1936 *Present:* **Dalton S.P.J., Akbar and Poyser JJ.**

THE KING *v.* DAVITH SINGHO.

93—P. C. Panadure, 29,864.

Statements recorded by Police—Investigation under Chapter XII. of the Criminal Procedure Code—Witnesses cross-examined on statement—For purpose of contradicting them—Regularity—Judge's direction to jury—Criminal Procedure Code, s. 122 (2) (3).

It is not a contravention of section 122 (3) of the Criminal Procedure Code to read to the jury the entirety of the statements of witnesses, recorded by a Police Officer under section 122 (1) during an inquiry, where it is done for the purpose of contradicting them.

Where the trial Judge directed the jury that they were entitled to take into consideration these statements to decide for themselves whether or not they were prepared to belive the evidence given by the witnesses during the trial,—

***Held*, it was not an improper direction in law.**

THIS was a case stated under section 355 (3) of the Criminal Procedure Code.

The accused was charged with murder and convicted of the offence in the Assize Court, Colombo.

At the trial among those who gave evidence for the prosecution were two witnesses, viz., Thepanis and Kumatheris, whose statements had been recorded by a Sub-Inspector of Police in the course of his inquiry. When the former witnesses gave evidence they were cross-examined by Counsel for the accused, suggesting that their original statements to the Police differed from their evidence given at the trial.

When the Sub-Inspector gave evidence he was questioned about the statements made to him and he stated that he could not remember the contents. The learned Judge thereupon asked for the officer's note-book and found that the statements made to the Sub-Inspector differed on certain points from the evidence given in Court. As a result, the learned Judge allowed the Sub-Inspector to read them from the witness-box.

Siri Perera (with him *Mackenzie Pereira* and *R. M. E. Rajapakse*), for accused.—A direction to the jury by the learned trial Judge that " they were entitled to take into consideration the statements made by these witnesses at the investigation made by the Sub-Inspector of Police in order to decide for themselves whether or not they were prepared to believe the evidence given by the witnesses during the trial ", is tantamount to a direction that the jury were entitled to take into their consideration these statements as a reason for deciding to believe the evidence given by these witnesses during the trial. In other words, it was a direction that if the jury found it as a fact that these statements corroborated the evidence given at the trial, that then they could decide to believe them. Inasmuch as this is a direction that the jury were entitled to regard the statements in question as corroborative evidence, it is an incorrect direction in law, for the reason that such a use of the statements in question would be plainly contrary to the provisions of section 122 (3) of the Criminal Procedure Code. Under section 122 (3) of the Criminal Procedure Code, statements made to a Police Officer conducting an

investigation under Chapter XII. of the Criminal Procedure Code can be used only for two purposes, *i.e.*, (*a*) to refresh the memory of the person recording the statement, and (*b*) to prove that a witness made a different statement at a different time. The effect of the statements of the two witnesses, Thepanis and Kumatheris, in the net result was to corroborate their testimony given in Court, despite the fact that on one or two points their statements to the Police Inspector were at variance with that testimony. That it was apparently not the intention of the learned trial Judge to contradict them by these statements is obvious from the fact that he did not follow the procedure laid down for that purpose in section 145 of the Evidence Ordinance. Therefore it was clearly illegal to read out to the jury the whole of the statements of these two witnesses, since such a procedure is manifestly contrary to the provisions of section 122 (3) of the Criminal Procedure Code.

J. E. M. Obeyesekere, Acting Deputy S.G. (with him *Kariapper*, C.C.), for the Crown.—Section 122 (3) of the Criminal Procedure Code may be used for one of three purposes, namely, (*a*) to prove that a witness made a different statement at a different time; (*b*) to refresh the memory of the person recording the statement; (*c*) to aid the Court in the inquiry or trial. It is improper to use such a statement to corroborate a witness (*The King v. Soyza* [1]). Counsel also referred to *Paulis Appu v. Don Davith* [2] and to *King Emperor v. Dal Singh* [3]. If the trial Judge intended to use the statements recorded in the Information Book to contradict Kumatheris and Thepanis, the points of contradiction should first have been put to these witnesses and their explanations obtained. Thereafter, the Inspector should have been permitted to testify only to those passages, which contradicted the evidence given by these witnesses in Court. It was improper to read to the jury the whole of their statements as they contained, in parts, corroboration of the evidence they gave. The learned Judge's direction to the jury that they could take these statements into account in deciding whether they were prepared to believe the witnesses or not, was in effect a direction that they may make use of the statements to corroborate the evidence given in Court. But an improper use of statements recorded in the Information Book will not necessarily vitiate a conviction. Counsel referred to *The King v. Soyza* (*supra*) and to *Horan v. James Silva* [4]. If the conviction can be sustained by the other evidence in the case, a Court of Review should not interfere. Counsel referred to the case of *Elahee Buksh* [5] and to *King v. Beecham* [6] and *King v. Williams and another.* [7]

