[COURT OF CRIMINAL APPEAL]

1967 *Present:* **H. N. G. Fernando, C.J., (President), Abeyesundere, J., and Alles, J.**

THE QUEEN *v.* W. M. SUGATHAPALA

APPEAL NO. 44 OF 1967, WITH APPLICATION NO. 58

S. C. 175—M. C. Nawalapitiya, 434

Evidence Ordinance—Section 27 (1)—Scope of expression " in the custody of a police officer "—Accused in custody of Fiscal—Statement made by him then to a police officer—Admissibility—Criminal Procedure Code, ss. 122 (3), 126A, 289A, Form No. 7A of Schedule 2.

A statement made by an accused person to a police officer during the time when he is in the custody of the Fiscal in consequence of an order made by a Magistrate remanding him is not a statement made by him while he is " in the custody of a police officer ".

The accused-appellant, who was alleged to have committed murder on 15th July 1965, was arrested and in police custody until the afternoon of 16th July, when the Magistrate held an inquiry at the scene of the alleged offence. At the end of the inquiry, the Magistrate made order remanding the appellant to the custody of the Fiscal. Shortly after this order was made, the appellant made a statement to a Police Inspector in the course of which he said " I can point out the spot to the police where it is buried ". He then accompanied the Inspector and pointed out a spot in which the police found a knife buried. Evidence was led, at the trial, of the statement made by the appellant and of the discovery of the knife.

Held, that the statement of the appellant was used in evidence in breach of section 122 (3) of the Criminal Procedure Code. The statement, although it was made to a police officer, was not within the scope of section 27 (1) of the Evidence Ordinance because the appellant, when he made it, was not in the custody of the police officer.

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

Colvin R. de Silva, with *M. L. de Silva*, *I. S. de Silva* and *C. Ganesh* (assigned), for the accused-appellant.

Siva Pasupati, Crown Counsel, for the Crown.

Cur. adv. vult.

June 16, 1967. H. N. G. FERNANDO, C.J.—

This appellant was convicted of murder on evidence which was entirely circumstantial, the principal item of which consisted of a statement made by the appellant himself. The submission that, but for this item of evidence, the conviction was not justified, has not been contested by the Crown.

It would appear that the appellant was arrested on the day of the alleged offence, 15th July 1965 and was in police custody until the afternoon of 16th July, when the Magistrate held an inquiry at the scene of the alleged murder. At the end of the inquiry, the Magistrate made order remanding the appellant to the custody of the Fiscal. Shortly after this order was made, the appellant made a statement to a police Inspector in the course of which he said " I can point out the spot to the police where it is buried ". He then accompanied the Inspector to the field and pointed out a spot in which the police found a knife buried. Evidence was led at the trial of the statement and of the fact that the knife was found in the circumstances just mentioned.

It was argued in appeal that the use of the statement at the trial contravened s. 122 (3) of the Criminal Procedure Code, as being a statement made in the course of an investigation under Chapter XII of the Code, and that the statement was not within the scope of s. 27 of the Evidence Ordinance because the appellant, when he made it, was not in the custody of a police officer.

A controversy which had existed for some years in our Courts over the apparent conflict between s. 122 (3) of the Code and s. 27 of the Evidence Ordinance was settled by the judgment of the Judicial Committee in *R. v. Ramasamy* [1] holding that " evidence falling within s. 27 can lawfully be given at a trial, even though it would be otherwise excluded as a statement made in the course of an investigation under s. 122 ". The circumstances relating to the particular statement which was held in that case to have been properly admitted are thus referred to in the judgment :—

> " In addition to these witnesses a police sergeant Jayawardene was called by the prosecution for the purpose of deposing to a statement made by the respondent in consequence of which " the " or at any rate " a " gun was discovered. It has not been in dispute that at the time of making the statement the respondent was in the custody of the police and that the statement was made by him during the course of a police investigation by sergeant Jayawardene. "

The judgment, in thus referring to the fact that " the respondent was in police custody ", appears to have regarded that fact as being a condition of the admissibility of the statement in evidence.

