[COURT OF CRIMINAL APPEAL]

1950 *Present:* **Jayetileke C.J. (President), Pulle J. and Swan J.**

SINNIAH, Appellant, *and* THE KING, Respondent

Appeal 35 with Application 75 of 1950

S. C. 5—M. C. Jaffna, 18,097

Court of Criminal Appeal—Evidence—Statement made to police officer during investigation into offence—Admissibility—Difference between oral statement and recorded statement—Criminal Procedure Code (Cap. 16), S. 122 (3).

The prohibition contained in section 122 (3) of the Criminal Procedure Code applies to the written record of the statement made by a person, and no legal objection can be taken to oral evidence being given of the statement.

R. v. Jinadasa (1950) 51 N. L. R. 529 followed.

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

H. V. Perera, K.C., with *M. M. Kumarakulasingham, E. B. Satturukulasinghe, K. Sivasubramaniam* and *G. K. C. Sunderampillai*, for the accused appellant.

A. C. Alles, Crown Counsel, for the Crown.

Cur adv. vult.

September 22, 1950. JAYETILEKE C.J.—

The appellant was convicted of the murder of one Annammah and sentenced to death.

The evidence shows that on the night of January 20, 1950, the witness Sinniah was attacked by a party of men with clubs and swords and, in the course of the attack, a shot was fired by the accused which struck Annammah and killed her. The principal witnesses for the prosecution were Kanagasabai and Vythilingam. They said that the night was a very dark one but they were able to identify the accused as the person who fired the shot with the aid of a hurricane lantern which was in the hands of a woman called Paruvathan who was with the assailants. The question whether Paruvathan had a lighted lantern in her hands was a very important one, and, judging by a question which the Foreman desired to put to Sub-Inspector Vandervert, the jury seem to have realized it. There is no note in the record of the question put by the Foreman and the order made by the presiding Judge, but there is a passage in the summing-up which indicates what they are. It reads,

"Then I want to refer to the question which you, Mr. Foreman, wanted to ask the Sub-Inspector with regard to whether a statement was made about a hurricane lantern. You will remember, I said that was a question which could not be put to the Sub-Inspector of Police

under our law. Let me put the matter this way. Certain contradictions were placed before you by Counsel for the defence. If there was a contradiction on this point you would expect that such a contradiction too would have been placed before you. That is all so far as I can take the matter. That would have been a vital contradiction with regard to the hurricane lantern, but no attempt was made to show that a different statement with regard to a hurricane lantern was made. So that you would have to draw your own inference from that ".

It is clear from this passage that the learned Judge has not only ruled that the question suggested by the Foreman could not be put under our law, but he has, in effect, directed the jury that, as Counsel for the defence did not suggest to the witnesses that they did not mention in their statements to Sub-Inspector Vandervert that Paruvathan had a lighted hurricane lantern in her hands, they were entitled to draw the inference that the witnesses did in fact mention in their statements that Paruvathan had a lighted hurricane lantern in her hands. The verdict implies that the jury followed the direction given by the learned Judge.

The said ruling and the said direction seem to us to be wrong. In *R. v. Jinadasa* [1] a Divisional Bench of this Court held that the statement referred to in S. 122 (3) of the Criminal Procedure Code is the written record of the statement made by a person and that no legal objection could be taken to oral evidence being given of the statement. Even if the answer to the question put by the Foreman was in the negative there is, in our view, nothing in S. 122 (3) to render it inadmissible because it cannot be said that the witnesses made different statements at different times. We are, therefore, of opinion that the question suggested by the Foreman should have been allowed to be put to the witness. With regard to the direction given by the learned Judge it will be sufficient for us to say that it presupposes that Counsel for the accused had in his hands a copy of the statements made by the witnesses to Sub-Inspector Vandervert, and it overlooks the positive provision in S. 122 (4) of the Criminal Procedure Code that neither the accused nor his agents shall be entitled to call for such statements.

We are of opinion that the appellant has been prejudiced by the order made by the learned Judge disallowing the question put by the Foreman and by the direction given by him that the Jury were entitled to draw their own inference from defence Counsel's omission to question the witnesses whether they did not omit to mention in their statements to Sub-Inspector Vandervert that Paruvathan had a lighted hurricane lantern in her hands. We do not think it is necessary to decide whether, in the circumstances of this case, the learned Judge was justified in withdrawing from the jury the question whether the appellant had merely the knowledge that his act was likely to result in death.

We would set aside the conviction and sentence and direct that the appellant be retried.

Case sent back for retrial.

[1] *(1950) 51 N. L. R. 529.*