Cur. adv. vult.

January 24, 1936. DALTON S.P.J.—

This matter comes before us in the form of a case stated by the Attorney-General under the provisions of section 355 (3) of the Criminal Procedure Code. The accused was charged with murder committed on or about December 6, 1934, and was convicted of that offence in the Assize Court, Colombo, on November 19 last by a verdict of the jurors of five to two.

[1] (*1924*) *26 N. L. R. 324.*
[2] (*1930*) *32 N. L. R. 335.*
[3] *44 Calcutta 876.*
[4] *7 Times L. R. 136.*
[5] *5 Sutherland's Weekly Reporter 80.*
[6] (*1921*) *3 K. B. 470.*
[7] *34 C. A. R. 135.*

At the trial, amongst those who gave evidence for the prosecution, were two witnesses named Thepanis and Kumatheris. A Sub-Inspector of Police, S. H. de Zoysa, was also called for the Crown. He had been called to the scene of the murder very soon after the deceased was killed, and investigated the circumstances of the offence, in the course of his duty recording statements from the witnesses whom he had taken to the Police Station.

In the course of the case for the prosecution at the trial questions were put to Thepanis, Kumatheris, and other witnesses for the Crown by Counsel for the accused, suggesting that their original statements to the Police differed from their evidence given at the trial incriminating the accused, and that they had been instigated by the Police, and presumably by Sub-Inspector de Zoysa, to change their original statements; it was further alleged that they had been coerced into giving evidence against the accused. The witnesses Thepanis and Kumatheris denied these allegations, and it may be stated here that no attempt was made by the defence to substantiate these charges against the Police. The accused in his evidence does say that the only reason he can give why the deceased's wife should give evidence against him was because she was instigated to do so by the Police, but apart from that there was nothing adduced in support of the charge, and it would seem to have been very recklessly made.

When Sub-Inspector de Zoysa came into the witness-box, he was questioned about the statements made to him, but stated he could not remember the contents of them owing to the length of time that had passed, nearly one year, since the offence was committed. The learned trial Judge thereupon asked for the officer's notebook containing the statements and examined it. He then found that Thepanis and Kumatheris had made statements to the Sub-Inspector, which differed on certain points from the evidence they had given in Court. It was clearly in the interests of the accused therefore that the original statements should be before the jury, since they went to contradict the two witnesses on some important points.

As a result of what he found in the statements contrary to the evidence given at the trial, the learned Judge allowed the Sub-Inspector to read them from the witness-box. No objection at all was raised by counsel for the accused to this being done, for it was in the interests of the accused. He asked for and obtained inspection of the notebook, and cross-examined the Sub-Inspector upon the entries in question. He also continued his charge against the Police, suggesting to the witness that he had intimidated the prosecution witnesses.

In the course of his charge to the jury, the learned Judge told the jury "in the clearest terms that they had to return their verdict upon the evidence given by the witnesses at the trial, but that they were entitled to take into consideration the evidence given by the witnesses in the Police Court and the statements made by them at the investigation by the Sub-Inspector of Police to decide for themselves whether or not they were prepared to believe the evidence given by the witnesses during

the trial before them". He went on to warn them against accepting the evidence of one Crown witness, the wife of the deceased man, on any point.

There can be no doubt that the instructions to the jury referred to in quotation marks above were given because the statements of the two witnesses read out by the Sub-Inspector contradicted their evidence given in Court on certain important points, and the jury were entitled to have those contradictions before them in deciding as to the truth or otherwise of the evidence of these witnesses at the trial.

