[COURT OF CRIMINAL APPEAL.]

1944 *Present:* **Howard C.J., Moseley S.P.J. and Wijeyewardene J.**

THE KING v. HARAMANISA.

3—M.C. Kurunegala, 12,250.

Evidence—Charge of murder—Circumstantial evidence—Erroneous statement of fact in charge to jury—Statement to Police Officer in course of investigation—Oral evidence of statement inadmissible—Purpose for which the statement is used—Criminal Procedure Code, s. 122 (3), Evidence Ordinance, s. 155.

The accused was charged with murder and the evidence against the accused was of a purely circumstantial character. The main circumstance was the fact that finger impressions of the accused were proved to have been discovered on a glass chimney found near the dead body of the deceased.

In his charge to the jury the presiding Judge made an erroneous statement of fact regarding the circumstances in which the accused testified to his having touched the glass chimney.

Held, that the accused had been prejudiced in his defence and that the conviction could not be sustained.

A statement made to a Police Officer in the course of an investigation under Chapter 12 of the Criminal Procedure Code by a person—which expression includes an accused person—must be reduced to writing. Oral evidence of such statement is inadmissible.

The investigation made by a Police Officer is not limited merely to the examination of persons by the putting of questions. It includes the search for incriminating evidence and the examination of the *locus in quo* and the locality in the vicinity of the scene of the crime.

The written record of such a statement is admissible by virtue of section 122 (3) of the Criminal Procedure Code to contradict a witness after such witness has given evidence.

The written record of the statement of a witness as formulated in sub-section (3) is not substantive evidence of the facts stated therein, but is available for impeaching the credit of a witness as laid down by section 155 of the Evidence Ordinance.

Failure on the part of the presiding Judge to make it clear to the jury that such evidence is available only for the purpose of impeaching the credit of a witness amounts to non-direction.

APPEAL against a conviction by a judge and jury before the second Midland Circuit 1944.

G. E. Chitty (with him *M. M. Kumarakulasingham*), for applicant.

E. H. T. Gunasekara, C.C., for the Crown.

Cur. adv. vult.

October 30, 1944. HOWARD C.J.—

The accused in this case appeals against his conviction on a charge of murder. The appeal is based on the following grounds:—

(*a*) That the accused was prejudiced in his defence by an erroneous statement of fact in the learned Judge's charge to the jury regarding the circumstances in which the accused testified to his having touched the exhibit P 5, a glass chimney found with certain finger impressions of the accused;

(*b*) That there was misreception of evidence in the proof by the Inspector of Police of the statement made to him by the accused under section 122 (3) of the Criminal Procedure Code;

(*c*) That there was no direction in the charge that the statement referred to in (*b*) was not original evidence against the accused.

Crown Counsel at the commencement of the hearing of this appeal conceded that the charge did contain an erroneous statement of fact and in these circumstances he could not support the conviction. The evidence against the accused who was indicted with another person, who was acquitted, was of a purely circumstantial character. The main circumstance was the fact that finger impressions of the accused were proved to have been discovered on a glass chimney found near the dead body of the deceased, who was a Buddhist Priest. The appellant did not deny that the finger impressions on the chimney were his, but in the witness-box gave an explanation as to the circumstances in which he handled the chimney. In his evidence-in-chief he stated as follows:—

"I went inside the temple, took a mat, spread it and placed the dead body on that mat. Then the body was raised with the mat and carried out of the house. Besides that there was a chimney close to the dead body on the ground and I took it from where it was and kept it aside. It was about a foot away from where the dead body was lying. I touched the chimney after the dead body was placed on that mat. I held the head side of the deceased's body in order to place it on the mat. There was a lot of blood on that part of the body. I took the chimney and put it under the arm-chair. I took it from the place where it was lying and placed it on the ground and rolled it along on the ground."

