[IN THE PRIVY COUNCIL]

1964 *Present :* **The Lord Chancellor, Viscount Radcliffe, Lord Morris of Borth-y-Gest, Lord Hodson, and Lord Pearce**

THE QUEEN, Appellant, *and* MURUGAN RAMASAMY, Respondent

PRIVY COUNCIL APPEAL No. 24 OF 1963

C. C. A. No. 2 of 1962—S. C. 14/M. C. Gampola, 3082

Evidence—Meaning and effect of section 122 (3) of Criminal Procedure Code—Applicability to an accused person as much as to any other witness—Exclusion of oral evidence as well as written records—Relationship between section 27 of Evidence Ordinance and section 122 (3) of Criminal Procedure Code—Applicability of maxim generalia specialibus non derogant*—Evidence Ordinance, ss. 24, 25, 26, 27, 157.*

Section 27 (1) of the Evidence Ordinance, No. 14 of 1895, is as follows :—

" . . . When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

Section 122 (3) of the Criminal Procedure Code, No. 15 of 1898, is as follows :—

" No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court ; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.

Nothing in this subsection shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

In a trial for attempted murder by shooting with a gun certain evidence was admitted by the presiding Judge to the effect that a gun capable of causing the injury actually inflicted on the injured person had been discovered in consequence of information of its whereabouts which the accused respondent had given to a police officer in a statement made by him in the course of an investigation set on foot under Chapter XII of the Criminal Procedure Code. It was not in dispute that at the time of making the statement the accused was in the custody of the police officer. The evidence that was admitted was not the entire statement but only that portion of it which related distinctly to the discovery of the gun. There was no application from the defence Counsel that the entire statement should be put in.

2——R 686—1,855 (9/64)

Held, (i) that statements made during a police investigation by a person then or subsequently accused are within the prohibition imposed by section 122 (3) of the Criminal Procedure Code and cannot be used at his trial. Section 122 (3) extends to an accused person as much as to any other witness.

(ii) that the prohibition of using "statements" that section 122 (3) of the Criminal Procedure Code imposes applies not only to the written records but also excludes oral evidence of anything said. Section 122(3) must be read as covering the use of oral evidence of statements made during police investigation just as much as the written records of such statements.

R. v. Jinadasa (1950) 51 N. L. R. 529, overruled on this question of construction.

(iii) that, in determining what, if any, effect section 122 (3) of the Criminal Procedure Code has upon section 27 of the Evidence Ordinance, which had been enacted about three years earlier, the maxim of interpretation *generalia specialibus non derogant* is applicable. Accordingly, evidence falling within section 27 of the Evidence Ordinance can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122 (3) of the Criminal Procedure Code.

(iv) that the evidence that was admitted in the present case under the rule of section 27 of the Evidence Ordinance was not vitiated by the fact that it was only a limited portion of the statement made by the accused person to the police officer.

APPEAL, with special leave, from a judgment of the Court of Criminal Appeal reported in (*1962*) *64 N. L. R. 433.*

Dingle Foot, Q.C., with *R. K. Handoo*, *Ralph Milner*, *V. S. A. Pullenayegum* and *V. C. Gunatilaka*, for the appellant.

E. F. N. Gratiaen, Q.C., with *John Baker*, for the accused-respondent.

Cur. adv. vult.

July 21, 1964. [*Delivered by* VISCOUNT RADCLIFFE]—

The main question raised by this appeal is an important and difficult one relating to the administration of the criminal law of Ceylon. It concerns the relationship between section 27 of the Evidence Ordinance (the section which permits the giving of evidence at a criminal trial as to information provided by an accused person, if the information has led to the discovery of some relevant fact) and section 122 (3) of the Code of Criminal Procedure (which strictly limits the use that may be made of statements made by a person to a police officer in the course of an investigation set on foot under Chapter XII of the Code, the chapter in which section 122 appears). The respondent was tried and convicted in the Supreme Court on a charge of shooting one Piyadasa with a gun with such intention and knowledge, to put it briefly, as would have resulted in murder if Piyadasa had died, and at his trial certain evidence was admitted by the presiding Judge to the effect that a gun capable of causing the injury actually inflicted had been discovered in consequence

of information of its whereabouts which he had given to a police officer in the course of a section 122 investigation. On the 17th December 1962 the Court of Criminal Appeal quashed his conviction and directed an acquittal, holding that the evidence of his statement to the police officer had been improperly admitted, that this had vitiated the jury's verdict at his trial, and that the case was not one in which it would be right for the Court to exercise its power under section 5 of the Court of Criminal Appeal Ordinance to dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred.

By special leave the appellant has appealed to this Board against the decision of the Court of Criminal Appeal. The appeal has been rested in argument on several independent grounds, which their Lordships will notice in due course. But, since the important point of principle is that which relates to the admission of the evidence of the information leading to the discovery of the gun, their Lordships will proceed in the first place to express their opinion on that issue. It will be convenient, in doing so, to consider the relationship between section 27 of the Evidence Ordinance and section 122 (3) of the Criminal Procedure Code without making any further introduction to the facts of this particular case.

To take section 27 first. It appears as one of a group of sections in that part of the Evidence Ordinance that deals with the inadmissibility of certain confessions. Section 24 renders inadmissible in evidence confessions produced under the stimulus of any inducement, and sections 25, 26 and 27 run as follows:

"25. (1) No confession made to a police officer shall be proved as against a person accused of any offence.

