[TRIAL-AT-BAR]

1968 *Present:* G. P. A. Silva, S.P.J. (President), Siva Supramaniam, J., and Tennekoon, J.

THE QUEEN *v.* REV. H. GNANASEEHA THERO and 21 Others

S. C. 66/67 (Western Circuit)—M. C. Colombo, 34638/A

Evidence—Confession—Burden of proof on prosecution to establish that it was made voluntarily—Circumstances affecting voluntariness of confessions—Evidence Ordinance, ss. 17 (2), 21, 24, 25, 26, 30, 104, 136—Power of a Magistrate to record confessions under s. 134 of Criminal Procedure Code—Requirement that proceedings should already have commenced in a Magistrate's Court—Inadmissibility of statements recorded prematurely—Criminal Procedure Code, ss. 122 (3), 126A, 129, 133, 134, 148 (1) (a) to (f), 149 to 151, 156, 289 (1)—Emergency Regulations—Preventive detention thereunder—Illegality of detention before service of detention order.

(i) When an alleged confession of an accused person as defined in section 17 (2) of the Evidence Ordinance is sought to be admitted in evidence against him by the prosecution, the burden is on the prosecution to establish that the making of the confession was voluntary in the sense that it was not caused by any inducement, threat or promise mentioned in section 24 of the Evidence Ordinance.

When considering whether confessions made by accused persons to a Magistrate in terms of section 134 of the Criminal Procedure Code were free and voluntary, not only facts preceding the confessions but also facts which immediately followed the making of the confessions are relevant. In the present case, the circumstances of the arrest, detention incommunicado and questioning of the accused by the police while they were under preventive detention under Emergency Regulations, the long duration of the interrogations,

the existence of signed statements in the hands of the police, the unusual nature of the custody and the other unusual features that preceded the production of the accused before the Magistrate were factors that should have warned the Magistrate of the need to probe much further than being content with the normal questioning by him in a straightforward case. Furthermore, the circumstance that during the time allowed for reflection and after the confessions were recorded, the accused were not in judicial custody but were sent back to the custody of prison officers and police officers could also have a bearing on the question of the voluntariness of the confessions made by the accused.

(ii) Section 134 of the Criminal Procedure Code provides *inter alia* as follows :—

" Any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial."

***Held*, that section 134 can be acted upon by Magistrates only after commencement of proceedings in a Magistrate's Court and before the commencement of an inquiry or trial in those proceedings. A Magistrate has no power to record statements (confessional or otherwise) at a stage prior to the institution of proceedings in a Magistrate's Court in any of the forms stated in section 148 (1) of the Criminal Procedure Code. Accordingly, where, during a State of Emergency declared and continued under the Public Security Act, persons who are suspected of conspiracy to overthrow the Government (a non-cognizable offence) are taken into preventive detention under the Emergency Regulations, a Magistrate has no power to record in terms of section 134 of the Criminal Procedure Code statements made by the suspects while they are still in the custody of police officers under detention orders and prior to the commencement of proceedings against them in a Magistrate's Court.**

***Held further*, that confessions which a Magistrate purports to record under section 134 of the Criminal Procedure Code at a time when no proceedings have commenced before a Magistrate's Court are inadmissible in evidence against the accused.**

***Obiter :* Preventive detention of a person under the Emergency Regulations before the service on him of the detention order is illegal.**

ORDER made, in the course of a Trial-at-Bar before three Judges and Jury, in regard to the admissibility in evidence of certain confessions.

A. C. M. Ameer, Q.C., Attorney-General, with *L. B. T. Premaratne*, Deputy Solicitor-General, *V. S. A. Pullenayegum*, Crown Counsel, *A. C. de Zoysa*, Crown Counsel, *Ranjit Abeysuriya*, Crown Counsel, and *Wakeley Paul*, Crown Counsel, for the Crown.

Colvin R. de Silva, with *K. C. de Silva*, *C. D. S. Siriwardena*, *H. L. Karawita*, *Hemachandra Perera* and assigned Counsel *Neil Dias*, for the 1st accused.

G. D. C. Weerasinghe, with assigned Counsel *Miss M. V. Barr Kumarakulasinghe*, for the 2nd accused.

Colvin R. de Silva, with *H. M. Jayatissa Herath* and assigned Counsel *Miss A. P. Abeyratne*, for the 3rd accused.

Neville Samarakoon, with *Felix Dias Bandaranaike, Nihal Jayawickrama, Tissa Wijeratne, Anil Obeysekera* and *Percy Karunaratne*, for the 4th accused.

Malcolm Perera, with *P. O. Wimalanaga, R. Weerakoon* and assigned Counsel *M. de S. Boralessa*, for the 5th accused.

D. T. P. Rajapakse, with *P. A. D. Samarasekera, Upali de Z. Gunawardena* and assigned Counsel *B. B. D. Fernando*, for the 6th accused.

G. G. Mendis, with *A. B. A. Mediwaka* and assigned Counsel *A. E. H. Sandaratne* for the 7th accused.

Tudor Siriwardena, with *Wasudeva Nanayakkara* and assigned Counsel *Premachandra Perera*, for the 8th accused.

Anil Moonesinghe, with *Tudor Siriwardena, Wasudeva Nanayakkara* and assigned Counsel *J. L. Fernando*, for the 9th accused.

Tudor Siriwardena, with *Harischandra Mendis, Gemunu Seneviratne, G. P. S. Fernando* and assigned Counsel *K. A. P. Rajakaruna*, for the 10th accused.

R. Weerakoon, with *Asoka Gunasekera* and assigned Counsel *M. H. Jayasinghe*, for the 11th accused.

Nihal Jayawickrama, with assigned Counsel *Mohamed Nassim*, for the 12th accused.

Anil Obeysekera, with assigned Counsel *Dharmasiri Jayawickrema*, for the 13th accused.

D. W. Abeyakoon, with *Harischandra Mendis, Gemunu Seneviratne, Vernon Gooneratne* and assigned Counsel *G. M. Samaraweera*, for the 14th accused.

Percy Karunaratne, for the 15th accused.

R. Weerakoon, with *Asoka Gunasekera* and assigned Counsel *D. P. S. Gunasekera*, for the 16th accused.

Sarath Mutteluwegama, with assigned Counsel *K. Thiranagama*, for the 17th accused.

U. B. Weerasekera, with assigned Counsel *A. W. Athukorala*, for the 18th accused.

Stanley Tillekeratne, with *Harischandra Mendis* and assigned Counsel *A. L. M. Hediyanthilaka*, for the 19th accused.

Prins Gunasekera, with *K. Thiranagama* and assigned Counsel *P. T. Fernando*, for the 20th accused.

Nihal Jayawickrama, with assigned Counsel *P. Illayperuma*, for the 21st accused.

Mangala Moonesinghe, with *Jayatissa Herath* and assigned Counsel *Miss C. M. M. Karunaratne*, for the 22nd accused.

Cur. adv. vult.

October 7, 1968. ORDER OF COURT—

At the commencement of the trial of this case the learned Attorney-General brought to our notice that there was a matter on which he wished to obtain a ruling from us before opening the prosecution case to the Jury, as he anticipated objection by the defence to any reference to this matter by him in his opening address. The Jury was therefore directed to retire at this stage to enable the Attorney-General and the respective counsel for the defence to make their submissions on this matter in their absence. The submission made to us by the learned Attorney-General thereafter was that the prosecution intended to place before the Jury as part of its case a series of confessions made to the Magistrate by nine of the twenty-two accused and recorded by him in the purported exercise of powers under Section 134 of the Criminal Procedure Code sometime before the institution of proceedings in the Magistrate's Court. After considerable argument on the submission of the Attorney-General that he could discharge the burden that lay upon him by reliance upon the presumption under Section 80 of the Evidence Ordinance to prove voluntariness of the confessional statements, he agreed to a request made by Dr. Colvin R. de Silva on behalf of the accused to abandon his original position and to call evidence to establish the voluntary nature of the confessions. As nearly all the witnesses that would have to be called for this purpose had not been called in the lower Court, and were not on the list of witnesses at the back of the indictment, the Attorney-General was directed to furnish to the defence the names of all the witnesses who would be called in this regard together with a short statement of the nature of the evidence each of them would give.

2. The impression that this Court formed at the time was that the Attorney-General agreed to lead such evidence as was necessary to satisfy the Court affirmatively of the voluntariness of the confessions. A considerable volume of evidence was led on behalf of the prosecution consisting of the evidence of the Magistrate who recorded the confessions and all those concerned in the taking into custody and interrogation of the respective accused prior to and immediately after the making of the

confessions. On the side of the defence the only evidence led was that of the 1st accused. At the stage of the addresses the counsel for the confessing accused made their submissions to Court on the basis that the onus of establishing voluntariness was on the prosecution. The learned Acting Solicitor-General who first addressed us on this among other aspects of the case informed us that the position of the learned Attorney-General was that although he has acceded to the request of Dr. Colvin R. de Silva to place before Court all the prosecution evidence relative to the confessional statements, the prosecution was entitled under section 21 of the Evidence Ordinance to lead evidence of any available confession and that the burden was on the defence if it wished to exclude the confession under Section 24 to place such evidence as would make it appear to Court that such confession was not a voluntary one.

3. It becomes necessary, therefore, to examine the nature of the burden, if any, that is upon the prosecution and/or defence when an alleged confession of an accused person is sought to be admitted in evidence.

4. Under the English Law, the rule is now well settled that the prosecution should prove affirmatively that the confession was free and voluntary. Lord Sumner, in delivering the Judgment of the Privy Council in *Ibrahim v. Rex* [1] said :

> " It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Regina v. Thompson* (1893) 2 Q. B. 12. "

5. It has been submitted by the learned Acting Solicitor-General that the law applicable in Ceylon which is laid down in the Evidence Ordinance, Cap. 14 (referred to hereinafter as the Ordinance) is different from the English Law and imposes no such burden on the prosecution.

6. Section 17 (2) of the Ordinance defines a confession as " an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence. " Under Section 21 " admissions are relevant and may be proved as against the person who makes them..... ". Section 24 provides as follows :— " A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person in the presence of a person in authority

[1] *(1914) Appeal Cases 599.*

and with his sanction, and which inducement, threat, or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

7. It is argued that a confession, being a species of an admission, can be led in evidence by the prosecution under Section 21 and it is for the party who contends that the confession is irrelevant by reason of the existence of any of the circumstances referred to in Section 24 to place before the Court evidence which would make it appear (not necessarily prove) that such circumstances exist. Sections 21 and 24 of the Ordinance are in identical terms as the corresponding sections of the Indian Evidence Act. The learned Acting Solicitor-General relied on certain decisions of the Indian Courts in support of his argument.

8. In the case of *Queen Empress v. Basvantha and others* [1] Fulton J. (Batty J. agreeing) said: "To require, as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not, in our opinion, be consistent with the terms of Sections 21 and 24 of the Evidence Act."

9. A similar view was expressed by Horwill J. in *In re Boya Chinna Papanna* [2] where he said: "The wording suggests that unless it appears to a Court that an inducement, threat or promise was held out by a person in authority, a confession would be relevant under Section 21 of the Evidence Act without any formal proof of the voluntary nature of the statement."

10. This view, though followed in certain other cases as well, has not been uniformly adopted by the Indian Courts. *Papanna's case* (supra) had been referred to Horwill J. owing to a difference of opinion on the facts between Wadsworth J. and Somayya J. who originally heard the case. On the question whether the prosecution should establish by positive evidence the voluntariness of a confession, Wadsworth J. expressed no opinion but Somayya J. after referring to the English rule laid down in *Ibrahim v. Rex* (supra) stated as follows:—

"In India, however, the question is put more elaborately in Section 24. The question that arises under Section 24 is whether it is really on the prosecution to prove that the circumstances mentioned in Section 24 do not exist or whether it is upon the accused to prove that the making of the confession was caused by inducement, threat or promise. It is no doubt true that the burden of proving facts which are specially within the knowledge of a person may be thrown upon him but having regard to the well known principle of Criminal Jurisprudence recognised in *Ibrahim v. The King*, I have no reason to doubt that what the Indian Legislature attempted to enact more elaborately in Section 24 Evidence Act is that a Court must be satisfied before admitting a confession that

[1] *(1901) I. L. R. 25 Bombay 168.*
[2] *(1942) 43 Criminal Law Journal 346 at p. 352.*

it is free from all taint. The wording of Section 24 is 'if it appears to the Court to have been caused by inducement, threat, etc. a confession is irrelevant'. It is not 'if it is proved to have been caused by inducement, threat or promise'. As pointed out in *Emperor v. Panch Kavi Dutt* (A. I. R. 1925 Calcutta 587) the Indian Legislature has deliberately used the expression 'if the making of the confession appears to the Court' and not 'if it is proved to the satisfaction of the Court'. Therefore, if the Court has any reason to doubt the free and voluntary nature of the confession, then it is for the prosecution to prove that it was made without any of the inducements, threats or promises mentioned in this section."

11. In the case of *Bala Majhi v. State of Orissa* [1] Chief Justice Ray stated:

"In considering the admissibility of a confession there is a simple test which can always be employed. The Court will address itself to the question 'Is it proved affirmatively by the prosecution that the confession was free and voluntary?', that it was not preceded by any inducement, threat or promise held out by a person in authority: if so, whether the effect of the inducement, threat or promise had clearly been removed before the statement was made. In that case and that case alone, the evidence of that statement is admissible. The burden of proof always lies on the prosecution."

12. In the same case, however, a contrary view was expressed by Das J. who said:

"The terms in which Section 24 Evidence Act is couched seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz., that the confession sought to be proved or admitted is not vitiated by the circumstances stated in the section."

The same learned Judge however proceeded to state as follows:—

"It is the right of the accused to have the confession excluded and equally the duty of the Court to exclude it even 'suo motu' if the vitiating circumstances 'appear'."

13. We were also referred by the learned Acting Solicitor-General to the case of *Pyare Lal Bhargave v. The State of Rajasthan* decided by the Supreme Court of India [2]. In that case, the Supreme Court considered the meaning of the word "appears" in Section 24 and the standard of proof expected, but did not examine the question as to the party on whom the burden lay. That case therefore is not helpful for the decision of the point now under consideration.

[1] *A.I.R. (1951) Orissa 168 at p. 170.* [2] *A.I.R. (1963) S. C. Vol. 50, p. 1094.*

14. Section 136 of the Ordinance provides as follows :—

"(1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking."

