[COURT OF CRIMINAL APPEAL]

1973 *Present :* **G. P. A. Silva, S.P. J. (President), Wijayatilake, J., and Walgampaya, J.**

K. M. PUNCHI BANDA and 2 others, Appellants, *and* THE STATE, Respondent

C. C. A. APPEALS NOS. 97-99 OF 1972, WITH APPLICATIONS Nos. 109-111

S. C. 247/72—M. C. Maho, 22817

Evidence—Evidence Ordinance, ss. 25, 27—Confessional statements by accused to a police officer—Discovery of facts in consequence of the statements—Extent of admissibility of the statements—Cross-examination of the accused—Questions put to him suggesting the

inference that he had made a confession to the police officer—Inadmissibility—Statements made to a police officer by different accused, all of which statements led to the discovery of the same fact—Propriety or otherwise of leading in evidence that part of each accused's statement which led to the discovery of the same fact—Defence of alibi—Burden of proof.

The three accused-appellants were indicted on a charge of having caused the death of a person by shooting. A material portion of the evidence for the prosecution consisted of the discovery of the deceased person's grave as a result of confessional statements made to the Police by the three accused and the finding of a 20-bore gun (P1) and a spent cartridge (P2) as the result of a statement made to the Police by the 1st accused. The Government Analyst's evidence was that the spent cartridge could have been fired from the gun P1 and that the pellet found in the region of the heart of the deceased's body could have come from the cartridge P2.

The defence was substantially an alibi and a complete denial of any knowledge of the offence.

The 1st accused-appellant gave evidence at the trial. In regard to the discovery of the deceased person's grave and the cartridge, all parts of the statements made by all the accused and considered to be admissible under section 27 of the Evidence Ordinance had been produced. But the cross-examination of the 1st accused by the State Counsel brought out by way of contradictions a number of statements alleged to have been made to the Police in the course of a confessional statement.

Held, (i) that the denials made by the 1st accused in the course of his cross-examination amounted to evidence offending section 25 of the Evidence Ordinance which completely excludes a confession to a Police Officer from being produced at a criminal trial. Considering the background of the present case, the circumstances of the finding of the grave and the body, the discovery of the gun and the cartridge, all of which resulted from statements made by the accused to the Police, the questions put in cross-examination to which strong exception was taken by counsel for the accused-appellants could not have given to the Jury any other impression than that the accused-appellants had made a confession to the Police.

(ii) that where a Police Officer, during his investigation of a serious offence, has in his custody several accused at the same time and either by himself or with the assistance of others records the statements of all the accused without unreasonable delay, and some or all of them have made statements which lead to the discovery of the same fact, if the officer in charge of the investigation sets out to discover that fact, his possession of a plurality of statements which led to the discovery of the same fact will not preclude him from producing under section 27 of the Evidence Ordinance that part of the statement of each of those accused who made the statements which led to the discovery of the same fact.

(iii) that, when an alibi is pleaded in defence, the burden of proof on the accused is not similar to that in a case where the accused raises a mitigatory or exculpatory plea. Where the defence is that of an alibi, the accused has no burden as such of establishing any fact to any degree of probability.

APPEALS against certain convictions at a trial before the Supreme Court.

A. C. de Zoysa, with *Justin Perera* and *Lal Wimalaratne* and *G. O. Fonseka* (Assigned), for the accused-appellants.

J. R. M. Perera, Senior State Counsel, with *N. Vil Cassim,* State Counsel, for the State.

Cur. adv. vult.

