1939 *Present :* **Abrahams C.J., Hearne and Keuneman JJ.**

THE KING *v.* KIRIWÀSTHU *et al.*

38—P. C. Matale, 22,162.

Evidence—Confession to Police Officer—Inadmissible to prove that the accused contradicted himself—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, s. 25.

A confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself.

THE two accused were charged with having committed murder and with having caused evidence of the commission of the offence of murder to disappear and tried before a Judge and jury at the Midland Assizes. During the course of the trial the Counsel for the second accused wanted to elicit from the second accused in the course of his examination-in-chief portions of the statement made by him to a Police Sergeant under section 122 of the Criminal Procedure Code, 1898. The Counsel for the first accused suggested that the whole should be put to the second accused. When the statement was put to him, he admitted portions of it whilst he denied the rest. At the close of the defence the learned Judge permitted Crown Counsel to recall the Police Sergeant to discredit the evidence of the second accused. The jury returned a unanimous verdict finding both accused guilty of murder.

The Attorney-General acting under the provisions of section 355 (3) stated a case and submitted two questions of law, which are set out in the judgment of His Lordship the Chief Justice.

H. V. Perera, K.C. (with him *J. R. Jayawardana* and *C. C. Rasaratnam*), for the two prisoners.—The questions of law to be decided are (i.) whether a confession made to a police officer could be used to discredit the story given by him in his own defence, and (ii.) whether the second accused could give oral evidence with respect to what he told the police officer or whether it could only be proved by the written statement taken down by the police.

Section 25 of the Evidence Ordinance says that no confession made to a police officer can be proved as against the accused.

[ABRAHAMS C.J.—Can it not be proved in his favour ?]

No. Confessions are tainted and the prohibition is absolute. The mere fact of a confession would prejudice the jury. A tainted statement which the Legislature had discredited cannot be used to discredit the accused. A statement recorded under section 122 of the Criminal Procedure Code is a mere record of an investigation. The person who makes the statement does not take the responsibility of testifying to the accuracy. There is a distinction between a statement signed by a person and a record of a statement. Sections 91 and 92 of the Evidence Ordinance make the distinction clear. Once it is signed he adopts it to be his statement. The statement under this section must not be signed.

[ABRAHAMS C.J.—What about section 122 (3) ?]

It must be read with section 25 of the Evidence Ordinance. The document can be used only for the purposes mentioned in section 122.

It cannot be used as evidence as held in *Muthukumaraswami Pillai v. King Emperor*[1]. The primary object of that section is to get a record. The Indian Courts had held that oral evidence of the statement could be given. Section 145 of the Evidence Ordinance does not apply. If section 122 (3) of the Criminal Procedure Code was absent, the provisions of the Evidence Ordinance would apply. That section indicates that oral evidence could be given. The statement does not fall within section 91 of the Evidence Ordinance. It is relevant under section 8 of the Evidence Ordinance though its probative value may be very small. The effect of these sections was considered in *Baby Nona v. Johana Perera*[2]. It was held in *The King v. Gabriel*[3], that oral evidence could be given by the police officer. A deposition is on a different footing because it is read over and signed by the witness. Then it becomes his act. *Maxwell v. The Director of Public Prosecutions*[4] and the case of *Frederick v. Rodley*[5] were cited.

J. W. R. Ilangakoon, K.C., A.G. (with him *D. W. Fernando, C.C.*), in support of the application. The statement was used to impeach the prisoner's evidence. It was allowed under section 155 of the Evidence Ordinance. Section 25 prohibits the Crown using a confession against the interest of the accused. See *Gulab v. The Crown*[6]. There is no prohibition on the Counsel for the accused using it. A confession made to a person other than a police officer can be proved against the accused.

Prior to 1889 there was no special procedure for the investigation of crime though investigations were made under the Police Ordinance. From 1889 to 1896 power was given to the Presidents under the Village Communities Ordinance, 1889. By the Repression of Crime Ordinance, No. 15 of 1896, power was given to inquirers to investigate without administering an oath or affirmation. Then in 1908 the sections under review were added to the Criminal Procedure Code.

If there is other evidence to support the conviction, the Court has the power to order a retrial as held in *The King v. Pila*[7].

Cur. adv. vult.

March 15, 1939. ABRAHAMS C.J.—

In this case the Attorney-General acting under the provisions of section 355 (3) of the Criminal Procedure Code has submitted for our consideration two questions of law that arose on the joint trial of two prisoners who were charged (i.) with having committed murder, and (ii.) with having caused evidence of the commission of the offence of murder to disappear. The jury returned a unanimous verdict finding both prisoners guilty of murder. They were accordingly sentenced to death. No verdict was returned on the second count as Crown Counsel, according to the usual practice, informed the Jury that if they found the prisoners guilty on the first count he would not ask for a verdict on the second count.

