[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Howard C.J., Moseley and Keuneman JJ.**

## THE KING *v.* NADARAJAH.

*15—M. C. Jaffna, 17,593.*

*Statement by accused in the course of Police investigation—Use of statement to contradict accused—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, ss. 145 and 155.*

A statement made by an accused person in the course of an investigation under Chapter XII. of the Criminal Procedure Code may be used to contradict him under section 122 (3).

If the statement was not made under Chapter XII. it is admissible under sections 145 and 155 of the Evidence Ordinance.

*The King v. Emanis (42 N. L. R. 166)* followed.

CASE heard before a Judge and Jury at the 1st Northern Circuit.

*C. Suntheralingam,* for accused, appellant, who is also applicant in the application.

*E. H. T. Gunasekera, C.C.,* for the Crown.

*Cur. adv. vult.*

May 11, 1942. HOWARD C.J.—

This case involves an appeal on grounds of law and an application for leave to appeal on grounds involving questions of fact or of mixed law and fact or on any other grounds under section 4 (*b*) of the Court of Criminal Appeal Ordinance. The grounds on which the application for leave to appeal is based are not of any substance and in these circumstances do not call for comment. The first ground of appeal based on law maintains that the verdict of the Jury was unreasonable and cannot be supported by the evidence, especially as the second accused was acquitted on the same evidence. The case against the second accused was not that he used a weapon against the injured man, but that he held the latter whilst the appellant stabbed him. It cannot, therefore, be urged that the second accused was acquitted on the same evidence. Nor, in view of the volume of evidence supplied by eye-witnesses as to what took place, can the verdict of the Jury be regarded as unreasonable. This ground of appeal has no substance.

The second ground of appeal complains that the learned Judge did not give in regard to the facts of this case an adequate explanation of the exercise of the right of private defence. It is true that the explanation given by the learned Judge of this right is not as comprehensive as it might have been. In particular, it dealt with the right of a person to defend himself when attacked, but omitted all mention of the exercise of the right to come to the aid of another person who is attacked. It was in reference to such a right that the alternative defence of the appellant was based. On the other hand, it seems to us that the omission of the learned Judge to deal with such a right was of no consequence. In fact, it was supererogatory on his part to invite the Jury to give consideration to a plea based on the exercise of the right of private defence.

It is true, as was held in *The King v. Bellana Vitanage Eddin*[1] *and The King v. Vidanalage Lanty*[2], that the fact that a defence had not been raised nor relied upon at the trial was not in itself sufficient to relieve the Judge of the duty of putting this alternative to the Jury, "if there was any basis for such a finding in the evidence in the record". In this case we think there is no basis for a finding on the evidence that the appellant in stabbing the injured man was exercising the right of defending Ramanathan. Neither the appellant nor his witnesses so testified. nor did such evidence merge from the testimony of those who gave evidence for the Crown. This ground of appeal therefore fails.

The only other ground of appeal was based on the contention that the statement made by the appellant to Sergeant P. K. Narayanapillai should not have been admitted in evidence. This statement was admitted under the provisions of section 122 (3) of the Criminal Procedure Code "to prove that a witness made a different statement at a different time". Counsel for the appellant contended that this provision did not apply inasmuch as the accused had been charged when the statement was made and hence any investigation undertaken by the Police under Chapter XII. of the Criminal Procedure Code had come to an end. If section 122 (3) did not apply, the statement was not, so he contended, admissible under any other provision of the law. If, on the other hand, the investigation by the Police was not concluded and section 122 (3) did apply, he maintained that "witness" in that section did not include an accused person. In this connection he referred us to the case of *Baby Nona v. Johana Perera*[3]. In that case, Soertsz J. decided *inter alia*, that the word "witness" in section 122 (3) of the Criminal Procedure Code must be strictly construed as meaning a witness pure and simple and does not include an accused person who testifies on his own behalf. Our attention was also invited to the other decisions, namely, *The King v. Emanis*[4] and *The King v. Ahamadu Ismail*[5], where in each case it was held that a statement made by an accused person in the course of an investigation under section 122 (3) of the Criminal Procedure Code may be used to contradict him, provided the statement is not a confession within the meaning of section 25 of the Evidence Ordinance. In deciding whether the law is as formulated in these two cases or by Soertsz J., in the earlier case, we have taken into consideration section 120 (*b*) of the Evidence Ordinance, which provides that an accused person may give evidence in the same manner and with the like effect and consequences as any other witness. The case to which I have referred was decided by Soertsz J. without argument. It may be that at the time he was unmindful of this provision of the Evidence Ordinance. Moreover, his *dictum* on this point was *obiter* inasmuch as the statement in question was a confession and therefore inadmissible under section 25 of the Evidence Ordinance. We think the two later cases correctly interpreted the law and a statement if made in the course of a Police investigation under Chapter XII. of the Criminal Procedure Code, is

[1] *41 N. L. R. 345*
[2] *42 N. L. R. 317*
[3] *8 C.L. W. 65*
[4] *42 N. L. R. 126*
[5] *42 N. L. R. 297*

admissible under section 122 (3). If not made under this Chapter, we think it is still admissible under sections 145 and 155 of the Evidence Ordinance. This ground of appeal also fails.

We think it only right to say that even if the appeal had been based on weightier grounds we should, having regard to the verdict of the Jury, have felt constrained to apply the proviso to section 5 (1) of the Criminal Appeal Ordinance and to dismiss the appeal as no substantial injustice had actually occurred.

For the reasons given, the appeal and application are dismissed.

*Appeal and application dismissed.*