[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* TENNAKONE MUDIYANSELAGE APPUHAMY

Appeal 123 of 1958, with Application 159

S. C. 35—M. C. Chilaw, 16,857

Evidence—Information received by police officer from accused—How much of it may be proved—Mode of proving it—" Fact "—Is a person a " fact " ?—Confession induced by the use of violence or threats of violence—Inadmissibility—Discovery of evidence—Unlawful methods should not be resorted to—Evidence Ordinance (Cap. 11), ss. 3, 25, 26, 27, 161—Criminal Procedure Code, ss. 122, 123, 133, 134.

Practice—Evidence for defence—Requirement that accused should be called before any of his witnesses.

Section 27 (1) of the Evidence Ordinance reads as follows :—

" 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. "

Held, (i) that the discovery of a witness is not the discovery of a fact within the meaning of the section. A person is not a " fact " within the meaning of that word in section 3 of the Evidence Ordinance. It is only when a " fact " has been discovered in consequence of information given by an accused person and when a witness has given evidence to that effect that so much of such information as relates distinctly to the fact thereby discovered may be proved.

Rex v. Sudahamma (1924) 26 N. L. R. 220, not followed.

(ii) that if a police officer acts contrary to section 123 of the Criminal Procedure Code and forces an accused person, by the use of violence or threats of violence, to make statements which are not his own, but the contents of which have been put into his mouth, such statements will not fall within the meaning of the word " information " in section 27 of the Evidence Ordinance.

(iii) that if a statement admissible under section 27 (1) of the Evidence Ordinance is being used to refresh the memory of a witness who recorded it, the fact should be made clear so that the adverse party may exercise the right conferred on him by section 161.

Observations on the methods of torture and violence resorted to by the Police in the present case for the purpose of discovering evidence against persons suspected of having committed the burglary.

An accused who is detained in Police custody cannot in law be forced to go from place to place and help the Police to discover evidence against him.

Persons examined under section 122 of the Criminal Procedure Code must not be made to sign their statements.

When the accused and his witnesses are called for the defence, the accused ought to give his evidence before he has heard the evidence and cross-examination of his witnesses.

2——J. N. B 13082—1,593 (4/59).

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

Colvin R. de Silva, with *M. L. de Silva*, for Accused-Appellant.

A. C. Alles, Deputy Solicitor-General, with *P. Colin Thome*, Crown Counsel, for Attorney-General.

Cur. adv. vult.

February 27, 1959. BASNAYAKE, C.J.—

The appellant Tennakone Mudiyanselage Appuhamy (hereinafter referred to as the appellant) and another, Ratnayake Rajapakse Mudiyanselage Weerasekera (hereinafter referred to as Weerasekera), were indicted on charges of house-breaking by night by entering the office of the Uturu Pitigal Korale Co-operative Union, Chilaw (hereinafter referred to as the Union), with intent to commit theft and committing theft of cash, cheques and money orders to the value of Rs. 48,607/02, property in the possession of K. M. D. Rajapakse, its Cashier.

After the jury had been empanelled but before Crown Counsel commenced his opening address, learned counsel for the prisoners expressed his desire to make a submission to the learned Commissioner in the absence of the jury. He invited him to give his ruling in regard to the admissibility of a document P46—a statement made by Weerasekera to the Magistrate and recorded under section 134 of the Criminal Procedure Code. His submission was that the statement was false and made under duress.

In that statement Weerasekera confessed his complicity in the crime and gave the following account of how he along with the appellant, Y. H. Piyadasa, Wijesinghe, and a man whom he did not know (who shall for convenience be referrd to as " the unknown man ") went to the store in a car on the night of 1st July 1956. The appellant and the unknown man broke the padlocks and opened the front door, the unknown man unlocking it with a key. Wijesinghe remained on the road while the others entered the building. Weerasekera held a torch while the appellant opened the inner room and also the safe with keys he had with him. The contents of the safe were emptied by the appellant into a gunny bag held by the unknown man. Thereafter they went with the booty to the appellant's house in Nattandiya in the car in which they came. Weerasekera was told that his share was Rs. 4,700 but he actually received Rs. 700 out of which he settled a debt of Rs. 400 which he owed one Leon Singho and deposited Rs. 300 in the Bank of Ceylon Branch at Chilaw. He added that the appellant was wearing gloves when he opened the door and the safe.