The questions we are asked to answer in this case are two in number:—

(1) Whether the trial Judge was right in causing to be read to the jury the whole of the statements made to the Sub-Inspector of Police by the witnesses Thepanis and Kumatheris ?

(2) Whether the trial Judge's direction to the jury that they were entitled to take into consideration the statements made by these witnesses at the investigation by the Sub-Inspector of Police in order to decide for themselves whether or not they were prepared to believe the evidence given by the witnesses during the trial is a proper direction in law ?

The position taken up by counsel for the accused now is that the two statements read by the Sub-Inspector were used to corroborate, and had the effect of corroborating, the evidence of the two witnesses given at the trial, and that the use of them was contrary to the provisions of section 122 (3) of the Criminal Procedure Code.

The evidence of Thepanis at the trial was shortly to the effect that on the evening just before the deceased was killed, he heard cries and saw the accused chasing the deceased along the road. He followed but did not approach them. It was a dark night but he stated that the accused had a torchlight in his hand and he noticed the light following the deceased. There were no lights on the road, but he made it clear to the Court that he identified the accused by two means, (1) the torchlight in the accused's hand, and (2) a cry by the deceased that the accused (giving his name) was chasing him. On the second point, in view of what the witness had stated in the Police Court, he was cross-examined by counsel for the accused to the effect that the deceased had not called out any name at all when he was being chased, but merely "Murder". A reference to the Police Court evidence shows that Thepanis there mentioned no cry by the deceased that the accused was chasing him. With regard to the first point, however, the presence of the torchlight in the accused's hand, counsel was not in a position to suggest that Thepanis' evidence in the Police Court differed from his evidence at the trial, but he (Thepanis) made it clear, beyond any doubt when before the Magistrate, that although it was dark, he was able to identify both the accused and the deceased by means of the accused's torchlight. In his cross-examination at the trial he stated for the first time that he (the witness) also had a torch-light in his hand, an addition to his earlier evidence which showed probably that even he appreciated the important part some artificial light on a dark night played as a means of identifying the assailant.

With this somewhat unsatisfactory evidence of Thepanis on the question of a light before him, the learned Judge, when Sub-Inspector de Zoysa was in the witness-box, became aware of the contents of the earliest statement of Thepanis, namely, the statement to de Zoysa made very early on the morning of the day following the murder. The statement, a very short one, was as follows :—

> " Yesterday at about 8 p.m. I was in the store when I heard shouts from the direction of the road. These shouts were ' murder '. I came up towards the road where I saw Baby Singho running followed by Davith Singho at this spot. I saw both fighting and then I saw Baby Singho falling down. I ran towards Horana to inform the Police Vidane and I told him that Baby is lying injured. "

It mentions no artificial light or torch in the hands of anyone when he purported to identify the accused and the deceased. If one may say so, the learned Judge appreciated the importance of this omission to the accused, and quite properly allowed it to go to the jury.

The objection to the course he took raised by counsel for the accused before us is that the statement corroborates the evidence of Thepanis on some points, for example, that about 8 p.m. he heard shouts on the road, and that he saw the accused and the deceased fighting. The real question, however, was whether Thepanis was speaking the truth when he said he had identified the assailant. On both points referred to above, (1) the cry of the deceased giving the name of the accused and (2) the presence of the torchlight in the hand of the accused or of anyone else, the statement to the Sub-Inspector contradicts, or is at variance with, his evidence at the trial. The only cry he mentions in his earliest statement was one of " murder ", and he makes no mention of any torchlight at all. The statement clearly therefore went to contradict and discredit the evidence given by him at the trial that he had identified the accused as the assailant of the deceased.

It was then urged that, if it was sought to discredit Thepanis by the production of this earliest statement of his, he should have been recalled and the statement put to him, as required by section 145 of the Evidence Ordinance. That was a course which it was open to counsel for the defence to follow if he thought it necessary, for we think it must have been apparent to him that it was in the interests of the accused to have the statement of Thepanis to Sub-Inspector de Zoysa before the jury to help them in arriving at the worth of his evidence at the trial. He did not take that course, neither did the learned Judge do so, possibly because Thepanis had already been fully cross-examined on both reasons he had given for identifying the accused that night.

