[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* **Basnayake, C.J. (President), Tambiah, J., Herat, J., Abeyesundere, J., and G. P. A. Silva, J.**

THE QUEEN *v.* MURUGAN RAMASAMY

APPEAL NO. 2 OF 1962, WITH APPLICATION NO. 2

S. C. 14—M. C. Gampola, 3,082

Court of Criminal Appeal—Statement (oral or written) made by accused to police officer during investigation of a cognizable offence—Deposition that a fact was thereby discovered—Inadmissibility—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, ss. 25, 26, 27, 59, 91—Court of Criminal Appeal Ordinance, proviso to s. 5 (1).

In a trial for attempted murder by shooting with a gun, a statement made by the accused to a Police Sergeant in the course of an inquiry under Chapter XII of the Criminal Procedure Code was admitted in evidence. The statement was as follows :— " I am prepared to point out the place where the gun and the cartridges are buried ".

Held, that the statement fell within the prohibition in section 122 (3) of the Criminal Procedure Code and could not, therefore, be admitted in evidence. A statement by an accused person containing information in consequence of which a fact is deposed to as discovered is not admissible in evidence if the statement was made to a police officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code. A statement which cannot be used under section 122 (3) of the Criminal Procedure Code cannot be proved under section 27 of the Evidence Ordinance.

Per Curiam : " In the case of *Buddharakkita* (63 N. L. R. 433) it was held that section 122 (3) extends to both oral and written statements made in the course of an inquiry under Chapter XII. The result of the decision in *Buddharakkita's* case is that the oral statement made to a police officer in the course of an inquiry under section 122 can no longer be proved under section 27 (of the Evidence Ordinance). We are in entire agreement with that decision and we are unable to agree with the decision in *Rex v. Jinadasa* (51 N. L. R. 529) that although the written statement falls within the prohibition in section 122 (3) the oral statement does not, and may be proved under section 27 of the Evidence Ordinance . . . . . Our decision in the instant case is in accord with that in *Buddharakkita's* case, and the decision in *Jinadasa's* case must not be regarded any longer as binding. "

Held further, that the onus of satisfying the Court of Criminal Appeal that no substantial miscarriage of justice has actually occurred in a case in which the point raised in appeal is decided in favour of the appellant is upon the Crown.

Quaere, whether, in the Evidence Ordinance, section 27 should be read as an exception to section 26 alone or to sections 25 and 26.

2—R 7792—1,883 (2/63)

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *T. W. Rajaratnam*, *S. S. Basnayake*, *S. C. Crossette-Tambiah*, *R. Weerakoon*, *K. Viknarajah* (assigned), for Accused-Appellant.

A. C. Alles, Solicitor-General, with *V. S. A. Pullenayegum*, Crown Counsel, *H. L. de Silva*, Crown Counsel, and *V. C. Gunatillake*, Crown Counsel, for Attorney-General.

Cur. adv. vult.

December 17, 1962. BASNAYAKE, C.J.—

The appellant Murugan Ramasamy *alias* Babun Ramasamy was indicted on a charge of attempted murder of one Kammalwattegedera Piyadasa by shooting him with a gun on 1st September, 1960. A unanimous verdict of guilty was returned by the jury and the appellant was sentenced to undergo ten years' rigorous imprisonment. This appeal is against that conviction.

The main ground of appeal urged by learned counsel for the appellant is that the judgment of the Court before which the appellant was convicted should be set aside on the ground that a statement made by the appellant to Police Sergeant Jayawardene had been illegally admitted in evidence.