Learned Crown Counsel sought to establish, by calling the Magistrate who recorded the statement to give evidence, that Weerasekera made the statement voluntarily. The Magistrate was cross-examined by counsel for the defence. Counsel for the defence called Weerasekera to give evidence to prove that he was coerced by violence and threats to make the

confessionary statement which was false. Learned counsel for the defence also called three other witnesses, Peter Perera who was the Administrative Secretary of the Union at the relevant date, Charles Wijesinghe, Hotel Proprietor and business partner of the appellant, and Dr. Andrew Fonseka, District Medical Officer of Chilaw in July 1956. All these witnesses were cross-examined by the Crown.

Weerasekera and the other witnesses described how they were severely assaulted, harassed and humiliated by Inspector Egodapitiya in an attempt to make them confess that they committed the crime. The doctor described the injuries on Weerasekera, the appellant, and Wijesinghe, and stated that each of them was in hospital for three days.

After hearing this evidence the learned Commissioner formed the conclusion that the confessionary statement was not made "voluntarily". On the uncontradicted evidence before him the learned Commissioner quite properly rejected the confessionary statement. It is noteworthy that although grave allegations of the use of violence and third degree methods were made against Inspector Egodapitiya he was not called by the Crown to contradict them. Learned Crown Counsel then stated: "In view of Your Lordship's ruling that the entirety of the confession is inadmissible and that the confession amounts to the whole of the evidence against the 2nd accused, I move to withdraw the indictment against the 2nd accused." The learned Commissioner allowed this application and discharged Weerasekera.

Crown Counsel next made his opening address and the trial against the appellant proceeded. The jury found the appellant guilty on both charges and he was sentenced to a term of seven years' rigorous imprisonment on the 1st charge and to a term of five years' rigorous imprisonment on the 2nd charge, the sentences to run concurrently. This appeal is against that conviction. The grounds of appeal urged are—

(1) That the verdict is unreasonable and cannot be supported having regard to the evidence.

(2) That confessionary material of a gravely prejudicial character was illegally admitted in evidence resulting in a miscarriage of justice.

(3) That there is no proof that the prints compared by the Registrar of Finger Prints with the prints found on the safe were the prints of the accused which were taken in court by Sergeant Daniel on the 13th of July 1956.

(4) That the learned trial Judge should have directed the jury that there was no evidence in the case which would entitle the jury to hold that the accused disposed of Rs. 4,100 on the 3rd of July 1956, and that the failure to do so resulted in prejudice to the accused which led to a miscarriage of justice.

It is convenient at this point to state briefly the relevant facts which are as follows: Early on the morning of Tuesday, 3rd July 1956, when Alphonso Fernando, peon of the Union, went to open the door of the office he found that the front door had been forced open. He immediately proceeded to the house of the Administrative Secretary, Peter Perera,

and informed him. He directed the peon to inform the Cashier, Danasena Rajapakse. Rajapakse met Peter Perera on his way to the office and together they went to the Police Station and came there along with the Police. On arrival they found that the iron bar and the padlocks of the front door were missing. Some of the hasps were also missing. The staples had been wrenched off and one was on the ground. The front door was ajar, the door leading to the room which contained the safe was also ajar, and the safe itself was partly open. Inspector Egodapitiya immediately sealed the building and informed the Finger Print Bureau, and two officers from the Bureau, Sub-Inspector Edwin Michael Fernando and Police Sergeant Hegoda, examined the safe, and the latter photographed some latent finger and palm impressions on the safe which the former developed by the application of a chemical powder.

The Cashier and the Administrative Secretary were taken into custody as suspects and produced before the Magistrate on 4th July 1956. They were remanded till 3 p.m. the next day and were again remanded till 9th July. On that day they were allowed bail in Rs. 2,500 each, and further proceedings were put off till 26th July. Inspector Miskin arrested the appellant and Weerasekera on 12th July at 10.30 a.m. at the District Court premises. He produced them before the Magistrate on the next day at about 1 p.m. and moved that they be ordered to give their finger and palm impressions, and order was made accordingly. The Magistrate also directed that the report of the Finger Print Expert be furnished on 26th July. The appellant was represented by counsel who brought to the notice of the Magistrate that his finger and palm impressions had already been taken at the Police Station and that he was also assaulted by the Police. The learned Magistrate does not appear to have taken any notice of this complaint. In a predicament such as that in which the appellant and Weerasekera were placed there was no one to whom they could complain except the Magistrate and it is regrettable that their allegations passed unheeded.

