[COURT OF CRIMINAL APPEAL]

1950 *Present :* **Jayetileke C.J. (President), Dias S.P.J., Gunasekara J., Pulle J. and Swan J.**

REX *v.* JINADASA

APPEAL ARISING OUT OF APPLICATION 66 OF 1950

S. C. 28—M. C. Matara, 14,167

Court of Criminal Appeal—Evidence—Confession—Investigation under section 122 of Criminal Procedure Code—How much of information received from accused may be proved—Admissibility of statement leading to discovery of relevant fact—Difference in admissibility between oral statement of accused and his recorded statement—Evidence Ordinance (Cap. 11), ss. 27, 91—Criminal Procedure Code (Cap. 16), s. 122 (3)—Court of Criminal Appeal Ordinance, No. 23 of 1938, Proviso to s. 5 (1).

A was charged with the murder of B. The evidence against him was circumstantial. The mistress of B stated that at about dusk on the day in question the appellant, A, came to her house and took away a katty which the medical evidence conclusively proved was the weapon with which B was killed. At about 9 or 9.30 p.m. A returned to her house without the katty. The next morning A gave certain information to the Police which led to the discovery of the body in a stream. A was then arrested. In the course of the Police inquiry under section 122 of the Criminal Procedure Code A told the Police "I can point out the place where I threw it" (meaning the katty). Thereafter A took the Inspector of Police to the scene and picked up the katty which was hidden in some bushes and handed it to the Inspector.

The prosecution moved under section 27 of the Evidence Ordinance (*a*) to prove the portion of the *oral statement* made by A to the Police which led to the discovery of the katty, and (*b*) to produce the extract from the Information Book in which that portion of the statement was *recorded*. The trial Judge allowed both applications.

Held (by the majority of the Court), (i) that the oral statement of A which led to the discovery of the katty was admissible, (ii) that the prohibition contained in section 122 (3) of the Criminal Procedure Code does not apply to the *oral* statement of a person made in the course of a Police investigation. The prohibition applies only to the production of the *written record* of the oral statement.

R. v. Haramanisa (1944) 45 N. L. R. 532 dissented from.

Held further, that, although the extract from the Information Book was improperly admitted, there was no substantial miscarriage of justice, and the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance was applicable.

APPEAL, with application for leave to appeal, from a conviction in a trial before a Judge and Jury.

M. M. Kumarakulasingham, with *D. W. F. Jayasekera*, *J. C. Thurairatnam* and *G. Rajanathan*, for the accused appellant.—The questions for decision are—(1) Whether oral evidence regarding the statement

J. N. B 1222-1,040 (9/50)

of the accused, "I can point out the place where I threw it", which led to the finding of the katty, and (2) whether the document X2, namely, the certified copy of the passage in the Information Book where that statement had been recorded, were rightly admitted at the trial. It is submitted that this evidence has been wrongly admitted. Section 122 (3) of the Criminal Procedure Code in effect repeals section 27 of the Evidence Ordinance so far as a statement to a Police officer is concerned. The effect of the corresponding section of the Indian Criminal Procedure Code, section 162, on section 27 of the Indian Evidence Act was considered by the Privy Council in *Pakala Narayana Swami v. Emperor* [1]. The Lahore High Court in *Hakum Khuda Yar v. Emperor* [2] held that section 27 of the Indian Evidence Act was *pro tanto* repealed by section 162 of the Indian Criminal Procedure Code. The Allahabad High Court took a similar view in *Baldeo v. Emperor* [3]. For contrary views see *Biram Saidar v. Emperor* [4], *In re Subbiah Tevar* [5], and *Emperor v. Mayadhar Pothal* [6]. With regard to the application of the maxim *generalia specialibus non derogant* see *Naresh Chandra Das v. Emperor* [7].

[Counsel also cited *Baby Nona v. Johana Perera* [8]; *King v. Emanis* [9]; *Rex v. Fernando* [10]; *The King v. Pabilis* [11]; *The King v. de Silva* [12]; *The King v. Gabriel* [13]; and *R. v. Haramanisa* [14].]