In cross-examination he stated as follows:—

"This was at about 5 P.M. Some entered through the front door and others through the kitchen door. I brought a mat from the temple. It was in the temple. It was in front of the place where the dead body was lying. The body was lying with the head towards the front door. The mat was found about 1½ fathoms away from the head. It was in the open space in front. It was rolled up and put into a corner. The people there said that a mat was required to take the dead body out. Then I brought the mat and put the mat under the body together with other people. The body was lifted up and placed on the mat. I spread the mat on the floor. Some people lifted the body and placed it on the mat. Three or four people lifted the body and placed it on the mat. I too helped in doing so. I got hold of the region of the head and neck. I saw blood all over the body. The blood was clotted. There was liquid blood also. Near about the place where there were injuries there was liquid blood. I did not put my hand where the liquid blood was."

And later in answer to questions put by the Court he stated—

"*To Court* : I said that when the robes were lifted out of place the chimney stood revealed. As a result of the robes being there the chimney was almost covered.

The chimney was near about the middle of the body. There were people to the left of the dead body. They could have seen the chimney, if they looked carefully. I took the chimney.

To Court: I just rolled it. I did not take it like this and roll it. It was not upright. I did not get hold of the chimney into my hand like this. The chimney was like this and I rolled it down. I simply rolled it down. I did not wait to see where it stopped. It rolled in the direction of that arm-chair. The other people who were there must have seen me rolling it. It was after the body was placed on the mat that I rolled it."

With regard to this evidence, the learned Judge stated at pages 19-21 of the charge as follows:—

'Now remember the story he related from that point to Crown Counsel as well as to Counsel for the defence. He said that when he approached the body of the priest in order to prepare to carry the body out for the purpose of the post-mortem examination he saw a mat a little distance away from where the body of the priest lay. The mat was folded, and he says it was necessary to get a mat or something like a mat in order to place the body of the priest upon, for the body had to be carried out; and so he says he went and took this mat and laid it alongside the body of the priest, and that at that time he noticed a chimney just peeping from beneath the folds of the robe with which the priest's body had been covered from head to toe, not literally, but the major part of the body had been covered. And he says—and he was repeatedly questioned on the point—thinking somebody might tread on the chimney or kick it he used his fingers and rolled the chimney along and it came to rest under the arm-chair you see on the photograph.

You see the chimney was photographed by Inspector Weerasinghe. It was photographed on the 30th. Nobody else had noticed this chimney till the 30th. It was on the 29th morning that the priest's body was discovered, and it was on the 29th afternoon that the body was carried out for the post-mortem examination. Nobody had noticed the chimney under the arm-chair till the 30th of June when the fingerprint expert and photographer were looking for objects to see if any fingerprints existed.

Now, gentlemen of the jury, if that was the correct version, the version given by the accused of how he came to discover the chimney somewhere under the robes and a part of it peeping out and that he thereupon moved the chimney and rolled it along like that till it came to rest under the arm-chair, you will see that all that happened before the body was raised and placed on the mat. That was his evidence. So that unless before he actually helped to raise the body and deposit it on the mat the first accused had gone and held the body for some reason or other—and he does not say he did that—there was no occasion for his fingers to have got blood-stained before he touched the chimney. They would get blood-stained only if he had carried the corpse or helped to carry the corpse, but according to him, it was only after he had pushed the chimney along and made it reach that place under

the arm-chair that he went on to help the others to carry the corpse and place it on the mat. So that really if it were in that way he acted, there was no occasion for his fingers to get blood-stained in a way in which he could communicate those blood-stains on to the chimney, because he does not say that thereafter he meddled with the chimney at all. But supposing he has forgotten it, the only other way in which you can account for the blood-stained fingerprints found on the chimney is that, although he does not say it, before the carrying of the body from the floor on to the mat, he had gone and held the body and so got his fingerprints on to the chimney."

It is, therefore, clear that the learned Judge told the jury that the accused's story was to the effect that he rolled the chimney before he had held the body of the deceased and in these circumstances the blood must have been on his hands before he touched the body. This was not what the accused had said either in examination-in-chief or in cross-examination. Having regard to this erroneous statement of fact in regard to what was the main piece of evidence in the case, we are of opinion that it is impossible to support the conviction.

