[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Moseley, Hearne and Wijeyewardene JJ.**

THE KING *v.* WEERASAMY *et al.*

56—M. C. Gampola, 2,172.

Statement recorded under section 134 of the Criminal Procedure Code—The meaning of the words " Before the commencement of the inquiry "—Confession made to a person in authority—Meaning of expression—Evidence Ordinance, s. 24.

For purposes of section 134 of the Criminal Procedure Code an inquiry does not commence until the charge is read out to the accused. A statement under section 134 of the Criminal Procedure Code may be recorded by the Magistrate who, in due course, would hold the inquiry. Section 134 has not been repealed by the amendment to sections 155, 156, and 157 made by section 8 of Ordinance No. 13 of 1938.

A person who detains a suspect until the presence of the Police is secured is not, *ipso facto*, a person in authority within the meaning of section 24 of the Evidence Ordinance.

The meaning of the expression " person in authority " explained.

APPEAL from a conviction by a Judge and Jury before the 4th Western Circuit.

B. G. S. David (with him *H. W. Jayawardene*), for the applicants.—The confession (P 55) made by the 2nd accused to Santiago on May 15, 1941, was inadmissible. The Magistrate purported to record the statement under section 134 of the Criminal Procedure Code, and it was put in evidence at the trial in spite of objection raised by defending Counsel. P 55 was inadmissible on the following grounds :—(1) It was taken under chapter 16 of the Code, *i.e.*, after the commencement of, and during the course of, the inquiry. Section 134 therefore, was inapplicable because it is clear that the inquiry in this case had in fact commenced, even though the Magistrate had not formally framed any charge. (2) Section 134 has been impliedly repealed by the amending Ordinance No. 13 of 1938. It cannnot defeat the effect of the new sections 155 and 156 of the Code. (3) Section 134 contemplates a statement recorded by a Magistrate other than the Magistrate who conducts the inquiry—*R. v. Jetoo et al.*[1]; *Barindra Kumar Ghose et al. v. Emperor*[2]. (4) The statement was obnoxious to section 24 of the Evidence Ordinance. It was the result

[1] *23 Sutherland's W. R. (Criminal) 16.*

[2] *I. L. R. 37 Cal. 467.*

of an inducement from a person in authority. The 2nd accused was running away, and Santiago had the power, under section 35 of the Criminal Procedure Code, to arrest him. Santiago became a person in authority when he effected the arrest. See *Phipson's Law of Evidence (6th ed.) 265 ; Roseoe's Criminal Evidence (15th ed.) 44 ; Taylor on Evidence (12th ed.) § 874 ; Archbold's Criminal Pleading (29th ed.) 390 ; R. v. Hewett* [1] *; R. v. Kingston* [2]*; Wills on Evidence (3rd ed.) p. 309, footnote (k) ; A. I. R. 1930 Cal. 633 ; R. v. Frewin* [3].

The trial Judge failed to direct that a lesser verdict was possible on the evidence—*R. v. Salaman et. al.* [4] *; Gour's Penal Code (5th ed.) 967 : A. I. R. 1941 Cal. 107.*

In regard to the 1st accused, the case against him also was prejudiced by the improper admission of P 55.

E. G. P. Jayetileke, K.C., Attorney-General (with him *R. R. Crosette-Thambiah, C.C.,* and *D. Janszé, C.C.*), for the Crown, called upon to address only on the point whether Santiago could be regarded as a person in authority.—The witness, Santiago, was not a person in authority within the meaning of section 24 of the Evidence Ordinance. In none of the cases referred to in *Phipson's Law of Evidence (6th ed.) 265* was the arrest effected by a private person. There is no definition anywhere of the expression "person in authority". A very extended meaning has been given to it in England, in *R. v. Kingston (supra)*.

[WIJEYEWARDENE J.—Even in India it appears to have an extended meaning. See, for example, *9 Calcutta W. N. 474 at 476.*]

But in all the cases cited in *Ameer Ali on Evidence (9th ed.) 281* the persons referred to were all people in authority, *i.e.*, officials. See also *8 Bombay L. R. 507.* The expression in section 24 of the Evidence Ordinance contemplates a person vested with authority. The word "in" presupposes a continuance of authority. It may also be noted that section 35 of the Criminal Procedure Code gives a private person merely a right, and does not impose on him the duty to arrest.