(2) No confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or to an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession.

26. (1) No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

(2) No confession made by any person in respect of an act made punishable under the Forest Ordinance or the Excise Ordinance, whilst such person is in the custody of a forest officer or an excise officer, respectively, shall be proved as against such person, unless such confession is made in the immediate presence of a Magistrate.

27. (1) Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

(2) Subsection (1) shall also apply *mutatis mutandis*, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively."

This group of sections entered the law of Ceylon in the Evidence Ordinance of 1895. Their origin however lies considerably further back, since they must have been taken over from the Indian Evidence Act, which contained a similar set of provisions. In fact, they seem first to have appeared in the Indian Criminal Procedure Code of 1861, being numbered as sections 148, 149 and 150 of that Code. Then in 1872 they were taken out of the Code of Criminal Procedure and enacted separately as sections 25, 26 and 27 of the Evidence Act of that year. They have been a very familiar part of the criminal law administered in India, and there is a large body of judicial decision, not all of it consistent, that has been devoted to the interpretation of their provisions, in particular of section 27, the construction of which has always raised several special difficulties.

There can be no doubt as to what is the general purpose of sections 25 and 26. It is to recognise the dangers of giving credence to self-incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and these two sections recognise and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying.

Section 27, on the contrary, envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery. The principle embodied in section 27 has always been explained as one derived from the English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century, see *R. v. Warickshall*[1] and *R. v. Butcher*[2]. The principle was stated by Baron Parke in the trial of *Thurtell and Hunt* (1825) (see Notable British Trials page 145), where he said "A confession obtained by saying to the party 'You had better confess or it will be the worse for you' is not legal evidence. But, though such a confession is not legal evidence, it is every day practice that if in the course of such confession that party state where stolen goods or a body may be found and they are found accordingly, this is evidence,

[1] *(1783) 1 Lea. 263.* [2] *(1798) 1 Lea. 265n.*

because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him."

It is worth while to make the observation at this point that the reason given for allowing it to be proved that an accused person gave information that led to the discovery of a relevant fact is not related in any special way to the making of a confession. It qualifies for admission any such statement or information that might otherwise be suspect on the ground of a general objection to the reliability of evidence of that type.

Section 122 (3) must now be set out. Its setting is Chapter XII of the Criminal Procedure Code, a chapter which has as its heading "Information to Police Officers and Inquirers and Their Powers to Investigate" and runs from section 120 to section 133 inclusive. Of these sections, section 121 deals with information relating to the commission of a cognisable offence given to an officer in charge of a police station. Such information, when given orally, must be reduced to writing by him or under his direction and read over to the informant and the person giving it must sign the writing so produced. The section further provides that if from information received or otherwise the police officer has reason to suspect the commission of a cognisable offence, he must send a report to the Magistrate's Court and proceed in person to the spot to investigate the facts and circumstances of the case and take such measures as may be necessary for the discovery and arrest of the offender. Finally, any police officer making such an investigation is empowered to require the attendance before himself of any person who appears to be acquainted with the circumstances of the case and such person is bound to attend as so required.

Section 122 is as follows :—

"122. (1) Any police officer or inquirer making an inquiry under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined, but no oath or affirmation shall be administered to any such person nor shall the statement be signed by such person. If such statement is not recorded in the Information Book a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded

in a case under inquiry or trial in such court and may use such statements or information not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.

Nothing in this subsection shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

These sections dealing with criminal investigation were first enacted in Ceylon in 1898, although at that time the powers conferred were conferred only on inquirers specially appointed, and not on police officers in charge of stations. Later they were extended to police officers. Although they became part of the law of Ceylon by the Criminal Procedure Code, No. 15 of 1898, three years after the Evidence Ordinance had been enacted, it is doubtful whether any particular significance attaches to the fact that the one Ordinance was made later than the other, since they too, like the sections of the Evidence Ordinance already quoted, were derived from comparable Indian legislation, in which both groups had existed side by side.

The analogue to section 122 in Ceylon is section 162 in India, and consideration of the question how far section 27 is affected by section 122 in Ceylon necessarily invites the question how the relationship between the same sections was worked out in the Courts in India. The absence of any unanimous line of decision in those Courts and the fact that section 162 has been more than once amended in significant particulars prevent any simple answer to this question: nor, if it were available, would it be conclusive in Ceylon. But in their Lordships' opinion some notice of the Indian position is desirable, as it indicates the difficulties that have so long prevented the present problem from coming to a head, and also, they think, it suggests that there has been a general disposition to treat section 27 and section 162 as capable of effective co-existence.

From 1861 to 1872 these two sections were part of the same Code, the Criminal Procedure Code, in British India. In 1872, when section 27 was transferred to the Evidence Act, as already mentioned, there was inserted in section 162 a specific saving for the operation of section 27. It is to be inferred that at that time it was not thought that there was anything inconsistent in principle in the two sections being allowed to operate, each according to its terms. This saving continued to appear until 1898 when, on amendments made to the Criminal Procedure Code, it

was removed from section 162. No explanation of the significance of this change seems ever to have been forthcoming, and it may well have been one of those " improvements " that delight draftsmen who make them and tantalise Judges who then have to interpret them. However that may be, in recent years the express saving of section 27 has been restored to the Indian Code, thus eliminating for the future any controversy as to whether it could be wrong to give effect to section 27 at a trial, even though the information given by the person accused had proceeded from a section 162 investigation.

