

1969

*Present : Wijayatilake, J.***THE QUEEN v. H. A. C. JAYASINGHE and another***S. C. 113/68 (Western Circuit Assize)—M. C. Colombo, 48342*

Evidence Ordinance—Section 27—“ In the custody of a police officer ”—Statement made by accused to a police officer when in custody of the Fiscal—Admissibility—Criminal Procedure Code, ss. 122 (3), 126 (a), 153, 361, 362 (2), 429—Coroner—His power to remand a suspect to Fiscal’s custody—Courts Ordinance, s. 83.

At a trial before the Supreme Court, the prosecution sought to put in evidence, under section 27 of the Evidence Ordinance, a statement made by the 1st accused to a police officer during the time when he was in the custody of the Fiscal after an order had been made by the Coroner remanding him to Fiscal’s custody.

Held, that the statement of the 1st accused, although it was made to a police officer, was not within the scope of section 27 of the Evidence Ordinance, because it was made at a time when the accused was in the custody of the Fiscal and not in the custody of a police officer.

Held further, that a Coroner has jurisdiction under section 83 of the Courts Ordinance to remand a suspect to Fiscal’s custody.

ORDER made in the course of a trial before the Supreme Court.

Cecil Gunawardane, Crown Counsel, for the prosecution.

Stanley Tillekeratne, with *K. W. D. Perera*, for the 1st accused.

M. S. Azeez, (Assigned) for the 2nd accused.

March 6, 1969. WIJAYATILAKE, J.—

The alleged offence was committed on 9th August, 1967. The first accused was arrested at 1.15 p.m. on the 10th August. On the order of the learned Magistrate, Colombo, Mr. A. H. M. Ismail, Coroner had held an inquest on the 10th August and after his verdict at about 6 p.m. on the same day, he had remanded both the first and second accused to Fiscal's custody. Thereupon, it would appear that the first accused had made a statement at 7 p.m. to Inspector Wijewardane at the Police Station. Learned Crown Counsel seeks to lead the evidence referred to at pages 50 and 54B of the non-summary proceedings marked as A, B, and C, under section 27 of the Evidence Ordinance. He has at the very inception, very fairly and justly, drawn my attention to a case which appears to be against him, namely, the judgment of His Lordship the Chief Justice H. N. G. Fernando in *Queen v. Sugathapala*¹ where, inter alia, it was held that the statement although made to a police officer was not within the scope of section 27 of the Evidence Ordinance, because the appellant when he made the statement was not in the custody of a police officer, but in the custody of the Fiscal; and it was further held that a statement of the accused had been used in evidence in breach of section 122 (3) of the Criminal Procedure Code. However, Crown Counsel seeks to distinguish the facts of the present case and he submits that unlike in that case where the Magistrate remanded the Accused to Fiscal custody, in the instant case the Coroner had no jurisdiction to remand the suspects to Fiscal's custody and that he had in purporting to do so, acted illegally. He has drawn my attention to sections 126 (a), 153, 361 and 362 (2) of the Criminal Procedure Code. So that it is his submission that although the Coroner purported to "remand" the suspects, they continued to be both legally and, in fact, in Police custody.

Mr. Stanley Tillakeratne, learned Counsel for the first accused, has drawn my attention to section 83 of the Courts Ordinance which gives power to an Unofficial Magistrate to exercise the jurisdiction of a Magistrate. Acting under section 429 of the Criminal Procedure Code, in order to clarify the position, I called Mr. A. H. M. Ismail, Coroner who held this inquest and he has stated that invariably in the cases which come before him he either grants bail or remands the suspects and that in doing so, he acts under section 83 of the Courts Ordinance.

¹ (1967) 69 N. L. B. 467.

In my opinion the submissions of learned Crown Counsel in this regard cannot be sustained and it is my view that the Coroner had the jurisdiction to remand the suspects. In the circumstances, it follows that the Police had recorded the statement of the 1st accused while he was in Fiscal's custody.

Learned Crown Counsel seeks to meet this situation by contending that although he may have been under the *de jure* custody of the Fiscal, he was in the *de facto* custody of the Police. This would appear to be a rather tenuous submission and I am not inclined to agree with him. Once a person is remanded to Fiscal's custody one cannot question the illegality of the custody or the nature of the custody until and unless that order is revoked, or set aside. Crown Counsel also refers me to a judgment by Basnayake, C.J. in the case of *Regina v. Perera*,¹ where it was held that even if the appellant was not in legal detention at the time the statement was recorded by the Police, the evidence of the statement made by him could not properly be excluded on the sole ground that he was illegally detained when he made the statement sought to be proved. His Lordship in the course of his judgment took the precaution of adding these words: "we should not be taken as laying down the broad proposition that evidence illegally obtained would under all circumstances and in every case be admissible. Cases in which a Court of Law may properly exclude such evidence are conceivable." In the light of the judgment of H. N. G. Fernando, C.J. in *Queen v. Sugathapala* which in my opinion has dealt with the question now before me, I do not think the principle set out in the earlier case can be adopted in the present context.

Learned Crown Counsel further submits that he is entitled to rely on the conduct of the first accused by marking these passages as "conduct" and not as "statements leading to discovery of a fact". I have carefully scrutinised the passages referred to and in my opinion it would not be possible to extricate the statements as such from the conduct of the first accused as they are so closely interwoven. The course suggested would amount to leading indirectly evidence which cannot be led directly and it would clearly nullify the principle set out in *Queen v. Sugathapala*. In the circumstances, I do not think the Crown can be permitted to lead this evidence. Accordingly, I disallow the application of learned Crown Counsel.

Application by the Crown to lead certain evidence disallowed.

¹ (1955) 57 N. L. R. 35.