It emerged during the course of the trial that the Police Sergeant who investigated the crime and took into custody the two accused who had already been arrested by the Arachchi, took down in writing a

[1] (1912) *I. L. R. 35 Madras 397.*
[2] (1937) *8 C. L. W. 65.*
(1937) *39 N. L. R. 38, at p. 42.*
[3] (1935) *A. C. 309, at p. 233.*
[4] (1913) *9 C. A. R. 69, at p. 76.*
[5] *A. I. R. (1923) Lahore 315.*
[6] (1912) *15 N. L. R. 453.*

statement made by the second accused. Presumably, in doing so, he acted under the provisions of section 122 (1) of the Criminal Procedure Code, though in disregard of the provisions of that section the signature of the second accused was affixed to the statement. The first accused at the trial did not give evidence or call any witnesses. The second accused gave evidence, and during the course of his examination-in-chief his Counsel asked him to state what he had told the Police Sergeant when he was taken into custody. Thereupon Soertsz J., who was the presiding Judge, pointed out to Counsel that when the Police Sergeant was in the witness-box giving evidence on behalf of the Crown, no attempt was made to elicit from him any statement made by the second accused taken down by him. The learned Judge said that, in those circumstances, any evidence given by that accused in regard to the statement taken down by the Sergeant would be secondary evidence and not the best evidence, and he requested Crown Counsel to give to the defending Counsel a copy of the statement recorded by the Sergeant so that he might, after perusing it, decide whether or not he should elicit the statement from his client.

After perusing the statement of the second accused, his Counsel desired to read only portions of it to the second accused and leave the other portions out. At that stage, the Proctor who represented the first accused indicated that it would not be fair merely to select portions of the statement because, if the whole of the statement was put in, the first accused could rely on it to show that the second accused must be treated as an accomplice in the murder. The learned Judge, therefore, ruled that Counsel should elect either to put the entire statement to the second accused or not question him at all on the contents of that statement. Counsel for the second accused, after consideration, elected to put to the second accused the entirety of the statement. The second accused admitted having made certain parts of the statement and denied the rest. Thereafter, the second accused was cross-examined both by the Proctor for the first accused and by Crown Counsel.

At the close of the defence, Crown Counsel moved to recall the Police Sergeant to show that the second accused had made a different statement to the Sergeant. The learned Judge permitted Crown Counsel to prove the whole of the statement, not, he said, as substantive evidence of any fact stated therein and denied by the accused, but solely for the purpose of impeaching his credit as a witness, and in his charge to the Jury the learned Judge gave an emphatic direction to them not to treat the portions of the statement said to have been made by the second accused to the Police Sergeant but not admitted by him at the trial, as substantive evidence against him, but to use them, if at all, to discredit him. He also directed them not to use the statement for any purpose at all as against the first accused. The questions submitted for our consideration by the Attorney-General are these :—

" (i.) Was Counsel for the second prisoner entitled to ask his client to state orally the statement made by him to the Police Sergeant, when it was in evidence that that statement was taken down in writing by the Sergeant and signed by the second prisoner, unless the document itself was put in evidence ?

(ii.) Was the statement of the second prisoner to the Police Sergeant which amounted to a direct confession that he was guilty of the charge relating to the disposal of the body of the deceased, and which also suggested the inference that he and the first prisoner were associated together in killing the deceased, rightly admitted in evidence for the purpose of impeaching the credit of the second prisoner ?"

Mr. H. V. Perera, K.C., who with Mr. J. R. Jayawardana was good enough to appear *pro Deo* on behalf of the accused dealt with these questions in the reverse order. In view of the decision which we are about to give, we shall deal with the second question only. Mr. Perera argued that the evidence of the Police Sergeant, placing before the Jury both portions of the statement of the second accused which amounted to a confession, was inadmissible for the reason that it violated the provisions of section 25 of the Evidence Ordinance which reads, "No confession made to a police officer shall be proved as against a person accused of any offence", and he contended that the fact that the second accused had himself given in evidence certain portions of that statement and denied the rest, had not justified the admission of the rest of the statement. We think it proper to say here that without giving any opinion upon the obligation or otherwise of the second accused to put before the Court his written statement, the correct course which should have been directed to be followed was not that the accused should give evidence of what he alleged that he told the Police Sergeant, which, in our opinion, is not sanctioned by any provisions of the law of evidence, but that he should have called the Police Sergeant and invited him, under the provisions of section 157 of the Evidence Ordinance, to corroborate his testimony. It may be that if that course had been taken, the difficulties that subsequently arose would have been avoided.