In the period that intervened between 1898 and the restoration of that saving the Indian Courts must frequently have been brought up against the problem of the impact of section 162 upon section 27. No final solution however was ever established, although the balance of authority seems to have been regarded as inclining in favour of treating section 27 as an exception from section 162, even without any saving words. Thus in the 6th Edition of *Sarkar on Evidence* published in 1939 (a significant date, as will appear later) it was stated at page 246 " The general rule that statements made by an accused to the police during an investigation cannot be proved does not affect the special exception in section 27. Statements admissible under that section can still be proved." See too, *Woodroffe and Ameer Ali—Law of Evidence* 9th Edition (1931) page 292.

It has to be recognised, however, that prior to 1939 the various High Courts of British India were not agreed as to whether the prohibition imposed by section 162, whatever its nature or extent, applied to an accused person at all. The decisions varied on this point, and it was not until the case of *Pakala Narayana Swami v. Emperor* [1] was decided by this Board that it was conclusively determined that statements made during a police investigation by a person then or subsequently accused were within the prohibition and could not be used at his trial. *Narayana Swami's* case did not touch section 27, but during the argument before the Board stress was laid on the point that, if section 162 did apply to the statements of an accused person, a very wide inroad had been made upon the application of section 27, contrary, presumably, to much of the existing practice at trials in India. The point was noticed by the Board in the opinion delivered by Lord Atkin (see page 52), but it was not necessary to the decision and was expressly left undecided. As he pointed out, section 27 might still have some, though a restricted, operation, even if all statements made by an accused person during investigation were banned; and, further, it was still open to Courts to decide that section 27 was a " special law " within the meaning of section 1 (2) of the Criminal Procedure Code and that section 162 did not constitute a " special provision to the contrary " for the purposes of that sub-section. If that construction were to prevail, it would follow that section 27 was unaffected.

When after 1939 the Courts in British India came to address themselves to this aspect of the problem, again no unanimous view emerged. The High Courts at Madras and Patna adopted the opinion that

[1] *(1939) A. I. R. (Privy Council) 47.*

section 1 (2) did amount to a saving of section 27 ; those of Lahore and Allahabad took the view that it had been " repealed ". These conflicting decisions were reviewed in the High Court of Bombay by Beaumont C.J. and Sen J. in the case of *Biram Sardar v. Emperor* [1], and the judgment of the Court, delivered by Beaumont C.J., came down in favour of the view that section 27 was saved by section 1 (2) of the Criminal Procedure Code.

The different views entertained on this issue can no longer be of direct importance, now that the express saving of section 27 has been restored to section 162, but it is relevant to observe that the principle adopted by the High Courts of Bombay, Madras and Patna in their construction of section 1 (2) treats that provision as being, in effect, no more than a statutory enactment of the general maxim " generalia specialibus non derogant ", to which resort has so often to be made in matters of statutory interpretation. Their Lordships must consider later whether that maxim is not a valuable guide in dealing with section 27 and section 122 in Ceylon.

Another construction of section 162 also served for a time to confuse the issue in India. That was the view that the section did not operate to exclude the tendering of oral evidence of statements made in the course of an investigation, its purpose being merely to prohibit the production or use of the written record of such statements, which the police officer receiving them was required to make. Such a construction, which was favoured by some of the Indian Courts, meant a very serious restriction of the protection which it seems reasonable to suppose that section 162 was intended to secure. In 1923, however, the section was amended in a form which made it impossible for the future to admit any such distinction the new wording being " such statement or any record thereof ".

A similar distinction has nevertheless been accepted and applied in several decisions of Courts in Ceylon over a considerable period of years and has only recently been departed from in two cases, of which one is that now under appeal ; and their Lordships must therefore deal with this question of construction when they turn, as they now must, to the law of Ceylon and the meaning and effect of section 122 of its Criminal Procedure Code. Of the law of India they think that no more can safely be said on this topic than that for one reason or another section 27 has been treated generally, though not universally, as unaffected by section 162, but that the reasons for this treatment, as has been shown, have been too various and, in some cases, too unreliable to afford any sound basis upon which to build a construction of the corresponding provisions in the law of Ceylon.

In considering section 122 (3) and its effect, then, there are two separate questions to be answered. One is, whether the prohibition of using " statements " that it imposes applies only to the written records and does not exclude oral evidence of anything said. The other is, whether

[1] *(1941) A. I. R. (Bombay) 146.*

the effect of the prohibition, if it does cover oral evidence as well as the production of the written record, is to negative the rule contained in section 27 of the Evidence Ordinance that a statement distinctly relating to a fact discovered can be proved against an accused, even if made by him while in custody.