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *D. Jansze*, Crown Counsel, *H. A. Wijemanne*, Crown Counsel and *Ananda Pereira*, Crown Counsel, for the Crown.—There are certain exceptions to the rule that a later enactment repugnant to an earlier enactment *pro tanto* repeals the earlier. One such exception is that statutes *in pari materia* should be construed as one. As to what is *in pari materia* see *Craies: Statute Law*, 4th ed., p. 124. As to the proper method of construing statutes *in pari materia* see *Richard Costa v. A. S. P. (C. I. D.), Colombo* [15] and *Craies: Statute Law*, 4th ed., p. 123. The later statute repeals the earlier if wholly inconsistent, but the presumption is against repeal by implication. Everything possible should be done to carry out the intention of the legislature—*Craies: Statute Law*, 4th ed., pp. 312, 313; *Maxwell: Interpretation of Statutes, 1946 ed.*, pp. 35, 163, 171, 264. On the maxim *generalia specialibus non derogant* see the leading case *Mary Seward v. The owner of the "Vera Cruz"* [16] and *Thimappa v. Thimappa* [17]. As to what is a "special law" see (1940) Cr. L. J., Vol. 41, p. 41. Local decisions have consistently held that section 25 of the Evidence Ordinance prevails over section 122 (3) of the Criminal Procedure Code—*The King v. Cooray* [18]; *The King v. Fernando* [19]; *The King v. Ranhamy* [20]; *The King v. Gunawardene* [21]; *Rex v. Vasu* [22]; *The King v. Kiriwasthu* [23]. With regard to the certified copy of the extract of the recorded statement

[1] *A. I. R. (1939) P. C. 47.*
[2] *A. I. R. (1940) Lahore 129.*
[3] *A. I. R. (1940) Allahabad 263.*
[4] *A. I. R. (1941) Bombay 146.*
[5] *A. I. R. (1939) Madras 856.*
[6] *A. I. R. (1939) Patna 577.*
[7] *A. I. R. (1942) Calcutta 593.*
[8] *(1937) 8 C. L. W. 65.*
[9] *(1940) 42 N. L. R. 166.*
[10] *(1939) 41 N. L. R. 151.*
[11] *(1924) 25 N. L. R. 424.*
[12] *(1940) 42 N. L. R. 57.*
[13] *(1937) 39 N. L. R. 38.*
[14] *(1944) 45 N. L. R. 532.*
[15] *(1948) 50 N. L. R. 574 at p. 576.*
[16] *(1884-85) 10 A. C. 59 at p. 68.*
[17] *(1928) 51 I. L. R. Madras 967 at p. 974.*
[18] *(1926) 28 N. L. R. 74.*
[19] *(1939) 41 N. L. R. 151.*
[20] *(1940) 42 N. L. R. 221.*
[21] *(1941) 42 N. L. R. 217.*
[22] *(1941) 27 C. L. W. 15.*
[23] *(1939) 40 N. L. R. 289.*

in the Information Book (X2), it is submitted that this is not a "document" within the meaning of sections 91 and 92 of the Evidence Ordinance—*Amir Ali : Evidence*, p. 624. It would appear that *R. v. Haramanisa* [1] was wrongly decided. Section 302 of Criminal Procedure Code indicates how statements should be recorded with strict formality. If no deposition, or an informal one, has been prepared, parol evidence of what was said by the witness may be given—*Phipson's Law of Evidence*, 8th ed., p. 559 ; *Rex v. Thomas* [2].

Cur. adv. vult.

September 11, 1950. DIAS S.P.J.—

The appellant Ranasinghe Jinadasa and A. P. James were jointly indicted with having committed the murder of a man named P. A. Somadasa on the night of July 2, 1949. The jury by their unanimous verdict convicted the appellant of the capital charge and acquitted A. P. James.

The appeal came up for hearing before a Bench consisting of my brothers Gunasekera and Swan and myself. The question raised appearing to us to be one of considerable importance, we adjourned the argument and suggested to the Chief Justice that the case should be submitted to a fuller Bench. The matter has now been argued before a Bench of Five Judges.