Under this section, the Court would admit the evidence only if the fact (namely, the confession) if proved, would be relevant. Since sections 24, 25 and 26 of the Evidence Ordinance make it plain that it is not every confession that is relevant against an accused person, a prosecutor proposing to give evidence of a confession can discharge his duty of showing that it is relevant only by showing that it is a confession that does not fall into the category of irrelevant confessions; and the effect of subsection 2 of section 136 coupled with section 104 of the Evidence Ordinance is that the burden of proving facts necessary to show that the confession is not irrelevant would fall on the prosecutor. We are unable to accept the contention of the Crown that the words "if the making of the confession appears to the Court" can be made the basis of any inference that the burden is on the accused accompanied as it is by the corollary that that burden can be discharged not by "proof" as known to the Evidence Ordinance but by a standard much short of proof and so insubstantial as to pass our understanding. Viewed from this angle, the burden that lies on the prosecution under our law is no different from that imposed on the prosecution under the English Law. We are in respectful agreement with the view expressed by Gajendragadkar J. (later Chief Justice of India) in *Rangappa v. State* [1] that "the effect of Section 24 is that before a confession becomes relevant it must be shown that it is not caused by inducement, threat or promise as mentioned in that section." This is in accord with the view that has been consistently taken by our Courts in earlier cases. In *Rex v. Weerasamy* [2] Soertsz J. ruled that the Crown must establish the relevancy of the confessions by leading some evidence to show that they were made voluntarily. In *The Queen v. Martin Singho* [3] the Court of Criminal Appeal stated:

"That fact (i.e., the voluntariness of a confession) has to be determined at the trial when it is sought to prove the confession in evidence. In such a case the burden is on the prosecution to prove beyond reasonable doubt facts necessary to make the confession not irrelevant under Section 24."

[1] *A.I.R. 1954 Bombay 285 at p. 289.* [2] *(1941) 43 N. L. R. 152.*
[3] *(1964) 66 N. L. R. 391.*

In *The Queen v. Kalimuttu* [1] the Court of Criminal Appeal observed :

> "It seems to us, however, that the better course for a Judge to follow . . . would be to direct the Jury that the burden lay on the prosecution to prove beyond reasonable doubt that a confession put before them in evidence had been voluntarily made."

15. The learned Acting Solicitor-General submitted that in *Rex v. Francisu Appuhamy* [2] Wijeyewardene J. (as he then was) had taken a contrary view as he had called upon the accused to lead his evidence when objection was raised by the defence to the admissibility of a confession by the accused. The question whether the burden lay on the prosecution or not to establish voluntariness was neither raised nor considered in that case. We cannot therefore regard that case as an authority for the proposition that under Section 24 of the Ordinance, the burden lies on the accused to show that the confession is irrelevant. He was unable to cite any other instance in our Courts where an accused who objected to the admissibility of a confession was called upon to place his evidence first in support of his objection.

16. We shall now proceed to consider whether the prosecution had discharged the burden that lies upon it.

17. The facts leading up to the making of the alleged confessions are these. On the 8th of January, 1966, as a result of some prevailing disturbances, a State of Emergency had been declared in Ceylon under the Public Security Act ; this State of Emergency was made continuous by means of repeated monthly Proclamations under the said Act. On the 17th of February, 1966, in consequence of some information received by the Police relating to " a conspiracy to overthrow the Government " one Mr. Chandrasoma was questioned by the Inspector-General of Police (whom we shall hereafter refer to as I.G.P.), the Superintendent of Police, Criminal Investigation Department, Special Branch, Mr. Ananda Seneviratne (whom we shall hereafter refer to as the S.P., C.I.D.) and Inspector Kandiah also of the C.I.D. In view of certain information disclosed in Mr. Chandrasoma's statement, the S.P., C.I.D., looked for the 1st accused, Henpitagedara Gnanaseeha Thero on this very day, first at the International Buddhist Centre, Wellawatte, and thereafter at Ratnapura and Pathakada where the 1st accused had his temple. Not finding him there the S.P., C.I.D., instructed Mr. Thalayasingham, Superintendent of Police, Ratnapura, to keep him under surveillance and returned to Colombo.. On the orders of the I.G.P. a statement was also recorded from Mr. N. Q. Dias, a retired public officer who had been Permanent Secretary, Ministry of Defence and External Affairs, under the previous Government and who, along with the 1st accused, would appear on the evidence to have been greatly interested in Buddhist activities among public servants and service personnel. The Police kept alert after this information from Mr. Chandrasoma and, about a week

[1] *(1966) 69 N. L. R. 349 at p. 352.* [2] *(1941) 42 N. L. R. 553.*

later, on the 25th February, they obtained the " first clue " to the alleged conspiracy from one Nalawamsa whose statement, the contents of which have not been placed before this Court, was recorded. On the 3rd March, some further information was communicated to the Ministry of Defence and External Affairs by one Wickremasena, an Army Officer who called on the Assistant Secretary, Mr. Nanediri, in the company of two other Army Officers Mettananda and Wickremapala. This information was passed on to the I.G.P. and on the 4th March, the investigation of the matters contained in this information was placed in the hands of the Special Branch of the Criminal Investigation Department. On this day itself, on the orders of the Permanent Secretary, 8 persons belonging to the Army including the 6th accused Amaratunga and 7th accused Hondamuni, 8th accused Bandara, 9th accused Mayadunna, and 11th accused Sirisena were brought to the Special Branch and, after being questioned, were placed under preventive detention under Regulation 26 of the Emergency Regulations then in operation. The Permanent Secretary had wide powers under these regulations and, it was in the purported exercise of these powers that the detenues were precluded from having access to friends and relatives or lawyers and were also brought up for questioning by the Police to the Headquarters of the C.I.D. on the 4th floor of the New Secretariat and the Technical Branch without any specific provision of law which empowered such a course.

18. It will be convenient at this stage to set out the circumstances of the taking into custody, detention, and questioning of the respective accused who made confessions in the chronological order in which the confessions were recorded.

6th accused Amaratunga

26.2.66 A statement was recorded by Inspector Wijesuriya in the Special Branch of the C.I.D. after the recording of Nalawansa's, statement.

4.3.66 At about 5 p.m. produced by an Army Officer before the S.P., C.I.D., and questioned by InspectorWijesuriya who recorded a statement, and a detention order served thereafter, and sent to detention at the Magazine Prison.

14.3.66 Brought to the C.I.D. Headquarters at his own request at about 12 noon. About 2.30 p.m. produced before the S.P., C.I.D., by Inspector Kandiah. Inspector Kandiah was directed by S.P. to record his statement. He asked Inspector Kandiah whether he would be given a pardon if he came out with the full facts, and was told that a pardon could not be given. He was taken before the S.P., C.I.D., who himself said that he had no power to offer such a pardon and was sent back to detention.

11.4.66 S.P., C.I.D., requested the Permanent Secretary to the Ministry of Defence and External Affairs to send the 6th accused for interrogation to the C.I.D. office, where he was interrogated by Inspector Weeratunga of the C.I.D. and Inspector Rahula Silva, Officer-in-charge of the Beliatta Police, and Sub-Inspector Senanayake of the C.I.D. The interrogation commenced at about 6 p.m. and was continued till morning of the 12th.

12.4.66 About 8 a.m.—The interrogating team reported to S.P., C.I.D., what the 6th accused had stated. S.P., C.I.D., made arrangements to tape record his statement.

8.30 a.m. to 10 a.m.—Inspector Kandiah took charge of the 6th accused and interrogated him again. 6th accused thereafter made a statement which was simultaneously reduced to writing and recorded on the tape recorder.

7 p.m.—The statement which ran into about 23 pages of typescript was concluded. The signature of the 6th accused was obtained at the top and bottom of each of the 23 pages of the typescript, and he was thereafter asked by Inspector Kandiah whether he desired to make the statement to the Magistrate to which he agreed.

9.45 p.m.—He was taken to the Magistrate's Bungalow by Inspector Weeratunga, and was produced before the Magistrate by S.P., C.I.D., who had arrived independently. The Magistrate after some preliminary questioning gave him time for reflection and remanded him to the Magazine Prison.

13.4.66 9 a.m. He was produced before the Magistrate who commenced recording the confession.

1.45 p.m.—The statement was concluded and he was thereafter taken back to the New Magazine Prison.

14.4.66 He refused his meals alleging that he wished to see the C.I.D. officers urgently as he had been promised to be sent home for the New Year. Assistant Superintendent of Prisons Mr. Jordon endeavoured to contact S.P., C.I.D., on the telephone to convey this information but failed to contact him.

17.4.66 Up to this day he continued to refuse meals.

18.4.66 He was transferred to Hulftsdorp detention barracks from where he wrote a letter to the Permanent Secretary, Ministry of Defence and External Affairs, through the Commander of the Navy requesting that some arrangement be made immediately to produce him before the C.I.D., and seeking

some special protection to his wife and children who were supposed to be undergoing some "hindrances" from the neighbouring people.

25.4.66 About 8.30 a.m. He was brought to the Technical Branch of the C.I.D. and interrogated by Inspector Kandiah for about 1 or 1½ hours and a statement running into 11 to 13 pages was recorded. His signature was obtained as before and he was asked whether he desired to make another statement to the Magistrate and he again agreed.

25.4.66 8.30 p.m.—He was produced before the Magistrate by Sub-Inspector Etin and procedure similar to the earlier occasion was followed by the Magistrate.

26.4.66 3 p.m.—He was produced before the Magistrate and a further confession was recorded.

7th accused Hondamuni

4.3.66 He was brought to the Special Branch along with the 6th accused and other Army officers on the orders of the Permanent Secretary. A statement was recorded by Inspector Wijesuriya and detention order was served thereafter and he was sent into detention at the Magazine Prisons.

12.4.66 At the request of the C.I.D. he was produced at the C.I.D. Headquarters sometime in the evening. 10 p.m. to 1 a.m. on 13.4.66—Interrogated by Weeratunga, Rahula Silva, and Senanayake. The interrogation being "unsuccessful" he was sent back into detention.

14.4.66 Brought back from detention to the C.I.D. Headquarters. 11.40 p.m.—Taken up for interrogation by Weeratunga, Rahula Silva and Senanayake. The tape-recorded statement of the 6th accused was played back to him for about an hour after which the 7th accused requested the interrogators to stop playing the tape and came out with the facts.

15.4.66 6 a.m.—The interrogation was concluded.

8.30 a.m.—Inspector Weeratunga reported to the S.P., C.I.D., the successful interrogation and the S.P. questioned him from about 9 to 10.30 a.m., and started recording his statement at about 1.30 p.m. He went on till 6.45 p.m. and after a break resumed recording the statement at 10.30 p.m.

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16.4.66 S.P. concluded the 7th accused's statement at 6 a.m.

8 a.m.—He was produced before the Magistrate and after preliminary questioning he was sent into remand for reflection.

7 p.m.—He was produced before the Magistrate who commenced recording his statement.

17.4.66 3 a.m.—Magistrate concluded recording the statement.

25.4.66 2.37 p.m.—7th accused was produced at the C.I.D. Office Technical Branch at the request of the S.P., C.I.D. He was not questioned for want of time.

28.4.66 7th accused addressed a letter X5 to the Permanent Secretary to the Ministry of Defence and External Affairs requesting that he be taken to the C.I.D. " to give an urgent statement about the coup ".

7.5.66 9.30 a.m.—7th accused produced before A. S. P. Kandiah in regard to his letter of 28.4.66. He was questioned for 1½ hours but no statement was recorded as he had nothing of importance to say.

16th accused Koralage

13.4.66 Produced at the C.I.D. Headquarters by the Army Authorities at the request of the S.P., C.I.D.—made a statement to Inspector Wijesuriya for about 3 hours. He was kept at the C.I.D. Headquarters till morning of the 16th.

14.4.66 12.15 p.m.—He was taken charge of by Inspector Fareed.

1.15 p.m.—Taken to Panagoda to search his house.

10.15 p.m.—Brought back to the C.I.D. Headquarters.

10.40 p.m.—Interrogated by Inspector Fareed and a statement recorded.

15.4.66 2.35 a.m.—Inspector Fareed completed recording his statement.

10.15 a.m.—He volunteered a further statement which was recorded by Fareed till 11.55 a.m.

10.15 p.m.—Volunteered a further statement which was recorded. This statement was in Sinhala which was translated by Fareed to English and was typed by P. C. Ratnapala. It was completed at 10.45 p.m.

16.4.66 Detention order served in the morning and sent to detention at Hulftsdorp detention barracks.

6.45 p.m.—Produced before the Magistrate who after preliminary questioning sent him back to the same detention barracks for reflection.

17.4.66 9.45 p.m.—Produced by Naval Authorities before the Magistrate to record the confession.

18.4.66 12.45 p.m.—Magistrate completed recording the statement.

1.5.66 16th accused addressed a letter X12 to the Permanent Secretary to the Ministry of Defence and External Affairs stating that in his earlier statement to the Magistrate he had forgotten to mention "certain things which will be very important to his defence and the case" and requested that he be given another chance to mention these to the Magistrate.

9.5.66 As a result of the letter of 1st May, 16th accused was questioned by A.S.P. Kandiah and Wijesuriya and statement recorded by Wijesuriya which was signed by the 16th accused.

12.5.66 16th accused was produced before the Magistrate at his bungalow by the Naval Authorities. After preliminary questioning the Magistrate handed over the 16th accused to the Prison Authorities and directed them to produce him at 6 p.m. on 13.5.66.

13.5.66 6 p.m.—16th accused was produced before the Magistrate, and his statement recorded.

7.30 p.m.—Statement concluded and 16th accused sent back to the detention barracks at Hulftsdorp.

1st accused Henpitagedara Gnanaseeha Thero

16.4.66 Detention Order in respect of 1st accused issued by Permanent Secretary, Ministry of Defence and External Affairs, with place of detention mentioned as New Magazine Prison.

8.15 p.m.—Inspector Farced took him into custody at Mudduwa Temple. 11.45 p.m.—Brought to Technical Branch by Inspector Farced.

17.4.66 10.30 a.m.—S.P., C.I.D., started questioning.

6 p.m.—Completed recording of statement.

9.15 p.m.—Produced before the Magistrate who remanded him to New Magazine Prison after the preliminary questioning.

18.4.66 7.30 a.m.—Statement recorded by the Magistrate.

11 a.m.—Statement concluded.

1st accused addressed letter to Chairman, Advisory Committee, objecting to detention.

9.5.66 Statement recorded by Chairman, Advisory Committee, at the Magazine Prison.

15th accused—Batuwatte.

13.4.66 Produced at C.I.D. Headquarters by Army Authorities at the request of S. P., C.I.D. Made a statement to Inspector Ahamed. Was kept at C.I.D. Headquarters till 16th April.

14.4.66 12.15 p.m.—Taken charge of by inspector Fareed.

1.15 p.m.—Taken to Panagoda by Inspector Fareed to search the home. 10.15 p.m.—Brought back to C.I.D. Headquarters.

15.4.66 3 p.m.—Inspector Fareed recorded statement.

8.55 p.m.—Recording of statement concluded.

16.4.66 Inspector Kandiah served detention order in the morning and sent him to detention barracks at Hulftsdorp.

18.4.66 5 p.m.—Produced before Magistrate who, after preliminary questioning, sent him on remand to the Magazine Prison.

19.4.66 9. a.m.-11 a.m.—Statement recorded by the Magistrate.

11th accused—Sirisena.

4.3.66 Taken into detention along with 6th and 7th accused among others. Statement recorded.

14.4.66 11th accused wrote letter to Permanent Secretary, Ministry of Defence and External Affairs, to provide an opportunity for him to meet his Commanding Officer and Army Commander.