Santiago had no power, under section 35 of the Criminal Procedure Code, to arrest the 2nd accused unless he was present at the time the offence was committed. It cannot be said that the 2nd accused was running away from the scene of the offence at the moment he was arrested by Santiago. The words "running away" should be given their literal meaning and not the meaning of "absconding". The word "abscond" appears more than once in the Code, *e.g.*, section 59 and 407, and would have been repeated in section 35 if the wider meaning had been intended.

B. G. S. David in reply.—The expression "running away" imports the idea of absconding—*Walters v. W. H. Smith & Son, Ltd.* [5]

Cur. adv. vult.

February 16, 1942. MOSELEY J.—

The appellants were convicted on December 19, 1941, at the Western Assizes of the murder of one C. A. G. Pope, Superintendent of Stellenberg

[1] *(1842) C. & Mar. 534.*
[2] *(1830) 4 C. & P. 387.*
[3] *6 Cox C. C. 530.*
[4] *(1936) 38 N. L. R. 113.*
[5] *L. R. (1914) 1 K. B. D. 595 at 602.*

estate, and were sentenced by Soertsz J. to death. They were respectively the first and second accused of six. The remaining four were acquitted.

Each of the appellants applied for leave to appeal against his conviction, under section 4 (b) of the Ordinance. Prior to the hearing, further grounds, involving questions of law, were submitted and were allowed to be argued. These grounds particularly concern the 2nd appellant, since those which have demanded our consideration are in respect of confessions alleged to have been made by him, which confessions the jury were very clearly and properly told to disregard except in so far as the person making such confession was concerned.

The incident which resulted in the death of the deceased occurred shortly after 11.30 on the night of May 9, 1940. At that hour the deceased returned to Stellenberg from a neighbouring estate where he had been dining. A few minutes later he was found by the factory watcher lying on the road between the factory and the bungalow. He had been seriously injured and died before 2 A.M. on the 10th. The medical witness who saw him at that time testified to twenty-eight separate injuries, including three fractures of the skull. The 3rd and 4th accused were produced before the Magistrate at 7.30 A.M. on the 10th. The latter proceeded to examine some ten witnesses after which he remanded the 3rd and 4th accused and issued warrants for the arrest of the appellants. At 9.30 A.M. on May 15, the 2nd appellant was arrested by one Santiago, conductor of Frotoft estate, eight miles or so distant from Stellenberg. The 2nd appellant made a statement to Santiago in circumstances which will be referred to more particularly later, also to one Nagarajah, kanakapulle on the estate. The Police, who had been informed by telephone, arrived at 2 P.M., took the 2nd appellant into custody and set out with him for Gampola where the party arrived at 5 P.M. At 5.30 P.M., or a little later, the 2nd appellant made a statement, P 55, to the Magistrate, Gampola, in the course of which he admitted having, in company with others, assaulted the deceased. The admission in evidence of this statement provides the first ground of appeal to be argued before us.

The statement, on the face of it, is expressed by the Magistrate to be recorded under the provisions of section 134 of the Criminal Procedure Code, sub-section (1) of which is as follows :—

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

It is contended by Counsel for the appellants that the statement in question was recorded during the course of an inquiry held under the provisions of Chapter XVI. of the Criminal Procedure Code. This contention is based upon the hypothesis that such inquiry commenced on May 10, when the Magistrate, as provided by section 153, proceeded to the spot where the offence was committed, and in the presence of the 3rd and 4th accused examined a number of witnesses. Section 153 required a Magistrate, in such circumstances, if the accused be present, to hold such part of the inquiry directed by Chapter XVI. as may be necessary, and "if the accused be not present to hold an examination of such persons as may seem to him to be able to give material evidence".