[1] *(1964) 66 N. L. R. 265.*

One further matter which must be taken as settled by *Ramasamy's* case is that s. 27 of the Evidence Ordinance is an exception to both s. 25 and s. 26. The statement in that case was made to a police officer, and hence the decision that it was properly admitted in evidence means that s. 27 permits proof of a statement to a police officer made by a person in police custody. But that case did not decide the question now raised, which is whether s. 27 permits proof of any statement made by a person not in police custody.

This question involves consideration of the purpose or intention of s. 27, which has to be inferred if possible from the terms of the section and the context in which it occurs. In sections 25 and 26, two prohibitions are enacted, i.e., prohibition of the proof of (1) a confession to a police officer, and (2) a confession made by a person in police custody (except in the presence of a Magistrate). S. 27, being a proviso to both sections, must prima facie be regarded as indicative of an intention to permit proof of a statement *which is a confession*. But in fact s. 27 covers certain statements which may or may not be confessions; it authorises proof of "information received from a person accused of any offence, in the custody of a police officer, ... whether it amounts to a confession or not .....". Insofar as s. 27 deals with information which does not amount to a confession, s. 27 is not properly a proviso to sections 25 and 26, and it directly authorises proof of such information. If the information amounts to a confession, then s. 27 excludes the information from the prohibitions against proof of confessions which are enacted by sections 25 and 26. But this analysis of the three sections provides no explanation of the reason why s. 27 appears on its face to restrict the "admissible" information by the qualification "received from a person ..... in the custody of a police officer". That same qualification is repeated in sub-section (2) of s. 27 which declares that sub-section (1) shall also apply to information received from a person, "when such person is in the custody of a forest officer or an excise officer".

The application of the maxim *generalia specialibus non derogant* does not support the construction that s. 27 was intended to permit proof of information received from a person not in police custody despite the prohibition in s. 122 (3) of the Criminal Procedure Code. The special rule of evidence as expressed in s. 27 does not in terms permit proof of such information. S. 27 undoubtedly appears to be defective in that it does not permit proof of information which might reasonably be regarded as being more reliable for the very reason that it is given by a person not in custody. That defect is perhaps attributable to an incorrect assumption that such information could be proved without proof of it being specially authorised by s. 27. But a statute framed on an incorrect assumption cannot be construed by a Court into an altered form which it might have had but for the assumption.

Counsel for the Crown put forward two arguments in support of the use of the appellant's statement in the present case.

It was argued firstly that the appellant was not in fact in police custody when he made the statement. Counsel suggested that there is nothing in the record to show that a Fiscal's officer was present at the scene, and that therefore the appellant must have continued to be in police custody despite the Magistrate's order of remand to the Fiscal. This suggestion is unacceptable in view of the terms of s. 126 A of the Code, and the form No. 7A of the warrant of detention on a remand. The warrant directs the Fiscal to take and convey to a prison the person who is remanded, and s. 289A requires the warrant to be delivered to the Fiscal, " who shall take charge of the person named therein ". The presumption must therefore be that a Fiscal's officer did take charge of the appellant when the order of remand was made by the Magistrate, and there is nothing on record to counter that presumption.

Secondly it was argued that the phrase " in the custody of a police officer " occurring in s. 27 must be read as " although in the custody of a police officer " or as " whether or not in the custody of a police officer ". It may have been open to a Court to construe or alter the phrase in that manner if it were clear that the true intention of the Legislature, in enacting s. 27, was to permit proof of a statement made by a person not in police custody. Our reasons for the opinion that the Legislature had no such intention have been stated earlier.

For these reasons, we are driven to the conclusion that the statement of the appellant was used in evidence in breach of s. 122 (3) of the Criminal Procedure Code. But for that item of evidence the conviction would have been unreasonable. We therefore set aside the verdict and sentence and direct that a verdict of acquittal be entered.

Accused acquitted.