15.4.66 Produced at C.I.D. Headquarters.

Met Army Commander in the presence of S.P., C.I.D.

9.50 p.m.—Inspector Mahat started recording his statement.

16.4.66 2.15 a.m.—Concluded recording his statement. Sent back to Hulftsdorp Detention Barracks in the morning.

19.4.66 11.30 a.m.—Produced before Magistrate who, after preliminary questioning, remanded him to Magazine Prison.

20.4.66 8.30 p.m.—Magistrate started recording statement.
12 midnight—Concluded statement.

8th accused Bandara

4.3.66 Taken into detention along with 6th, 7th and 11th accused among others.

15.4.66 Brought to the C.I.D. Headquarters.

16.4.66 Sent back in the morning—not questioned.

22.4.66 2.20 p.m.—A.S.P. Kandiah took charge of 8th accused and began interrogation.

5 p.m.—Started recording statement.

23.4.66 5.30. a.m.—Statement concluded.

23.4.66 8.30 a.m.—Produced before Magistrate who, after preliminary questioning, remanded him to Magazine Prison.

8.30 p.m.—Magistrate started recording statement.

24.4.66 3.30 a.m.—Statement concluded.

9th accused Mayadunne

4.3.66 Taken into detention along with 6th, 7th, 8th and 11th accused.

15.4.66 Brought to C.I.D. Headquarters.

16.4.66 Sent back in the morning without interrogation.

24.4.66 10.30 a.m.—Produced at the Technical Branch, C.I.D., and taken charge of by A.S.P. Kandiah, and statement recorded.

6.30 p.m.—Statement concluded.

8.30 p.m.—Produced before Magistrate who, after preliminary questioning, remanded him to Magazine Prison.

25.4.66 8.30 p.m.—Magistrate started recording statement.

26.4.66 1 a.m.—Statement concluded.

3rd accused Wickremasinghe

24.4.66 3rd accused appeared at Kurunegala Police Station with the father. Taken by Kurunegala Police to Colombo.

9.45 p.m.—Produced at Fort Police Station and locked up.

25.4.66 7.45 a.m.—3rd accused produced before S.P., C.I.D., at the Technical Branch.

8.30—10 a.m.—3rd accused interrogated by Inspector Wijesuriya.

10 a.m.—Inspector Wijesuriya started recording the statement.

11 p.m.—Statement concluded and 3rd accused sent back to detention.

29.4.66 3rd accused sent communication through Permanent Secretary, Ministry of Defence and External Affairs, to Chairman, Advisory Committee, requesting him to make arrangements for him to make a statement to Magistrate as early as possible.

3.5.66 8.34 a.m.—3rd accused produced by Lt. Andreas of the Navy before the Magistrate who, after preliminary questioning, remanded the 3rd accused to Magazine Prison.
3 p.m.— Magistrate started recording statement.
6.30 p.m.—Statement concluded.

19. A few observations are called for at this stage in regard to the custody of the 1st, 3rd, 15th and 16th accused until the service of the detention orders. In the case of the 1st accused, even according to the prosecution, the detention order authorising him to be taken into preventive detention under the Emergency Regulations (and not in respect of any offence) was served after his statement was recorded by the S.P. at the Techincal Branch on the 17th evening, while according to the 1st accused it was served much later at the Magazine Prison some time after he was taken for detention. It is not the position of the Crown that he was taken into custody at Pathakade on the 16th in pursuance of any powers conferred by the Criminal Procedure Code, the offence, even if it is the one appearing in the indictment, being non-cognizable and therefore not one empowering a Police Officer to arrest a person suspected thereof without a warrant. It was only sought to be argued that the custody of the 1st accused was at the relevant time legal because the officer who took him into custody, Mr. Fareed, was armed with the detention order even though it was not served on him and even though the 1st accused was not informed of its existence. This is not an argument that one can accept. The liberty of the subject is a sacred right that courts of law have to safeguard and the least that a police officer who interferes with that right can do is to inform a person arrested of the reason therefor and no court should countenance a police officer acting in contravention of that requirement. This question was considered in the case of *Corea v. the Queen* [1] by Gratiaen J. who expressed himself in the following terms :—" I have given most anxious consideration to Mr. Chitty's argument, and am very glad to re-affirm my conviction that in this country (as in England) a police officer who arrests private citizens with or without the authority of a warrant is equally obliged to notify the arrested person of the reason for interfering with his personal freedom. A recognition of this fundamental rule (which owes its origin to the English common law) is demonstrably implicit in the scheme of our Code." In stating this proposition he had the authority of a House of Lords Case, *Christie v. Leachinsky* [2] in which Lord Simon observed, " The matter is one of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed."

20. In regard to the 3rd accused too a similar criticism can be made. He surrendered at the Kurunegala Police because he learnt that he was wanted. But although the Kurunegala Police was not armed with a

[1] *(1954) 55 N. L. R. 457.* [2] *1947 A. C. 573.*

warrant of arrest or a detention order nor had a right to arrest him without a warrant, he was brought to Colombo and locked up in a cell till he was produced before the S.P., C.I.D. Similarly in regard to the 15th and 16th accused too their detention in the C.I.D. Headquarters from the evening of the 13th till the morning of the 16th was not in pursuance of any warrant of arrest or in pursuance of a right of arrest without a warrant and not after the service or communication of the contents of a detention order. In each of these cases we are of the view that the detention until the service of the detention order was illegal, although of course, this illegality did not have a significant bearing on the voluntariness or otherwise of their confessions.

21. According to the evidence of the S.P., C.I.D., the investigation of this alleged offence imposed too heavy a burden on his existing staff and he was compelled to requisition the services of some investigators from the outstations. His choice fell on Inspector Vittachchi, Sub-Inspector Gnanadasa, Inspector Rahim, Inspector Egodapitiya and Inspector Rahula Silva. Various allegations have been made by the defence in regard to some of these new arrivals. So far as the first three of these are concerned no special charge has been made. As regards the fourth officer, Egodapitiya, it was alleged that his conduct in obtaining statements from witnesses had been the subject of certain strictures by the Court of Criminal Appeal—this fact being proved by reference to the relevant law report—and that he was specially summoned to the C.I.D. in order to extract confessions by adopting doubtful methods of interrogation. As regards Rahula Silva it was alleged by the defence and accepted by Inspector Farced, who was his senior in the service, that he was unpleasant and offensive, lacked a human approach towards people and had a reputation for assault. As against this the reason given by the S.P., C.I.D., for selecting Rahula Silva was that he had a good reputation as a Police Officer having earned more than 1000 good entries in nine years and having been commended by courts in certain cases. The S.P. confessed that he had no personal acquaintance with Rahula Silva at any station.

22. The manner in which Rahula Silva was brought down to the C.I.D for the purpose of this investigation is one that arouses suspicion. For we have it from Inspector Weeratunga that on 10.4.66, he was directed to contact Rahula Silva, Officer-in-charge of Beliatta Police, and to ask him to report to the C.I.D. without informing his S.P. or A.S.P. On this very day Weeratunga went to Beliatta in his own car, contacted Rahula Silva and brought him to Colombo at about 3.30 a.m. on the 11th. Before leaving Beliatta, Rahula Silva admittedly made a false entry at the station to the effect that he was taking four days leave. The evidence of the S.P., C.I.D., was that the I.G.P. was aware of this move. These circumstances exposed the Police to the comment by the defence that Rahula Silva's arrival had a very sinister significance. The speed with which the order of the S.P. was carried out without regard to the distance covered or the hours of the night when Weeratunga had to drive his vehicle are factors

which suggest grave urgency in obtaining the services of Rahula Silva. On the morning of the 11th April when Rahula Silva met the S.P., C.I.D., at about 10.30 a.m. at the Headquarters of the Special Branch on the fourth floor of the New Secretariat he was handed over two dossiers to study and was directed to interrogate the 6th accused Amaratunga who, it must be remembered, had requested a pardon not so long ago as a condition of his making a statement. On a request made by the S.P., C.I.D., the 6th accused was brought to the C.I.D. Headquarters later in the day from his detention barracks. Rahula Silva learnt that the team of interrogators would consist of Inspector Weeratunga, himself, and Sub-Inspector Senanayake. Rahula Silva studied the dossiers for some hours and later met Weeratunga and Senanayake and discussed with them the lines of interrogation before the 6th accused was brought up before them. They also armed themselves with some badges which were recovered from a certain house on information and a paper bag in which a large number of these badges was found wrapped.

23. In addition to the special circumstances and conditions under which the confessing accused were questioned, with which we shall deal later, it is important to note that this was the first instance during this inquiry when there was a clear division of functions in questioning a witness. In fact several senior police officers gave evidence touching the general practice of questioning witnesses during police investigations to the effect that when they were assigned a task of questioning a witness during any investigation they would first interrogate the witness to ascertain what he knew and thereafter record his statement. This was the method adopted by the S.P., C.I.D., regarding the 1st accused. The practice of one officer or a team of officers interrogating a witness and another recording the statement was not one that generally obtained. The suggestion for the defence was what the accused persons who had refused to make statements earlier were subjected by this team to a softening process after which certain confessions were obtained and that thereafter they were made to repeat these confessions before the Magistrate.

24. Another unusual procedure adopted by this interrogating team was that the interrogation commenced late in the evening of one day and was continued throughout the night. The suggestion that is made by the defence on this aspect is threefold. It is firstly argued that this time was deliberately chosen as the fourth floor of the Secretariat at this hour was completely cut away from the public as every office and shop around it would have been closed and this seclusion was eminently suitable for the interrogators to practise any unlawful method they chose in obtaining confessional statements. Secondly, the loneliness of the place and the stillness of the hour and the complete helplessness of the interrogated surrounded by police officers in whose hands they were mere pawns would shatter their moral courage and resistance. Thirdly, the continued interrogation over long hours without sleep and perhaps without food in the night would have broken their physical resistance. Human nature being what it is, these suggestions seem to us to merit serious consideration.

We do not wish to be understood to say here that from a practical angle it was quite possible in all the instances when interrogations took place for such interrogations to have been conducted during day time. It may have been both desirable and necessary to have prolonged interrogation in some instances in order to enable the police to conduct their investigation properly in so serious a case. But we find that the interrogations of the 6th and 7th accused which resulted in confessional statements were commenced late in the evening and were carried on throughout the night, although there was no urgency in this instance such as in the ordinary case to complete inquiries within a few hours in order to comply with the law and produce the person arrested before a Magistrate. The attack made by the defence therefore is one that is not without justification and is of the utmost relevancy to the limited question that this court is now considering, namely, whether the circumstances stated above are sufficient to raise a reasonable doubt in our minds as to whether the confessions made to the police and thereafter to the Magistrate by these accused were free and voluntary.

25. In examining the confessions we propose to follow as far as possible the chronological order in which they were recorded. The first confession in that order was that of the 6th accused Amaratunga. In dealing with his case it is necessary to keep in the forefront of our mind the fact that he is a person who had asked for a pardon from the S. P., C.I.D., in order to come out with the facts and that he was the first person to be taken up by the interrogating team. The first witness to give direct evidence regarding this interrogation was Inspector Weeratunga. On more than one occasion he was questioned by Court as to whether he was aware that the 6th accused had come before the S.P., C.I.D., on the 14th of March and asked for a pardon before making a statement and the witness' answer was emphatically in the negative and further that no reference was made to this fact during the protracted interrogation. It appeared to the court to be highly improbable that the senior member of the interrogating team would not have been informed either by the S. P., C. I. D. or A. S. P. Kandiah, of this vital fact or that he would not have discovered this fact from the papers which he studied before the commencement of the interrogation. Rahula Silva, however, in the course of his evidence admitted that he as well as the rest of the interrogating team knew this fact and that he tried to make use of this fact during the interrogation. Having regard to the probabilities too we feel compelled to accept Rahula Silva's evidence and to reject Weeratunga's evidence on this point. The attempt by Inspector Weeratunga to conceal this fact becomes most significant when one considers the suggestion of the defence made to A. S. P. Kandiah which of course was not admitted—that it was by making a promise to release him to be home for the Sinhalese New Year that the 6th accused was induced to make the statement which he did to the Magistrate after his statement was recorded by the Police on the 12th. The second serious contradiction between the evidence of Weeratunga and Rahula Silva concerned the serving of dinner

to the 6th accused on the 11th night. According to Weeratunga dinner was served to him at about 8 p.m. at the same time as when the interrogating officers had dinner. Rahula Silva, however, was emphatic that the 6th accused was given his dinner only at about 11.30 p.m. when the officers decided to go to Nauneris Fernando's house at Sarikkamulla as it had transpired in the answers given by the 6th accused that he was the maker of the badges. The importance of this contradiction is not because of the simple fact as to when the 6th accused had dinner but because of the compelling inference of the 6th accused having been kept for long hours, from the afternoon of the 11th till almost midnight without food and sleep which would have the effect of breaking down his resistance. The third vital contradiction was in regard to the confrontation of the 6th accused with the bag which contained the badges. The evidence of Weeratunga was that the paper bag with the words " white line " written on it was shown to the accused and it was before him when he was asked to write these words several times on a sheet of paper. According to Rahula Silva, however, he did not show the 6th accused the writing on the bag when he asked the 6th accused to write the words for comparison. The course deposed to by Rahula Silva seems to us the only intelligent one because the purpose would have been completely defeated if the 6th accused was made to write the words while having a look at the writing on the bag with which the handwriting of the 6th accused was to be compared. This contradiction which may ordinarily have been relatively unimportant assumes vital importance in view of the fact that this, according to the police witnesses, was the turning point of the interrogation which did not yield any useful result for about 4 or 4½ hours. Secondly the paper on which the words are said to have been written which would have been most useful for this court to compare the handwriting which is said to have been similar, has not been forthcoming before this court. These contradictory versions shake one's confidence in the socalled turning point in an otherwise unsuccessful interrogation. The statement of the 6th accused recorded by A. S. P. Kandiah and simultaneously tape recorded was the product of this prolonged interrogation of about 12 hours throughout the night of the 11th and morning of the 12th. The interrogation ceased at about 6 a.m. and the 6th accused was taken over again after his morning ablutions by Inspector Kandiah who interrogated him for about 1½ hours and immediately started recording the statement which ran into about 23 pages of typescript and was concluded at about 6.30 p.m. Kandiah's evidence which is challenged by the defence is that he asked the 6th accused whether he wished to make a statement to the Magistrate as his statement appeared to be a confession and he agreed. He immediately telephoned the S. P., C. I. D. who made arrangements for the 6th accused to be produced before the Magistrate at 9.45 p.m. on the 12th. One must bear in mind that the 6th accused by this time had had a continuous session with the Police from about 3 p.m. on the 11th till about 9 p.m. on the 12th although it was stated by one of the police witnesses that he did not appear to be exhausted.