Briefly the material facts are as follows : Piyadasa the injured man was shot on 1st September at Monte Cristo Estate, Nawalapitiya. The estate had both Sinhala and Tamil labourers, a section of whom had gone on strike a few days before the shooting. The appellant belonged to the group that had gone on strike while the injured man and the prosecution witnesses Heen Banda and Juwanis belonged to the group that had not. The road to Nawalapitiya runs through the estate. The man or men who shot were in a place below the road which was known as the ' wadiya '. Piyadasa the injured man was working along with the witnesses Heen Banda, Juwanis and about 24 others in a section of the estate above the road in field No. 25 in extent about 25 acres. The injured man and the witnesses claimed that they were engaged in weeding at the time the firing took place. This claim was challenged by the defence as the witnesses were unable to give a satisfactory account of what happened to their tools. The witnesses say that about 10.30 a.m. the sound of some sort of commotion from the ' wadiya ' attracted their attention. When they looked in that direction they saw the appellant and two others named Muttiah and Sinniah. The appellant had a gun and the other two had stones in their hands. As the first shot was fired they took cover. The second shot injured Piyadasa in the region of the chest as he moved from one position to another. A diary in his breast pocket saved Piyadasa's life as the force of the slug which struck him was

broken by it. The resulting injury is described by the doctor as "a lacerated wound skin deep about 1/4" long on the left side of the chest about the level of the sternum. There was an abrasion 1" long 1/2" wide around it". Piyadasa, Heen Banda and Juwanis who were called by the prosecution stated that it was the second shot that caused the injury and that it was the appellant who fired it; but Heen Banda departed from that position in cross-examination. He said that he did not see any action on the part of the appellant when he heard either the second shot or the third shot.

Learned counsel maintained that these witnesses did not see the assailant as they took cover after they heard the first shot, and that they were falsely implicating the appellant. They were all cross-examined at length on the question of identification. In support of his contention that they did not identify the assailant learned counsel pointed to the fact that Piyadasa's pocket diary P4 contained under the date 1st September, 1960, not the names of Muttiah and Sinniah, but those of Jayasena and Mendis. He also relied on Piyadasa's evidence which threw doubt on his claim that he identified his assailant. When asked why he wrote the names of Jayasena and Mendis he said: "I wrote down the names of Jayasena and Mendis on the diary because another person who was next bed to me (*sic*) told me that out of the three persons whom I saw, two people, except for Ramasamy, must be Jayasena and Mendis, and not Muttiah and Sinniah". When asked further whether there was a discussion at the hospital in regard to the identity of those who shot, Piyadasa said:

> "At the time I was in the hospital there was a man injured by gun shots in the next bed. At the time Ramasamy shot me Muttiah and Sinniah were with him. Then the man who was in the next bed said that he including others were shot by Jayasena and Mendis and then I thought that I must be making a mistake."

Piyadasa finally sought to get out of the difficulty in which he found himself by saying that because the man in the adjoining bed had no paper he wrote down in his diary the names of the persons who he said were his assailants. But he was unable to give any clue as to who this man in the adjoining bed was. He neither knew his name nor his whereabouts. He was also positive that he was not William the man who died. The other point made against Piyadasa's testimony was that his statement to the Police was not made till 7 p.m. on the night of the shooting. The defence also made a point of the delay in recording the statements of Heen Banda and Juwanis.

In addition to the evidence of the three eye-witnesses the prosecution sought to prove a statement made by the appellant to Police Sergeant Jayawardene in the course of his inquiry under Chapter XII of the

Criminal Procedure Code (hereinafter referred to as the Code), and the learned trial Judge permitted Crown Counsel to elicit the following evidence from Sergeant Jayawardene :

" 839. Q : You told us yesterday that you took the accused into custody?
A : Yes.

840. Q : And you recorded his statement?
A : On his volunteering to make a statement I recorded his statement.

841. Q : Please refresh your memory from the note-book ; did you bring your note-book?
A : Yes.
(Witness refreshes his memory from the note-book.)

842. Q : Did the accused in the course of his statement tell you ' I am prepared to point out the place where the gun and the cartridges are buried '?
A : Yes.

843. Q : Thereafter did you and the accused go to a spot near line No. 6?
A : Yes.

844. Q : Were the gun and the cartridges discovered?
A : Yes.

845. Q : Where were they discovered?
A : I took the accused to line No. 6 and the accused pointed out a spot to me. He unearthed some rubbish and I discovered the gun broken into three parts and a cloth bag containing 12 cartridges—12 bore cartridges.

846. Q : Was the gun wrapped in anything?
A : It was wrapped in a gunny sack.

847. Q : (Shown P2). Was this the gunny bag?
A : Yes.

848. Q : It was produced in the lower Court marked P2?
A : Yes.

849. Q : You assembled the gun?
A : I did not assemble the gun. I examined the barrel and there was fouling and there were signs of recent firing.