To take up the first of these questions. It seems plain, as has been pointed out already, that if it is really open to the prosecution to prove statements made by an accused person during police investigation by the process of calling the police officer to whom the statement was made and allowing him to recall orally what was said, apparently with the aid of his notes to refresh his memory, the accused has very little effective protection against the use of damaging statements, as for example admissions, that he may have made in reply to police questioning. This seems to their Lordships to be a surprising result, when it is recalled that police investigations under Chapter XII procedure involve compulsory attendance on the part of persons summoned and compulsory reply to questions (except those tending to incriminate), without any oath administered or any opportunity for the person questioned to see the record made of his statements, much less to read it over and sign it. Moreover, the opening words of section 122 (3), "No statement made by any person . . . in the course of any investigation shall be used otherwise than etc." seem categorically to exclude the idea that such a statement can be proved positively against the maker of the statement as part of the prosecution's case. Yet this must be the consequence of any construction of section 122 (3) that treats the word "statement" throughout that sub-section as if it referred merely to the written record brought into existence by the police officer and that does not admit the connection of the prohibition with any general policy of forbidding the use at a criminal trial of statements obtained from an accused person by the use of the special procedure.

The practice of admitting oral evidence of statements made during investigation as substantive evidence and not merely allowing them to be used to contradict a witness making conflicting statements was evidently of long standing in Ceylon. It is spoken of with approval by Bertram C. J. in *R. v. Pabilis* [1], when he said in reference to the words "to refresh the memory of the person recording them" in section 122 (3) "These words have always seemed to me to imply that an officer recording such a statement may (where the law allows it *e. g.* under section 157 of the Evidence Ordinance) give oral evidence as to the terms of that statement, but may not put in the written statement itself". Similar views were expressed in two succeeding cases, *R. v. Gabriel* [2] and *R. v. de Silva* [3]. The question was given fuller consideration in 1944 by a Court consisting of Howard C.J., Moseley S.P.J. and Wijeyewardene J., see *R. v. Haramanisa* [4]. Although their judgment called attention to the serious difficulties involved in the interpretation of section 122 (3)

[1] *(1924) 25 N. L. R. 424.*
[2] *(1937) 39 N. L. R. 38.*
[3] *(1940) 42 N. L. R. 57.*
[4] *(1944) 45 N. L. R. 532.*

and raised other objections, not now material, to the oral proof of statements that the law required to be recorded in writing, the Court adopted the same construction of the sub-section as that which had been accepted in the earlier cases and in certain pre-1923 decisions in High Courts in India (Bombay, Calcutta and Madras) and held that " the evidence of the oral statement is not subject to the limitations imposed by section 122 (3) ". Since *ex hypothesi* such statements are made orally the Court's meaning would perhaps have been more accurately expressed if they had said that oral evidence of the statement was not subject to the section 122 (3) limitations.

None of these cases had been concerned with the question of Section 27 itself. They had all related to evidence in corroboration of a witness as allowed under section 157 of the Evidence Ordinance, and, in fact, not all of the statements discussed were held in the end to be section 122 statements at all The case of *R. v. Jinadasa* [1], however, involved section 27 directly. It was a decision of the Court of Criminal Appeal, consisting of five Judges, Jayetileke C.J., Dias S.P.J., Gunesekara, Pulle and Swan JJ ; and the effect of the decision was to hold that an oral statement made during the course of a section 122 investigation can be proved under section 27 against an accused, the prohibition of its " use " applying only to the written record. The view of the Court can be taken to be summarised in the following quotation (page 540): " Section 122(3) imposes restrictions on the use of the police officer's record of the oral statement made to him, but does not govern the admission of oral evidence of such statement. Therefore, where the law otherwise permits such evidence to be given by a police officer, he may give oral evidence of any statement to him ". This is to restate the opinion of Bertram C.J. in *R. v. Pabilis* (supra) in virtually the same words.

The reason for drawing the distinction between the use of oral evidence of a statement and the use of a written record of it rests wholly on certain deductions made from some of the phrases that appear in section 122(3). Thus, no statement can be used " except to refresh the memory of the person recording it ". How can he refresh his memory, it is asked, except by referring to a written document ? To that question their Lordships think that the correct reply is that, of course, he cannot, but that it by no means follows from that that as a matter of construction the words " no statement " at the beginning of the sentence are confined to the written record of the statement made. The words themselves do not suggest such a limitation, and the true view, in their Lordships' opinion, is that in this opening sentence no distinction is intended between an oral statement or oral evidence of such statement and its written record. What is intended is that except for the limited purposes specified, which may indeed require and contemplate no more than reference to the written record, statements made by a person under the special conditions of a police investigation are not to be used against him in any form, whether such evidence is tendered orally or in writing.

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

Then it is said that there are further indications in the sub-section which show that the legislature was only dealing with use of the written record. Neither the accused nor his agents shall be entitled to "call for" such statements, or to "see them" merely because they are referred to by the Court. Here certainly it can be accepted that the statements spoken of are written material, for it is only such material that can be called for or seen; but this point loses all force as a guide to construction of the prohibition contained in the opening sentence when it is appreciated that after the close of that opening sentence the next sentence begins "But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements . . . . .". Here the reference is explicitly to "statements recorded" i.e. the record itself, and there is no difficulty in seeing that in what immediatly follows the words "such statements" do apply to the "statements recorded", without throwing back any light upon the meaning of "statements" in the opening sentence.