Bail in Rs. 5,000 each was ordered in respect of them and they were bailed out on 16th July. The appellant and Weerasekera were at their request taken by the Fiscal to the Chilaw Hospital that very day. On 26th July on the motion of the Police the Cashier and the Administrative Secretary were discharged. The case was then fixed for 9th August and on that day put off for 19th October, as the inquiries were not complete. The inquiry was again put off for 8th November and on that day, more than four months after the commission of the crime, a report under section 148 (1) (*b*) of the Criminal Procedure Code was filed, charging the appellant, Weerasekera, R. M. Jinadasa and Y. H. Piyadasa with the offences of house-breaking and theft. This long delay in instituting proceedings against the appellant and the other accused remains unexplained. At the end of the inquiry on 21st September 1957, more than fourteen months after the date of the offence, the Magistrate discharged Jinadasa and Piyadasa, and committed the appellant and Weerasekera for trial to the Supreme Court. From the very outset of the proceedings counsel for the appellant and Weerasekera charged the Police with using violence on them and Inspector Egodapitiya was accused in particular.

Objection was also taken to his leading evidence for the prosecution. On 15th March 1958, more than one year and eight months after the date of the offence, the appellant and the other accused were indicted. It is not in the interests of justice that such a long time should elapse between the date of the offence and the indictment of the accused. Instances of delay are becoming far too common and those in charge of prosecutions should give serious attention to the causes of such delay and take early steps to remove them. The trial, which commenced on 23rd September 1958, lasted seven days.

The evidence tendered against the appellant falls into the following categories :—

(*a*) Evidence of identity of two finger and two palm impressions of the appellant on the iron safe of the Union Office.

(*b*) Evidence that Daniel the goldsmith turned out in lead the tongue portion of what resembled the key of a safe according to a pattern provided by the appellant.

(*c*) Evidence that David the blacksmith turned out three door keys of iron according to impressions on soap supplied by the appellant and a steel key according to a specimen in lead also supplied by the appellant.

(*d*) Evidence that a few days after the burglary the appellant paid off a mortgage debt of Rs. 1,500 and gave a loan of Rs. 1,600 to one Podiappuhamy.

(*e*) Evidence that the appellant gave a sum of Rs. 1,000 to Rev. Pragnakeerti.

The appellant himself gave evidence denying the charges and called six witnesses including the Magistrate. The evidence for the defence consisted mainly of the atrocious treatment meted out not only to the appellant but to all other persons who were from time to time suspected of having committed this burglary. The persons who complained on oath of the use of violence, torture, and the most humiliating treatment by Inspector Egodapitiya are the appellant, Weerasekera the discharged accused, Peter Perera the Administrative Secretary of the Union who was at one time an accused, and Wijesinghe a businessman of Nattandiya and a partner of the appellant in the business of Ratnasiri Hotel in Chilaw. The District Medical Officer who examined Wijesinghe, Weerasekera, and the appellant at the Hospital where they sought treatment also gave evidence of the injuries he found on them.

Of the grounds of appeal the second, which is the most important, will be dealt with first. The Crown proved through Inspector Egodapitiya the following statements made by the appellant to him and recorded by him :—

" (*a*) I went to Daniel Baas the goldsmith and got him to pour lead on to the impressions and got the key.

(*b*) I kept Rs. 3,100 with Appuhamy of Pillakalamulla and I gave Rs. 1,000 to Rev. Pragnakirti Thero of Nigrodaramaya Temple of Nattandiya. "

These statements were admitted by the learned Commissioner under section 27 of the Evidence Ordinance. That section reads :

" (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. "

In admitting the statements set out above the learned Commissioner said that he was satisfied on the evidence placed before him in connexion with the confession of Weerasekera that the statement made by the appellant to the Police was not a voluntary statement but had been induced by Inspector Egodapitiya under duress as a result of an assault or threat of an assault. The learned Commissioner took the view that the fact that the information had been forced out of the appellant by the use of violence on him did not preclude the Crown from proving it under section 27. He also held that the facts discovered in consequence of the information were the witnesses Daniel the goldsmith, Podiappuhamy and Rev. Pragnakeerti.

We are unable to uphold the learned Commissioner's view. According to the prosecution the facts discovered were the witnesses. Is a person a " fact " ? We think not. The expression " fact " as used in the Evidence Ordinance—

" means and includes—

(*a*) anything, state of things, or relation of things capable of being perceived by the senses ;

(*b*) any mental condition of which any person is conscious. " (s. 3)

The tracing of the witnesses is not a fact within the above definition ; because it is their evidence and not their existence that is relevant. Did Egodapitiya " discover " Daniel the goldsmith ? The evidence of Egodapitiya on the point negatives such a conclusion. This is his evidence :—

" 2692. Q : The next place you visited that night was the house of one Daniel the goldsmith ?

