[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Keuneman S.P.J. (President), Jayetileke and Dias JJ.**

THE KING *v.* DON SAMEL.

Application 169 of 1946.

S.C. 3—M. C. Matara, 56,551.

Evidence—Statement of witness to police officer in course of investigation—Written statement alone, and not oral evidence of it, admissible—Only to contradict witness—Divisibility of the statement into two parts—Relevant portion alone admissible—Criminal Procedure Code, s. 122 (3)—Evidence Ordinance, s. 91.

Where a statement made by a witness to the Police under section 122 (3) of the Criminal Procedure Code is put to the witness at the trial of the accused—

Held, (i.) that, by reason of section 91 of the Evidence Ordinance, the written statement should be proved. The admission by the witness that he made the statement cannot be regarded as anything more than oral evidence of the statement and does not amount to proof of the written statement which alone is admissible;

(ii.) that the statement is admissible only to contradict the witness and not to give support to his testimony ;

(iii.) that, where the statement is divisible into two parts, one of which is relevant and the other inadmissible, the relevant portion alone is admissible.

[1] *(1905) 1 Balasingham's Reports, 194.* [2] *I. L. R. (1884) 9 Bom. 131.*

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

Mahesa Ratnam, for the first accused, applicant.

H. A. Wijemanne, C.C., for the Crown.

Conviction quashed.

Reasons later.

October 11, 1946. KEUNEMAN S.P.J.—

The first accused in this case, Don Samel, was convicted of murder by the unanimous verdict of the Jury. The second accused Don Andiris was acquitted.

The points urged against the conviction of the first accused are as follows :—

(1) Oral evidence was admitted of a statement alleged to have been made by one of the eye-witnesses, Premawathie, to the Police, and the contents of this statement were used to give support to the evidence of Premawathie at the trial as against this first accused.

(2) That the first information (P6) given to the Police by the witness Don Davith affecting this accused was proved, and that no adequate warning was given that that evidence was not substantive evidence. Don Davith in his statement to the Police asserted that he was an eye-witness of the assault, but at the trial he denied that he made the statement in question, and stated that he came on the scene after the assault was over and merely received information of the assault from Premawathie. He added that he saw the two accused going away from the scene.

As regards (1) it seems quite clear that the statement made by the witness Premawathie to the Police was put to her for the benefit of the second accused, for in her statement she said that the second accused though present did no harm ; at the trial she said that the second accused participated in the assault on the deceased. Her statement to the Police was therefore important in order to contradict her testimony against the second accused. What happened at the trial was that the whole of her statement to the Police was put in in two parts. Premawathie admitted that she made the first part of the statement which related to the acts of the first accused on that occasion. As to the second part of her statement relating to the presence of the second accused at the scene and to the fact that she did not see him do any harm, she made no reply. In point of fact no attempt was made by any counsel to prove the written statement made by her.

Counsel for the appellant relied on the decision of the Court of Criminal Appeal in *The King v. Haramanissa* [1]. In that case the effect of section 91 of the Evidence Ordinance on statements made to the Police under section 122 of the Criminal Procedure Code was considered. The finding of the Court is summarised 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.

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

"(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 . . . . .

In this case the written statement made by Premawathie to the Police has not been proved. In our opinion the admission by Premawathie at the trial that she made a part of that statement cannot be regarded as anything more than oral evidence of that part of the statement, and does not amount to proof of the written statement which alone could be admitted.

We are not at present concerned with that part of the statement to which she made no reply. The second accused has already received the benefit of that, although perhaps he was not legally entitled to that benefit.

The further point argued is that the portion of Premawathie's statement to the Police, which she admitted, has been used to give support to her testimony against the first accused at the trial. We have carefully considered that matter. In his charge the trial Judge made a point of the fact that Premawathie, in her statement to the Police, said that the first accused attacked the deceased with a sword, before the medical examination revealed that the attack had been made with a long-bladed weapon. The trial Judge suggested that this may be " circumstantial evidence to corroborate the oral testimony " of Premawathie. At a later stage of the charge also the trial Judge stated that with regard to the first accused Premawathie was " consistent " in her statement to the Police and in her evidence at the trial.

It is true that in the charge the trial Judge twice repeated to the Jury the warning that a statement made outside the Court by a witness could be used for the sole purpose of contradicting that witness and for no other purpose, and that it was not substantive evidence of a fact. But the matters earlier referred to may have been understood by the Jury to give additional support to the testimony of Premawathie and consequently prejudice may have been caused to the defence of the first accused.

We may add that in this case the statement made by Premawathie was easily divisible into two parts, and that the only portion of the statement admissible for the purpose of contradicting the witness was that which related to the fact that the second accused though present did no harm to anyone. That portion of the statement which related to the acts of the first accused was not relevant for the purpose of contradicting the witness.

As regards the other eye-witness Somawathie the position is very similar and no special comment need be made, except to say that only

that portion of her statement which contradicted her testimony in respect of the second accused appears to have been put to her. In the charge however the two girls were dealt with on the same footing.

(2) The statement P 6 made by the witness Don Davith was the first information to the Police and was not made in the course of the Police investigation. The statement has been properly proved. It was relevant and important as it tended to contradict the evidence of the witness and to discredit him. The warning by the trial Judge referred to earlier was emphatic and should have been understood by the Jury as showing that this statement was not substantive evidence in the case. Although we think that a special reference to the fact that it was not substantive evidence was perhaps advisable, we do not think that the absence of such specific reference caused prejudice to the first accused.

For these reasons under heading (1) we have already quashed the conviction of murder entered in this case and have ordered that a new trial be held, and we trust that this will be held without delay.

New trial ordered.