Although Counsel for the accused had succeeded in obtaining the setting aside of the conviction on the first ground put forward by him, we conceive it our duty, having regard to the uncertainty that exists with regard to the interpretation of section 122(3) of the Criminal Procedure Code, to deal with grounds (*b*) and (*c*). In cross-examination by Counsel for the accused, Inspector Dole said that the latter made a statement to him voluntarily and said that he had a sword which he had thrown into the ela. Also that he did not say that he used that sword on that particular night or that he had been to the Temple that night. In answer to the Court the Inspector said that the accused said he had not gone to the Temple at all. At the end of his testimony the Inspector in answer to questions put by the Court stated as follows:—

"This is a part of the statement to me by the 1st accused which was recorded by me. On the morning of the 29th at about 10 A.M. when I was ploughing a field I heard that the police had been informed. I did not go to the Temple. I had a sword at home. Immediately after the murder I threw it into the ela for I feared that I could be unnecessarily implicated. I can point out where the sword is now. I know nothing about the murder."

In his charge to the jury the learned Judge referred to the statement made by the accused to the Inspector in the following passage:—

"Now there is not a single witness in regard to that, and there is additional significance in the absence of evidence on that point when you remember the statement made by the first accused to Inspector Dole on the 12th of July, the day he was arrested, for he said to Inspector Dole: 'I heard about this when I was working in the field. I did not want to go to the Temple. I did not go there at all'. He did not say that he went there in the afternoon, that he helped to carry the corpse and things like that. That is not conclusive in itself, but that is a point which you may take into account."

Mr. Chitty makes three points with regard to the reception of this evidence and the manner in which it was treated. These points are as follows:—

(1) It was a statement within the ambit of section 122 (3) of the Criminal Procedure Code and hence cannot 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.

(2) The evidence with regard to the statement being only admissible to impeach the credit of the accused, the learned Judge should have directed the jury to the effect that such statement to the Inspector was not substantive evidence of the facts stated in such statement, but merely evidence impeaching the credit of the accused as a witness tendered under section 155 (*c*) of the Evidence Ordinance (Cap. 11). In the absence of such a direction Mr. Chitty maintains there was non-direction.

(3) Parts of the statement made by the accused were not admissible.

With regard to (2) Mr. Chitty in support of his contention cited the case of the *King v Silva*[1] in which it was held that a statement which is made by a witness to a Police Officer and is afterwards denied by the witness at the trial, cannot be used as substantive evidence of the facts stated against the accused. Such a statement is only relevant for the purpose of impeaching the credit of the witness. In his judgment on pages 195-196, Fisher C.J. stated as follows:—

" As regards the statement to the Superintendent, it was admissible only for the purpose of impeaching the credit of the witness Mohammadu and, in view of the fact that his evidence amounted to a denial of all knowledge of the circumstances, it could not strengthen the case for the prosecution. A statement such as this so put in evidence is not substantive evidence of any of the alleged facts stated in it against an accused person; it is merely evidence of the unreliability of the person who denies having made it. That being so, the learned Judge's direction to the jury that they should not act upon Mohammadu's statement unless they were corroborated by other evidence they could accept was a misdirection. That direction amounts to a direction that if the facts stated in the statement were corroborated by reliable evidence they could act upon the statement as substantive evidence against the accused. They should have been directed that they were not entitled to consider any of the contents of either of these statements as evidence against the accused."

The wording of section 162 of the Indian Criminal Procedure Code is on similar lines to section 122 of our Code. In *Syamo Maha Patro v. Emperor*[2] and in *Pakala Narayana Swami v. King-Emperor*[3] it was held that " a statement made by any person " includes a statement made by a person accused of the offence under investigation. Hence the accused in this case was in the same position as the witness Mohammedu in the *King v. Silva* (*supra*). The direction " That is not conclusive in itself" (that is to say the accused's statement and alleged lack of frankness

[1] *30 N. L. R. 193.*
[2] *(1932) A. I. R. Mad. 391.*
[3] *(1939) I A. E. R. 396.*

about certain matters) " but that is a point which you may take into account " did not make it clear that such evidence was only available for impeaching the credit of the accused. We think that Mr. Chitty's contention that the learned Judge's treatment of such evidence amounted to non-direction is strictly speaking correct.