A : Yes.

2693. Q : Which place you reached at 9.17 p.m.

A : Yes.

2694. Q : You had not even questioned this man Daniel earlier ?

A : Yes, that was the first time in fact that I saw him.

To Court : 2695. Q : Who took you to Daniel ?

A : This accused.

Examination continued—

2696. Q : Would it be correct to say that it was on the accused's directions that you went to Daniel ?

A : Yes. "

It is only when a " fact " has been discovered in consequence of information given by an accused person and when a witness has given evidence to that effect that so much of such information as relates distinctly to the fact thereby discovered may be proved. In the case of *Rex v. Sudahamma*[1], which the learned Commissioner followed, it was held by Jayawardene A. J. that the discovery of a witness was the discovery of a " fact " and that the circumstance that the discovery was made not in consequence of information given by the accused but by the accused himself does not make section 27 inapplicable. We are unable to agree with that view. The report does not show that either the definition of " fact " or the distinction between the existence of a person and the evidence he can give was considered. The section, which enables the proof of even a confession made by an accused person while in the custody of a Police Officer, is an exception to the rule enacted by sections 25 and 26 which forbids the proof of confessions made by any person to a Police Officer or while he is in the custody of a Police Officer, and must be strictly confined to the case provided therein.

The next question is whether information forced out of an accused person by the use of violence is the kind of information contemplated in section 27. We think not. The Legislature does not enact laws on the assumption that the guardians of the law will themselves break them. When construing a legislative instrument regard must therefore be had to this fundamental assumption. Section 123 of the Criminal Procedure Code provides :

> " No inquirer or police officer shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement with reference to the charge against such person. But no inquirer or police officer shall prevent or discourage by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will. "

The investigation under Chapter XII must not therefore be tainted by statements illegally forced out of persons be they accused or be they not. Similar protection is provided against confessions being extracted by peace officers and persons in authority by section 133 of the Criminal Procedure Code which provides :

> " Except as provided in Chapter XXII no peace officer or person in authority shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement having reference to the charge against such person. But no peace officer or other person shall prevent or discourage by any caution or otherwise any person from making any statement which he may be disposed to make of his own free will. "

The Evidence Ordinance further protects an accused person by forbidding the proof of a confession even when made of his own free will to a Police

[1] *(1924) 26 N. L. R. 220.*

Officer (s. 25) or when in the custody of a Police Officer except in the immediate presence of a Magistrate. If a Police Officer acts contrary to section 123 of the Criminal Procedure Code and forces an accused person by the use of violence or threats of violence to make statements which are not his own, but the contents of which have been put into his mouth, such statements will not fall within the plain meaning of the word " information " in section 27 of the Evidence Ordinance.

The entire scheme of our Criminal Procedure Code and the Evidence Ordinance is against the admission in evidence of confessions induced by the use of violence or threats of violence. In this respect our law, though enacted in the form of Codes, is in accord with the law obtaining in most advanced countries and gives expression to the same principles. *Nihil consensui tam contrarium est quam vis atque metus* (nothing is so destructive of consent as force and fear) is a maxim applicable alike in civil and criminal law. In this connexion it will not be out of place to quote the admirable statement on the subject of forced confessions in Wigmore on Evidence, which though made in relation to the laws of England and America is applicable to our country. (s. 833 Vol. III p. 267)—

> " A threat of corporal violence is the clearest case of an inducement that excludes the confession. To escape the disagreeable consequences of silence—whip, gallows, or rack—the threatened person naturally prefers to utter what his tormentors desire to hear—a confession. He trusts to chance to enable him to repudiate his untrue avowal and vindicate his innocence ; or perhaps, under the violent pain of the rack, he thinks of nothing but the present relief from agony which his confession will gain him. Not every threat of violence, to be sure, is necessarily sufficient to cause distrust of the confession which follows it ; ' I shall put you out of my house unless you confess yourself guilty of this murder ' has obviously no tendency to cause a false confession. But the typical cases of such violence in legal annals—the rack of the inquisitor, the whip of the slave-owner, and the slipnoose of the jail-breaking mob—serve as the clearest and least questionable instances of an inducement which vitiates a confession for evidential purposes.
>
> " That a confession obtained by the rack, or a threat of the rack, is inadmissible was apparently never judicially decided ; that it would be inadmissible is of course unquestioned to-day. Confessions obtained from slaves under the whip, or a threat of the whip, have usually been excluded, upon the circumstances of the case presented. Confessions made in fear of a mob are usually made under circumstances calculated to educe a false confession ; and in almost all the instances brought before the Courts they have been excluded, usually with propriety upon the facts of the case. Other forms of violence or physical intimidation seem to be rare ; except in certain communities where the police administration has degraded itself by crude methods. "

