If indeed, as we think, a vital document has been excluded although it is in law admissible, it would be only reasonble to expect that a final judgment reached by the trial Judge without the use of the statement may be ultimately set aside on the ground of improper rejection of the statement. No inconvenience would be caused to the parties by its admission at this stage for the trial was adjourned in the ordinary course to 10th June 1962, before which date our order can be made.

The only difference therefore between the present case and that decided by Gratiaen, J., is that the defendant's complaint is in the present case being considered in proceedings in revision and not in an interlocutory appeal. The circumstances would have been exactly parallel if the learned Judge had, as was done in the other case, in his discretion granted a stay of proceedings pending the interlocutory appeal which the present appellant had in fact taken. There is much force in counsel's contention that since no stay was granted, his only mode of securing the intervention of this court before the resumption of the trial was to seek an order in revision.

In view of the opinion I have formed as to the nature of the prohibition imposed by section 122(3) against the admission of statements recorded under that section, it is unnecessary to consider the further argument that in any event the scope of the prohibition is limited to criminal proceedings and does not cover the use of such statements in a civil action. It suffices to mention that support for this argument is to be found in the judgment of Howard, C.J. in *Chitty v. Peries* [1].

For the reasons stated, I set aside all proceedings taken after the stage at which the evidence of the plaintiff was interrupted on 21. 3.62 when counsel for the defendant called for the original statement of the witness

[1] *(1940) 41 N. L. R. 145.*

to the police with a view to using the statement in order to contradict the witness, including the proceedings of 22.3.62 at which the evidence of the Inspector of Police and of Dr. Nilar was taken, as well as the orders made by the learned District Judge on 21st and 22nd March 1962, and direct that when the trial is resumed the defendant will be entitled to use and produce in evidence the record of the plaintiff's statement alleged to have been made to the police on 26th October 1959. In view of the special circumstances, I direct that the costs of all proceedings taken after the interruption above referred to as well as the costs of this application will abide the ultimate result of this action.

HERAT, J.—I agree.

Application allowed.