The relevant facts are as follows:—The appellant was living in the house of the deceased man and his mistress Hinnihamy. There was evidence to show that the appellant was on terms of intimacy with Hinnihamy. It was the habit of the deceased man, who did contract work on Tennehena Estate, to go every Saturday to receive money to make weekly advances, and also at the end of the month to receive the balance due for the work done. On Saturday, July 2, 1949, the deceased man left his house at about 2 p.m., saying he was going to the house of the estate superintendent, S. Chinniah. Hinnihamy never saw her husband alive thereafter. The deceased man having borrowed a bicycle from Pantis, reached Chinniah's house at about 4 p.m. and was given a cheque for Rs. 100. The deceased man went to the boutique of R. Piyadasa where he cashed the cheque and was given change in one-rupee and two-rupee notes. The deceased left Piyadasa's boutique at about 7 p.m.

Hinnihamy says that "at about dusk" on this day, the appellant came to the house and took away the katty P4. The medical evidence proves conclusively that the deceased man was done to death by the katty P4.

Between 7 p.m. and 8.30 p.m., the witnesses Francis and Hendrick saw the deceased man on a cycle. Pantis says that the deceased man returned the cycle at about 8.30 p.m., paid him some money, and left on foot in the direction where his dead body was subsequently found.

The witness Cornelis says that at about 9 or 9.30 p.m., when he was returning home from his father-in-law's house, he had to pass the spot where bloodstains were later found. He says that he then saw the

[1] *(1944) 45 N. L. R. 532.* [2] *13 Cox Cr. Cases 77.*

appellant and James coming along the road towards him. Cornelis had no cause to suspect anything, but, subsequently, when the body was discovered, the significance of what he saw struck him.

Hinnihamy says that the appellant returned to her at about 9 or 9.30 p.m., without the katty P4. He told the woman in Sinhalese "The job went wrong. I have killed the *Liyana Mahatmaya*" (the deceased). He also dropped on the table a bundle of money containing Rs. 72 in one-rupee and two-rupee notes wrapped in a piece of paper (P14). The woman observed that the appellant was wearing the sarong P6 on which the Analyst found traces of human blood. The appellant partook of a meal and water and reclined on a bed in the verandah. Hinnihamy says that when she began to weep the appellant threatened to kill her also. She, therefore, locked herself inside her room.

Police Sergeant Fernando says that on Sunday, July 3, at 9.30 a.m., the appellant came to him at the Pittabedora Junction and made a voluntary statement which he recorded, P15. The appellant stated that as the deceased man did not return to his house on the previous day, he went out to look for him with James, and "saw the dead body in a stream known as Hulanda-ela by the side of the Hiniduma Road". The Sergeant went with the appellant to the spot and at about 11.45 a.m. the dead body was pointed out by the appellant. The Sergeant says that the body was not visible to the road and "he had to bend down and take a lot of pains" in order to see the body from the roadside. He found a trail of blood from the road to the place where the body was. The Magistrate reached the scene at about 5 p.m. At 8.30 p.m. the appellant was arrested at his father's house. The sarong P6 was found hanging on a clothes' line in that house. It was wet and was covered by or concealed under a camboy on the clothes' line. The appellant was then taken to the police station and Inspector Mahendram went to have his dinner. Thereafter the inspector resumed his inquiry. At 1 a.m. on Monday, July 4, the appellant is alleged to have made a certain statement in the course of which he said "I can point out the place where I threw it" (meaning the katty P4). In the morning the Inspector went with the appellant to the scene. The evidence of the Inspector as recorded at the trial appears at page 96 of the transcript and is as follows :—

"I went to the scene with the 1st accused (appellant) and the last witness Sergeant Fernando.

Q. Did you search for anything when you went to the scene ?

A. I searched for a katty.

Q. Was the katty found ? A. I found a katty.

Q. In consequence of what did you search for it ? A. In consequence of a statement made by the 1st accused to me. Q. Referring to what ? A. Referring to the katty.

Q. What did he say ? A. He said : 'I can point out the place where I threw it'. I produce a certified copy of it marked X2. The katty was found on the top of some *bata* bushes. 1st accused pointed the katty out and he had to shake the *bata* bushes and

the katty fell. The *bata* bushes were by the side of the road about ninety feet from the place where the blood trail started. The katty was visible to anybody who was looking about the place.