The construction that had been adopted in the *Jinadasa* case was reconsidered in 1962 by the Court of Criminal Appeal (Basnayake C.J., Sansoni, H. N. G. Fernando, Sinnetamby and de Silva JJ.) in *Reg v. Buddharakkita Thera* [1]. The evidence in question was a statement made by an accused person during the course of police investigation, but it was not put forward as information leading to a discovery under section 27. The judgment of the Court, which was delivered by the Chief Justice, refused to accept the long-standing distinction between oral evidence of statements and the written record of them and held that the effect of section 122 (3) was to render the use of an oral statement made to a police officer in the course of an investigation just as obnoxious to it as the use of the same statement reduced into writing. The judgment pointed out, with what seems to their Lordships to have much force, that the original form of this section, when enacted in the Criminal Procedure Code 1898, had clearly intended its prohibition "No statement other than a dying declaration. . . . . shall if reduced to writing be signed by the person making it or shall be used otherwise etc.", to apply to all statements whether in oral or written form and however proved; and the judgment further commented on the unlikelihood of the legislature, when introducing its new form of Chapter XII, the primary purpose of which was to give police officers the powers of inquirers, intending to make a far reaching change in the substance of the law.

In the judgment now under appeal the Court of Criminal Appeal has applied the construction of section 122 (3) adopted in *Buddharakkita's* case in preference to that favoured in *Jinadasa's* case, holding that the latter "must not any longer be regarded as binding". For the reason that they have given their Lordships are in agreement with the decision of the Court in *Buddharakkita's* case on this question of construction, and they are of opinion that the *Jinadasa* construction is incorrect and

[1] *(1962) 63 N. L. R. 433.*

ought no longer to be applied. Section 122 (3) then must be read as covering the use of oral evidence of statements made during police investigation just as much as the written records of such statements.

Before proceeding to the next point, the relation between section 122 (3) so construed and section 27, their Lordships must notice an argument that was presented to them by the appellant to the effect that, on the principle of *stare decisis*, the Court in the present case acted wrongly in departing from the *Jinadasa* decision, one arrived at a few years earlier by the same Court constituted by a Bench of the same number of Judges. Their Lordships do not consider that it could serve any good purpose to deal with this argument, since to do so could lead to no useful result. The principle of *stare decisis* may be invoked in more than one sense. It may lead a superior Court to adhere to an established line of decisions in Courts to which it is constitutionally a Court of error, even though, if the matter were to be raised for the first time, it would not itself agree with those decisions. It was not in that sense that the principle was advanced in this appeal, nor in a matter of this sort relating to an important aspect of evidence in criminal trials would their Lordships have thought it proper to apply it. What was said was that the Court of Criminal Appeal in this case ought to have regarded itself as bound by the previous decision of the same Court in *Jinadasa's* case and should have treated itself as not being at liberty to depart from it.

But now that the legal issue as to the true construction of Section 122 (3) has reached this Board, which is not bound in any sense by the *Jinadasa* decision, the issue has in any event to be argued and decided as open matter, and in a criminal cause, in which the incidence of costs is not material, it is merely academic to inquire at this stage whether the Court appealed from ought to have followed the earlier decision, even if it did not agree with the law as there expounded. In these circumstances their Lordships do not think it necessary to express any opinion on the point.

Thus it now becomes necessary to decide what, if any, effect section 122 (3) has upon section 27, assuming, as their Lordships now hold, that section 122 (3) bars oral evidence as well as written records and that, as the Board held in *Narayana Swami's* case, it extends to an accused person as much as to any other witness. This question has been answered by the Court of Criminal Appeal in the judgment now under appeal, and they have held that a statement which cannot be used under section 122 (3) cannot be proved in any form under section 27. Consequently section 27 is to that extent, an important extent, repealed by implication by section 122 (3).

This view was evidently not at first regarded in Ceylon as a necessary consequence of the decision in *Buddharakkita's* case, which abolished the old distinction between oral evidence and written records under section 122, Thus in that case itself the judgment of the Court seemed to treat section 27 as still providing an exception to section 122 (3);

and even as late as 1962 the Court of Criminal Appeal (Basnayake C.J., Sansoni and Sinnetamby JJ.) are recorded as saying (see *Reg. v. Don Wilbert* [1]) "Having regard to the decision in *Buddharakkita* which is not yet reported, statements made in the course of an investigation under section 122 cannot be used, whether they be oral or written, except for the limited purpose contemplated by section 27 of the Evidence Ordinance".

The basis of the Court's present decision rests upon the fact that there are certain express savings attached to section 122 (3), and one of these involves an actual reference to the Evidence Ordinance, since it is provided that "Nothing in this sub-section shall be deemed to apply to any statement falling within . . . section 32 (1) of the Evidence Ordinance". The reference here is to the rule governing the admissibility of dying declarations. It is a very natural and persuasive line of interpretation to argue that, if section 32 is expressly excepted, it cannot have been the intention of the legislature to except by implication another and separate section which is not referred to.

Their Lordships are certainly not unimpressed by the force of this reasoning. But the fact remains that both the sections in question stand in the Statute Book without any qualification that indicates the relationship of one to the other, and in the difficult task of interpreting the mind of the legislature with regard to them it seems necessary to look for guidance in a wider field than that of section 122 (3) itself as at present drafted. Both sections, as we know, were adopted by Ceylon from the existing legislation of British India, section 27 in 1895 and section 122 in 1898. Both, as has been shown, had originated in India in the same measure of 1861, and they had been administered since then under a system which treated section 27 as an express exception from the Indian section 162. It is reasonable to suppose therefore that when they were incorporated into the legal system of Ceylon they were looked upon at the time as complementary rather than as conflicting provisions.