July 9, 1973. G. P. A. SILVA, S.P.J.—

Several questions of considerable importance have arisen in this case in regard to reception of evidence and the necessary directions to the Jury by the trial Judge. Some of these questions have been argued for the first time in this Court while some of the other aspects have often been dealt with although in different circumstances. This case has therefore assumed some special importance and the points argued before us merit very careful consideration. The questions revolve mostly around the unqualified prohibition of confessions to Police Officers laid down in Section 25 of the Evidence Ordinance, the discovery of facts in consequence of confessional statements, the warnings that should be administered to the Jury by the trial Judge when a part of a confessional statement is produced in evidence, the appropriate direction to be addressed by a trial Judge in a case where the accused places evidence of an alibi, and the caution that must, as a rule of prudence, be given to the Jury in such cases. A particular feature of the case is also the multiplicity of statements by the different accused, all of which statements led to the discovery of the same fact and the propriety or otherwise of leading in evidence that part of each accused's statement which led to the discovery of the same fact. Different aspects of these questions have been raised by both counsel which have arisen for the first time in these Courts. It is therefore our duty to consider every aspect of this question deriving whatever assistance we can from the available commentaries on the subject and applying such principles embodied therein as we consider appropriate.

It is necessary in the first instance to give a summary of the facts in the case which brought these points of law to the forefront. According to the 1st witness Appuhamy, who was called for the prosecution, the deceased, a neighbour, was a boy of about 20 years, who used to visit him often. On the 13th April 1971, during the peak of the insurgency period, about 11 or 11.30 in the morning, he was at his house when the deceased came and requested his bicycle in order to go to a neighbouring village to purchase some sugar. Appuhamy asked the deceased to take a seat until he went inside the house and got the bicycle for him. As he was about to go in, the three accused-appellants, Punchi Banda, Asoka and Piyadasa, came there with three guns in their hands. The 1st accused-appellant, Punchi Banda, who was in the compound with the others aimed the gun at Appuhamy and said "don't move", whereupon the latter sat on a chair and the deceased ran inside the house. The 2nd and 3rd accused-appellants jumped into the house and pulled the deceased out of the house while the 1st accused-appellant was still placing his

gun on Appuhamy's chest and remaining there. Thereafter the 2nd and 3rd accused-appellants, joined by the 1st accused appellant, assaulted the deceased with hands and feet and also with guns and dragged the deceased in the direction of the tarred road without stating why they were taking him. The deceased raised cries saying "Brother, save me", whereupon Appuhamy went towards the gate on his compound at which time too he saw the 1st and the 3rd accused-appellants assaulting the deceased. They held the deceased by his hands and went in the direction of the tank which, it transpired later, was about a quarter mile away from Appuhamy's house. Appuhamy came back home and this was the last occasion on which he saw the deceased alive. About 20 minutes to half an hour later he heard the report of a gun. He learned thereafter—he does not specify how long after—that the deceased had been killed and buried and on the day that the body was exhumed, which was about two months later, he too went to the spot where the body had been buried. He made a statement to the Police and also identified the sarong P5 as the one which was worn by the deceased on the day he saw the accused-appellants taking him away. It would appear that Appuhamy too had taken up residence in this area only since July 1970 and bore no animosity against any of the accused-appellants. Apart from testifying to this incident, he stated that the deceased's mother and sister came running on to the road at the time he was being taken away and that he told the deceased's mother what happened. Having gone in the direction in which her son had been taken she later came and stayed the night with her daughter at Appuhamy's house.

The mother of the deceased, who was the next witness to be called, testified that on this day at about 11.30 a.m., after she finished cooking she went with her daughter aged 12 years and the deceased son to the tank for a bath and, when they were returning home, the deceased said that he was going to Appuhamy's to borrow a bicycle and left them while she and the daughter returned home. Having had their lunch she served the meal for the son after which she heard cries of distress of her son from the direction of Appuhamy's house. She and the daughter went towards the road in the direction of the cries and she noticed the 1st, 2nd and 3rd accused-appellants holding her son with guns in their hands at the junction of the road which led to the "Wewa" where they had just gone for the bath. She saw the 1st accused-appellant assaulting the deceased and the deceased falling when she and the daughter raised cries and ran in that direction. Thereupon the 2nd accused-appellant came running back in their direction and said "stop, stop" and aiming his gun he placed the gun on her chest and said "turn back and go home. If you look behind I will shoot, and go quickly". Saying