26. Apart from the facts preceding this confession before the Magistrate to which we have referred, there are certain facts which immediately followed the making of the confession which also appear to militate against the voluntariness of the confession. The evidence of W.L.C. Perera, Chief Jailor, attached to the Magazine Prison in April, 1966, is that on 13.4.66, he took the 6th accused to the Magistrate at about 8.40 a.m. and brought him back at 1.55 p.m. He went off duty at 2.30 p.m. and resumed at 8.30 p.m. Speaking with reference to the Log Book X46 which related to the 6th accused, he stated, in answer to the Deputy Solicitor-General in re-examination, that when he went to the 6th accused's cell at 8.50 p.m. after assuming duties at night he found that the 6th accused had not consumed his meals. He had however not noticed any meals left over when he went to the 6th accused's cell on the morning of the 13th before taking him to the Magistrate. He waited till 10 p.m. to see if the 6th accused would have his dinner. Before making an entry in the Log Book he tried to contact the Assistant Superintendent of Prisons, Mr. Jordon. On the 14th too, the 6th accused refused his meals. The evidence shows that even till the 16th he refused at least some of his meals. We are not taking into consideration what the 6th accused told the Jailor in regard to the C.I.D. officers as evidence of the truth of those statements. It is however relevant to note that the explanation given by the 6th accused of his conduct in refusing meals was that the C.I.D. had promised to take him home for the New Year and that he was disappointed. Mr. Jordon tried to contact S.P., C.I.D., over the telephone to convey the message of the 6th accused but failed. He himself tried to persuade the 6th accused to have his food but failed and the 6th accused repeated his request to contact the C.I.D. officers. He did not take these requests seriously because he said he thought that the 6th accused was trying to make up a case to invalidate the confession. Jailor Gananadan who gave evidence denied on the first occasion any knowledge of the 6th accused having declined his meals on any date; but when he was recalled and questioned on this point he admitted that such an incident did take place and that he was present when Mr. Jordon telephoned the C.I.D. We are disturbed to find that a Prisons Official who cannot and should not have any interest in the success of a prosecution should conceal from Court for reasons best known to himself facts material to the question of voluntariness of the confession. We accept without hesitation the evidence of the Chief Jailor Perera and are of the view that Ganandan gave deliberately false evidence on the first occasion.

27. The 6th accused also made a second statement to the Magistrate, X69, on 26th April, 1966, which was confessional in nature. The facts leading up to this confession are these. He continued to refuse his meals till the 17th. On the 18th he was transferred to Hulftsdorp Detention Barracks. On this very day he addressed a very urgent request, X15, to the Permanent Secretary, Ministry of Defence and External Affairs, asking that some arrangements be made immediately

to produce him before the C.I.D. In the background in which this letter was written we are satisfied that the purpose for which the 6th accused wanted to see the C.I.D. was one quite other than making a further statement in addition to his earlier statement, as alleged by the Police. On the 25th he was produced before the C.I.D. at the Technical Branch, where he was interrogated by Inspector Kandiah for 1 or 1½ hours, a statement signed by the 6th accused running into 11 to 13 pages was recorded by him; and he was soon after produced before the Magistrate, who after preliminary questioning gave him time for reflection till the next day. X69 was recorded by the Magistrate at 3 p.m.

28. It was contended by the Crown that the Court is concerned with the voluntariness of the confession recorded by the Magistrate and not of the statement recorded by the Police; that, whatever infirmities there may have been in regard to the statement recorded by the Police, the nature of the questions put, the warning administered and the time for reflection given by the Magistrate to each of the confessing accused were sufficient to remove fully any impression caused by inducement, threat or promise, if any, that may have been offered by the Police. The Crown's submission therefore was that even if the court had any doubt in regard to the voluntariness of the statement made to the Police, such doubt should not influence the court in arriving at a decision on the voluntariness of the confessions to the Magistrate. In considering this submission, it is necessary to examine the extent to which the questions put and the caution administered by the Magistrate were sufficient to ensure the voluntariness of the statements made to him.

29. The evidence of the officers who recorded these statements was that, whenever any of these persons made a confessional statement, the recording officer obtained the signature of the deponent at the top and bottom of each page of the statement. There is no provision of law which either requires or empowers a police officer to obtain signatures to statements from persons questioned by him. The only provision which relates to the examination of witnesses by police officers is contained in Chapter XII of the Criminal Procedure Code which specifically prohibits the obtaining of such signatures. Even if the inquiry in the present case was conducted under a special law the prosecution has not been able to point to any provision enabling the police to adopt such a course. While it is correct that there is nothing in law to prevent a police officer obtaining a signature to a statement made by a person questioned by him, otherwise than in the course of an investigation under Chapter XII of the Code, the fact remains in this case that the police did obtain the signatures and had with them the signed copies of the statements of the confessing accused before they were produced before the Magistrate for the purpose of recording their statements. The Magistrate himself was totally unaware of the fact that the Police had in their possession such signed confessions from each one of the persons who came before him to make statements. This fact to our minds comprises such a strong

link between the confession to the police and the one to the Magistrate that if the one is suspect the other can hardly escape the taint, unless the Magistrate was made aware of this fact, and had himself taken steps to remove its constraining influence from the mind of the person seeking to make a statement to him. The practice of Magistrates asking police officers who produce a person for the purpose of having his statement recorded, to "withdraw" is reduced to an empty gesture, if the unseen bond which the police had forged—perhaps unwittingly—is also not detected and its effect dissipated.

30. On the question of the adequacy of the probe by the Magistrate in regard to the voluntariness of the confessions, the defence pointed out that the Magistrate's records themselves contained some errors. The Magistrate himself admitted that some of the preliminary entries made by him, such as the particulars regarding the time of production of the accused, and the persons who produced them, were incorrect. Indeed those entries were contradicted by some other records produced by the prosecution itself. Relying on those admitted errors the defence suggested that the preliminary questioning was never done, and that the entries had been made as a mere matter of routine even before the accused were produced before him. One of those erroneous entries was: "The Superintendent of Police Mr. Ananda Seneviratne produces at my bungalow one Noris Koralage..... I request Mr. Seneviratne to withdraw, and he leaves my place." The other evidence adduced by the Crown categorically established that Mr. Seneviratne did not produce that accused, and could not have been asked to withdraw. Koralage had in fact been produced by Lt. Guneratne of the Navy. The Magistrate stated that this error had occurred as he had made this entry as soon as Mr. Seneviratne telephoned him, and had fixed a time for producing the accused, in anticipation of Mr. Seneviratne producing that accused. This error is one which cannot possibly attract a favourable comment from us. Basing their argument on such erroneous entries, it was further submitted by the defence that even the entries by the Magistrate in regard to the questions put to and the answers given by the accused were also fictitious. We are however not prepared from the existence of a few such errors and purely as a matter of inference therefrom, in the face of Mr. David's evidence to the contrary, to accept that submission.

31. Quite apart from this contention, we have considered whether the learned Magistrate's questioning, as it appears on the record, has been adequate. In our view it is not. The circumstances of the detention in this case, the hours of interrogation, the duration of the questioning, the existence of signed statements in the hands of the police, the nature of the custody and such other unusual features that preceded their production before the Magistrate are in our opinion factors that should have warned the Magistrate of the need to probe much further than being content with the normal questioning that would be adequate

in a straightforward case. We find that in one instance, even where an accused said he thought it would be an advantage to make a statement to the Magistrate, he did not think it necessary to pursue the questioning to find out why the accused thought so. We feel that having regard to the factors enumerated above, the learned Magistrate should have made a more searching inquiry from every accused before he decided to record his statement. For, the very first person produced before him, the 6th accused, came to him after five weeks of detention and over 24 hours of continuous questioning and the second person, the 7th accused after the same period of detention and even a more sustained questioning from the night of the 14th to nearly 6 a.m. on the 16th. Not only did the Magistrate fail to probe this aspect adequately but the intrinsic evidence contained in the statements themselves shows that he did not regard factors such as the long duration of the interrogations and the circumstances of the detention and custody of the confessing accused as having a bearing on the question of voluntariness. For the records show that he sought for certain particulars as to the arrest and detention from the confessing accused only after he had decided that the statements about to be made were voluntary. Although it is difficult to say in a particular case what special weight should be attached to these factors the trend of judicial decisions in England, India and in Ceylon shows that they occupied an important place in the decisions which rejected confessions as being involuntary. The Magistrate's failure to appreciate the importance of these factors renders unsatisfactory his decision in regard to voluntariness.

32. Another circumstance relating to action falling within the purview of the Magistrate which has a bearing on the question of voluntariness is the nature of the opportunity afforded for reflection. There being no proceedings in relation to any offence pending in the Magistrate's Court, the Magistrate was not in a position to make any legal order for remand. This fact was conceded by the Crown and also admitted by the Magistrate. The evidence is that formal orders of remand were made by the Magistrate, after the accused were produced before him; they were then taken to the new Magazine Prison in charge of prison officials often under heavy armed escorts. It is doubtful whether this atmosphere would have conduced to any sober reflection on the lines of the admonition given by the Magistrate. It has been repeatedly laid down by the courts of this country and elsewhere that where an opportunity is given for reflection the prisoner must be sent to a place not accessible to officers whose presence itself can exert influence on his mind. The new Magazine Prison to which the accused were sent had been their place of detention at an earlier stage, and the accused would have been conscious of the fact that they were accessible to the Police from that place. For, whether the accused were at the new Magazine Prison or at the Hulftsdorp Detention Camp, they were considered to be detenues and were available for production before the Police on an application made to the Permanent Secretary, Ministry of Defence and External Affairs. The Magistrate's

remand orders did not appear to have made any difference as is illustrated in the case of the 6th accused, who while under an order of remand, was removed from the new Magazine Prison to the Hulftsdorp Detention Camp without the permission of the Magistrate. In another case, an accused who was produced by the Naval authorities (*sic*) before the Magistrate for the purpose of his confession being recorded was handed back to the same authorities. He spent the period of reflection in the same place of detention, and this was done without any formal order being made by the Magistrate.

33. It was only in the case of the 6th accused that a formal order for remand—though ineffective was made after the recording of the confession. All the other accused were sent back after their confessions were recorded to the same custody from which they came, namely, the place of detention. It is significant that they were not sent back to a custody which had any semblance of judicial custody.

34. In this connection it would be useful for Magistrates to bear in mind the following observations of Mr. Justice Frankfurtur in the case of *Colombe v. State of Connecticut.*[1]

> "But persons who are suspected of crime will not always be unreluctant to answer questions put by the police. Since under the procedures of Anglo American criminal justice they cannot be constrained by legal process to give answers which incriminate them, the police have resorted to other means to unbend their reluctance, lest criminal investigation founder. Kindness, cajolery, entreaty, deception, persistent cross-questioning, even physical brutality have been used to this end. In the United States, 'interrogation' has become a police technique, and detention for purposes of interrogation a common, although generally unlawful, practice. Crime detection officials, finding that if their suspects are kept under tight police control during questioning they are less likely to be distracted, less likely to be recalcitrant and, of course, less likely to make off and escape entirely, not infrequently take such suspects into custody for 'investigation'. This practice has its manifest evils and dangers. Persons subjected to it are torn from the reliances of their daily existence and held at the mercy of those whose job it is—if such persons have committed crimes, as it is supposed they have—to convict them for it. They are deprived of freedom without a proper judicial tribunal having found even that there is probable cause to believe, that they may be guilty. What actually happens to them behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence, a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. The prisoner knows this—knows that no friendly or disinterested witness is present—and the knowledge may itself induce

[1] *367 U. S., 568.*

fear. But, in any case, the risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.

In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

These observations appear to us to have some relevancy when we consider the evidence in the present case in regard to the circumstances under which the accused made their statements to the police such as suspension of the ordinary laws of the land, the emergency provisions under which the accused were taken into custody, the gravity of the charges, the places of detention, the unusual nature of the custody, the detention incommunicado, the inaccessibility to lawyers, the unusual security measures, the display of arms and such others each of which is absent in the investigation of an ordinary criminal charge. The adoption of stringent measures for purposes of security may be inevitable and may be justified at a time of emergency. But a Court called upon to decide a question of the voluntariness of a confession cannot ignore the presence of these factors in deciding that question.

35. It has been laid down, both in our Courts as well as in India, that the recording of a confession is a very solemn duty and that an element of casualness should never be allowed to creep into it (vide *Rangappa Hanamappa and another v. the State*[1] and the dicta of Abrahams C.J. in *King v. Ranhamy*[2]). These decisions show that any material omission or shortcoming on the part of the Magistrate before arriving at his conclusion on voluntariness is sufficient to vitiate a confession. The statutory admonition contained in Section 133 to the effect that "no peace officer or other person shall permit or discourage by caution or otherwise any person from making any statement which he may be disposed to make of his own free will" does not in any way diminish the responsibility imposed on a Magistrate by Section 134 (3). Any slackness on the part of a Magistrate in the performance of this duty can result in a violation of the spirit of Section 25 of the Evidence Ordinance.

[1] *A. I. R. 1954, Bombay, 285 at 290 (Gajendragadkar, J.).*
[2] *(1937) 38 N. L. R. 347; 2 Ceylon Law Journal 104.*

The decisions in the cases of *Mal Bhagan v. State of Pepsu*[1], *Shibarasappa Thaiappa v. State of Mysore*[2], and *Bhagavan Din v. The Emperor*[3] are illustrative of the vitiating effect on a confession to a Magistrate of certain types of custody to which the accused are sent either during the time allowed for reflection or after confession has been recorded. Some of these decisions go so far as to suggest that a Magistrate before recording a confession should inform the accused that he will thereafter remain in the free atmosphere of judicial custody.

36. On a consideration of all the matters relating to the two confessional statements made by the 6th accused and the principles adumberated above, we are unable to hold that the Crown has affirmatively established the voluntariness of those two statements. We accordingly hold that X68 and X69 are inadmissible.

37. We next pass on to the 7th accused whose statement was the next to be recorded by the Magistrate on the 16th April. Hondamuni, the 7th accused, was one who like the 6th accused was kept under detention from the 4th March. On the 12th April he was brought back from Naval custody to the 4th floor and interrogated throughout the night by the same team that interrogated the 6th accused. He did not show any desire to make any disclosures either to them or to the Magistrate, and was sent back. It is important to note therefore that up to this amount he was not desirous of incriminating himself. On the 13th April Rahula Silva obtained from the S. P. permission to go back to his station where he could combine some relatively unimportant investigation regarding this case with a visit to the family for the New Year and left Colombo. But he was soon to be disappointed. On the 14th a top level conference was held in Colombo attended among others by the Permanent Secretary, Ministry of Defence and External Affairs, the I. G. P., the S. P., C. I. D., and A. S. P. Kandiah. Inspector Weeratunga and Inspector Rahula Silva were also requested to be present. It is of considerable significance that it was found necessary to summon Inspector Rahula Silva from Beliatta to be present during this conference where ordinarily, not being even a regular officer of the C.I.D. and having only the rank of an Inspector, he would not have found a place. For, his evidence was that he could not attend to any of the matters for which he returned to Beliatta and having had a sleepless night travelling on the 13th he received a telephone message from the S. P., C. I. D., and returned at express speed to attend this conference, even leaving behind on the road his car with tyre punctures to be attended to by the driver. After the conference was over, the S. P., C. I. D., instructed Inspectors Weeratunga and Rahula Silva to play the tape-recorded statement of the 6th accused to the 7th accused. This tape recording was however in existence and should have been available to the interrogators on the night of the 12th April too, but was not made use of allegedly because none of the three officers who formed the

[1] *1955, A. I. R. Pepsu 33.* [2] *1959, A. I. R. 46 Mysore 47.*
[3] *1934, A. I. R. Oudh 1951.*

interrogating team knew of its existence. The 14th night was one of unqualified success brought about, according to them, by playing to the 7th accused the tape-recorded statement of the 6th accused. Although it was stated by Weeratunga and Rahula Silva that after the tape was played for an hour or so the 7th accused asked them to stop playing it stating that he would come out with the story, the interrogation went on till about 6 a.m. on the 15th before he was taken to S. P., C. I. D., to have his statement recorded. The recording of this statement commenced at 9 a.m. on the 15th and was concluded, after certain breaks, at 6 a.m. on the 16th. According to the evidence of the S. P., C. I. D., the 7th accused in the course of this statement expressed the desire to make a statement before the Magistrate without any inquiry by him.