Q. Anyone looking from the road could not see it ? A. It was not visible to anyone looking from the road. At the time I took charge of P4 there was something like human hair on one side of the blade. I produced P4 before the Magistrate, Matara.

To Court—The accused led me to the place where the katty was ".

Before this evidence was led, the question of its admissibility was argued in the absence of the jury. The learned Judge ruled as follows : " My ruling is that Crown Counsel is entitled to prove the statement he proposes to lead in evidence by producing a certified copy of the statement of the 1st accused which he wants to prove, that is the sentence which he has read out ".

The questions for decision are whether oral evidence of what the appellant said leading to the discovery of the katty and the document X2 were rightly admitted ?

Sections 24 to 30 of the Evidence Ordinance (Chapter 11) form a group of sections dealing with confessions made by accused persons. Section 24 excludes from proof a confession made by reason of an inducement, threat or promise proceeding from " a person in authority ". Section 25 (as amended by Ordinance No. 18 of 1928) makes inadmissible confessions made to police, forest and excise officers. Section 26 provides that confessions made by an accused person while he is in the custody of a police, forest or excise officer shall not be proved against him unless it be made in the immediate presence of a Magistrate. Then follows section 27 which is in the following terms :

" 27. (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.

(2) Sub-section (1) shall also apply *mutatis mutandis*, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively. "

In *R. v. Packeer Tamby* [1] the question arose whether section 27 of the Evidence Ordinance is a proviso to sections 24 and 25 ? It was laid down that section 27 qualifies section 24. " Therefore, whatever the inducement that may have been applied, or made use of towards the accused, there is nothing in the law which forbids policemen or others from, at any rate, going so far as to say, ' In consequence of what the prisoner told me, I went to such and such a place and found such and such a thing '. Moreover they may repeat the words in which the information was

[1] *(1931) 32 N. L. R. 262.*

couched whether they amount to a confession or not, provided they related distinctly to the fact discovered. Therefore, although a confession may be generally inadmissible in consequence of an inducement having been offered within the meaning of the 24th section, yet, if any fact is deposed to as discovered in consequence of such confession, so much thereof as relates distinctly to the fact thereby discovered may be proved under this section". This case was followed with approval in *Iyer v. Galboda* [1].

The manner in which section 27 of the Evidence Ordinance has been understood and applied are illustrated by the following cases:—In *R. v. Sudahamma* [2] the accused, who was charged with the theft of a Savings Bank pass book and with the fogery of a withdrawal form, when in police custody pointed out a certain person as being the man who wrote and filled up the withdrawal form for him. It was held that the information given by the accused led to the discovery of the witness who filled up the application form for him. It related distinctly to the fact discovered. The fact that the discovery was made, not in consequence of the information given by the accused but by the act of the accused himself, did not make section 27 inapplicable. "If instead of pointing out the witness Bruin, the accused described Bruin with such particularity as to enable the police to discover the man who filled up the application form for him, the information so given would have been admissible under section 27". The "fact discovered", however, must be itself relevant to the case against the accused. If it is not so relevant, but merely goes to show that the accused had given a different account when he was first questioned by the police, the evidence would be inadmissible—*Nambiar v. Fernando* [3]. In *Fernando v. S. I. P., Slave Island* [4] it appeared that the police were investigating the alleged theft of a Hercules bicycle. The prisoner who had been detained as a suspect gave the police certain information in regard to the theft by him of a Raleigh bicycle. In consequence of that information the police discovered parts of that Raleigh cycle in the house of a certain person. The prisoner was thereupon charged with the theft of the Raleigh cycle. The proctor for the prisoner when cross-examining the police officer elicited from him the statement made by the accused, whereupon the officer stated that the accused told him "that he had stolen a cycle at the City Dispensary and had later sold it to a carter". It was held that the evidence given by the police officer was inadmissible as it was not covered by the words "as relates distinctly" in section 27 of the Evidence Ordinance. It was further held that the Raleigh cycle was discovered in consequence of the information given by the accused that he sold it to a carter, and that the further information that the accused had stolen a cycle at the City Dispensary did not "relate distinctly" to the discovery of the cycle. The conviction was affirmed on other grounds. The principle underlying section 27 of the Evidence Ordinance was thus stated by Baron Parke in *R. v. Thurtell and Hunt* [5]: "A confession obtained by saying to the party 'You had better confess, or it will be worse for you if you do not confess' is not legal evidence.