In the instant case we cannot escape the conclusion that, on the evidence which the learned Commissioner has accepted and with whose conclusions

we have no reason to disagree, " the police administration has degraded itself by crude methods. "

Apart from the fact that the statements do not fall within the ambit of section 27 the way in which they were produced in evidence is open to serious objection. The witness did not pretend to remember the very statements recorded as having been made by the appellant. It would appear from the examination-in-chief that they were read out to him by Crown Counsel who had a copy of the written statement before him. This is how the evidence reads in respect of Daniel—

" 2705. Q: Earlier in the afternoon you recorded the statement of the accused at the Police Station ?

A: Yes.

2706. Q: The accused in that statement made a reference to Daniel Baas ?

A: Yes.

2707. Q: In that statement half way down had the accused told you this: 'I went to Daniel Baas the goldsmith and got him to pour lead on to the impressions and get the key' ?

A: Yes. "

and this is how it runs in regard to Podiappuhamy—

" 2735. Q: Did you go to the house of Podiappuhamy on your own or were you taken there ? On whose information did you discover that Podiappuhamy was a witness ?

A: On the statement of the accused.

2736. Q: In that statement you had recorded of the accused at the Police Station did he tell you, 'I kept Rs. 3,000 with Appuhamy of Pitakatuwella' ?

A: Yes, I was taken to the house of this witness by the accused. "

The following is the evidence in regard to the other witness Rev. Pragnakeerti :—

" 2748. Q: Did you go to that temple and question the priest on any information you received ?

A: Yes.

2749. Q: From whom did you receive that information ?

A: That was also on the statement made by this accused that I went there.

2750. Q: And you discovered the priest was a witness ?

A: Yes.

2751. Q: That is the witness Ratnakirthi Thero ?

A: Yes.

2752. Q : And in the course of the accused's statement at the Police Station did the accused tell you, ' I gave Rs. 1,000 to Revd. Pragnakeerti Thero of Nigrodaramaya Temple of Nattandiya ' ?

A : Yes. "

It would appear from the questions and answers quoted above that learned Crown Counsel, with the written statement before him, virtually made the jury aware of various parts of it. If the statement was being used to refresh the memory of the witness that should have been made clear so that the adverse party may exercise the right conferred on it by section 161. The right conferred by that section is a valuable right and an accused person must not be denied its benefit by the adoption of a course not warranted by law. In the instant case the written statement itself could not be used except for the purpose of contradicting the appellant (if such a course became necessary) or refreshing the memory of the person recording it. The course adopted by learned Crown Counsel deprived the accused of the benefit of that section. If Crown Counsel was relying on *Rex v. Jinadasa*[1] for the step he took he was clearly mistaken.

The third ground of appeal is that there is no proof that the appellant's finger and palm impressions taken in court were the impressions examined by the Registrar of Finger Prints. The evidence of the Registrar of Finger Prints on this point is given in answer to a leading question :

" 2331. Q : Subsequently on the 13th July 1956 you received from the Magistrate's Court, Chilaw, by Registered Post certain finger and palm prints taken in the Magistrate's Court, Chilaw, by Police Sergeant Daniel ?

A : Yes, P. S. No. 2098 Daniel. "

But Police Sergeant Daniel does not say that he despatched the finger and palm impressions taken by him by registered post. He only says, " Subsequently these prints were sent to the Registrar of Finger Prints. " He does not say by whom, how or when they were sent. The prosecution should have proved by definite evidence that the finger and palm impressions taken by Police Sergeant Daniel were the very finger and palm impressions examined by the Registrar, especially as, on Egodapitiya's own admission, the appellant's finger and palm impressions were taken before he was produced in the Magistrate's Court. Those finger and palm impressions were sent by special motor-cycle orderly to Colombo almost immediately after they were taken on 12th July. They were handed by Police Constable Latiff to Assistant Superintendent of Police Thalayasingham at 4.40 p.m. on that very day.