38. For the events of the night of the 14/15th we have to rely mainly on the evidence of Inspectors Weeratunga and Rahula Silva. We have already made our observations on the evidence of Inspector Weeratunga in connection with the interrogation of the 6th accused. Regarding Inspector Rahula Silva, the best opportunity we had to test his evidence and incidentally the evidence of the third member of the interrogating team, Sub-Inspector Senanayake, was when we heard their testimony in regard to the interrogating of Dodampe Mudalali. Although there were several inherent improbabilities in the story as narrated by these two witnesses regarding that incident, so far as the oral evidence was concerned they tallied in substance. It appeared to us most improbable in the first place that a person like Dodampe Mudalali whose alleged activities loomed large in the statements to the Magistrate, who was portrayed as an opium dealer and a bomb maker and whose physique compared well with even Rahula Silva's should have been interrogated by only the most junior and smallest built member of the interrogating team. Secondly, it appeared improbable that having been assigned the task of interrogating Dodampe Mudalali along with two others Rahula Silva would have kept himself out of the interrogation and spent the night, as he said, in the ladies' rest room to have some uncomfortable sleep without leaving for his brother's place where he had slept in the early hours of the 11th after travelling from Beliatta. Further, we did not think it probable that, having been assigned the task of interrogating Dodampe Mudalali, he would have gone to sleep in the very premises where the S. P. himself was recording a statement of the 7th accused almost throughout the night and till the next morning. While we were inclined to reject his evidence in relation to this interrogation on these improbabilities alone we alighted on his statement made to the Police on the morning of the 16th in connection with the death of Dodampe Mudalali in which he had specifically referred to his participation in the interrogation of Dodampe Mudalali by confronting him with statements of other suspects and the like—a position so inconsistent with his evidence. We are, therefore, compelled to the conclusion that Rahula Silva's testimony in regard to the extent of his participation in the interrogation of Dodampe Mudalali was untrue. This finding also affects at once the

credibility of Sub-Inspector Senanayake who fell in line with Inspector Rahula Silva and attempted to keep him out of the interrogation of Dodampe Mudalali. These unsatisfactory features in the evidence of each of the officers of the interrogating team do not enable us to accept with confidence their evidence as to the reasons for the somersault of the 7th accused who had on more than one earlier occasion been unsuccessfully interrogated.

39. Apart from these matters, the comments we have made in paragraphs 29 to 36 are also relevant in the consideration of the voluntariness of the 7th accused's confession, and lead us to the conclusion that the Crown has failed to establish the voluntariness of the confession X70. It is, however, contended for the Crown that the 7th accused sent a letter X5 dated 28th April, 1966, in which he made a request that he be produced before the C.I.D., to enable him to make an urgent statement about a coup, and that that letter would not nave been sent if there had been any compulsion in regard to the making of the confession. We have carefully examined this letter, but are unable to hold that it is sufficient to remove the doubt in our minds in regard to the voluntariness of the confession created by the numerous circumstances we have referred to above. We, accordingly, hold that X70 is inadmissible.

40. The general objectionable features such as those relating to the custody, detention and interrogation as well as the obtaining by the Police of signatures of the accused prior to their production before the Magistrate, the inadequacy of the Magistrate's probe and the absence of judicial custody either during the period of reflection or after the confessions were recorded were present, though in varying degrees, in the case of all the others namely the 1st, 3rd, 8th, 9th, 11th, 15th and 16th accused.

The doubts in regard to voluntariness created by the existence of these features must enure to the benefit of these accused in the absence of any factors which would dispel such doubts. We do not find any such factors in regard to the confessions made by the 8th, 9th, 11th and 15th accused, and we accordingly hold that X71, X72, X74 and X75 are inadmissible in evidence.

41. The confession of the 1st accused stands on a very different footing from that of the rest of the confessions. In the first place it is necessary to bear in mind the background, education and stature of the 1st accused as compared with the rest of the accused in this case. He is a Buddhist monk, 58 years old, a scholar of great repute, a Prachcena Pundit and winner of a coveted gold medal and the head of the Bhikku Training Centre at Pathakade. He had organised Buddhist activities among public servants and army personnel in various parts of Ceylon and can be said to have been held in high esteem particularly among the Buddhists in Ceylon. He had known the S. P., C. I. D., Mr. Seneviratne for some years and had developed a close association with him and in

fact had helped him in many ways, namely, to organise Buddhist activities at Ratnapura where he was the Superintendent of Police, to obtain treatment for an ailment which he was suffering from and, according to the 1st accused, even to secure a transfer in the service. There is hardly any doubt from these facts that the S. P., C. I. D., and the 1st accused had mutual regard for and confidence in each other.

42. The treatment accorded to the 1st accused when he was brought to Colombo by Inspector Fareed on the orders of the S. P. was entirely different from the treatment which other accused in this case had received. For, Inspector Fareed was ordered by the S. P. to make him comfortable at the Technical Branch of the C. I. D. where he was in fact provided with his meals at the proper times and also supplied with a bed in a separate room. Even before questioning the 1st accused, the S. P. himself went up to him, made obeisance and approached the 1st accused with deference and courtesy.

43. According to the S. P., C. I. D., who generally made a very favourable impression on us, at about 10.30 a.m. on the 17th April, 1966, he started questioning the 1st accused whose first reaction was to ask the S. P. why it was necessary to make another statement when he had already made some statements earlier in connection with this alleged attempt to overthrow the Government. After a short while, however, the 1st accused decided to make a statement which ultimately turned out to be a very long speech delivered in the style of a sermon, which could be heard even by persons outside the room in which the questioning was carried out. The statement was simultaneously typed by a Sinhala Typist whose services the S. P., C. I. D. had engaged. The statement produced as 1D2 ran into eight type-written pages and contained the very words of the 1st accused. He corrected one of the copies in his own handwriting and the S. P. obtained his signature at the top and bottom of each page. The 1st accused who had one copy in his hands made a request to the S. P. to allow him to have a copy and even though it was contrary to the usual practice, the S. P. felt compelled to accede to the 1st accused's request. At about 5.30 p.m. the 1st accused broke down saying that he had fallen into a trap ; the S. P. left the room for a while to enable the 1st accused to collect his thoughts after which he dictated one last paragraph and concluded his statement. At the conclusion of the statement the S. P. asked the 1st accused whether he would like to make a statement to the Magistrate, to which he agreed.

44. Having regard to the friendship and the mutual confidence the S. P. and the 1st accused had in each other, the intellectual attainments of the 1st accused and the intrinsic evidence contained in the statement itself such as the language and the subject matter, coupled with the favourable impression we formed of the S. P. as a witness, we see no reason to think that the statement made by the 1st accused to the S. P., 1D2, is anything but a voluntary statement. The 1st accused however has taken up a different position with regard to this

statement. According to him, the S. P., finding that the 1st accused was reluctant to make a statement, asked him whether he trusted him and added that he went to Pathakade to see the 1st accused to advise him not to get involved in this attempted coup but was sorry to have missed him. After some further discussion, the S. P. asked him to make a statement on the lines suggested by him, if he wished to save himself. To this course the 1st accused agreed and thereafter the S. P. and he prepared the statement 1D2, in collaboration. We cannot help thinking that implicit in such an agreement is an admission by the 1st accused that he was prepared to collaborate with the S. P. and include matters in the finished product which were both true and untrue if it suited the purpose. The 1st accused's version with regard to 1D2 was that the S. P., at the conclusion of the typed statement, handed him one copy with instructions to make his statement to the Magistrate in accordance with the contents of that statement. The 1st accused agreed to this subject to the qualification of his being free to say what he considered appropriate if the Magistrate should surprise him with a question. This evidence too would seem to us to point to a readiness on the part of the 1st accused to come out with something appropriate to the occasion even if it was strictly not in accordance with the facts.

45. There is a further item of evidence given by the 1st accused which we find it difficult to accept as true. His evidence was that on the way to the Magistrate's bungalow for the purpose of making his statement, the S. P., C. I. D., advised him to write a letter to the Chairman, Advisory Committee, stating his objection to the detention, after making his statement to the Magistrate and that he would thereafter be released. This was not admitted by the S. P. The suggestion for the Crown was that the letter 1D1 dated 18.4.66 was written by the 1st accused to the Chairman, Advisory Committee, not at the instance of the S. P., C. I. D., but as a result of the letter X5SA addressed to the 1st accused by the Ministry of Defence and External Affairs informing him of his right to object to the detention. The contents of the letter and the form of the address proved almost beyond doubt that 1D1 was written by a person who had seen the letter X5SA and followed the instructions contained therein. In addition to this the prosecution produced document X77 which contained an acknowledgment under the signature of the 1st accused of the receipt by him on 18.4.66 of the communication X5SA. The inference is, therefore, irresistible that the 1st accused was not giving us a truthful version of 1D1.

46. These considerations, apart from several others, which it is needless to catalogue, militate against an acceptance of the 1st accused's evidence that the statement 1D2 was not his own but one made as suggested by the S. P., C. I. D. and with his collaboration.

47. We shall consider next the confession made by the 1st accused to the Magistrate. According to the evidence of the 1st accused, the instructions of the S. P. were to make a statement to the Magistrate in

accordance with 1D2. While there are several substantial similarities in the contents of 1D2 and the confession to the Magistrate X66, the Acting Solicitor-General took great pains to show some substantial variations between the two statements and additions which cannot be considered merely as appropriate answers to questions put by the Magistrate given in accordance with his alleged arrangement with the S. P. Although the 1st accused's evidence was that there was no preliminary questioning by the Magistrate before recording his statement, no direct suggestion was made to the Magistrate on this point when he was under cross-examination. We are also not impressed by the evidence of the 1st accused regarding the intensive probing by the Magistrate during the recording of his statement and the inclusion of some particulars in the statement for which the 1st accused was not responsible. The contents of his confession which is largely exculpatory in character also suggests that the 1st accused's statement was a voluntary one. We might pause here to say that whenever we describe any confession or statement as voluntary we must not be understood to mean that it is voluntary in the full dictionary sense but that it is voluntary in the limited sense in which it is conceived in section 24.

48. The 1st accused stated that he made his confession to the Magistrate only because of a promise said to have been made by the S. P., C. I. D., that the making of such a statement would result in his release. He had thus excluded the presence of any other features which may have vitiated his confession.

49. As regards the 3rd accused, he voluntarily surrendered to the Police on the 24th April presumably because he was aware that certain investigations were going on in regard to an alleged conspiracy to overthrow the Government and that he was wanted for questioning in that connection. If he so desired, it would have been possible for him to seek any legal advice before he surrendered. His interrogation by Inspector Wijesuriya of the C. I. D. was of short duration and carried out by day. After his statement was recorded he was not asked whether he would go before the Magistrate and he was sent to the Hulftsdorp Detention Camp. There is nothing in the evidence to show that the Police wanted to take him before the Magistrate. A few days later, he had, on his own, addressed a letter to the Permanent Secretary, Ministry of Defence and External Affairs, in which he said he never conspired to overthrow the Government, that he was aware of certain matters and that he was prepared to testify anywhere against "Amaratunga, Hondamuni and all others who deceived and misled me to participate in this conspiracy and to get them punished for the wrong they have committed." In a post-script to the letter he said, "Please arrange for me to make a statement before the Magistrate as early as possible." It was in compliance with this letter that arrangements were made for him to be produced before the Magistrate for the purpose of his statement being recorded. In these circumstances, we are satisfied beyond reasonable doubt that his statement X67 was a voluntary one.

50. The only other confessions which remains for consideration are the two statements made by the 16th accused, X75 and X76. It will be seen from the summary of facts appearing in paragraph 18 relating to this accused that, having made one statement to Inspector Fareed on the 14th/15th April, he volunteered two subsequent statements to the same police officer within some hours of each other. He, thereafter, made a confessional statement to the Magistrate on 18.4.66 after which he was taken back to the Hulftsdorp Detention Camp. On the 1st May, 1966, he addressed a letter to the Permanent Secretary, Ministry of Defence and External Affairs, in which he stated, *inter alia*,

> "I made a statement to the Chief Magistrate on the same day and forgot to mention (*sic*) certain things which will be very important to my defence and the case. Therefore, I humbly request that I may be given another chance to mention those to the Magistrate please."

In pursuance of this request he was sent before the Magistrate on 12.5.66 and he made the statement X76 on 13.5.66. In X76 the opening sentence is as follows : "In my previous statement I had mentioned about a visit to the Pathakade temple on 1.3.66" and then continued to add to what he had already said in his previous statement. Having regard to the undoubted voluntariness of this second statement and the adoption of the first statement in the second statement, we have no difficulty in holding that the first statement too was a voluntary one.

51. While, in our view, the last four confessions which we have referred to have been voluntarily made by the 1st, 3rd and 16th accused, their admissibility will depend on the answer to the question whether the Magistrate had power to record these statements under section 134 of the Criminal Procedure Code and the consequences of any such lack of power upon their admissibility.

52. It has been submitted by the defence that the confessions which are under consideration in this case cannot be admitted in evidence because—so it is argued—the Magistrate had no power under section 134 of the Criminal Procedure Code to record them ; it is submitted that the power to record statements under section 134 arises only in the course of an investigation under Chapter XII of the Criminal Procedure Code or at least when there is a case pending in a Magistrate's Court.

53. Before considering this submission it is necessary to set down certain facts. It is common ground that—

(i) the offences of conspiracy to wage war and of conspiracy to overawe the Government of Ceylon by means of criminal force or the show of criminal force are (*a*) non-cognizable offences, and (*b*) offences of which no court can take cognizance without the sanction of the Attorney-General.

(ii) no order to investigate these offences—which are non-cognizable offences—had been made by any Magistrate under section 129 of the Criminal Procedure Code which provides that :

"(1) Every inquirer and police officer shall have power, upon receiving an order from a Magistrate, to investigate a non-cognizable offence and to exercise all the powers conferred upon them by this Chapter (Chap. XII) in respect of such investigation.

(2) Subject to the provisions of section 37, every inquirer and officer in charge of a police station shall have power to authorise the detention of a person during an investigation."