It seems to us that the requirement to hold such part of the inquiry as may be necessary invests the Magistrate with some degree of discretion and, in a case such as the one under consideration, when it must have been apparent at the outset that more than the two suspects then before the Magistrate were concerned in the affair, it may well have been that the Magistrate deemed it unnecessary to hold any part of the inquiry under Chapter XVI. and preferred to adopt a course which, in our view, was open to him, and merely "to hold an examination" of such persons who seemed to be able to give material evidence. Be that as it may, it is clear from the record that no charge was read to the 3rd and 4th accused on May 10. Section 156 provides that a Magistrate conducting a preliminary inquiry under Chapter XVI. shall "at the commencement" read over to the accused the charge or charges in respect of which the inquiry is being held. The charge was read for the first time at the commencement of the proceedings on June 6 when all six accused persons were present. For this reason it seems clear to us that the inquiry referred to in section 134 commenced on June 6, and consequently that it was open to the Magistrate to record the 2nd appellant's statement on May 15.

It was further contended that section 134 has, by implication, been repealed by the amendment of sections 155, 156, and 157 by section 8 of Ordinance No. 13 of 1938. In our view there are no grounds to support such a contention. Counsel also argued that section 134 does not permit the recording of a statement by the Magistrate whose duty it is to hold the inquiry. He relied upon sub-section (2) which provides for the forwarding of the statement "to the Magistrate's Court, by which the case is to be inquired into or tried". These words no doubt provide for a case where a statement is recorded by a Magistrate other than the one who is to inquire into or try a case, but so to restrict the words "any Magistrate" in sub-section (1) would seem to us to do violence to the words.

Another ground of objection to the admission of the statement P 55 is that it is obnoxious to section 24 of the Evidence Ordinance, in that the making of the statement, or confession, as it may more conveniently be styled, was caused by an inducement proceeding from a person in authority. The fact relied on is that, after 2nd appellant was detained and tied up on Frotoft estate by Santiago, the latter, on being requested to release him, said that he would do so if he spoke the truth. That was at 9.30 A.M. and it is contended that at 5 P.M. Velaithan was still buoyed up by the hope that he would be released if he spoke the truth. Velaithan, however, in his statutory statement made on June 21 in which he retracted the confession, described the threats and assaults to which he had been subjected at the hands of the Police and ascribed his confession to fear of another assault. There is no evidence whatever upon which it could be held or inferred that the confession recorded by the Magistrate was caused by any inducement offered by Santiago, even if the latter can be considered a "person in authority", a question which will presently receive our attention.

Objection was taken to the charge by the learned trial Judge in that he had not indicated to the Jury that it was open to them on the evidence

to return a verdict of culpable homicide not amounting to murder, or of grievous hurt. Our attention was invited to *The King v. Salaman et al.*[1] which does not seem to us at all in point. In view of the injuries inflicted upon the deceased man it would seem to us that it would have been almost a misdirection on the part of the learned Judge had he suggested the possibility of a lesser verdict. Other instances of non-direction in the course of what we can only, with respect, describe as an exemplary charge, do not seem to demand our consideration.

There remains to be considered a question of some importance, namely, whether or not the man, Santiago, can be regarded as a person in authority within the meaning of section 24 of the Evidence Ordinance. Counsel for the appellants has sought to place him in that category on the ground that by his act, in arresting Velaithan, he has placed himself in the position of a person in authority. He relied upon a passage in *Phipson's Law of Evidence (6th edition, p. 265)* where a person in authority is stated to mean "someone engaged in the arrest, detention, examination, or prosecution of the accused". He argued that Santiago, exercising, consciously or unconsciously, powers conferred upon him by section 35 of the Criminal Procedure Code was a person engaged in the arrest of Velaithan and was therefore a person in authority. Section 35 empowers a private person, such as Santiago, to arrest another who (1) commits a cognisable offence in his presence, or (2) has been proclaimed an offender, or (3) is running away and whom he reasonably suspects of having committed a cognisable offence. It is conceded that only the third set of circumstances, if any, applied to Velaithan at the time of his arrest by Santiago. It must further be conceded that Santiago had reasonable grounds for suspecting that Velaithan had committed a cognisable offence. To empower Santiago to arrest him there is the further requirement, viz., that Velaithan was running away. Counsel for appellants sought to give to the expression "running away" the meaning of "absconding", and it cannot be doubted that Velaithan was in fact absconding. The Attorney-General, on the other hand, contends that, inasmuch as the word "abscond" appears in other parts of the Code, *e.g.*, sections 59 and 407, the Legislature would have repeated the word in section 35 if the wider meaning had been intended. He invited us to give the words their literal meaning, for instance, to go at quicker than walking pace, rather than a metaphorical, or perhaps, colloquial meaning. Section 35 would appear to be the only part of the Code in which the expression is employed. He further argued that whereas the first set of circumstances provided for by the section contemplates the commission of an offence in the presence of the potential arrester, the intention of the Legislature, when the third act was introduced by Ordinance No. 15 of 1898, was to provide for the case where the arrester is not actually on the scene but so near as to be aware that an offence has been committed by a man whom he sees running away from the scene.