850. Q : You smelt the barrel?
A : Yes.

851. Q : It smelt fouling?
A : Yes. "

It was suggested to Sergeant Jayawardene in cross-examination that the appellant did not volunteer a statement nor say that he was prepared to point out the place where the gun and cartridges were buried. It

was also suggested that he did not point out a spot or unearth some rubbish as deposed to by him. The Sergeant repudiated those suggestions.

It was contended on behalf of the appellant that even if the statement: " I am prepared to point out the place where the gun and the cartridges are buried " had been made by him, its reception in evidence was illegal. Learned counsel rested his contention on the following grounds :

(*a*) The statement being a statement made to a police officer in the course of an inquiry under Chapter XII cannot 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.

(*b*) That even where a fact is deposed to as discovered in consequence of information contained in a statement made in the course of an inquiry under Chapter XII, section 27 of the Evidence Ordinance affords no authority for proving that statement.

(*c*) That statements containing information in consequence of which a fact is deposed to as discovered may not be proved in the following cases :

(i) where the statement is made in the course of an inquiry under Chapter XII ; and

(ii) where the statement, not being one falling under (*a*) above, is a confession to a police officer.

(*d*) That in the instant case no fact was either discovered or deposed to as discovered in consequence of the information received from the appellant and that the statement did not come within the ambit of section 27.

Learned Solicitor-General contended that the gun was discovered in consequence of the information. He submitted that although the appellant dug up the heap of rubbish in the place where the gun was, it was Police Sergeant Jayawardene who discovered it. He also contended that section 122 (3) did not bar the proof of information, the proof of which was permitted by section 27. He relied on the decisions of this Court in *Rex v. Jinadasa* [1], *The Queen v. O. A. Jinadasa* [2], and *Regina v. Mapitigama Buddharakkita Thera and 2 others* [3].

The submissions of learned counsel for the appellant will now be discussed. As they are all interconnected, they will be examined as a whole. The most important of them is that the statement being one made to a police officer in the course of an inquiry under Chapter XII falls within the prohibition in section 122 (3) of the Code. We are of opinion that that submission is sound and we hold that the statement " I am prepared to point out the place where the gun and the cartridges are buried " comes

[1] (*1950*) *51 N. L. R. 529.* [2] (*1960*) *59 C. L. W. 97.*

[3] (*1962*) *63 N. L. R. 433.*

within that prohibition and cannot be admitted in evidence. Certain provisions of law are expressly saved from the operation of section 122 (3) by the words :

> " 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. "

The rules of interpretation will not countenance the reading of section 27 into the exception created by those words. Besides such a course cannot be adopted without violating such well-known maxims applicable to the interpretation of statutes as " *expressio unius est exclusio alterius* " (the express mention of one thing implies the exclusion of another), " *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud* " (when anything is prohibited, everything relating to it is prohibited), and "*Quando aliquid prohibetur ex directo prohibetur et per obliquum*" (when anything is prohibited directly, it is also prohibited indirectly). Section 27 of the Evidence Ordinance should therefore be read as permitting the proof of only statements that do not fall within the prohibition in section 122 (3). In the case of *Buddharakkita* (*supra*) it was held that section 122 (3) extends to both oral and written statements made in the course of an inquiry under Chapter XII. The result of the decision in *Buddharakkita's* case is that the oral statement made to a police officer in the course of an inquiry under section 122 can no longer be proved under section 27. We are in entire agreement with that decision and we are unable to agree with the decision in *Rex v. Jinadasa* (*supra*) that although the written statement falls within the prohibition in section 122 (3) the oral statement does not, and may be proved under section 27 of the Evidence Ordinance. The learned Solicitor-General relied on the following passage in the judgment of *Buddharakkita's* case as approving *Rex v. Jinadasa* (*supra*) :

> " . . . . no decision of the Supreme Court or of this Court has been cited to us in which it was argued and expressly decided that statements made by an accused person to an officer investigating a cognizable offence under Chapter XII may be proved contrary to the prohibition in section 122 (3) except in a case to which section 27 of the Evidence Ordinance applies. "