Is there anything to suggest the contrary in the way in which the Ceylon legislation was framed? It is true that section 122 came in three years after section 27, but considering their common Indian origin, it seems pedantic to attach any significance to the fact that one was enacted at a later date than the other. Their relationship cannot be determined by the mere sequence of dates. The question turns, it seems, not so much on the present form of section 122 (3) but on the form which its predecessor, section 125, assumed in the Criminal Procedure Code of 1898: for if that section on its first introduction is not to be read as overruling section 27, which had been introduced three years earlier, it would not be right to infer that the changes of drafting form which have led to the present wording of section 122 (3) were ever intended to bring about so important an alteration.

[1] *(1962) 64 N.L.R. 83.*

Portions of that section 125 have already been quoted. In full it ran as follows: "No statement other than a dying declaration made by any person to an inquirer in the course of any investigation under this chapter shall if reduced to writing be signed by the person making it or shall be used otherwise than to prove that a witness made a different statement at a different time". There are two observations to be made upon the section expressed in this form. First, there is not in it, as there is in section 122 (3), any explicit reference to the Evidence Ordinance, although the exception of "a dying declaration" no doubt assumes that the rules of that Ordinance will be applied to govern the matter. Secondly, 1898 was the same year as that in which the saving of section 27 was omitted from the Indian section 162. The omission did not, as has been shown, lead to any general change in the Indian practice of applying section 27, and Indian text-books continued to speak of section 27 as an exception from section 162. In such circumstances there seems to be altogether insufficient ground for attributing to the legislature in Ceylon an intention to wipe out the rule enacted in section 27 by the introduction of section 125 in the Criminal Procedure Code of 1898.

The question is, of course, a difficult one: but their Lordships are of opinion that the correct way to solve it is by applying the maxim of interpretation "generalia specialibus non derogant". On the one hand there is the Evidence Ordinance containing a precise and detailed codification of the rules that are intended to govern the admission and rejection of evidence. Among them is this section 27, a well-known rule, which has always been regarded as removing all objections to the statements that it deals with, so far as those objections rest upon misgivings as to the conditions under which such statements have been made. On the other hand there is the Criminal Procedure Code not primarily concerned with rules of evidence at all but containing regulations for the special procedure of investigation under Chapter XII and manifesting a clear general intention based on the peculiarities of the procedure, to keep material produced by it out of the range of evidence to be used when a trial takes place. Their Lordships think that they must accept the conclusion that evidence falling within section 27 can lawfully be given at a trial, even though it would otherwise be excluded as a statement made in the course of an investigation under section 122.

It is necessary now to apply the legal principles that have been discussed to the trial of the respondent. He was charged, as has been said, with having shot one Piyadasa with a gun with such intention or knowledge and in such circumstances that had Piyadasa died by his act he would have been guilty of murder. This was a charge under section 300 of the Penal Code.

The evidence called for the prosecution included the evidence of two men, apart from Piyadasa, who were eye-witnesses of Piyadasa's shooting and who deposed, as did Piyadasa himself, to the fact that it was the respondent who fired the shot that injured Piyadasa. There may be some doubt whether or not one of these two eye-witnesses qualified his

evidence under cross-examination, but, whether he did or not, there was ample direct evidence placed before the jury to show that the gun-shot that injured Piyadasa was deliberately fired at him from a gun held by the respondent.

In addition to these witnesses a police sergeant Jayawardene was called by the prosecution for the purpose of deposing to a statement made by the respondent in consequence of which " the " or at any rate " a " gun was discovered. It has not been in dispute that at the time of making the statement the respondent was in the custody of the police and that the statement was made by him during the course of a police investigation by Sergeant Jayawardene.

The full statement was at no time placed before the jury. What happened was that in their absence from the Court the prosecuting Counsel told the Judge who had the written record of the statement before him, that he proposed to " lead in certain portions of the statement made by the accused in consequence of which the gun was discovered ".

The full record of the statement that was before the Judge has been set out in the Judgment of the Court of Criminal Appeal and apparently that record ran as follows—

" I am now leaving with P.CC. 4358, 7326 and 5617 and suspect Ramasamy to trace the gun.

1.9.60 at 3.25 p.m. Monte Cristo Estate, Line No. 6. Suspect Ramasamy points out to me a place in the garden opposite Line No. 6 and dug out the spot. Here I find a Wembley & Scott S.B.B.L. 12-bore gun barrel No. 10973 in three parts wrapped in an old gunny sack and 14 cartridges 12-bore in an oil cloth bag ranging as follows : 2 S.G., 2 No. 6, 2 No. 3, 7 No. 4 and 1 F. N. filled 12-bore cartridges. I smelt the barrel and there is a smell of gun powder and recent fouling in the barrel. I tied both ends covered with paper. I here take charge of them as productions. Here there is (?) shrub (*sic*) jungle in the vicinity. I now proceed to record his statement. Ramasamy *alias* Babun Ramasamy s/o Murugan, age 48 years, labourer of line No. 9, Monte Cristo Estate, states : " This morning about 8 a.m. I was in my line room. At this time I heard the shouts of people towards the upper line where I am residing. I came out and saw about 50 to 100 people collected outside the lines and there was pelting of stones. Just then I heard the report of a gun in the direction of Dhoby's line. I then came running to line No. 6 through fear. As I came running to line No. 6 I again heard the report of a gun towards the line of the mechanic. At the time I saw about 40 to 50 men and women including strikers and non-strikers shouting. As I came to the (verandah) back verandah I found a 12-bore gun broken lying on the ground and some cartridges in an oil cloth bag. I broke the gun into three pieces, picked up a gunny sack and wrapped the parts of the gun with the bag of cartridges buried in the garden opposite line No. 6. I am prepared to point out the place where the gun and

cartridges are buried. I deny having shot at anyone. I am one of the strikers. This is all I have to state. Read over and explained and admitted to be correct."