(iii) At the time the Magistrate recorded the confessions not only was there no investigation being carried out under Chapter XII of the Criminal Procedure Code, but there were also no proceedings initiated and pending in the Magistrate's Court of Colombo or in any other court in Ceylon in relation to the offences under consideration; proceedings were initiated for the first time by the Warrant of the Attorney General filed in terms of Section 148 (1) (*c*) of the Criminal Procedure Code in the Magistrate's Court of Colombo on 14.7.66, over two months at least after the last of the confessions was recorded.

(iv) None of the accused were under arrest for these offences (or indeed for any offence) at the time they were produced before the Colombo Magistrate for their statements to be recorded; an arrest for these offences would have required prior institution of proceedings in a Magistrate's Court and the obtaining of a Warrant of Arrest. Each of the accused so produced before the Magistrate was only under detention under Regulation 26 of the Emergency Regulations then operative and this was detention, not for the commission of any offence but was merely preventive—i.e., detention for the purpose of preventing their acting contrary to the public interest or public order or for the purpose of preventing the commission of certain offences under the Emergency Regulations (which do not include offences which are anything like those referred to in section 114 of the Penal Code). These accused were thus under preventive detention, in the custody of either Mr. Jordon, Assistant Superintendent of Prisons, New Magazine Prison, or Lieut. Wise of the Navy who was in charge of the Hulftsdorp Detention Barracks.

54. The Detention Orders on the authority of which all the confessing accused were taken into custody were invariably placed in the hands of the Criminal Investigation Department for service and execution on the person to be detained. How the Criminal Investigation Department

executed this task is dealt with earlier in the Order. It would appear from the evidence that the Criminal Investigation Department fell into the error of thinking that each of the detenues *was under arrest for the offence of conspiring to overthrow the Government* and that while the Detention Order was in force the Criminal Investigation Department could exercise all the rights and powers of an investigator under the Criminal Procedure Code without regard to any of the restrictions, limitations and obligations placed upon investigators by that same law. The Superintendent of Police, Criminal Investigation Department himself stated in evidence that from the 4th March 1966 he and his branch were investigating an alleged offence under section 114 of the Penal Code and that any person whom the Criminal Investigation Department suspected was taken into custody not by invoking the powers of arrest under the Criminal Procedure Code but by seeking the aid of the Permanent Secretary to the Ministry of Defence and External Affairs to issue a Detention Order in respect of the suspect. The suspect was thus taken into custody not for any offence but for preventive purposes, a procedure which, while it was perfectly legitimate under the Emergency Regulations, had no relation to the investigation of offences, arrest in respect of offences or proceedings in respect of offences as contemplated by the Criminal Procedure Code ; as the Emergency was extended from month to month, the detention could have been prolonged indefinitely without recourse to any court ; during this period the detaining authorities readily made any detenue available to the Criminal Investigation Department enabling the latter to remove the detenue from the place of detention fixed by the proper authority to the offices of the Criminal Investigation Department with liberty to them to interrogate the detenue under conditions and times determined by the Criminal Investigation Department; the detenues would, when the Criminal Investigation Department had done with them, be returned to the Detention Authorities sometimes after 2 or 3 days at the 4th floor of the Criminal Investigation Department office. The facts relating to these interrogations have been detailed earlier but it is important to note here that the confessing accused were taken before the Magistrate *not under arrest for an offence or charged with an offence*,and the confessions recorded by the Magistrate had no reference to any offence then being investigated (or ever investigated) by the police under Chapter XII of the Criminal Procedure Code or to any proceedings then pending in that or any other court in relation to any offence.

55. Section 134 reads as follows :—

" 134 (1) Any Magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

(3) No Magistrate shall record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily ; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect :—

> I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.
>
> (Signed) A.B.
> Magistrate of the Magistrate's Court of . . . . . ."

56. Dr. Colvin R. de Silva for the defence submits that the power given to Magistrates under subsection (1) is a considerably limited one having regard to its purport and content. It is submitted for the Crown that the expressions '*any* Magistrate', '*any* statement, and 'at *any* time before the commencement of an inquiry or trial' are as wide in their connotation as they at first glance appear.

57. We have been told by counsel who appeared for the Crown that there is no need to enter upon an interpretation of the section as its meaning is plain and that it has been drafted in the widest possible language to give Magistrates the widest amplitude of power to record statements. We ourselves doubt whether the most indulgent apologist for the draftsman of this section would suggest that the words of section 134 (1) are clear and unlimited in their meaning. It is sufficient to reproduce another provision of the Code somewhat similar in terms to section 134 (1) to illustrate the effect of context on the plain dictionary meaning of words : Section 172 (1) of the Code reads :

> " Any Court may alter any indictment or charge at any time before judgment is pronounced . . . . . ".

58. The meaning of section 134 (1) must of course be determined by reference to the words used in it. But they cannot and must not be looked at in isolation ; we must judge them by the company they keep. In other words we must read them in the context of the Code as a whole to determine what meaning the legislature intended them to bear.

59. It seems to us that the expression " any statement " is not as wide as contended for by the Crown. Obviously a statement recordable under this section must have some relation to an offence. Again the submission of the Crown that the expression " *at any time before* the commencement of an inquiry or trial " implies that the power of a Magistrate to record statements under this section in relation to a particular offence arises immediately upon the commission of the offence and continues up to and beyond the stage at which proceedings (if any) in relation

to that offence are instituted and ends only upon commencement of an inquiry or trial in those proceedings, appears to us to be unsupportable. This kind of expression is very common in our procedural codes. A few illustrations will suffice: "at any time before judgment is pronounced" (section 172 Criminal Procedure Code); "at any time before verdict" (section 202 Criminal Procedure Code); "at any time before hearing" (section 94 Civil Procedure Code); "at any time before passing a decree" (Section 149 Civil Procedure Code). In all these cases the legislature has in contemplation a limited period of time, not only ending with the designated event but also one commencing at a point of time at which proceedings were instituted or the court otherwise took cognizance of the matter. There is therefore considerable weight in the submission that the expression "at any time before the commencement of an inquiry or trial" was intended to refer to a period which begins to run only with the initiation of proceedings in a Magistrate's Court and which ends upon commencement of an inquiry or trial in those proceedings.

60. What then is the true significance of the words *before the commencement of an inquiry or trial, etc.* in section 134?

61. Proceedings in a Magistrate's Court can be commenced in one or other of the ways set out in section 148(1) (*a*) to (*f*). It is unnecessary to refer in detail to these different ways of instituting proceedings; it is important to note however that a written report made by an officer in charge of a Police Station or by an enquirer under section 121(2) can amount to the institution of criminal proceedings in the Magistrate's Court within the meaning of section 148(1) (*b*); this would be so even though at that stage the offender is unknown—see section 150(1). Again a Magistrate receiving direct information of the commission of an offence within his jurisdiction may initiate proceedings under section 148 (1) (*c*) on the basis that the information gives rise to the suspicion that an offence has been committed; and he may at the same time, if the information relates to a cognizable offence, bring it to the notice of the Officer in Charge of the appropriate Police station for investigation under Chapter XII or in the case of a non-cognizable offence, if he is satisfied that there are reasonable grounds for so doing, make order under section 129 authorising an investigation under Chapter XII. The absence of a power in the police or in an inquirer to investigate non-cognizable offences under Chapter XII without an order from a Magistrate is noteworthy. It seems that the legislature was not prepared to countenance the indiscriminate use of the Police agency for the investigation of every minor crime and give rise to a police-ridden state; again when crimes of a serious nature such as offences against the State were made non-cognizable, the legislature has obviously proceeded on the premise that the power of arrest without warrant and of compulsive investigation under Chapter XII should be withheld from the minions of the State such as inquirers and police officers in relation to such offences unless they first had authorisation from an independent judicial officer. A further protection against

hasty embarkations on prosecutions and investigations is seen in those provisions which prevent any court from taking cognizance of certain offences except upon the complaint of the Attorney-General or of some other person with the previous sanction of Attorney-General. Offences against the State fall into this category. See section 147(1) (*d*) of the Criminal Procedure Code and section 127 of the Penal Code. Proceedings are also, under section 148 (1) (*d*), regarded as being instituted when any person is brought before a Magistrate having been arrested without warrant in respect of, and accused of having committed, an offence which such court has jurisdiction to inquire into or try.

62. Whatever the manner of institution of proceedings, whether they are accompanied by an investigation under Chapter XII or not, it will be seen from the provisions of sections 149 to 151 and the investigatory procedures following upon a report to court under section 121 (2) that a considerable period can elapse between institution of proceedings in a Magistrate's Court and the commencement in that court of an inquiry under section 156 or of a trial under section 152(3), section 166 or section 187 ; and there would thus be proceedings pending in the Magistrate's Court which can quite properly and truly be described as *a case in which an inquiry or trial is to be held;* further the Magistrate's court in which such proceedings are pending cannot be more appropriately described than as the Magistrate's Court by which *the case is to be inquired into or tried.*

63. It is contended by the Crown that a Magistrate before whom a person comes to have a statement recorded need not inquire whether or not an inquiry or trial has commenced and that he should proceed to record any statement without reference to that fact ; and that it could be left to a trial court later to say whether he acted within his powers or not. We are unable to accept this view.

64. It seems to us that when the legislature made the Magistrate the donee of a power limited by reference to a time before which only the power can be exercised, the legislature must necessarily be deemed to have cast a duty on the Magistrate to ascertain *at the time he is called upon to exercise that power,* whether he was acting within the limits of his power or not. It seems to us that the words " before the commencement of an inquiry or trial " necessarily mean that the Magistrate recording a statement under this section must be in a position to ascertain whether an inquiry or trial has yet commenced or not and this he can reasonably do only by reference to proceedings actually pending in a Magistrate's Court. We find it difficult to ascribe to the legislature an intention to vest in Magistrates a power to record statements *in vacuo,* i.e., without reference to any proceedings pending in any court and without reference even to an allegation that any person has in fact committed an offence or been charged with one.

65. We find also another section in which the term "commencement of inquiry or trial" occurs. Section 289 (1) reads as follows :—

> "If from the absence of a witness or any other reasonable cause it becomes necessary to or advisable to *postpone the commencement* of or adjourn *any inquiry or trial* the court may from time to time order a postponement or adjournment . . . . . .

66. It seems to us beyond argument that the power given under this section refers to a power exercisable only in respect of *proceedings pending* in court at the time the power is exercised. It cannot be exercised in respect of an *offence* relating to which no proceedings are pending in court. It was argued by counsel for the Crown — but not with any enthusiasm—that the power to postpone the commencement of an inquiry or trial can be exercised even before proceedings have been instituted in that or any other court. Indeed the argument was sought to be carried further when it was submitted that Mr. David was only postponing the commencement of an inquiry when he, in respect of each of the accused who were brought before him for the purpose of having their confessions recorded in April and May, 1966, handed them to the prison authorities (*sic*) and asked the latter to produce them later after a period of reflection upon their desire to make confessions. It is sufficient to say (1) there was not on any of those dates any inquiry under Chapter XVI of the Code due to commence and the commencement of which the Magistrate could have postponed (ii) that when the Magistrate had actually recorded the confessions there was not any further postponement of the commencement of an inquiry or any order of any kind made by the Magistrate, whose only action was to convey the confessions to his court and lock them up in his safe in the hope that they may some day be of use to some prosecutor who initiates proceedings in his court, and (iii) an inquiry in this case commenced only on the 25th July 1966 on which date the charges were read out to the accused in terms of section 156 of the Code, proceedings having been initiated on the 14th July 1966 by the Attorney-General filing his warrant in terms of section 148 (1) (*e*) ; it was accordingly only after the 14th of July 1966 that the Magistrate could have exercised the power of postponing the commencement of an inquiry.

67. Much of the confusion arises from the presence of the word "*commencement*" in section 134(1). It is important to note that the word "*commencement*" is coupled not with "of proceedings in a Magistrate's court", but with "of an inquiry or trial". It is beyond controversy that the word "inquiry" refers to the inquiry under Chapter XVI commencing with the reading of the charge to the accused. See cases of *King v. Ranhamy* [1], *King v. Franciscu Appuhamy* [2] and the Court of Criminal Appeal decision in *King v. Weerasamy* [3]. Thus the words "commencement of inquiry", in section 134 (1) refer to a prospective event just as much as "commencement of trial" would refer to a

[1] *(1940) 42 N. L. R. 221 at 224.* [2] *(1941) 42 N. L. R. 553 at 557.*
[3] *(1942) 43 N. L. R. 207.*

prospective event which are both events in the course of *proceedings* which have already had their commencement. And just as much as expressions such as "before the hearing", "before answer filed", "before judgment" and "before verdict" which are events in proceedings commenced in court, refer to a period after commencement of proceedings in court the expression "before commencement of inquiry", or "before commencement of trial" in section 134 can only refer to a period after a court has taken cognizance of a matter and before commencement of the inquiry or trial in those proceedings.

68. It is next argued by the Crown that subsection (2) of section 134 militates against the view that there should be proceedings pending before the power under subsection (1) can be exercised. We think the contrary is the case.

69. Subsection (2) reads as follows :—

"Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried."

70. This subsection in our view clearly implies that the Magistrate recording a statement must be in a position contemporaneously with his recording of the statement to ascertain the Magistrate's Court by which the case is to be inquired into or tried. The occurrence of the definite article "the" before the word "case" confirms the view that statements recorded under subsection (1) must have some connection with an existing case and not with a hypothetical one that may or may not come to be instituted in the future. Further the duty to "forward" is enunciated in terms which admit of no exceptions. If the Crown's contention is correct, Magistrates would have power to record statements relating to offences triable exclusively by Rural Courts and also statements relating to offences of bribery under the Bribery Act in respect of which indictments can be presented in a District Court without any proceedings in a Magistrate's Court; further, under section 385 of the Criminal Procedure Code, the Attorney-General has the power, without any proceedings in a Magistrate's Court to exhibit informations in the Supreme Court in respect of certain offences. In these cases where would the Magistrate who has recorded a statement and bided his time till the institution of proceedings, forward the statement to? The section does not contemplate the forwarding of the recorded statements to any court other than to a Magistrate's Court. Then again on the Crown's view, Magistrates would also have power prior to any proceedings having been instituted in any court to record statements in relation to offences which cannot be taken cognizance of by any court except with the sanction of the Attorney-General and (in some cases) of the Bribery Commissioner, under section 147 of the Code; under the Conciliation Boards Act 10 of 1958 no prosecution in respect of certain offences can be

instituted without a certificate from the Chairman of the appropriate Conciliation Board. Apart from these statutory bars which may result in an offence committed not being followed by a prosecution, there is no reason to believe that every offence committed in Ceylon ends in a prosecution even when there is good evidence. In such cases a Magistrate recording statements without reference to pending proceedings would never be able to comply with the duty to forward the statement " to the Magistrate's Court by which the case is to be inquired into or tried " if for one or other of the reasons indicated no proceedings are ever instituted.