With regard to the third point, Mr. Chitty maintains that parts of the statement made by the accused to the Inspector as elicited by the learned Judge were not admissible. The inadmissible parts were the alleged statement " He said that he had not gone to the Temple at all " recorded on page 47 of the record and the following parts of the statement recorded on page 48:—

> " On the morning of the 29th at about 10 A.M. when I was ploughing a field I heard that the Kollure Temple had been burgled and that the police had been informed. I did not go to the Temple, immediately after the murder. I know nothing about the murder."

This evidence, it is asserted by Mr. Chitty, could only be given to contradict the accused. It was, therefore, premature as the latter had not at that stage given his evidence. At page 195 in the *King v. Silva* (*supra*), Fisher C.J. stated as follows:—

> " As regards this statement, in my opinion, the objection to its admission should have been upheld. If it was intended to apply section 157, it was admitted prematurely; a witness cannot be corroborated in advance, and moreover the sequel showed that the statement would not have been corroboration of his evidence. This statement was therefore inadmissible under the circumstances."

The principle laid down by Fisher C.J. in our opinion applies. The evidence of Inspector Dole with regard to the accused's statement was admitted prematurely. A witness cannot be contradicted in advance any more than he can be corroborated.

In regard to the first point made by Mr. Chitty as to the reception in evidence of the statement made by the accused to the Inspector, Mr. Gunasekera on behalf of the Crown contends—

(1) That the statement is not within the ambit of section 122 (3) as it was not made in the course of any investigation under Chapter XII. of the Code.

(2) Section 122 (3) only limits the use of the written record of a statement. Oral evidence of such a statement is not subject to such restrictions.

We are of opinion that there is no substance in (1). The investigation made by a police officer or inquirer under this chapter covers a wide field and is not limited merely to the examination of persons by the putting of questions. The investigation includes the search for incriminating evidence and the examination of the *locus in quo* and the locality in the vicinity of the scene of the crime. A statement made by any person to a police officer who was so engaged would, in our opinion, be made " in the course of any investigation ".

Mr. Gunasekera's second contention raises a more difficult problem. Section 122 (3) is worded as follows:—

> " 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.
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> 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 words " No statement " would, at first glance, seem to refer back to the words " any statement " in sub-section (1), that is to say the statement or words used by the person orally examined which must by virtue of sub-section (1) be reduced into writing by the police officer or inquirer. " No statement " would therefore include both the oral statement of a witness and such oral statement reduced into writing. The use of the words " to prove that a witness made a different statement at a different time " also points to the same conclusion. On the other hand the words " or to refresh the memory of the person recording it " seems to indicate that " No statement " refers only to the written record inasmuch as the memory cannot be refreshed by an oral statement. Again the last sentence seems to imply that only the recorded or written statements come within the purview of this sub-section. The sub-section bristles with difficulties and is so difficult to interpret that, in our view, it is the duty of the Legislature to re-draft the section so as to make its meaning clear. We are, however, not devoid of authority in so far as the interpretation of the words to which I have invited attention is concerned. At page 425 of the judgment of Bertram C.J. in the *King v. Pabilis*[1] we find the following passage:—

> " A difficulty has, from time to time, arisen with regard to the words ' to refresh the memory of the person recording it '. These words have always seemed to me to imply that an officer recording such a statement may (where the law allows it, *e.g.*, under section 157 of the Evidence Ordinance) give oral evidence as to the terms of that statement, but may not put in the written statement itself. He may only use that

[1] *25 N. L. R. 424.*

statement to refresh his memory, though, of course, counsel for the defence may call for a statement so used under section 161 of the Evidence Ordinance."