I am now leaving with P. CC. 4358, 7326 and 5617 and suspect Ramasamy to trace the gun. 3.25 p.m. Monte Cristo Estate opposite line No. 6. On the statement made by Ramasamy I recovered one S. B. B. L. 12-bore Wembley and Scott gun No. 10973 broken in three parts, barrel, butt and hand guard wrapped in an old gunny sack and one oil cloth bag containing 14 cartridges 12-bore ranging as follows: 2 S. G., 2 No. 6, 2 No. 3, 7 No. 4, and one F. N. filled 12-bore cartridges. I found them buried in the garden where shrub jungle is found. I smelt the barrel. It is smelling of fouling and gun powder. I find the barrel fouled and signs (?) of recent firing. I have (tied) covered and tied both ends and taken charge as productions. At 4.20 p.m. I produced the productions, gun and cartridges, and the suspect Ramasamy before I. P."

Prosecuting counsel wished to put in the words "I picked up the parts of the gun wrapped up in a gunny sack and a bag of cartridges buried in the garden opposite line No. 6" (*sic*). The Judge however directed him that he must confine himself to proving the words "I am prepared to point out the place where the gun and the cartridges were buried". Plainly both of them were treating the statement as one coming within the rule of section 27 and intended to limit the words proved against the accused to those which "relate distinctly to the fact thereby discovered".

The respondent's counsel had not at that time seen the record of the statement, and section 122 (3) does not give him any general right to call for it merely because the Judge refers to it. He did state, in answer to the Judge, that he did not object to the words indicated but that he objected to the other part of the statement going in. The Judge assured him that he was not going to allow that.

The evidence of the respondent's statement was then put before the jury in this limited form. Sergeant Jayawardene was cross-examined on it by Counsel for the respondent, the cross-examination being directed at the outset to establishing that the respondent had never produced "this gun" to him, never pointed it out and never made a statement to him about it. The witness rejected these suggestions. At this stage of the trial the judge handed to respondent's counsel the witness's diary, in which the statement attributed to the respondent was recorded, and his counsel was thus afforded his first opportunity of seeing in writing what the rest of the recorded statement amounted to.

The respondent did not give evidence. In his summing up to the jury the Judge indicated to them clearly that in his view the most important part of the evidence was that of Piyadasa himself and the two other eye-witnesses, and said that their "verdict must surely rest in this case upon your belief or disbelief" of those witnesses. With regard to the evidence of Sergeant Jayawardene as to the finding of the gun he directed them that it meant nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him.

The jury brought in a unanimous verdict of guilty after seventeen minutes retirement. The Court sentenced the respondent to ten years rigorous imprisonment.

His appeal against conviction and sentence was allowed by the Court of Criminal Appeal on the ground that Jayawardene's evidence as to the information leading to the discovery of the gun and cartridges was improperly admitted, since section 27 did not permit the giving of evidence that was covered by section 122 (3). Their Lordships have already expressed their opinion on this question and in their view section 27 is not displaced in the way that has been suggested. Consequently they are not able to support the Court of Criminal Appeal's judgment on this aspect of the law and they must hold the conviction to have been wrongly set aside.

There are however two further points to which allusion must be made before the appeal is disposed of. Having regard to the view of the law taken by the Court of Criminal Appeal it was necessary for them, as it is not for their Lordships, to consider the further question whether they ought to exercise the power given to them by the proviso to section 5 of the Criminal Appeal Ordinance and dismiss the respondent's appeal on the ground that his conviction had not actually involved any substantial miscarriage of justice. In dealing with this the judgment delivered by the Chief Justice dwells largely upon what he described as the grave prejudice inflicted upon the respondent by the form in which Sergeant Jayawardene's evidence of the statement made to him was put before the jury. Their Lordships have thought it necessary to give careful attention to this point, which was fully argued before them, so as to assure themselves that his evidence, even if admissible under section 27, was not vitiated by the partial nature of the statement proved or by some improper treatment of it in the Judge's summing up to the jury.

In their opinion no objection can be maintained on either of these grounds. It is quite true that the words "the gun" and "the cartridges", if put before the jury as words attributed to the accused in

connection with the discovery, are capable of suggesting or even likely to suggest a positive connection between the gun discovered and the gun with which Piyadasa was shot, which the full statement did not bear out. For in another part of the statement the accused states that having heard the sound of two gun shots, he had come running up to the back verandah on the Monte Cristo estate and that he had found there a 12-boro gun, broken, lying on the ground and some cartridges in a bag. He says that he had broken the gun into three pieces, picked up a sack, wrapped the parts of the gun with the bag of cartridges and buried them in the garden opposite line No. 6. Only after these statements does he state that he is prepared to point out the place where the gun and cartridges were buried. He then says that he denies having shot at anyone.