so he brought them to the house at the point of the gun and he came inside the house and said " if you have any money give it ". She replied that she did not have any money whereupon he said " no you have got money " and saying so he opened a box and threw away the contents and took the jewellery which was in that box. At this time there were five 10 rupee notes folded in their almirah which fell and her daughter, apparently stricken with fear, picked it up and gave it to the 2nd accused-appellant saying " here is the money ". She also had two tills in which some coins were collected and the 2nd accused-appellant dashed the tills on the ground when one Millington, a brother of the 2nd accused-appellant came there and took away the 2nd accused-appellant, both of them having helped themselves to some sweetmeats that were in the house. As they left, the 2nd accused-appellant said "Don't come out to the road." She fell unconscious and recovered, as she said, in about half an hour and noticed her little daughter too crying by her side. They went on to the road and having not found the son nor anyone else they remained at home and as darkness fell, they went to Appuhamy's house in the evening and stayed there for the night. As she heard that some people were searching for them to take their lives, on the next day they went to another village and stayed with a person known to them where they remained till the 18th of April and came along a jungle track and went to the Maho Police to make a complaint. They were told at the Maho Police that it was too late to make a complaint and they next went to Kurunegala to the house where the father of the deceased was residing, he being an employee in the Department of Agrarian Services. On the 19th, they went to Maho again and were informed that complaints could not be entertained. They tried Kurunegala next and were given the same reply and asked to go to the Grama Sevaka who also refused to entertain a complaint. They came home thereafter and remained there when at some later stage, about 1½ months after the incident, they heard that complaints were being entertained at Kurunegala and they made a complaint. It would appear that the day was the 11th of June and the Police started their investigations on the 12th.

The other evidence for the prosecution consisted of the discovery of the grave where the body was buried as a result of statements made by the three accused-appellants, which were confessional, the finding of a 20-bore gun as a result of a statement of the 1st accused-appellant at a place called Riviresa Stores which had been attacked by insurgents and where a number of guns had been stored, the finding of a spent cartridge as a result of this statement by the 1st accused-appellant and the Government Analyst's evidence that the spent cartridge could have been fired from the gun P1 which was the 20-bore gun

pointed out by the 1st accused-appellant. There was in addition the medical evidence of the doctor, who held the post-mortem examination on the body of the deceased exhumed from the grave pointed out by the accused-appellants, that the deceased had died as a result of fracture of the ribs and probably the laceration of the heart and lung from a gunshot injury, this too being his inference from the pellet found in the region of the heart. This pellet according to the Government Analyst resembled a SSG pellet which could have come from the cartridge P2 which was pointed to the Police by the 1st accused-appellant.

The defence was a complete denial of having committed the offence and the allegation was made that, because Appuhamy was angry with the brother of one of the accused-appellants, a false case had been fabricated against the accused by Appuhamy, a position altogether denied by Appuhamy. A further suggestion made to Appuhamy was that he had fallen out with the accused over some allotment of the share of a chena of which Appuhamy denied any knowledge. The defence was not able to suggest any reasonable motive as to why Rosalin, the mother of the deceased should have implicated any of the accused-appellants falsely.

The 1st accused-appellant gave evidence and stated that he and the 3rd accused-appellant were members of a Vigilance Committee that defended the Polpitigama Hospital when there was an attack on the hospital by the insurgents on the 13th of April. He was aware that the deceased was an insurgent and a number of houses, shops and boutiques had been burnt in the area and some Vigilance Committee Members too had lost their lives. He denied having made a statement to the Police but stated that he and the other accused had been taken to an estate at Sandalankawa, kept in a room and assaulted and threatened to be shot at Deduruoya and also taken to the Kurunegala Cemetery and threatened to be shot. His defence was substantially an alibi in that he attempted to make out that he and the 2nd accused-appellant at least were members of the Vigilance Committee who were patrolling the road and defending the hospital at Polpitigama.

One of the main points taken by learned counsel for the accused appellants was that the cross-examination of the 1st accused-appellant by the State Counsel brought out by way of contradictions a number of statements alleged to have been made to the Police in the course of a confessional statement. In order to appreciate the gravamen of the complaint by accused-appellants' counsel one has to consider the entire background of the evidence. If I may collate the evidence, some items of which I

have already referred to, I would enumerate the following points :—

(1) The grave where the body of the deceased was buried was pointed out by the three accused.