[1] *(1942) 44 N. L. R. 94.*
[2] *(1924) 26 N. L. R. 220.*
[3] *(1925) 27 N. L. R. 404.*
[4] *(1945) 46 N. L. R. 158.*
[5] *(1824) Notable British Trials, p. 145.*

But though such a confession is not legal evidence, it is everyday practice that if, in the course of such a confession, that party state where stolen goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him ".

In the present case two facts were discovered in consequence of statements made by the appellant to the police. In the first place, in consequence of the statement P15 made by him to Sergeant Fernando, the dead body of the deceased man was discovered. In the second place, in consequence of the statement of the appellant " I can point out the place where I threw it " (the katty), and in consequence of the acts of the appellant in going up to a certain *bata* bush and shaking it, the katty P4 was discovered. It was the weapon used to kill the deceased man as the medical evidence conclusively proves. The admissibility of the former statement of the prisoner has not been objected to. Objection is taken to the admission of the latter statement and the document X2.

Mr. Kumarakulasingham for the appellant submits that, while he cannot object to the prosecution proving that in consequence of a statement made by the appellant he was taken to the scene and that he then shook a bush and the katty fell out of that bush, he strongly objects to the admission (*a*) of the oral evidence regarding the statement alleged to have been made by the appellant, namely, " I can point out the place where I threw it ", and (*b*) to the admission of the document X2, namely, the passage in the Information Book where that sentence has been recorded. He contends that the admission of this evidence is wrong and vitiates the conviction. His submission is that the provisions of section 122 (3) of the Criminal Procedure Code in effect have repealed section 27 of the Evidence Ordinance in so far as a statement made to a police officer is concerned. If his argument is right then (*a*) if the master of the prisoner, not being a police officer, by some improper inducement makes the prisoner who is not in police custody to state where he hid the stolen property, and the property is discovered in consequence of that statement—so much of that statement as led to the discovery of the stolen property would be admissible under section 27 of the Evidence Ordinance in spite of the improper inducement, but (*b*) if such statement is made to a police officer when holding an investigation under Chapter XII of the Criminal Procedure Code, then, by reason of section 122 (3) of that Code, such statement would be totally inadmissible.

In considering the provisions of section 122 of the Criminal Procedure Code, it is also necessary to consider the terms of section 121. Section 121 relates to the procedure to be adopted by an officer in charge of a police station or an inquirer to whom the *first information* relating to the commission of a cognizable offence is given. If the information is given orally, it must be reduced to writing by the police officer or the inquirer or under his direction, and be read over to the informant. Every first information whether given in writing or given orally and reduced to writing " shall be signed by the person giving it " and a copy thereof shall be entered in the Information Book. It is common ground

that a first information or first complaint under section 121, provided it is otherwise relevant and admissible, can be used as substantive evidence or for any evidentiary purposes, e.g., to corroborate the evidence of the informant, &c.

If from the information received or otherwise the police officer or the inquirer has reason to suspect the commission of a cognizable offence, he reports the same to the Magistrate, and proceeds to hold his inquiry or investigation under Chapter XII. In order to do this, he is empowered to summon persons to state what they know about the matter—Section 121 (3).

Section 122 (as amended by Ordinance No. 14 of 1941, section 3), is in the following terms:—

"122. (1) Any police officer or inquirer making an inquiry under this Chapter *may examine orally* any person supposed to be acquainted with the facts and circumstances of the case and *shall reduce into writing any statement* made by the person so examined, but no oath or affirmation shall be administered to any such person, nor shall the statement be signed by such person. If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements *recorded* in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial.

Neither the accused nor his agents shall be entitled to call for *such statements*, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.

Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

The precise meaning and effect of section 122 have given rise to considerable difficulty in the past—See *R. v. Haramanis*[1].