What is said is that, if the words admitted by the Judge were to be admitted at all, it could not be just or fair to the accused to allow them to be placed before the jury without letting them hear also the explanatory and self-exculpatory words which formed the context of his offer to show where the objects were buried. Their Lordships do not consider this objection to be well founded. The Judge in admitting the words relating to the discovery was applying the rule laid down by section 27. That rule limits the admissible words, whether they amount to a confession or not, to those relating distinctly to the fact discovered. He is not at liberty to go beyond that limit, however much the prosecution may wish to do so, and it has always been regarded as the correct practice that Judges should be strict in applying the requirement that the words admitted must "relate distinctly" to the fact. No doubt it is considered that such a practice is likely on the whole to tell in favour of an accused, even though it may result in the exclusion of self-exculpatory statements.

The present case illustrates the difficulty of allowing the rule to be applied in any extended way. In order to show the exact significance of the words "the gun" when used by the respondent the Judge would have had to direct the prosecution to supplement them by putting in as well so much of his statement as set out his story of the finding of a gun on the verandah and of his decision to pick it up and bury it and the cartridges, without any explanation offered of his reason for acting in such a suspicious way. A Judge might very reasonably suppose that to put this in on top of the other evidence would only make the case against the accused the blacker for the addition. To direct such evidence to be put in, without any application from the defence counsel (who, it must be remembered, had seen the full record of the statement before the close of Jayawardene's evidence) and in

face of the line being taken in his cross-examination of that witness that the accused had never made any statement to him at all, would not, in their Lordships' opinion, have represented the duty of the Judge conducting the trial that was taking place before him. They do not think that he can be charged with having misconducted the trial in this regard.

The course that he did adopt when he came to sum up to the jury appears to them to have been the correct way of handling his difficult problem. On the one hand, as has been pointed out, he told the jury to concentrate on the question whether they were going to believe or disbelieve the evidence of the eye-witnesses. On the other hand he suggested to them that the evidence about the finding of the gun did not amount to anything very much. The gun discovered, he said, was one that, according to the Analyst " could possibly have caused the injuries ", because " with this gun you can fire S. G. slugs ". The prosecution's point was, he said, that if the accused did point out that gun, it was because he knew where it was. He then explained the respective positions of the prosecution and the defence as follows:—

> " Well, the Defence has challenged Jayawardene and said he is nothing more than a liar in uniform. That is the suggestion. The Defence alternatively argues, even if that suggestion of the Defence is not accepted, but Jayawardene is believed when he says that the Accused pointed out the gun, the statement of the Accused is that he could point out a place where a gun and cartridges are buried. The Defence therefore argues that means nothing more than that the Accused was aware of where a gun and cartridges were buried, not necessarily buried by him. I did not understand the Prosecution as placing the case any higher than placed by the Defence Counsel himself. The Prosecution does not say that it proves anything more than showing a place where a gun and 14 cartridges were buried, and this was about 3.25 or 3.30 that the cartridges were unearthed. Well, gentlemen, that is the evidence in this case. "

With the matter put to the jury in that way in the summing up their Lordships do not think that it can fairly be said that any injustice was caused to the defence by the words of the statement that were admitted under the rule of section 27 being admitted in the limited form chosen by the Judge.

It only remains to place on record one further observation which arises out of certain strictures contained in the judgment of the learned Chief Justice reflecting upon the handling of the prosecution's case

at the trial and the evidence of Sergeant Jayawardene. His comments on the conduct of counsel for the Crown are to be found in the last two paragraphs of his judgment, and it is sufficient to note in referring to them that they attribute to the prosecution a lack of proper fairness and detachment in the presentation of the case and even a conscious attempt to mislead the Court. This censure, which is of the gravest order, was not supported in any particular by counsel for the respondent in his argument before the Board. Their Lordships have found no justification for it, and they think that it must have arisen from an insufficient appreciation on the part of the Court of the limitations imposed by observance of the conditions of section 27 and of the part played by the Judge himself in the instant case in directing what part of the accused's statement he would allow to go before the jury. Their Lordships must dissociate themselves from any endorsement of the learned Chief Justice's words of censure.

As to Sergeant Jayawardene's evidence at the trial it is described by the Chief Justice as a reprehensible attempt at " suggestio falsi et suppressio veri ". Any Court reviewing the written record of a witness's oral evidence under examination and cross-examination is at liberty to form its own conclusion as to his intentions and bona fides, even if the attribution to him of gross bad faith is usually regarded as an exceptional departure on the part of an appellate Court. Their Lordships are certainly in no better position than the Court of Criminal Appeal to form a judgment on this matter : they will merely state in regard to this witness that neither their own analysis of his evidence nor the criticisms of it made by the learned Chief Justice have seemed to them to require so hostile a conclusion.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the Judgment and Order of the Court of Criminal Appeal dated 17th December 1962 set aside and the verdict of the jury finding the respondent guilty of the offence of attempted murder, dated 21st December 1961, restored. Since his appeal to the Court of Criminal Appeal was against sentence as well as against conviction and the appeal against sentence did not come up for consideration owing to the Court's decision to quash the conviction, the appeal should now be remitted to that Court for hearing of the appeal against sentence on the basis that the verdict of the jury is to stand. In accordance with the condition imposed when special leave to appeal to the Board was granted the appellant must pay the respondent's costs of the appeal.

Appeal allowed.