(2) The gun from which the cartridge produced in the case was fired was pointed out by the 1st accused-appellant.

(3) The cartridge itself from which the pellet found in the heart of the deceased's body at the post-mortem examination could have come, according to the Government Analyst, was also pointed out by the 1st accused.

In respect of (1) all parts of statements made by the accused in terms of Section 27 of the Evidence Ordinance had been produced and in respect of (3) the conduct of the accused in pointing out the pellet was deposed to by the Inspector. It must be noted that, for whatever it was worth, the 1st accused denied having made any statement to the Kurunegala Police and only made an allegation of the Police assaulting and interrogating the accused, having also denied any knowledge of the offence. In the background of these facts the State Counsel was allowed by the learned trial Judge to put the following questions to the 1st accused:

(1) Do you still deny having made statements to the Kurunegala Police.

(2) In your second statement to the Police you said I can point out the spot where Kumarasinghe (deceased) was buried.

(3) I further put it to you that in your statements to the Police on the 13th you said " I can point out and give charge of the gun. "

(4) Are you quite sure that you did not give back the gun that you used, to Riviresa Stores.

These were all denied.

(5) I put it to you witness that in your statement to the Police you have stated " I returned the gun to the Riviresa Stores, Polpitigama ".

This was denied.

I shall now reproduce the questions and answers to which the most serious exception was taken by counsel for the accused-appellants :—

" *Q*. And after you and 3rd accused dragged Kumarasinghe into the jungle you sent Mellington to call Asoka from the house of Kumarasinghe ?

A. I don't know.

Q. And thereafter when Asoka came there *you* shot Kumarasinghe from behind ?

A. I did not shoot.

Q. And thereafter you dug a grave and buried Kumarasinghe there ?

A. I do not know.

Q. And then you made a statement and in your statement you said that you can point out the place where Kumarasinghe was buried ?

A. I deny.

Q. I further put it to you that you took Inspector Ratnayake to Riviresa Stores and pointed out the gun and gave it in charge of Inspector Ratnayake.

A. I was in the jeep.

Q. And I further put it to you that you showed where the spent cartridge was.

A. I deny.

Q. And when the place was searched the cartridge was found.

A. I do not know anything about it.

Q. And all that you have been saying in this Court is absolutely false.

A. I have told the truth."

The submission of counsel for the accused-appellants was that this evidence was altogether inadmissible and that it should not have been produced before the Jury, and that the mis-reception of this evidence vitiates the verdict. The submission is based on the complaint that this evidence offends Section 25 of the Evidence Ordinance which is an absolute bar to the leading of a confession made to the Police by an accused person. One of the cases on which Mr. de Soysa relied for his submission was that of *The Queen v. Abadda*[1] 66 N. L. R. 397, in which it was held that the question whether a statement made by an accused person to a Police Officer is a confession within the meaning of Section 25 of the Evidence Ordinance is one that has to be decided upon reading the entire statement. If the statement as a whole contains a statement that the accused person committed an offence or that suggests the inference that he committed an offence then it would come within the prohibition contained in Section 25 of the Evidence Ordinance. In that case the passage that was

[1] *(1963) 66 N.L.R. 397.*

put to the accused and to which exception was taken by counsel for the defence was as follows:

> "On 28.3.62 at about 6 or 6.30 p.m. I garaged the lorry No. 22 Sri 3797 at Tingolla as usual in the garage of the owner one Dharmasena. At about 2 or 2.30 p.m. I bought this knife for Rs. 3 from a hawker at Tingolla to be taken home in the evening for use in the kitchen. It was kept in the lorry. When I was coming about 6 or 6.30 p.m. I brought this knife along with me. At Talahingoda I saw Jayatissa driving the car towards Mawatagama. He saw me and stopped the car. I got into the rear seat. Thenna was seated in the front seat next to Jayatissa the driver. This knife was in my hand."