[1] *(1944) 45 N. L. R. 532.*

An examination of the provisions of section 122 shows that when a Chapter XII investigation is in progress a person summoned before the police officer makes an oral statement. The officer holding investigation is enjoined " to reduce into writing any statement made by the person so examined ". Section 122 (1) provides that no oath or affirmation is to be administered to the deponent who is not required to sign the written record. Nothing is said about reading over the written record to the deponent. Section 122 (1) further provides " If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book ". This envisages a case where the investigation takes place at the scene or elsewhere than at the police station, where the statements are noted in the officer's note book. Section 122 (2) enacts that the person examined " shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture ". Then comes section 122 (3).

The question in this case is whether evidence of the appellant's statement to the Inspector, which would otherwise be admissible under section 27 of the Evidence Ordinance, is rendered inadmissible by section 122 (3) of the Criminal Procedure Code ? This raises the further question as to what is meant by the phrase " Statement made by any person to a police officer or inquirer " in that sub-section ? It seems quite clear from the context that the phrase is not to be taken literally, but must be understood to mean the police officer's or inquirer's *record* of a statement made to him, for the language of section 122 (3) clearly indicates that that statement is capable of being used " to refresh the memory of the person recording it ". One cannot refresh memory from an oral statement. One can only refresh memory from a document or a record of a statement. Furthermore, section 122 (3) contemplates " statements recorded ", and that the Court " may send for " and may use them, not as evidence in the case, but to aid it in the inquiry or trial. Section 122 (3) also makes it plain that neither the accused nor his agents shall be entitled " to call for such statements ", and they are not entitled " to see them merely because they are referred to by the Court ".

The record is the one that is made by a police officer or inquirer acting under section 122 (1) which provides that he " may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and shall reduce into writing any statement made by the person so examined ". It appears that in a proceeding governed by the Criminal Procedure Code, this record cannot be used except in the manner and to the extent permitted by section 122 (3). According to *R. v. Haramanisa* [1], it is only by the production of this record (or by secondary evidence of its contents when secondary evidence is admissible) that a statement made by a person orally examined under section 122 (1) can be proved, and, therefore, such a statement cannot be admitted in evidence except as provided by section 122 (3). This decision is based on the view that by reason of the requirement that the police officer or inquirer shall reduce the oral statement into writing, the statement is a matter that is " required by law to be reduced to the form of a

[1] *(1944) 45 N. L. R. 532.*

document ", and is, therefore, one to which section 91 of the Evidence Ordinance applies. But as the judgment in *Haramanisa's* case[1] itself points out, this interpretation involves the view that the provision for the use of the statement to refresh the memory of the person recording it is rendered " almost nugatory " ; for the necessary implication of such use is that the person recording it may give oral evidence of the statement. It is only when he has attempted to give oral evidence of the statement and his memory fails, that the rule regarding " refreshing memory " can arise. That is not the only unsatisfactory result of *Haramanisa's* case. Section 122 (2) enacts that a person examined under section 122 (1) " shall be bound to answer truly " all questions relating to the case (subject to certain exceptions) that are put to him by the police officer or inquirer. Therefore, such a person being thus bound by an express provision of law to state the truth, would be guilty of the offence of giving false evidence as defined by section 188 of the Penal Code if upon the occasion of his examination under section 122 (1) he makes any statement which is false, and which he knows or believes to be false or does not believe to be true. Yet, if the decision in *Haramanisa's* case is correct, he cannot be tried for the offence of giving false evidence, for section 122 (3) of the Criminal Procedure Code prohibits proof of the statement in question. It is no answer to say, as was urged by learned counsel for the appellant, that it may be possible to deal with such a case by prosecuting the offender on a charge of giving false information to a public officer punishable under section 180 of the Penal Code, for it would be immaterial for the purposes of such a charge whether section 122 (3) is part of the law or not. In short, the construction adopted in *Haramanisa's* case would render nugatory the provisions of section 122 (2) as well. Furthermore, upon that construction, if it is sought to contradict a witness by proof of a statement made by him on an examination under section 122 (1), the only evidence that can be tendered in proof of that statement is the record of it made by the police officer or inquirer. It follows that there would be sufficient proof of it, if the authenticity of the record is established, and the witness is identified as the person whose statement the police officer or inquirer has purported to record. There is no requirement of law that it is only by the evidence of the person who has made the report that its authenticity can be proved. Nor is it necessary as a matter of law that the evidence by which a person is identified as a person referred to in the record must be the evidence of the person making the record. Therefore, according to the view taken in *Haramanisa's* case, a witness can be contradicted by a statement imputed to him in a document to which he was not a party, and which was made by a person who need not himself give evidence, although the statement so imputed to him has never been accepted by him as being correct, or even read by him or to him, and which he has not signed. In other words, he can be contradicted by hearsay, even though the person who has alleged that that person made the statement in question may be alive and able to attend the trial and competent to give evidence.