71. It is further contended by the Crown that if the view is correct that there must be proceedings pending before a Magistrate can exercise power under subsection (1) it would follow as a necessary corollary that only Magistrates having jurisdiction over the offence in respect of which the statement is made would have power to record statements under this section. It is unnecessary to decide this point for the purposes of this case but we are inclined to think that that is the correct view. For one thing, Magistrates appointed to a particular Magistrate's Court (having jurisdiction over a particular territorial division) and unofficial Magistrates appointed to that particular Division would be able more readily to ascertain whether there are proceedings pending or not in their court and if so what stage those proceedings have reached ; for another, since Magistrates do not, like police officers, have the privilege of exercising their powers " in every part of Ceylon " (see section 56 of the Police Ordinance) but are creatures of territorial circumstance one would have expected a more positive indication of a legislative intention to empower Magistrates to record statements relating to offences committed outside their jurisdiction than the word " any " before the word " Magistrate ". Such a provision for instance occurs in the Indian Code where section 164 ends with the statutory explanation that it is not necessary that the Magistrate acting under the section should have jurisdiction in the case.

72. The question is then asked why did the legislature in subsection (2) require that the statement " shall *then be forwarded* to the Magistrate's Court by which the case is to be inquired into or tried ". Is it to be inferred from this that a Magistrate having jurisdiction over the offence and who is accordingly likely to be the Magistrate who will inquire into or try the offence is debarred from exercising powers under subsection 1 of section 134 ? A submission to this effect was made in the case of *King v. Weerasamy* but was rejected both in the court of trial (see 43 N. L. R. 152 at 153) and by the C. C. A. (43 N. L. R. 207 at 210). The learned Attorney-General has sought to submit that the decision in that case conflicts with the view that the Magistrate who can record a statement under section 134 must be one who has jurisdiction over the offence to which the statement relates. We can find no such conflict. The facts in that case were that a confession was recorded by a Magistrate after institution of proceedings but before commencement of the

nonsummary inquiry. The same Magistrate later commenced and held the non-summary inquiry. The confession recorded by the Magistrate was sought to be attacked on the ground (*inter alia*) that he was debarred from recording the confession because he was the one who later held the inquiry. While we find some illogicality in the submission that a Magistrate is disqualified from exercising powers under section 134 by reason of a *subsequent* event it is sufficient to state that the Court of Criminal Appeal rightly held that the Magistrate who later holds or who is due to hold the inquiry is not debarred or disqualified from recording a statement under section 134. It seems to us that the more appropriate question to ask and seek an answer to is whether a Magistrate who records a statement under 134 is not, if he becomes personally interested in sustaining the legality and regularity of his act of recording, disqualified by reason of section 89 of the Courts Ordinance from subsequently holding any inquiry or trial in which such question arises or is likely to arise unless he has the consent of both parties to the litigation.

73. We ourselves venture to think that the duty to forward the recorded statement which is a duty enjoined on every Magistrate acting under the section arises from the fact that the act of recording here contemplated is one that, although it is related to a proceeding in Court, partakes more of a ministerial rather than a judicial character ; it precedes the more strictly judicial processes of inquiry and trial. It is more akin to the kind of act a court performs in postponing the commencement of an inquiry or trial under section 289 of the Code. Now, it cannot be postulated of any Magistrate who records a statement under section 134 that he, even if he be the sole Magistrate appointed to that particular Magistrate's Court, will inevitably hold the inquiry or trial in the proceedings in relation to which the statement was recorded. Death, illness, transfer or the presence of other Magistrates appointed to the same court may result in the case having to be inquired into or tried by a Magistrate other than the one who recorded the statement. The statutory provision for forwarding the recorded statements *to court* is in our view intended to emphasise the fact that such statements are not private and confidential to be retained by each recording Magistrate but documents which must be placed on the judicial record of the pending case, for there is nothing to suggest that these statements cannot be inspected and used, if occasion arises, by the prosecution *as well as by the accused*. An examination of subsection (2) of section 134 accordingly confirms the view we have taken of subsection (1).

74. If we apply our conclusions to the case of most common occurrence in our courts it will be seen that where the police arrest a person in a case of murder or culpable homicide they are obliged under section 36 of the Code to take the arrested person to the *Magistrate's Court having jurisdiction* over the offence. If the arrested person desires to make a statement he would have to make his statement to a Magistrate of that Court and there would be proceedings initiated and pending in that court

(sufficient to give a Magistrate power to act under section 134) either by reason of a report having already gone to that court under section 121(2) of the Code or by reason of the very act of bringing the arrested person in custody before the court accused of having committed an offence—see section 148(1) (*d*).

75. We accordingly take the view that section 134 can be acted upon by Magistrates only after commencement of proceedings in court and before the commencement of an inquiry or trial in those proceedings.

76. The defence however carries the argument further. It has been submitted that having regard to its place in the Code section 134 must be read as giving power to Magistrates to record statements only in the course of investigations under Chapter XII of the Code.

77. An examination of Chapter XII shows that whether the investigation carried out thereunder be in reference to a cognizable or non-cognizable offence, such investigation postulates a proceeding in court in respect of which an inquiry or trial can be said to be in contemplation. The functions of the Police are at this stage purely investigatory and for this they are vested with a number of compulsive powers including the one of ordering a person to attend at a police station for the purpose of being questioned. The Magistrate is himself given no powers of "investigation" of offences in the way in which police officers and inquirers are given such powers. He is not invested with the power given to police officers and inquirers of orally examining and questioning persons supposed to be acquainted with the facts and circumstances of the case, when such persons are bound to answer truly any questions put to them by the Police officer or the inquirer except those which would tend to incriminate him. But although the Magistrate himself is given no direct powers of investigation, the Code contemplates a close liaison between the Magistrate and the inquirer or Police Officer investigating an offence under Chapter XII. It is important to note that whatever other powers or duties of investigation the police may have derived from other statutes, any investigations carried out in the exercise of those powers or duties, are not carried out under Magisterial supervision contemplated in an investigation under Chapter XII. For instance, if the C.I.D. chooses to investigate a crime (without bringing in the uniformed branch of the Police) they will not enjoy any of the compulsive powers of investigation given to an officer in charge of a Police Station and subordinate officers investigating an offence under Chapter XII. We would like to quote in this connection a passage from a recent book of Lord Devlin on the Criminal Prosecution in England because his comments are substantially true also of the position in Ceylon. He says at page 67 :—

> "Before I leave the connection between interrogation and detention, it may be useful to bring out this point. When a person is taken into custody, it is not that of the Criminal Investigation Department.

The C.I.D. have no places of their own where they can keep their quarry under their own control. The detective officer who makes an arrest must take the accused to a police station, and there he is formally charged by the station Inspector or the station Sergeant, and it is in a cell there that he is confined. So he passes at once into the charge of what is sometimes called the uniformed branch of the service as distinct from the plain clothers or detective branch. You should not overlook the importance of this. If any Gestapo practices existed, the C.I.D. could not keep the knowledge of them within its own body, the knowledge would spread through the whole police force. Furthermore, the accused's detention even in the police station is only temporary, perhaps for a night or two, until he can be brought before a Magistrate. After that, if he is remanded in custody, he is sent to a local prison, where he comes under the control of the prison service, a distinct body of men from the police, men who have no more interest in the detection and punishment of crime than the ordinary citizen has and whose vocation is the reform of the criminal. Special rules govern the custody of an accused person, he is treated quite differently from those who are convicted and undergoing punishment, and if possible he is not to be put with them. He may, if he can afford it, buy his own food and pay for specially furnished rooms and certain domestic service. He may see his legal advisers in private and his written instructions to them are not subject to censorship. Any infringement of his common-law rights not authorised by the rules would be actionable."

78. When an investigation is duly carried out under Chapter XII, statements recorded in the course of such investigation become subject to the provisions of section 122(3) and have only a very limited usefulness at a subsequent inquiry or trial. Further, s. 25 of the Evidence Ordinance places a complete bar on the use against an accused person of any statement amounting to a confession made to a police officer ; section 26 places a similar bar on confessions made by an accused person while in custody unless made in the immediate presence of a Magistrate ; section 24 of the Evidence Ordinance debars a court from admitting as evidence any confession which appears to it to have been made (to put it briefly) as a result of any inducement, threat, or promise proceeding from a person in authority into which class would fall police officers and inquirers, as they are persons (particularly those investigating the offence) concerned in the arrest detention, examination and prosecution of the accused. It is in this background, the defence submits, that section 134 of the Criminal Procedure Code gives a power to Magistrates to record " statements ". The limitations placed by section 122(3) of the use of statements made to police officers and inquirers would not apply to statements made to a Magistrate because he is neither a police officer nor an inquirer holding an investigation under Chapter XII. If the statement to the Magistrate amounts to a confession neither section 25 nor 26 of the Evidence Ordinance would operate to prevent the use of such confession in evidence

against the accused ; and in order to ensure that the confession is not one which might be rendered irrelevant under section 24 of the Evidence Ordinance, the Magistrate is required not to record, in the exercise of his power of recording statements, any statement amounting to a confession unless he is satisfied upon questioning the person desiring to make the statement that it is being made voluntarily.

79. It is submitted by Dr. de Silva that section 134 was enacted and finds a place in our law mainly, if not solely, for the purpose of enabling a police officer or inquirer investigating an offence under Chapter XII to send or produce before the Magistrate any person who has been taken into custody willing to make a statement to the Magistrate so that such statement when recorded by the Magistrate will not suffer the infirmities attaching to statements made to a police officer or inquirer in the course of an investigation carried out under Chapter XII. Having regard to similar infirmities attaching to similar statements in India and the presence in section 164 of the Indian Code of a provision similar in terms to our section 134 and having regard to the position in England which does not attach these infirmities to statements made to investigating police officers, coupled with an absence of any provision in that country similar to section 134, there seems to be considerable substance in the contention that section 134 was enacted in Ceylon (and Section 164 in India) only in aid of the investigations of Police Officers and Inquirers authorised by the Code. This view also receives support from a passage that occurs in the judgment of Soertsz, J. in *King v. Ranhamy*[1] where he says at page 223 :—

> " Section 134 of the Criminal Procedure Code makes provisions for recording, before the commencement of the inquiry or trial of two kinds of statements, non-confessional statements and confessional statement. Non-confessional statements may be made by persons then accused or by a witness whose statement the Investigating Officer considers it desirable to obtain in this manner so that it may not suffer from the frailties attaching to statements made under Chapter XII to a police officer or inquirer. "

80. We have set out in full the arguments submitted for the view that before a Magistrate can act under section 134 the investigatory processes under Chapter XII must be under way in addition to there being proceedings pending in Court.

81. While we are much attracted by this argument, we prefer the view that it is sufficient if proceedings are pending in a Magistrate's Court in which no inquiry or trial has yet commenced for a Magistrate to exercise powers under section 134. While we acknowledge the danger, which Soertsz, J. commented upon in *King v. Chandrasekera* [2] of trying to define our law by placing it upon the Procrustean bed of English or

[1] *(1940) 42 N. L. R. 221.*

[2] *(1942) 44 N. L. R. 97 at 122.*

Indian law, we would like to merely refer to the parallel Indian Section (Section 164) which gives to Magistrates of a certain category power to record statements and confessions made to them (to quote the words of the Indian section) " in *the course of an investigation under this chapter or at any time afterwards before the commencement of the inquiry or trial* ". We also note that section 164 occurs within the very chapter dealing with investigatory powers of the police, whereas our section 134 appears in a chapter separate from Chapter XII headed " Chapter XIII—Statements to Magistrates or Peace Officers ". Having noted these differences between the Ceylon and Indian enactments we would only like to say that we are not surprised to have arrived, upon analysis, at a conclusion in regard to the Ceylon law different—though not substantially so—from the law in India.

82. It has been contended by the Crown that if Magistrates cannot record confessions under section 134 before proceedings are initiated in the Magistrate's Court it would have the " monstrous " result that a Magistrate would be unable to record a confession from a person who, with no proceedings pending before the Court, comes to the Magistrate and confesses that he has killed, say, his wife. We can find nothing monstrous in such a situation having regard to the fact that the legislature has done, if one adopts a similar line of thinking, an equally monstrous thing in rendering a Magistrate incapable of recording a confession under this section *after* the commencement of an inquiry.

83. In any event we do not think that the legislature in enacting section 134 was providing a public amenity for remorseful criminals to make " clean " confessions. This, an offender, if he is so disposed, can easily do by confessing orally or in writing to anyone who is not a person in authority or even by writing a letter of confession to the Editor of one of our Newspapers or even to a Magistrate, District Judge or Judge of the Supreme Court because in such a case the recipient of the oral or written confession is not called upon to exercise powers under section 134 of the Criminal Procedure Code. But it is quite a different matter to go to a particular Magistrate and seek to *invoke his statutory powers of recording statements.*

84. But the stiuation is not as bad as imagined by the Crown. If a person desires to make a confession to a Magistrate and to no one else and also to have it recorded with all the solemnities attendant on a recording of a confession under section 134 and also desires to ensure that a virtually unassailable piece of evidence that can be used to secure his conviction should come into existence, then such a person has only to go to a Magistrate having jurisdiction over the offence—and this is very likely to be the closest Magistrate—and ask to have his statement recorded. In such a case the Magistrate has only immediately to commence a case under section 148 (1) (c) in his court on suspicion based

on what the person has said and thereafter to record any statement confessional or otherwise which the person wishes to make in relation to that proceeding which has now been instituted.

85. There is one further point that militates against the view that the Crown would have us take of this section. It has been emphasised in many decisions in the courts of this country and India that when a person is produced by the police for the purpose of having a confessional statement recorded, the Magistrate should administer appropriate cautions and give such person time to reflect upon his desire to make a confession, away from the presence and influence of persons in whose custody he is at the time he is produced. Great stress too is laid on the necessity for seeing that after the confession is made also he does not go back to his previous custodians but into judicial custody. A Magistrate must have powers of remand to Fiscal's custody if he is to act in conformity with these rules. Remands of this nature can be made only under section 126A or section 289 of the Criminal Procedure Code both of which *contemplate proceedings pending in that court before such power can be exercised.*

86. In the present case, the Superintendent of Police, Criminal Investigation Department, was constantly in touch with the Magistrate from the 11th of April 1966 onwards. At no stage did he arm himself with the sanction of the Attorney-General to initiate proceedings in court, nor seek an order from the Magistrate under section 129 of the Code authorising an investigation under the Criminal Procedure Code. Even the Magistrate himself did not on any of the various dates on which various persons were produced for the purpose of having statements from them recorded treat the production of any of these persons as persons " brought before him without process accused of having committed an offence which the Magistrate's Court of Colombo had jurisdiction to inquire into or try "—vide section 148(1) (*d*). The Crown has not contended and it is hardly possible to contend that there was initiation of proceedings before the Magistrate's Court of Colombo either on the 11th April 1966 or on any of the subsequent dates on which various persons were produced to have their statements recorded. Indeed, the learned Attorney-General's filing of a warrant under his hand on 14th July 1966 is consistent only with no proceedings having been initiated prior to that date. One important fact must be noted in this context. If proceedings were in fact initiated on the 11th of April 1966, the 6th accused and most of the other accused would have had to be brought up on warrant and would have passed into judicial custody from which it is hardly likely that any court would have permitted their being taken to the Criminal Investigation Department Office for indefinite periods of time for the purpose of being subjected to the process of interrogation. The Magistrate at no stage ordered an investigation under section 129. Initiation of proceedings was not even remotely present in the Magistrate's mind for he neither opened a case record nor asked for or received any reports of

investigation from the police. The Magistrate himself conceded while giving evidence that although he issued remand warrants under section 126A of the Criminal Procedure Code in respect of the period allowed for reflection, the circumstances did not exist for exercise of powers under that section and the Crown accepts this as the correct legal position. Even this unauthorised exercise of remand powers was abandoned after the confessions were recorded and the confessing accused passed out of even the pretended judicial custody into which the Magistrate purported to send them. The learned Attorney-General has contended before us that there was ample evidence against these accused gathered before the 11th of April 1966 and that the confessions were in the nature of a windfall for the prosecution; if that were so, it is difficult to understand why proceedings were not commenced earlier so as to vest the Magistrate with necessary powers of remand which are so necessary in recording confessions of persons under section 134 when they are produced by the police. We do not wish to speculate on the reasons why this was not done, but the evidence suggests that commencement of proceedings in court with the resulting judicial superintendence over the investigation and the passing of the accused into judicial custody seems to have been studiedly avoided until the possibility of obtaining confessions—if any were available—was fully explored.