The opinion of Bertram C.J. that the evidence of the oral statement is not subject to the limitations imposed by section 122 (3) was an *obiter dictum* but was followed by Keuneman J. when sitting as Commissioner of Assize in *The King v. Gabriel*[1]. Nihill J. in *The King v. de Silva*[2] would also seem to have been of the same opinion. Various Indian judgments on the interpretation of section 162 of the Indian Criminal Procedure Code support the view taken by the Courts in Ceylon that only the written statement is excluded. This view was taken in *Emperor v. Ramaraddi*[3], *Panindra Nath Banerjee v. Emperor*[4] and *Muthukumaraswami Pillai v. King-Emperor*[5]. In the first of these cases it was held that under section 162 of the Criminal Procedure Code a policeman can be allowed to depose to what a witness had said to him in the course of the investigation for the purpose of corroborating the testimony of that witness before the trial Court. Although on the wording of section 122 the question cannot be said to be free from doubt, we are of opinion that on the various authorities I have cited oral evidence of a statement made under section 122 is not subject by virtue of sub-section (3) to the limitations imposed by that sub-section and can be given in evidence under section 157 of the Evidence Ordinance (Cap. 11).

As pointed out by Mr. Chitty there is, however, a further impediment to the reception of such oral evidence. This is imposed by section 91 of the Evidence Ordinance which is as follows:—

> " When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Section 91 of the Indian Evidence Act is similarly worded. But oral evidence of a statement made to a police officer by a person under section 162 of the Indian Criminal Procedure Code is not rendered inadmissible as the police officer is not required to take down such statement in writing. Under section 122 of the Ceylon Criminal Procedure Code the statement must be reduced to writing. Hence section 91 of the Evidence Ordinance would seem to be applicable and no evidence can be given except the document itself. Indian decisions support this view. Thus in *Reg. v. Bai Rataro*[6] it was held that a confession of an accused person, taken by a Magistrate having no jurisdiction to convict or try him, is imperfect, if not signed by the accused person, and is inadmissible in evidence, and oral evidence to prove such confession is by reason of section 91 of the Evidence Act inadmissible also. This case was followed in

[1] *39 N. L. R. 38.*
[2] *42 N. L. R. 57*
[3] *A. I. R. 1914. Bombay 263.*
[4] *I. L. R. 36 Cal. 281.*
[5] *I. L. R. 35 Mad. 397.*
[6] *Bom. High Court Reps. 166.*

Reg. v. Shivya[1] and *Queen-Empress v. Viran*[2]; *Jai Narayan Rai v. Queen-Empress*[3] and *The Empress v. Mayadeb Gorsami*[4] are authorities to the same effect. In the latter case the headnote was as follows:—

> "Failure to comply with the provisions of ss. 182 and 183 of Act X of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under s. 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible."

In conclusion our findings may be summarized as follows:—

(1) A statement made to a police officer or inquirer by any person, which expression includes a person accused in the course of any investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.

(2) By reason of section 91 of the Evidence Ordinance only the written record of a statement within the ambit of (1) is admissible in evidence. Hence oral evidence of such a statement is inadmissible. The effect of our finding on this point is to render the words "or to refresh the memory of the person recording it" almost nugatory, since there would appear to be no circumstances in which oral evidence regarding the contents of the statement would be admissible. This is one of the matters to which we would invite the attention of the Legislature.

(3) The written record of such a statement is admissible by virtue of section 122 (3) of Cap. 16 to contradict a witness after such witness has given evidence.

(4) The written record of the statement of a witness used as formulated in (3), is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance.

(5) If it had not been for the prohibition contained in section 91 of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section 157 to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory.

For these reasons the appeal must be allowed and the conviction set aside.

Conviction set aside.

[1] *(1876) 1 Bom. 219.*
[2] *(1886) 9 Mad. 225.*
[3] *(1890) 17 Cal. 863.*
[4] *(1884) 6 Cal. 762.*