These consequences follow from the interpretation of section 122 (1) of the Criminal Procedure Code as requiring a statement made under

[1] *(1944) 45 N. L. R. 532.*

that provision to be reduced to the form of a document. With all respect to the learned and distinguished Judges who decided *Haramanisa's* case[1], it seems to the majority of us that, rightly understood, section 122 (1) does not have that effect, but only requires the police officer or the inquirer to make a record of the oral statement. There is, we think, an important difference between such a requirement, and a requirement that a statement made in the form of spoken words shall be reduced to the *form* of a document. In the former case, the document which is brought into existence is the police officer's record of what is alleged to have been said by the person examined, and not a written statement by that person himself. The statement is not converted from one that is oral *in form* to one that is in *the form* of a document. In the latter case, the document which is brought into existence is not a reporter's account of what was said by the person examined, but a written statement by that person himself, either written by himself, or written by another and adopted by him as his statement. For an illustration of this distinction one need travel no further than section 121 (1) and section 122 (1) of the Criminal Procedure Code. The former enacts that every information relating to the commission of a cognizable offence " if given orally " to the police officer or to an inquirer " shall be reduced to writing by him or under his direction and be read over to the informant ; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it ". There can be no question that here a statement that is oral *in form* " is required by law " to be reduced to a statement by him that is documentary *in form*. The document which is brought into existence by the reduction of the statement into writing and it being read over to and by being signed by the informant, is no mere record made by another of what he is alleged to have said, but his own written statement. On the other hand, under section 122 (1) the statement that is reduced into writing by the police officer or inquirer is not only not signed by the person making it and is not even read over to him, but the law expressly provides that it shall not be signed by him. In other words, the law provides that there shall not come into existence a written statement by the person examined. The *form* of his statement is to be oral, and it is not to be converted in its form to the form of a document. There is here no matter that " is required by law to be reduced to the form of a document ", unless the " matter " is the police officer's or inquirer's impression of the oral statement made to him.

The majority of us are, therefore, of opinion that the words " And in all cases in which any matter is required by law to be reduced to the form of a document " in section 91 of the Evidence Ordinance do not apply to the record which has been made under section 122 (1). Furthermore, the provisions of section 122 (3) indicate that the Legislature used the word " statement " in that sub-section in two different senses. The word as used in the opening sentence of the sub-section refers to the oral utterances of the person made to the police officer or inquirer who is holding the investigation. The words " Statements " used in the expressions " Any criminal Court may send for the statements recorded ", " Such Court may use such statements ", " Neither the accused nor his

[1] *(1944) 46 N. L. R. 532.*

agents shall be entitled to call for such statements" imply that they refer to the *record* of the oral utterances made by the police officer or inquirer under section 122 (1), and not to the oral utterances themselves.

Section 122 (3) imposes restrictions on the use of the police officer or inquirer's *record* of the oral statement made to him, but does not govern the admissibility of *oral evidence* of such statement. Therefore, where the law otherwise permits such evidence to be given a police officer or inquirer may give oral evidence of a statement made to him. For that purpose he may, if necessary, refresh his memory by reference to his record of the statement and that record may also be used to contradict him. But even where the law would otherwise permit the record to be used as evidence of the statement (e.g., under section 35 of the Evidence Ordinance), section 122 (3) prohibits such use except where the statement is one falling within the provisions of section 32 (1) of the Evidence Ordinance or where it is sought to be used as evidence in a charge under section 180 of the Penal Code.