The learned Judge's justification for permitting the Police Sergeant to give evidence of the second accused's incriminatory statement is very concisely expressed in his summing-up. He says this, "Now ordinarily, a statement made by an accused person to a Police Sergeant or to any police officer and later denied by him, cannot be used as substantive evidence. This is what I mean. Suppose A has told a police officer : 'I struck B with a club'. He comes into Court and in the witness-box says : 'I was never near the place. I did not see B on this day at all. I did not strike him with a club'. Then the Crown is entitled to confront him in the witness-box with this statement which he has previously made : 'I struck B'. Then, suppose he denies that he made that statement to the Police Sergeant, and the Police Sergeant swears that he made that statement ; in those circumstances you cannot take that statement as a piece of substantive evidence. All that the evidence serves to do is to discredit the man as a worthless kind of witness, as a man who cannot be relied upon. In order to convict him you have got to look for independent evidence; in other words you cannot take this evidence, which the police officer swears the witness made to him and which the witness in the witness-box denies, as substantive evidence of the witness, because the evidence that applies in a Court of law is the evidence which the witness chooses to give upon oath or affirmation

and subject to cross-examination. That is quite clear law. You cannot make use of a statement made by a witness and subsequently denied by him as substantive evidence. Now, that is why I say a difficulty arises in this case as to how to regard this statement which has been brought into this case by the second prisoner himself and not brought into the case by way of being used to contradict the second prisoner in the box when he gave evidence. But, I think, out of an abundance of caution and in order to be as generous as possible towards the second prisoner, I would invite you not to treat that statement recorded by the Police Sergeant Fernando where portions of that statement have been impeached by the second prisoner—not to regard those impeached portions as substantive evidence of the prisoner, but you may use that statement for the purpose of saying: 'Well, we cannot pay much regard to this man when he says this or that because we find that he is shown to have said different things at different times'. You can use that to discredit him".

We must observe upon these remarks of the learned Judge that it is not accurate to say, "You cannot make use of a statement made by a witness and subsequently denied by him as substantive evidence", because had this confession been made to a person not a police officer it could manifestly have been used not to contradict but as substantive evidence of its truth and it is only because the confession was made to a police officer that there is a bar to its proof. The learned Judge appears if we may say so, to have endeavoured to identify a statement made by an accused person which is, if there is no statutory bar to its admission, admissible in evidence against the person making it, with a statement made by a witness in the case, which statement that witness subsequently denies and which, therefore, as the learned Judge properly says, can only be employed to show that the witness is unreliable because he is inconsistent. We are of the opinion that a confession made to a police officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself. The observations of the learned Judge would, if acceptable, compel us to treat section 25 of the Evidence Ordinance as if it read as follows:—

> "No confession made to a police officer shall be proof as against a person accused of any offence as substantive evidence, but any such confession may be admitted in evidence if the accused gives evidence in contradiction of such confession in order to impeach his credit by showing that he has made two contradictory statements and is therefore inconsistent".

We can find no warrant for expanding the terms of section 25 in this manner. It would obviously be dangerous to expect a Jury with a confession before them, no matter how much it was emphasized in the summing up that the confession must not be taken as true, not to draw the ordinary inference one draws from an admission of guilt that the person making such an admission is in fact guilty.

We are of the opinion that in view of the wrongful admission of a confession by the second accused, the Jury not only may have been, but very probably were, influenced against both of the accused, considering what the terms of that confession were. That in such circumstances

the conviction cannot stand is obvious. The question then is what other order we should make in addition to quashing the conviction. As regards the second accused, we think that he is entitled to be acquitted for there was very little against him beyond the confession as regards the charge of murder. As regards the first accused, however, there was a considerable volume of evidence direct and circumstantial against him upon which, had it not been for the confession of the second accused, the Jury might well have convicted. As we have only the dry bones of the case in front of us, so to speak, we cannot say what impression the witnesses made on the Jury. Under section 355 (3) of the Code, under which we are acting, we may reverse, affirm or amend the judgment or make such other order as justice may require, and this wide power has been held to include the power to direct a new trial in a proper case, see *The King v. Pila*[1]. We think then that in view of the volume of evidence referred to above, the charge of murder against the first accused should be tried out and we direct a new trial accordingly to take place before another Judge and a different Jury. The accused will be remanded to the custody of the Fiscal for that purpose.

HEARNE J.—I agree.

KEUNEMAN J.—I agree.