87. In concluding our consideration of the question whether the Magistrate had power to record statements prior to the initiation of proceedings, we would like to refer to an incident which occurred on the 25th of July 1966. Proceedings having been instituted on the 14th of July, all the accused except one, on whom warrant had not been served, appeared in court on the 25th of July. Counsel appearing for those of the accused with whom we are now concerned informed the learned Magistrate that these accused desired to make statements to him *before the commencement of the inquiry* in the proceedings now pending in court and applied that these statements be recorded. After some discussion between court and counsel, the application appears to have been dropped, and the inquiry commenced; in the course of the discussion the learned Magistrate is recorded to have remarked that *this was not the time nor the venue to make statements under section 134.* This remark is one that the Magistrate might more legitimately have made to the Superintendent of Police, Criminal Investigation Department, when the latter produced various persons before him at his private residence in April and May 1966 to have their statments recorded at a time when there were no proceedings pending in any court and when the Magistrate could not divine whether proceedings would ever be instituted or not. On the occasion on which the learned Magistrate did express this view, we can think of no time more proper than the time at which the application was made, and no venue more appropriate than the court house. for statements to have been recorded under section 134.

SS. For the reasons stated above we are of opinion that—

(1) a Magistrate has no power to record statements (confessional or otherwise) at a stage prior to the institution of proceedings in a Magistrate's Court,

(2) the proceedings in this case were instituted only on the 14th of July 1966,

(3) the Magistrate had accordingly no power under section 134 to record the confessions which are the subject of this inquiry, these having been recorded by him long prior to the 14th of July 1966.

89. It now becomes necessary to consider the next point made by the Crown, viz:, that even though the Magistrate may have had no power to record the confessions under section 134 of the Code, the confessions in fact taken down by the Magistrate and signed by the accused and the Magistrate are admissible under sections 17, 21, 24 and 26 of the Evidence Ordinance as though they were written confessions given to a person other than a Magistrate. Drawing an analogy with evidence discovered in the course of an illegal search, the learned Acting Solicitor General submits that a confession recorded *ultra vires* of the Magistrate's powers is still admissible.

90. We accept as settled law that relevant evidence (i.e., evidence existing independently of the illegal activity of the person discovering it) is admissible despite the illegality of the activity in the course of which such evidence was discovered.

91. But where, as here, the fact which is sought to be admitted in evidence is one which was *non-existent prior* to or independently of the Magistrate's unauthorised act, and came into existence only because of it, and would not have come into existence at the time and in the circumstances it did, but for the *ultra vires* act of the Magistrate, the principle that relevant evidence *discovered* in the course of an illegal or irregular activity is admissible can have, in our view, no application.

92. It is urged that section 134 contains no rule of relevancy or irrelevancy. It certainly does not; but at the same time the provisions in section 134 relating to the recording of confessions are founded upon the rules of relevancy and irrelevancy contained in sections 21 and 24 of the Evidence Ordinance; with these provisions in view the section, while in the first place, it empowers a Magistrate to record statements, *debars* him from recording such a statement if it is confessional in nature unless he is satisfied of its voluntariness. This section, coupled with section 80 of the Evidence Ordinance, contemplates the coming into existence of a piece of evidence, i.e., of a confession, together with presumptive proof of its relevancy. In the case of *Nazir Ahamed v. King Emperor* [1] where there was a complete failure by a Magistrate to follow

[1] *(1936) A. I. R. (P. C.) 253.*

the procedural requirements of the Indian Section 164 Lord Roche delivering the opinion of the Privy Council said :

> " Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbiddden."

and refused to permit admission of oral evidence of the confession as evidence rendered relevant by an application of section 21 of the Evidence Ordinance. Their Lordships of the Privy Council went on to say :

> "It was said that it (i.e., oral evidence of the confession) was admissible just because it had nothing to do with section 164 or with any record. It was argued that it was admissible by virtue of sections 17, 21, 24 and 26, Evidence Act, 1872, just as much as it would be if deposed to by a person other than a Magistrate . . . .
>
> For the appellant it was said that the Magistrate was in a case very different from that of a private person, and that his case and his powers were dealt with and delimited by the Criminal Procedure Code, and that if this special Act dealing with the special subject matter now in question set a limit to the powers of the Magistrate, the general Act could not be called in aid so as to allow him to do something which he was unable to do, or was expressly or impliedly forbidden to do, by the special Act. The argument was that there was to be found by necessary implication in the Criminal Procedure Code a prohibition of that which was here attempted to be done : in other words that the Magistrate must proceed under section 164, or not at all.
>
> Upon the construction adopted by the Crown, the only effect of section 164 is to allow evidence to be put in a form in which it can prove itself under sections 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.".

Lord Roche also added:

"In their Lordships' view it would be particularly unfortunate if Magistrates were asked at all generally to act rather as Police Officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under section 162 (the Ceylon section would be section 122) and to be at the same time freed, notwithstanding their position as Magistrates from any obligation to make records under section 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever."

93. We regard this case as authority for the proposition that a confession recorded by a Magistrate either *without the power to do so* or without substantial compliance with the procedural requirements cannot be used in evidence. The reason for this can only be that what comes into existence in such circumstances is in the eyes of the law a *nullity* to which it is unnecessary to apply any rules of relevancy before disallowing its use in evidence.

94. It seems to us beyond question that persons in the position of judicial officers should not act as catalysts for the creation of evidence except in the exercise of a power given by law and in substantial compliance with the manner prescribed by law for its exercise. In India there appears to be some divergence of opinion as to the true meaning of what the Privy Council said in regard to confessions recorded by Magistrates acting *ultra vires* of their powers under section 164. It is unnecessary to examine the Indian cases cited, because it seems to us, quite independently of what the Privy Council has said, that the principle is plain that Magistrates should not be permitted by acting *ultra vires* their powers to bring into existence evidence against persons accused of offences. The Crown submits that the *ratio* in *Nazir Ahmed's case* is that a confession taken in breach of the procedural provisions of law is inadmissible even though it may upon an application of sections 17, 21, 23 and 26 of the Evidence Ordinance be shown to be a relevant fact. While we agree that the case before their Lordships was one of failure to comply with procedural provisions and not one of total lack of power, it is perfectly plain upon a reading of the judgment that their Lordships' comments applied not only to cases of procedural lack of power but also to cases of substantive lack of power in the recording Magistrates. At the same time we must not be taken as saying that *Nazir Ahmed's case* must be regarded as shutting out all confessions to Magistrates outside section 134. One can contemplate many situations in which confessions made to Magistrates can be admissible though the Magistrate had no

power to receive or record such confessions under section 134. A few illustrations will suffice: (1) Cases in which the Magistrate's act of recording was referable to some power in the Magistrate other than section 134; e.g., if a Magistrate holding an inquest of death records from a witness a statement which amounts to a confession, such a statement, even if recorded before the institution of criminal proceedings in the Magistrate's Court would be admissible in evidence subject to section 24 of the Evidence Ordinance; see for example the case of *Ramasamy Reddiar* [1] (2) cases in which neither the Magistrate nor the accused purport to act under section 134., e.g., where an accused person sends an application in writing or a letter to the Magistrate in which he confesses to the commission of an offence; see the case of *Rane Naresh v. King Emperor* [2]. (3) cases where a confession is made by one person to another who happens to be a Magistrate and who neither purports to act nor holds himself out to be listening to or receiving the confession in his capacity as a Magistrate.

95. In the present case it is impossible to contend—and the Crown does not contend—that the recording of the confessions is referable to some power in the Magistrate other than section 134; nor that the confessions which were written out by the Magistrate were signed and tendered by the accused to the Magistrate independently of section 134; nor that the confessing accused accidentally came upon Mr. David and confessed to one who turned out to be a Magistrate; nor that each of the accused spontaneously thought of going to the Chief Magistrate of Colombo in order to make a confession. On the contrary the Magistrate before whom they were to go was chosen by the Police; the accused were taken to the bungalow of the Magistrate at times arranged between the Police and the Magistrate and in every case under heavy armed escort. We have no doubt at all that each of the accused fully believed that Mr. David had power to record statements at the time and in the manner adopted by him. We have also no doubt that Mr. David himself believed that he had authority at that stage to record confessions under section 134 of the Code. Indeed Mr. David announced to each of the accused "I am the Chief Magistrate" and went through all the motions of a Magistrate acting under section 134. Thus we have here a case where the Magistrate purported to act and held himself out as acting under section 134 of the Code.

96. He did all this, we have no doubt, quite *bona fide*; but as said by Abrahams, C.J. in *King v. Sepala & others* [3]—"The fact that a person *bona fide* believes himself to possess the authority to perform certain official acts does not create that authority, *not even if others believe that he has that authority.*"

[1] *A. I. R. 1953 Mad. 138.* [2] *A. I. R. 1939 All. 242.*
[3] *(1937) 38 N. L. R. 285; 7 C. L. W. 53.*

97. Where a confession is recorded by a Magistrate in circumstances such as these we are of opinion that it cannot be used in evidence. The same view has been taken in India—see the two cases of *State v. Chaudhry* [1] and *In re Thothan* [2]. A passage from the former will suffice to indicate the approach made to this question in India :

> " The other questions of law urged related to the admission of the confessions made by Budhoo. It was contended that though the confession could not be recorded by a Magistrate under s. 164, Criminal P.C., after the investigation had concluded and inquiry had commenced before the committing Magistrate, the Magistrate recording the confession was not precluded from recording it if the accused was prepared to make it and that, therefore, the Magistrate was a competent witness to prove that Budhoo had made a certain confession to him. We do not agree with this contention and are of opinion that the case reported in *Nazir Ahmed v. King Emperor*, A.I.R. 1936 P.C., 253 (2) (N) is a complete answer to the contention. It is true that an accused is free to make a confession at any time he likes and the person to whom such a confession is made is also free to make a statement about it in Court and no question of admissibility or otherwise of such a confession should arise. The question of weight to be attached to such a confession is a different one. But the real point is that a Magistrate is not just ' any person '. He occupies the position of a Magistrate. He purports to act as a Magistrate and not as an ordinary individual. It has clearly been laid down by their Lordships in the aforesaid decision that when a power is conferred upon a certain public servant, it must be exercised precisely in the manner in which it is ordained to be exercised and that it was very undesirable that Magistrates should act like ordinary citizens and should appear as witnesses in Courts of law, and they should appear as witnesses only in very exceptional cases when law makes it incumbent for them to play that role. This view of the Privy Council was endorsed by the Supreme Court in A.I.R. 1954 S. C. 322 at p. 335 (M) though in another connection. We are, therefore, of opinion that a Magistrate could not have recorded that confession of Budhoo purporting to exercise the powers conferred on him U/S 164 Cr. P. C. and could not be taken in evidence."

98. In Ceylon we have come upon only one case in which the question has been considered whether a confession made to a Magistrate at a time he had no power to act under section 134 is admissible in evidence. That is the case of *King v. Punchimahatmaya* [3] in which the Court of Criminal Appeal while holding that a confession recorded by a Magistrate *after* the commencement of the non-summary inquiry was not a statement of the

[1] *A. I. R. 1955 All. 138.* [2] *A. I. R. 1956 Mad. 425.*

[3] *(1942) 44 N. L. R. 80.*

accused which the Crown was bound to put in under section 233 of the Code also held that the Trial Judge had rightly ruled that it was not competent for the Crown to put in evidence a confession recorded at a time when the Magistrate had no power under section 134 of the Code to record it.

99. In cases in which the Magistrate had power to act under the section but did so without substantial compliance with the procedure laid down, our courts have uniformly rejected such confessions without pausing to consider whether evidence of such confessions could not be admitted under the general rules of relevancy of confessions contained in the Evidence Ordinance. For example : in *King v. Mudianse*[1] it was held (*inter alia*) that a confession recorded by a Magistrate purporting to act under section 134 *but taken under oath* was inadmissible in evidence *by reason of that fact alone* and without the application of any tests for voluntariness. In *King v. Bilinda*[2] the court rejected a confession recorded by a Police Magistrate without complying with any of the requirements of sections 134 and 302. In this case, Jayewardene, A. J. said :—

> "In my opinion the Magistrate failed to question the accused to satisfy himself that the confession was voluntary and I can see no ground for saying that he had reason to believe that it was in fact voluntary. There has been a failure to comply with the letter and the spirit of section 134 which is framed in imperative terms. The socalled confession *is therefore inadmissible* in evidence and ought to have been rejected."

In *King v. Mudiyanselage Ranhamy*[3] Abrahams, C.J. rejected a confession on the ground that the Magistrate, although he did put some questions to the accused before recording his confession, was "too perfunctory in the discharge of his duty".

100. For the reasons set out we find the conclusion irresistible that a confession recorded by a Magistrate having no power to do so is inadmissible in evidence. Accordingly all the confessions under consideration in these proceedings including those of the 1st, 3rd and 16th accused (X66, X67 and X75 and X76) would, on this ground, be inadmissible in evidence.

101. In the result we rule that the Attorney-General is not entitled to refer to any of the confessions under consideration in his opening address to the jury.

[1] *(1918) 21 N. L. R. 48 F. B.*
[2] *(1926) 27 N. L. R. 390.*
[3] *(1937) 2 C. L. J. 104.*

102. We take the opportunity of expressing our deep debt of gratitude to all the counsel on both sides, particularly the Attorney-General, the Acting Solicitor-General and Dr. Colvin R. de Silva for their very helpful addresses on the intricate points of law involved in this inquiry.

Sgd. G. P. A. SILVA,
Senior Puisne Justice.

Sgd. V. SIVA SUPRAMANIAM,
Puisne Justice.

Sgd. V. TENNEKOON,
Puisne Justice.

Confessions ruled inadmissible in evidence.