We are unable to agree with his view of that passage. If the language lends itself to such an impression, we wish to make it clear that it should not be understood as implying that the Court held that a statement which cannot be used under section 122 (3) may be proved under section 27. Our decision in the instant case is in accord with that in *Buddharakkita's* case, and the decision in *Jinadasa's* case must not be regarded any longer as binding. It is convenient at this point to dispose of *The Queen v. O. A. Jinadasa* (*supra*), the other case on which the learned Solicitor-General relied. The questions that arise for decision here did

not arise there, and if any passage in that judgment is in conflict with our decision in the instant case, that case should, to that extent, be regarded as overruled.

The opinion we have formed herein is consistent with the view taken by the Privy Council on the corresponding provisions of the Indian Evidence Act and Criminal Procedure Code. In *Narayana Swami v. Emperor* [1] Lord Atkin stated :

> " It is said that to give S. 162 of the Code the construction contended for would be to repeal S. 27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can in some circumstances stand together. Section 162 is confined to statements made to a police officer in course of an investigation. S. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. S. 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by S. 162. . . .
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> . . . . The words of S. 162 are in their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. "

In India all controversy on this topic has been silenced by the addition of section 27 to the exceptions in section 162 which is the corresponding section of the Indian Code.

Where proof of statements made in the course of an inquiry under Chapter XII is permitted, they can only be proved by documentary evidence and not by oral evidence for the reasons that contents of documents cannot be proved by oral evidence (S. 59 Evidence Ordinance), and that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence may be given in proof of the terms of such matter except the document itself or secondary evidence where secondary evidence is admissible (S. 91 Evidence Ordinance).

Learned counsel for the appellant sought to place a further limitation on section 27. He argued that it did not apply at all to statements which amount to confessions made to a police officer. His reasoning was as follows :—Section 25 bars proof, as against a person accused of an offence, of all confessions made to a police officer whilst in custody or not. Section 26 bars proof, as against the person making them, of all confessions made by him whilst in the custody of a police officer unless it be made in the immediate presence of a Magistrate. As section 25 bars all confessions made to a police officer whilst in custody or not, the only confessions to which section 26 can apply are confessions made to persons other than police officers. Proof of statements made to a police officer in the course of an inquiry under Chapter XII of the Code, whether they are confessions

[1] *(1939) A. I. R. (P. C.) 47 at 52.*

or not, is barred by section 122 (3). Proof of all other confessions to a police officer is barred by section 25 of the Evidence Ordinance. As the effect of section 122 (3) of the Code and section 25 of the Evidence Ordinance is to bar the proof of confessions to a police officer regardless of the situation in which they are made, and as section 27 is not among the exceptions to section 122 (3), a confession to a police officer cannot be proved thereunder. The words of section 27 " in the custody of a police officer " are a pointer to the fact that section 26 and not 25 is contemplated therein. The further condition imposed by section 27 is that the person giving the information must not only be in the custody of a police officer but must also be a person accused of an offence. In support of the first part of his contention, that sections 25 and 26 do not overlap in the sense that the former bars all confessions to police officers whether made whilst in their custody or not and that the latter bars all confessions made whilst in their custody, he relied on the decisions of the Indian Courts, the weight of which is in his favour. The learned Solicitor-General conceded that it was so and did not contend that the two sections should be given a different interpretation in Ceylon. He accepted the position that section 25 barred all confessions to a police officer whether made in custody or outside and that section 26 applied to confessions made to others than police officers.