The entirety of the statement to the Police conveyed a confession. The objection taken to the passage referred to above was that it was tantamount to proving a confession. The learned trial Judge took the view that the passage did not necessarily show that the accused confessed to the using of the knife and treated it only as an admission that the accused had a knife. Basnayake C. J. in his judgment of the Court of Criminal Appeal expressing agreement with the decision of their Lordships of the Privy Council in the case of *Anandagoda v. The Queen,* 64 N.L.R. 73[1], referred to the following passage in the Privy Council Judgment.

> "The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts . . . It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is none the less a confession even although the accused at the same time protests his innocence ... The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt ?"

[1] *(1962) 64 N.L.R. 73.*

There have of course been decisions of our Courts which took a somewhat different view. In *Rex v. Vasu*[1] 27 C. L. W. 16, for instance, Howard C. J., in a very short judgment held that a part of a confessional statement which does not amount to a confession can be proved in evidence to contradict an accused. The crux of the matter seems to be not that a completely innocuous portion of a statement made by an accused to the Police in the course of a confessional statement cannot be proved but that if the portion of a statement with which the accused is sought to be contradicted in any way suggests the inference that he committed the offence, such portion cannot be proved. In this regard each case will depend on its own facts. The cardinal principle is that if such a statement offends Section 25 of the Evidence Ordinance which completely excludes a confession made to a Police Officer from being produced at a criminal trial such a statement is barred by that section. Not only have the Courts been consistently strict in the interpretation of this section of the Evidence Ordinance but it would appear that the Legislature for nearly a 100 years has not thought it fit to depart from this principle. I say this for the reason that within recent times there has been special legislation for the trial of certain persons suspected of an attempted coup and for the trial of insurgency cases and exchange control offences. In both these instances the Legislature introduced certain rules of evidence which effected a departure from the principle laid down in Section 25, perhaps for the very good reason that extraordinary situations even warranted extraordinary methods of proof. At no stage has the Legislature thought it prudent however to repeal or modify in any manner the provisions of section 25 which makes irrelevant a confession made to a Police Officer in its application to ordinary criminal proceedings in our courts. This being the attitude of not only the judiciary but even of the Legislature regarding confessions of accused persons to the Police it is the clear duty of a Court interpreting this Section to give a construction in the circumstances of a particular case which will neither offend the letter nor the spirit of the provisions of this section. The facts and circumstances which I collated earlier, namely, the background to the incident, the delay in conveying the information of the disappearance of the deceased to the Police, even though it may have been unavoidable in this case, the circumstances of the finding of the grave and the body, the discovery of the gun and the cartridge,

[1] *(1941) 27 C.L.W. 16.*

all of which were as a result of statements by accused, coupled with the questions to which strong exception was taken by counsel for the accused-appellants, to our mind would have given a lay Jury no other impression than that the accused-appellants had made a confession to the Police. Had it perhaps not been for the fact that the discovery of the grave, the body, the gun and the cartridge, was as a result of a statement made to the Police by the accused-appellants, we may perhaps not have taken the view that the questions under cross-examination were not legitimate. Conversely, had the cross-examination referred to above not taken place, and only the evidence of the discovery of various items only remained, then too we may not have felt justified in taking a view that there was a contravention of Section 25. It is the cumulative effect of the background of the case, the discovery of facts in consequence of accused's statements and the volume and nature of the questions, all considered together, that persuade us to the conclusion that section 25 has been contravened at least in its spirit. I may also mention that there were, in addition, certain discussions that took place between the trial Judge and Counsel for the State in the presence of the Jury such as, reference to the omission of certain words in the statement made to the Police by the accused and such other matters. A lay Jury watching this exercise is bound to feel that there was something which had by law to be concealed from them. The proper course would have been for such discussions in this particular case to have taken place in the absence of the Jury. This too is an additional factor which, taken in conjunction with the aforesaid circumstances, would, in our opinion, be tantamount to a circumvention of Section 25 of the Evidence Ordinance. The point raised by counsel on this matter alone, in the circumstances of this case, seems to us to be a sufficient ground to quash the conviction in this case.