This act of Egodapitiya in taking the appellant's finger and palm impressions and despatching them to the Registrar of Finger Prints even before the appellant was taken to the Magistrate and thereafter applying to the Magistrate for an order on the accused that they should furnish their finger and palm impressions is perplexing. What was the

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

need for another set of finger and palm impressions of the accused persons after a set had already been despatched to the Registrar of Finger Prints ? The conduct of the Police in regard to the finger and palm impressions makes it necessary to approach the finger-print evidence with suspicion.

The appellant explains in his evidence how his finger impressions could have got on to the safe. Rajapakse the Cashier was a friend of his who stayed at his hotel every Monday. The appellant used to go to the Union Office to obtain change and on occasion to meet the Cashier. On those occasions he would stand by the safe. On the day on which the burglary was discovered Rajapakse, when asked who were the persons who came to the office frequently, named the appellant and three others. The appellant says in his evidence that the last occasion on which he went to the Union Office was on the Saturday immediately preceding the burglary. The existence of the appellant's finger impressions on the safe is therefore not inconsistent with his innocence. It was sought to establish that the finger and palm impressions were fresh and thereby tilt the scales against the appellant. The witness Inspector Fernando who gave this evidence was not put forward by the prosecution as an expert. He has admitted that a latent finger impression may remain fresh and decipherable even after a month or two. The prosecution having failed to exclude the possibility of the finger impressions having come there innocently cannot be said to have established that their presence on the safe proves that the appellant was the thief.

In regard to the last ground there is no substance in it. The learned Commissioner has expressly stated in his address to the jury—

> " There is no evidence that that particular money stolen from the Co-operative Union has been paid to Podiappuhamy or the priest ; "

The first ground of appeal that the verdict is unreasonable or is unsupported by the evidence need not be discussed except in passing in view of the conclusion we have formed on the second ground that the statements (*a*) and (*b*) said to have been made by the appellant have been wrongly admitted. We have next to consider whether the evidence improperly admitted vitiates the conviction. If so whether we should quash the conviction and enter an order of acquittal or order a new trial. We are of opinion that the evidence improperly admitted is fatal to the conviction and that we should quash the conviction and not order a new trial as the entire case has been tainted by the illegal conduct of the Police, especially of Inspector Egodapitiya.

In view of David's expression of fear of the Police we cannot confidently approach his evidence as the evidence of a witness who regards himself as free to speak the truth. Nor can we approach the evidence of Daniel the goldsmith with the conviction that it was uninfluenced by the Police. Daniel says he turned out in lead a key like the genuine safe key P1A on Egodapitiya's order, which the Inspector took away with him. Egodapitiya denies it. A lead key similar to the one Daniel says he made for the appellant was fished out of a pool of water in

David's smithy by Sub-Inspector Kodituwakku shortly after midnight on 11th July. Was this the key Daniel made for Egodapitiya or was it the key he says he made for the appellant ? The prosecution claims that it is the specimen Daniel made for the appellant ; but the circumstances surrounding its discovery make that evidence highly suspicious. Besides there is a serious discrepancy between Daniel's evidence and that of David in regard to the lead specimen ; according to David it was brought to him many days before Daniel says he made it. In addition to the taint of illegal conduct of the Police the above infirmities in the crucial evidence and the suspicion that shrouds the finger-print evidence convince us that the ends of justice will not be served by a new trial. We therefore quash the conviction and direct that a judgment of acquittal be entered.

Before we part with this judgment we must refer to the most disturbing feature of this case. The appellant and Weerasekera were arrested by Inspector Miskin in the premises of the District Court of Chilaw at about 10.30 a.m. on 12th July, within 20 or 30 yards of the Magistrate's Court, at a time when the Magistrate was on the Bench. But they were taken to the Police Station and produced in court only the next day at about 1 p.m. This is a studied disregard of the provisions of sections 36 and 37 of the Criminal Procedure Code (which the Police undoubtedly knew)—provisions which are designed to protect the citizen against detention in custody without a judicial order in that behalf. They read—

> " 36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.
>
> " 37. No peace officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate. "