The Indian decisions are referred to in such well-known commentaries on the Indian Evidence Act as Sarkar on Evidence and Monir on Evidence. It is unnecessary to cite them in this judgment. It will be sufficient if reference is made to the recent decision of the Supreme Court of India in *State of Uttar Pradesh v. Deoman* [1]. In support of the second part of his contention, that section 27 was a proviso to section 26 alone and not also to section 25, he called in aid passages in the judgments of the Privy Council in cases of *Narayana Swami v. Emperor* (*supra*) and *Kottaya v. Emperor* [2] which are cited below *in extenso*. In the former case Lord Atkin observed at p. 51 *et seq.*—

> " In this case the words themselves declare the intention of the Legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on Ss. 25, 26 and 27, Evidence Act, 1872. S. 25 provides that no confession made to a police officer shall be proved against an accused. S.26— No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. S. 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer so much of such information whether it amounts to a confession or not may be proved (*Here occur the words quoted earlier in this judgment*). .
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> . . It only remains to add that any difficulties to which either the

[1] (1960) *A. I. R.* (*Supreme Court*) *p. 1125.* [2] (1947) *A. I. R.* (*P. C.*) 67.

prosecution or the defence may be exposed by the construction now placed or S. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under S. 164. "

In the latter case Sir John Beaumont said at p. 70—

"The second question, which involves the construction of S. 27, Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms : "

(*Sections 25, 26 and 27 are omitted as they are the same as our sections.*)

" Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. . . . . Mr. Megaw, for the Crown, has argued that in such a case the 'fact discovered ' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. The ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. . . . . The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into S. 27 something which is not there, and admitting in evidence a confession barred by S. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law. "

The learned Solicitor-General maintained that the passages in the judgments of the Privy Council relied on by the appellant's counsel were obiter and not binding on us, and he strenuously argued that section 27 was a proviso to both sections 25 and 26 and claimed that on that point the weight of Indian decisions was on his side. He referred us to some of them. Learned counsel for the appellant did not contend that it was not so. Those decisions too are collected in the Commentaries mentioned above and need not be referred to here. The most recent pronouncement on the subject is in the judgment of the Supreme Court of India in the case of *State of Uttar Pradesh v. Deoman* (*supra*). As the question whether in our Evidence Ordinance too section 27 should be read as an exception to section 26 alone or to sections 25 and 26 does not arise for decision in the instant case, we refrain from expressing our opinion on that question although the matter was argued at length on both sides.

Before we part with this part of the case it would not be out of place to refer to the decision of the Privy Council in *Nazir Ahmad v. King-Emperor* [1] which has a bearing on the words in section 26 " unless it be made in the immediate presence of a Magistrate ". There Lord Roche expressed the view that under the Indian Code the only procedure for recording a statement to a Magistrate before the commencement of an inquiry or trial was that prescribed in sections 164 (our section 134) and 364 (our section 302). His reasons are illuminating and bear repetition *in extenso* as they are germane to the matters discussed above. He said :

> " . . . . where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts—*Taylor v. Taylor*, 1 Ch. D. 426 at p. 431—and although the Magistrate acting under this group of sections is not acting as a Court, yet he is a judicial officer and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to S. 164.
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> On the matter of construction Ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of S. 164 is to allow evidence to be put in a form in which it can prove itself under Ss. 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing

[1] *(1936) A. I. R. (Privy Council) 253.*

or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of S. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case."

The next question that arises for decision is whether the conviction should be set aside on the ground of the improper admission of Sergeant Jayawardene's evidence, or whether, while upholding the point taken by learned counsel, the appeal should be dismissed on the ground that no substantial miscarriage of justice has actually occurred. The onus of satisfying us that no substantial miscarriage of justice has actually occurred in a case in which the point raised in appeal is decided in favour of the appellant is upon the Crown. In the instant case the Crown has failed to satisfy us that no substantial miscarriage of justice has actually occurred. What is more—the material before us discloses that a substantial miscarriage of justice has actually occurred.

We now turn to that aspect of the case. In the first place there is no evidence that the parts of a gun dug up from a rubbish heap near line No. 6 are the parts of the crime gun. Sergeant Jayawardene who says he recovered the gun from the rubbish heap says that he did not at any stage try to re-assemble the gun and that he produced it in the Magistrate's Court in three parts. The analyst's evidence is that P1 which was produced at the trial was received by him in a parcel marked 'X' and was in working order. There is no evidence that the parts of a gun recovered by Sergeant Jayawardene constituted a gun that could be fired. Nor is there any evidence that P1 constitutes a gun formed from the parts recovered from the rubbish heap. In the absence of such evidence there cannot be said to be proof that the gun P1 consists of the parts of a gun recovered from the spot pointed out by the appellant and no inference against him can be drawn from the circumstance of his pointing out and digging up the rubbish heap near line No. 6. What is more—Jayawardene's evidence that the appellant said in a statement which he volunteered, "I am prepared to point out the place where *the* gun and *the* cartridges are buried", has gone to the jury as containing a reference to the crime gun. In his summing-up the learned Judge said :

> ". . . in the afternoon of 1st September this accused, after he had been arrested, took Jayawardana along to some place near line set No. 6 and there dug up the earth underneath which Jayawardana found *this* gun P1, at that time in three parts along with some bag containing 14 live cartridges."