Whatever may have been the intention of the Legislature the majority of the Court, in view of the solitary instance of the use of the term, prefer to give to it the narrower meaning, and to hold that in the circumstances Santiago had not the power of arrest conferred by section 35.

[1] *38 N. L. R. 113.*

Assuming that he had that power does it necessarily follow that, having arrested Velaithan, he occupied the position of a person in authority contemplated by section 24 of the Evidence Ordinance? The expression is not defined in the Ordinance, nor is any illustration given therein. It is however as Sargent C.J. observed in *Reg. v. Navroji Dadabhai*[1] an expression well known to English lawyers on questions of this nature and the English decisions may still serve as valuable guides. In the course of his judgment the same learned Judge continued: "The test would seem to be had the person authority to interfere with the matter; and any concern or interest in it would appear to be held sufficient to give him that authority". We may say at once that, applying the test laid down by Sargent C.J., in the view of the majority of the Court, even if Santiago were acting properly under the provisions of section 35 of the Criminal Procedure Code he had no such power of interference with the prosecution.

There is no doubt that in the early part of last century there was a tendency on the part of English judges to give the expression a liberal interpretation. An examination of such English decisions as have been brought to our notice or such as we have been able to trace reveals no case in which a private person who has arrested another has been held to be a person in authority over such person. If such a case existed it would, in the opinion of the majority of the Court, be possible to draw a distinction between the positions in England and Ceylon respectively, seeing that in England there is a duty imposed upon the individual to arrest a wrongdoer in certain circumstances, while section 35 of the Criminal Procedure Code at the most confers a power.

There are certain persons who merely by virtue of their official positions must be regarded as persons in authority. In this class are Magistrates and their clerks; a constable, or other officer, having an accused person in custody; a constable, or some person assisting him, in apprehending an accused person; a gaoler or even a chaplain of a gaol. In another category but in a similar position are such persons as a prosecutor or his wife or attorney. Upon still another footing is the master or mistress of an accused person, if the offence has been committed against the property or person of either. Persons in each of these categories have been held to be persons in authority. The authorities which have so held are set out in *Phipson's Law of Evidence (6th edition, p. 265)*.

It is clear that the man Santiago does not fall within any of the classes indicated in the English decisions considered by us. In 1852 *Reg. v. Hannah Moore*[2], Parke B. whose attention has been drawn to many authorities bearing on the point said that "the cases on the subject had gone quite far enough, and, in the opinion of the Judges, ought not to be extended". In the course of his judgment the learned Baron expressed the view that *all those who were engaged about the prosecution or apprehension of a person charged might* (the italics are ours) be regarded certainly as persons in authority. We have already expressed our opinion as to the role played by Santiago in regard to the apprehension of Velaithan. In the view of the majority of the Court he was in the

[1] *9 Bombay H. C. R. 358.* [2] *5 Cox C. L. C. 555.*

position of one merely detaining a suspect until the presence of the Police could be secured and that he in no way satisfies the conditions quoted above from the judgment of Sargent C.J., that is to say, he had no power of interference with the prosecution.

For these reasons the majority of the Court are unable to hold that Santiago was a person in authority and are of opinion that the statements made by Velaithan to him, to Nagarajah and to the Magistrate were properly admitted. The appeal of the 2nd appellant is dismissed.

In regard to the 1st appellant no grounds have been advanced upon which we could hold that the verdict of the Jury is unreasonable or that it cannot be supported by the evidence. His application for leave to appeal is refused.

1st Appellant's application refused.

2nd Appellant's appeal dismissed.