This, however, was not the only point taken by Counsel and, as some of these points were argued at length, we owe it to both Counsel to make our observations on them.

One of the interesting questions that arose was whether, in terms of Section 27 of the Evidence Ordinance, if a fact is discovered in consequence of the statement of more than one accused, that portion of the statement of each of the accused which led to the discovery could be utilised by the prosecution and produced in evidence against each of the accused who made the statement. In the present case what was sought to be produced in evidence was that each of the accused had made a state-

ment which would have independently taken the Police to the grave where the body of the deceased was buried. The submission of counsel for the appellant was that only the portion of the statement made by one of the accused which led to the discovery of the grave would be relevant and not the statements of the others, the argument being that the Section was not intended to enable the production of a part of a confessional statement for the purpose of re-discovering what had already been discovered. There are no decided cases on the point in this country. I find, however, a useful observation on this topic in a passage referred to us by counsel in Ameer Ali on Evidence, XIth Edition, page 593, which refers also to the case of *R. v. Babulal* in which Straight J. observed "I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state 'they said this' or 'they said that' or the 'prisoners then said'. It is certainly not at all likely that both the persons should speak at once and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. In dealing with statements of this kind, which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the witness was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it." Ameer Ali also quotes a passage from a Judgment of *Budha v. Emperor*[1], 1922 Lahore 315, which throws some light on the question :—" Once property has been discovered in consequence of information received from a suspected person it cannot be re-discovered in consequence of information received from another suspected person. It is only the information that was given by the first person, and which led to the actual discovery, which may be proved under the terms of this Section." This view is buttressed by the opinion expressed in some other cases that if a statement made by the first of the accused interrogated could have resulted in the discovery of a fact, if it was pursued, it would not be legitimate to postpone the discovery of the fact in the hope that the other accused would make similar statements which would lead to the

[1] *1923 Lahore 315.*

discovery of the same fact and which could therefore be produced in evidence. For, it could not be then said that the discovery was in consequence not only of the statements of the accused first interrogated but also in consequence of the subsequent statements. In contrast to this, the view has also been taken that the mere plurality of informations received before discovery shall not necessarily take any of the informations out of the section and that in a suitable case it is possible to ascribe to more than one accused the information which leads to the discovery and that joint or simultaneous statements of the accused persons are not inadmissible in evidence. In view of these conflicting opinions, if I may venture to construe our own Section, I may say that the plain words enable the production of so much of a statement as leads to the discovery of a fact. The object of the Section is not to legalise by Section 27 something which is rendered already illegal by Section 25, but only to enable the prosecution to explain how a fact was discovered which would otherwise remain unexplained. Secondly, the objectionable feature in a confession is removed by the guarantee of the finding of a fact which renders it highly probable that the Police Officer's evidence of the statement made to him by an accused person was true which evidence might otherwise be viewed with suspicion on the ground of an inducement, threat or promise of some sort. As a strict construction is called for in interpreting a section which operates against an accused, it seems to me that a Court should lean towards the view that ordinarily it is only the part of the statement, leading to the discovery of a fact, made by the first person interrogated which would be relevant in a case where the Police Officer concerned acts immediately on that information and discovers the fact. Even if several other accused subsequently make statements to him which would equally have led to the discovery of the same fact no part of such statements will be admissible under Section 27 as the fact has already been discovered by the time the subsequent statements were made. But where for instance a Police Officer investigating has in his custody several accused at the same time and the Police Officer either by himself or with the assistance of others records the statements of all the accused, and some or all of them have made statements which lead to the discovery of the same fact, if the officer in charge of the investigation sets out to discover that fact, his possession of a plurality of statements which led to the discovery of the same fact will not preclude him from producing under Section 27 that part of the statement of each of those accused who made the statements which led to the discovery of the same fact.

This seems to me to be a reasonable construction of the provisions of Section 27 which will give effect to the wording thereof without at the same time doing any violence to its spirit. It also excludes from the purview of the section the use of any portion of any information given by the accused for the purpose of re-discovery of a fact already discovered.