Again later on in his summing-up he said :

> ". . . . Jayawardana took the accused away and according to Jayawardana, the accused made a certain statement to him in the course of which, the accused told him that he could point out the place

where *the* gun and cartridges were buried. If you believe Jayawardana that is a question of fact, you can understand the police not wasting any time thereafter. Jayawardana says he at once took him to line No. 6 and at a certain spot which was indicated by the police, the accused himself dug up the earth and underneath that there was *this* gun in a gunny bag in three parts and there was another bag containing 14 live cartridges which are productions in this case. . . . .

Well, the defence has challenged Jayawardana 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 Jayawardana 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. "

It was urged by learned counsel that the repeated reference both in the evidence and the summing-up to *the gun* and *this gun* was gravely prejudicial to the appellant if Jayawardene's evidence was meant to prove nothing more than that the appellant was aware of where a gun and cartridges were buried, not necessarily buried by him. He further submitted that the way in which the evidence was presented to the jury is likely to have had the effect of influencing the jurors to attach that amount of weight which they might not otherwise have attached to the evidence of Piyadasa, Heen Banda and Juwanis. In our opinion this submission is well-founded.

In the course of the argument there emerged a fact which, if it received sufficient attention at the trial, is likely to have altered the whole course of events. Sergeant Jayawardene in his examination-in-chief, which is reproduced earlier in this judgment in connexion with the discussion of the admissibility of the appellant's statement to him, stated that it was after he had recorded the statement which the appellant volunteered to make that he took him to line No. 6, that the appellant pointed out a spot to him and dug up a heap of rubbish in which he discovered a gun broken into three parts and a cloth bag containing twelve 12-bore cartridges. In cross-examination he gave an entirely different version as would appear from the following questions and answers :

" 934. Q : At what time did you commence to record the accused's statement ?

A : After the discovery of the gun and cartridges.

935. Q : At what time did you record it ?

A : At 3.10 immediately on arrival at the estate.

936. Q : That is before or after the discovery of the gun ?
A : Before the discovery of the gun.

937. Q : You know now that it was after the discovery of the gun ?
A : That was a mistake when I said that.

938. Q : I make a further allegation against you. I say that the accused never produced this gun to you ?
A : No.

939. Q : He never pointed it out to you ?
A : He did.

940. Q : He never made a statement to that effect to you ?
A : He did. "

Later on in answer to the presiding Judge he said :

" 991. Q : Have you made an entry in regard to the finding of the gun by you ?
A : Yes.

992. Q : Before that have you made an entry in regard to any statement made to you by the accused ?
A : Yes.

993. Q : Can you refresh your memory from what you have recorded and say whether it was after the accused had told you that he could point out the place where the gun and cartridges were buried or before he told you that he could point out the place where the gun and cartridges were buried that you went to a certain place near line No. 6 ?
A : Before the discovery of the gun and cartridges.

994. Q : After the discovery of the gun I take it that you made a record of that fact in your diary ?
A : Yes.

995. Q : After that was done did you take statement of the accused ?
A : No.

996. Q : After making a record of the finding of the gun did you settle down to recording a statement of the accused ?
A : Not after the discovery.

(The Sergeant's diary is marked C by Court.)

997. Q : At page 144 of your diary did you begin making a statement in regard to the circumstances in which the gun was discovered by you ?

A : Yes.

998. Q : And does that entry in regard to the discovery of the gun run into page 145 as well ?

A : Yes.

999. Q : And after that entry has been concluded did you record the statement of the accused as well ?

A : Yes.

1000. Q : Before the discovery of the gun had you questioned the accused ?

A : I have.