Officers whose duty it is to enforce the law should themselves abide by the law. It is not by such conduct that respect for law is fostered. What happened later, according to the appellant and Weerasekera, makes matters worse. The appellant's story is that no sooner than they were taken to the Police Station the appellant's and Weerasekera's finger and palm impressions were taken, a thing which the Police had no power to do except with their consent. The appellant was next taken to Inspector Egodapitiya's room. The door was closed and he was alone with him. Then Egodapitiya addressed him roughly and in disparaging terms, " You fellow, are you the legal man ! ", and struck him on his back. He was then assaulted and kicked. After the battery was over he was asked to strip himself naked. He was then ordered to insert his genitals into a drawer which was slightly open. When the appellant refused to do so Inspector Egodapitiya got hold of them and forced them into the drawer and pushed the drawer in. Then he ordered Sergeant Sally to bring a needle and while Sally held the drawer tightly Inspector

Egodapitiya inserted the needle under the appellant's finger nails. He was then released and next made to crawl on all fours under Egodapitiya's table and under his chair for about an hour. At 4 p.m. he was taken to another room and Weerasekera was brought into the room. He was rudely questioned on a number of matters and then seized by the waist and severely shaken and threatened with violence. He was next ordered to remove his sarong. When he protested and said that he had not worn any underwear Egodapitiya said, "That is what I like. It is good you have come without the underwear to-day. Pull out your sarong." After he had carried out the order he was forced to insert his penis into the drawer of Egodapitiya's table which was slightly open. Egodapitiya then kept on pressing the drawer little by little causing him excruciating pain till he almost fainted. Thereafter he was removed to another room where he remained till 7 p.m. when he was taken away in a jeep with the appellant. They were driven to an estate about 2½ miles from Chilaw. At the estate after they alighted Weerasekera was first taken away to a shed, stripped, and tortured. His legs were tied with one end of a long rope. The other end was thrown over a beam in the shed. Two Police Officers held him by his waist and lifted him while the other end of the rope was pulled till he was hanging by his legs. Then while he was in that position the mouth of a gunny bag which contained a pot of red hot charcoal into which chilli powder had been put was held to his face till he cried in agony and later became unconscious. Next the appellant was tortured. He was stripped, and made to hold his ears with his crossed hands and squat and stand up about 50 times. Whenever he stopped he was dug in his ribs or struck with a coconut stalk. Then he was made to lie on the ground and chilli powder was applied on his testicles and penis. The appellant being a heavier man than Weerasekera, they decided not to suspend him by his legs as the rope they had did not seem strong enough. Instead they forced him to insert his head into a gunny bag which contained an earthen pot of burning charcoal, into which chilli powder had been put. His appeals for mercy only brought threats of much worse treatment. Egodapitiya threatened, "I shall not kill you but what was done to John Silva will be done to you before dawn if money is not given." Next they were driven the whole night long from place to place without food or drink. Weerasekera led them to the house of his employer and to one Leon Singho's. The appellant led the Police to his house, the house of Daniel the goldsmith, the house of David the blacksmith, the house of Podiappuhamy, and the temple of Rev. Pragnakeerti. It was past 4 a.m. by the time they got to the last place. Inspector Egodapitiya with the accompanying Police Officers, the appellant, and Weerasekera, returned to the Chilaw Police Station at about 6 a.m. on 13th July. Egodapitiya went to his quarters to sleep leaving instructions that the appellant and Weerasekera be produced before the Magistrate, but it was not till about 1 p.m. that they were produced before him.

The stories of Peter Perera and Wijesinghe were equally harrowing. Apart from being assaulted with fists, they each testified to the fact that they were ordered by Egodapitiya to remove their clothes, their protests notwithstanding, and their private parts were subjected to terrifying acts of cruelty. In the case of Wijesinghe, Egodapitiya got him

to place his penis on the edge of his table and struck it with the narrow side of a cricket bat till he bled. In the case of Peter Perera he was asked to place his testicles on the top edge of the back of a chair and Egodapitiya attempted to strike them with a baton. When he failed owing to the fear-stricken victim wincing each time the blow came down he inserted the baton between his thighs and kept on striking his testicles. The tortures inflicted on the suspects at the Police Station had got abroad and had caused terror to those who heard of them as is shown by a letter written to his master on 17th July 1956 by one of the discharged accused Y. H. Piyadasa in which he said : " How can I appear when I have heard all that had happened to those who were arrested. "

The condition of the appellant when he was produced in court and the prompt complaint made by his counsel to the Magistrate support his story. The Magistrate himself noticed that he was tired and exhausted and he felt he was going to faint and ordered the Fiscal to give him a glass of water and gave him a chair to sit on. Against the evidence of the appellant, Weerasekera, Wijesinghe and Peter Perera there is the bare denial of Egodapitiya.