In this view of the matter, the prosecution will not be permitted to lead evidence of a portion of a statement in terms of Section 27 where one accused has made such a statement and the Police does not pursue the discovery of facts in consequence of the statement, which would be the normal course of a diligent investigation, but unreasonably delays the discovery until some other accused is arrested who makes a similar statement and an endeavour is made to produce part of the statement of the latter as well. The principle then would be that, having regard to a reasonable investigation taking place when a serious offence is reported to the Police, if a fact is discovered in consequence of one of the statements or more than one similar statement made, such part of the statement or statements as led to the discovery can be produced. Re-discovery of the same fact as a result of a subsequent statement to the Police will definitely not enable a statement of an accused person subsequently made to be produced. The question is by no means free from difficulty. It seems to me, however, that in this case the evidence led at the trial being that all three accused were in custody and their statements were recorded without unreasonable delay and each of them having made a statement which led to the discovery of the grave, the Court was entitled to receive the evidence in respect of such portion of the statement as led to the discovery of the grave made by each of the accused. By this I do not intend to say that, at a re-trial which we propose to order, it will be permissible without doubt to lead the statements of each of the accused leading to the discovery of the grave. This will depend on the state of the evidence regarding the conditions precedent which will be available at the re-trial. The facts and circumstances in any particular case will have to be first established and on them will depend whether a Court is permitted to receive evidence of any one or more statements which led to the discovery of a fact.

There was yet another difficulty created in this case by reason of serious discrepancies which appear in the record between the productions, particularly P 11, P 12 and P 15 which are statements produced in terms of Section 27 of the Evidence Ordinance, and the evidence relating to them as testified to by the Police Officer concerned. If one looks at the evidence alone, the passages proved by the witnesses would not appear to offend

Section 27 as those portions which are purely confessional have been kept out of the Jury. But the productions certified and produced as P 11, P 12 and P 15 include certain passages which are confessional in nature and which would, if they reached the Jury, have affected the trial and the verdict. The difficulty has been accentuated by the fact that the learned trial Judge after asking the Jury to retire and consider their verdict added "if there are any documents you wish to have, you can ask for them." There is of course no record as to whether they called for any documents. Seeing, however, that this offer was made by the trial Judge and that there are several documents relating to different accused in the case, one cannot say for certain whether during their deliberations the Jury asked for the documents in the case from the Clerk of Assize who, if asked, would have acceded to their request in view of the concluding words of the trial Judge in his summing-up. Had this occurred and the documents as appearing on the record P 11, P 12 and P 15 been sent up to the Jury during their deliberations, the offensive portions of these statements such as the words "from which I fired" in the statement P 11 :— "I can point out and give charge the gun from which I fired"; "I emptied the spent cartridge" in the statement P 12 :—"I can point out the spot from where I emptied the spent cartridge"; and "where the grave was cut" in the statement P 15 :— "I can point out the spot where the grave was cut and the body was buried", would certainly have influenced the Jury and the verdict would have been vitiated by the misreception of this evidence.

A further complaint made was that the learned Commissioner misdirected the Jury in regard to the burden of proof. The defence, as I said earlier, was that the accused did not commit the offence and that in fact they were engaged on the day in question in defending the Polpitigama Hospital against an insurgent attack away from the scene of this offence. The learned trial Judge at the very commencement of his charge in regard to the burden of proof that lay on an accused person stated—

> "Now gentlemen, in this case the first accused had chosen to get into the witness box and give evidence. And evidence has been led by the defence. Now gentlemen, when the accused has to prove anything, the standard of proof required of the accused is far less than the standard of proof required of the prosecution. The accused need not prove, whatever the accused has to prove, to the same degree of certainty as the prosecution has to. The standard of proof

> generally required of the accused is far less than that of the prosecution. Gentlemen, after considering all the matters, it is for you to say whether you believe such a situation, as stated by the defence, existed, or consider its existence so probable that you, as prudent men could act upon the supposition that it existed. Gentlemen, in this case you will see the defence has set up what is called an alibi: the defence is an alibi. That is to say, in other words the defence says, " How can we have caused the death of this man Kumarasinghe ; we were at the hospital engaged in a battle with the insurgents at this time you say this happened, that we took this man and shot him in the jungle."