1001. Q : And have you recorded that fact before you began making statement in regard to the discovery of the gun ?

A : Yes. "

Under examination by the learned Judge, Sergeant Jayawardene went back on the position he had stoutly maintained in cross-examination. The repeated reversal of his evidence as to the sequence of events in regard to the finding of the gun and recording of the appellant's statement greatly impaired the value of Sergeant Jayawardene's evidence. What is more—even this final version is contradicted by his own notes of the inquiry which were produced and marked in the proceedings at the instance of the learned trial Judge. The record begins :

" On Monte Cristo Estate I interrogated the suspect at length and suspect says that he could point out the place where the gun and cartridges used for the shooting are buried and volunteers to make a statement : "

This record contradicts his evidence given in examination-in-chief that the appellant volunteered to make a statement. The record then proceeds:

" I am now leaving with the P. CC. 4358, 7326, 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 and Scott S. B. B. L. 12-bore gun barrel No. 10973 in three parts wrapped in an old gunny sack and 14 cartriges 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 cartriges. I smelt the berrel and there is a smell of gun powder and recent fouling in the berrel. I tied both ends covered with paper. I here take charge

of them as productions. Here there is (?) a 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 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 & 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. "

Sergeant Jayawardene's evidence when compared with what is recorded in his note-book discloses a reprehensible attempt on his part at *suggestio falsi et suppressio veri*. His notes speak of the same gun being discovered twice, once before and a second time after the appellant's statement was recorded. In the first case he says that the appellant pointed out the spot where the gun lay buried and in the second case he purports to have discovered the gun on the information received from him. The two statements are irreconcilable and his evidence on the point far from solving the confusion makes " confusion worse confounded ". In examination-in-chief he said that he found the gun after recording the statement of the appellant. In cross-examination he first said that he commenced to record the appellant's statement after the discovery of the gun and cartridges (Q. 934). He next said that he recorded the statement before the discovery of the gun (Q. 936). He then said that he made a mistake when he said that the statement was recorded after

the discovery of the gun (Q. 937). In answer to the question (Q. 993), whether it was after the appellant had told him that he could point out the place where the gun and cartridges were buried or before he told him that he could point out the place where the gun and cartridges were buried that he went to a certain place near line No. 6, he said that it was before the discovery of the gun and cartridges and that after the discovery he made a record of that fact in his diary. Further answering he also said that he did not take a statement of the appellant after he made the record relating to the discovery of the gun (Q. 995) and that he did not after making a record of the finding of the gun settle down to recording a statement of the appellant after the discovery of the gun and cartridges (Q. 996). In answer to questions 997, 998, 999, 1000 and 1001 he reversed what he had said before. All this shows what an unreliable witness the Sergeant is. He was either deliberately misleading the Court by giving his evidence a complexion which was prejudicial to the appellant or was so confused that he was unable even with the assistance of the written record to give a consistent and unbiased account of what he did that day. Now the learned Judge omitted to warn the jury that they should approach his evidence with caution as he had contradicted himself so many times in the course of his evidence on a vital point in the case. Of the two statements recorded as coming from the appellant in regard to the gun and cartridges, one does not indicate that the appellant was the person who used the gun while the other carries that implication. The Crown sought to prove the one implying guilt when in the course of that very statement the appellant had stated the circumstances in which he found the gun and denied that he shot anyone.

It is difficult to escape the conclusion that the prosecution has not been conducted in the instant case with that fairness and detachment with which prosecutions by the Crown should be conducted. With the statement of the appellant, in which he had expressly denied that he shot, before him, learned Crown Counsel, despite the learned trial Judge's warning of the perils of the course he was seeking to adopt, insidiously persisted in placing before the jury a statement alleged to be made by the appellant which, when taken out of its context, tended to create the impression that he had confessed to the crime and that he had hidden the crime gun himself after the shooting by him.

That, officers on whom the Court is entitled to rely for assistance in the administration of Justice should consciously seek to mislead it, is deplorable. There is no question that the appeal must be allowed and the conviction quashed, and we accordingly do so and direct a Judgment of acquittal to be entered.

Accused acquitted.