The " information " referred to in section 27 of the Evidence Ordinance is the oral statement of the accused himself, whereas the document contemplated in section 122 (3) of the Criminal Procedure Code is not a statement by the accused but another person's record of an oral statement which is alleged to have been made by the accused. Therefore, the conclusion which the majority of us reach is that there is nothing in section 122 (3) which acts as a bar to the full operation of the provisions of section 27 of the Evidence Ordinance or the admission of an oral statement made by an accused person to a police officer for the purposes of section 27. There is nothing in section 122 (3) which prohibits oral evidence being given of so much of the statement made by an accused which is relevant under section 27 of the Evidence Ordinance as relates distinctly to a relevant fact thereby discovered.

My Lord the Chief Justice takes the view that in view of the language of section 122 (3), which enables oral evidence to be led of a statement, the provisions of section 91 of the Evidence Ordinance are not applicable, and that, therefore, it was permissible for the prosecution to lead oral evidence of the statement made by the accused which led to the discovery of the katty.

With regard to the admission of the written record of that oral statement X2, we are of opinion that its admission was improper and not permitted by section 122 (3). Whether that irregularity vitiates the conviction in this case, we shall now proceed to consider.

The oral evidence of the statement being admissible, the production of the written record of that statement is nothing more than a mere irregularity. It caused no prejudice to the appellant. The other facts in the case show that the appellant had a formidable case to meet. We are, therefore, of opinion that this is a case to which the proviso in section 5 (1) of the Court of Criminal Appeal Ordinance of 1938 may properly be applied as no substantial miscarriage of justice has in fact occurred.

It is unnecessary, in view of the conclusions which the majority of us have reached, to deal with the other questions raised, namely (*a*) whether the

provisions of section 122 (3) repeal the provisions of section 27 of the Evidence Ordinance, or (*b*) whether the maxim *generalia specialibus non derogant* applies to save section 27 of the Evidence Ordinance in the event of there being repugnancy or a conflict between the provisions of section 122 (3) of the Criminal Procedure Code and section 27 of the Evidence Ordinance. Our brother Pulle, we understand, takes the view that the maxim applies in this case and preserves section 27 of the Evidence Ordinance. For the reasons given the majority of us are of the view that it is unnecessary to consider whether that maxim applies to this case.

We are, therefore, unanimously of the opinion that the conviction must be affirmed and the appeal dismissed.

Appeal dismissed.

1949 *Present :* **Basnayake J. and Gratiaen J.**

SINNALEBBE *et al.*, Appellants, *and* MUSTAPHA *et al.*, Respondents

S. C. 52 Inty.—D. C., Batticaloa, 570

Muslim Intestate Succession and Wakfs Ordinance (Cap. 50)—Sections 15 and 16—Application by persons interested in mosque—Omission to make all trustees respondents—Fatal irregularity—Power of Court to add remaining trustees as parties—Civil Procedure Code, section 18.

A court has no jurisdiction to entertain an application made under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance unless *all* the trustees of the charitable trust or place of worship in question are made respondents. Where the petitioners omit to name some of the trustees as respondents the court has no power to invoke the aid of section 18 of the Civil Procedure Code in order that the remaining trustees may be added as parties.

APPEAL from an order of the District Court, Batticaloa.

H. V. Perera, K.C., with *H. Wanigatunga*, for appellants.

E. B. Wikramanayake, K.C., with *J. N. David* and *Naina Marikar*, for respondents.

Cur. adv. vult.

December 14, 1949. BASNAYAKE J.—

On April 19, 1948, the nine persons who are respondents to this appeal (hereinafter referred to as the petitioners) made a preliminary application under section 16 of the Muslim Intestate Succession and Wakfs Ordinance (hereinafter referred to as the Ordinance) for leave to make an application under section 15 of that Ordinance. They named the two appellants as respondents to that application. The petitioners alleged that they were regular worshippers and members of the congregation of the Mosque called Meera Pallivasal at Kattankudy and that the first appellant was the Chief Maracair and the second appellant a Maracair of that Mosque, and asked that leave be granted to make a regular application to the District Court under section 15 of the Muslim Intestate Succession and Wakfs Ordinance.