Eogdapitiya admitted that he took the appellant from place to place throughout the night of the 12th-13th July. His action is illegal and is deserving of the severest censure. An accused who is detained in Police custody cannot in law be forced to go from place to place and help the Police to discover evidence against him. What aggravates the illegal conduct of Egodapitiya in especial and the Police in general in this case is that it now appears that the Police, without producing them before the Magistrate on that day, as they were in law bound to do, detained them for the express purpose of coercing them to provide evidence against them. We know of no other case in which such grave allegations have been made by so many responsible men on oath in the Supreme Court against a Police Officer. All these are persons of good character and men of means and good standing in the society to which they belong. The appellant is the manager of a large store in Nattandiya and is the trusted servant of its proprietor. He is also a half-share holder of one of the leading hotels in Chilaw. He also owns two lorries and a Car Sales establishment. Besides these he owns a paddy land of 8 pelas and a high land of 3½ acres. His income is between Rs. 800 and Rs. 1,000 per month.

It required more than ordinary courage for the appellant and his witnesses to overcome their sense of shame and narrate in detail their account of the humiliation and cruel treatment they were subjected to. The allegations made against Egodapitiya are grave and cannot be lightly treated. They call for a full dress inquiry by an independent tribunal. Except the appellant no one stood to gain by disclosing what was done to them. On the contrary they ran the risk of incurring the wrath of Egodapitiya and the other members of the Police force. The following passage from the appellant's evidence indicates the fear with which the Police were regarded :—

" *To Court :* Q. In your opinion why are these two people (Daniel and David) alleging that you got this done ?

A. I heard the Police say that I got keys made by them.

Q. Let me repeat the question. Why in your opinion is it that these two people say that you got the keys made ?

A. The whole world and all the people in the area know about Egodapitiya. When people see Mr. Egodapitiya they close their doors and get inside and it is possible that Egodapitiya got them to say that.

Q. What you suggest is that Egodapitiya must have coerced these people to say this ?

A. Yes. "

The appellant's statement gains support from the conduct of the witness David. When Inspector Hamid and Police Constable Siritunge arrived at his house and asked him to get ready to go to the Police Station he took the opportunity given by their short absence, whilst they were turning their jeep, to slink away to the house of Sir Albert Peiris and ask him for a letter to the Police. Under cross-examination he said that he obtained a letter from Sir Albert to go to the Police Station as he was afraid of the Police and feared that he would be beaten up. That the public should have such a terror of the Police is a serious drawback to the administration of justice and the sooner it is removed the better it is for the public weal. Certainly conduct such as that attributed to Inspector Egodapitiya will not help to allay that fear of the Police Station. It is said that the public are slow to come forward to assist the authorities to bring offenders to justice. The defence evidence in this case provides the explanation for their reluctance.

Another matter which has transpired in the course of Egodapitya's evidence is that persons examined under section 122 of the Criminal Procedure Code are made to sign their statements contrary to the express prohibition in that section. The circumstances of this case reveal how necessary it is that the requirements of that section should be observed. These infractions of the law should cease.

The appellant's evidence discloses a dangerous trend in the attitude of those entrusted with the enforcement of the law towards those who invoke its aid. He states that he was subjected to this savage treatment and falsely implicated in this case because he proclaimed that he would take legal action against the Police Officers who ill-treated and assaulted his partner Wijesinghe on the 5th of July in connexion with the same burglary. This evidence explains why Egodapitiya asked the appellant " Are you the legal man ? ".

There is no gainsaying that this was a difficult case. Its investigation therefore called not for the use of brute force but for the finesse of a keen and experienced detective who could track the offenders down without resorting to torture and violence. Of the sum of Rs. 32,240·62 which was in notes and coins, only Rs. 4,100 was produced as having been recovered from persons to whom the appellant had given money, and

Rs. 1,110·05 from Weerasekera and those who had received money from him. The appellant and Weerasekera have explained how they got this money and what they did with it. There is no proof that it is part of the money stolen from the Union Office. We therefore make order that the money be returned to the persons from whom it was taken.

Before we conclude this judgment we wish to advert to a matter of practice. The appellant and six witnesses were called for the defence. The appellant gave evidence last. This is contrary to the practice both here and in England. We think that the practice of calling the accused to give evidence before other witnesses on his behalf are called should be observed. In this connexion we wish to cite the following words of Lord Alverstone with which we are in agreement :—

> "In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call." (*Stinie Norrison,* 6 Cr. App. R. 159 at 165).

Accused acquitted.