It seems to us that the above direction justified this complaint. For, in this portion of the summing-up the learned trial Judge gave a direction which was appropriate to a case where an accused person had a burden to discharge such as in a mitigatory or exculpatory plea and the learned trial Judge was wrong in so directing in a case where the defence was that of an alibi and an accused person had no burden as such of establishing any fact to any degree of probability. This principle has been repeatedly laid down in several cases in these Courts, and it is an area in which a trial Judge has to exercise great caution in view of the liability to err. It must be said in fairness to the learned Commissioner that in the very next page of the summing-up he has proceeded to give certain directions which are unexceptionable and are quite appropriate to a case where an alibi defence has been set up. The directions complained of being erroneous, however, one is not certain whether the Jury was guided by the first part of the summing-up or the second part in deciding how they should consider the case when such a defence was put up by the accused. We cannot therefore exclude the possibility that the Jury may have thought that the accused had to show that the 1st accused's version that all the accused were on this day engaged at the Government Hospital defending it against the insurgents was probably true, if they were to secure an acquittal. If they had been misled into that line of thinking, there would be substance in the complaint made by the counsel for the appellant. Coupled with this there is also an absence of a caution by the learned Commissioner to the Jury that, even if they fully disbelieved the defence of alibi that had been set up, the prosecution was not absolved from the duty of proving its case beyond reasonable doubt and that the falsity of an alibi does not strengthen the case for the prosecution. The absence of such a direction in the face of the opening passage in

regard to the burden of proof which is erroneous and which amounts to a misdirection is also a ground which would vitiate the verdict in this case.

Having regard to all these considerations, we feel that the verdict of the Jury cannot be allowed to stand. We therefore quash the conviction of all the accused appellants. The only other question for consideration is whether this is a case for an acquittal of the accused or for a re-trial. There is no doubt that, despite the delay by the two principal witnesses in making the statements to the Police, which was inevitable in the circumstances, their evidence alone, which appears to contain no other infirmities, is sufficient to establish a case of circumstantial evidence against all the three appellants, quite apart from the discovery of the grave, the gun and the cartridge in consequence of the statements made by the appellants, which would strongly support the oral evidence. We have given anxious consideration to the question whether a distinction can be made between the 2nd accused's case and the cases of the 1st and the 3rd accused-appellants, in view of the evidence of the mother of the deceased that it was the 1st and the 3rd accused who took away the deceased in spite of her entreaties towards the tank from where the body of the deceased was ultimately found buried, and that the 2nd accused had been ransacking her house until she fell senseless. Having regard, however, to the very active part played by the 2nd accused in dragging the deceased out of the house of Appuhamy while the 1st accused was threatening Appuhamy, and, the subsequent conduct of the 2nd accused in turning his attention on the mother and the sister of the deceased who were the only persons to go to the rescue of the deceased and who might have been possible witnesses and warning them off from the place where the 1st and 3rd accused were taking the deceased at the point of his (2nd accused's) gun and, after ransacking the house, leaving the place when he received a message from Mellington sometime before the gunshot was heard, there is no question that the 2nd accused has equally with the 1st and the 3rd accused to meet a prima facie case of having acted together in furtherance of the common intention in bringing about the death of the deceased. In these circumstances, following the principle laid down in the dictum of Lord Ellenborough in *R. v. Lord Cockraine*,[1] Gurney's Reports, page 479, it is only an explanation by the 2nd accused which might have distinguished his case from that of the other two and, in the absence of such explanation, we find no justification in treating his case differently. In the state of this evidence, even though the offence took place two years ago, we feel that this is a case in which we are compelled to order a re-trial.

[1] *Gurney's Reports, p. 479.*

We wish to express our gratitude to counsel on both sides for the very able assistance we received. We were deeply impressed by the commendable restraint with which counsel for the appellants argued this case and the characteristic thoroughness with which Senior Counsel for the State met the arguments of counsel for the appellants.

Case sent back for re-trial.