The statement of the witness Kumatheris to Sub-Inspector de Zoysa was as follows :—

> " To-day at about 8 P.M. I was in the house of Baby Akka when I heard shouts from the direction of Baby Singho's house. I came up running when I saw Baby Singho and Davith on the road near Baby's house. Davith had a torch in one hand and a knife in the other hand. I then saw Davith stabbing one blow

> at Baby Singho. I cannot say where the blow alighted. Then Baby Singho shouted out 'murder' and came running towards Horana followed by Davith. Davith was flashing the torch at the time. Baby Singho came up to the spot where the body is lying now, and Davith stabbed him several times and Baby Singho fell down. Several people came running with me. Davith ran away and I cannot say where he ran. I went home and informed Arthur and hid myself and later appeared."

This evidence given by Kumatheris at the trial differs on two important points from the statement he made to the Sub-Inspector, and there is another minor difference which in the circumstances might have some bearing on his credibility at the trial. The witness makes it plain at the trial that it was, to use his words, "a very dark night", and that he identified both the accused and the deceased, and was able to make them out by means of a light thrown on the road from a house near by. He adds that he also identified the deceased (but not the assailant) by means of a light thrown on him from a torch in the hands of the assailant. The impression one gets from the statement to the Sub-Inspector is that it was the torch being flashed in the hands of the assailant that helped the witness to identify both the accused and the deceased. No other light at all is mentioned by him on that occasion, and he does not say that anything spoken by the assailant assisted him in recognizing the accused as the man.

Another important difference is as to the actual stabbing he alleged he saw. At the trial he said he only saw the accused stab the deceased once, that thereafter the deceased ran away, the accused chasing him, there was then a struggle, the deceased fell down, and the accused went away. He stated in cross-examination at the trial that he did not see the accused stabbing the deceased when he lay fallen. That cross-examination was doubtless based upon his statement on this matter in his evidence in the Police Court, which is the same as his statement to the Sub-Inspector. There he said he saw the accused stab the deceased several times at the spot where the body was eventually found lying. The question would naturally arise, whether, having made these two contradictory statements on most important points, he had seen the accused stabbing the deceased at all.

The remarks made above in respect of the contradictions in the evidence of Thepanis that came to the notice of the learned trial Judge apply equally to the evidence of Kumatheris, and the answer to the objection raised by counsel before us to this evidence is exactly the same. The two statements were used for the purpose of contradicting the two witnesses and were properly put before the jury. In that case there was no contravention of the provisions of section 122 (3) of the Criminal Procedure Code.

The Acting Deputy Solicitor-General took up the same position as counsel for the accused in respect of the first question raised in the case stated, namely, that the learned trial Judge should not have allowed the whole of the statements to Sub-Inspector de Zoysa to be read, and that the two witnesses whom it was sought to discredit should have been recalled, but that argument has been dealt with above. He further

urged, however, that, apart altogether from the evidence of Thepanis and Kumatheris, there was ample evidence to justify the verdict of the jury.

With regard to the second question, assuming that the answer to the first question was in the affirmative, namely, that the trial Judge was right, counsel for the accused urged that his direction to the jury was nevertheless wrong. The Acting Deputy Solicitor-General was unable to agree with counsel for the accused on this point. Counsel for the accused argued that, on the assumption referred to, the only direction the trial Judge could give was that the evidence given at the trial could not be acted upon by the jury at all. With that argument we are unable to agree. Having come to the conclusion that the trial Judge was correct in admitting the statements made to the Sub-Inspector, we are of opinion that he correctly directed the jury as to how they were entitled to make use of them. Both questions must therefore be answered in the affirmative.

It is necessary to make one more remark. When the argument before us was opened, counsel for the accused informed us that there were some statements in the learned trial Judge's order of November 20, refusing to state a case for this Court, which to the best of his recollection were incorrect. These alleged inaccuracies related to the cross-examination of the two witnesses by counsel for the accused, suggestions by him of intimidation by the Police, inspection of the Sub-Inspector's notebook, and the statements therein, and cross-examination of the Sub-Inspector thereon by counsel for the accused. The report of the learned Judge thereon was before us when the argument was continued on January 20, and counsel has frankly accepted the correctness of that report and that his own recollection was at fault. In that event no more will be said on the subject.

AKBAR J.—I agree.
POYSER J.—I agree.

Conviction affirmed.