1918.

[FULL BENCH.]

Present: Ennis, Shaw, and De Sampayo JJ.

THE KING *v.* MUDIANSE *et al.*

P. C. Kandy, 17,348.

Accused arrested on suspicion — Murder — Statement of accused taken on oath — Statutory statement under s. 155, Criminal Procedure Code — Statement of accused read over to him and admitted to be correct — Statement admissible — Criminal Procedure Code, ss. 134, 302, and 155.

The statement of an accused person (arrested on suspicion of having committed an indictable offence) taken on oath as that of a witness is not in accordance with the provisions of sections 134 and 302 of the Criminal Procedure Code, and is inadmissible against the accused at the trial.

An accused whose statement was so recorded subsequently made a statement, when addressed under section 155 of the Criminal Procedure Code, as follows: "Yesterday I made a full statement to the Magistrate, that is the statement I wish to make now." The Magistrate then had the statement previously recorded read to the accused, and made the further endorsement that the accused admitted it to be correct.

Held, that as the first statement had become incorporated with the statutory statement under section 155, it was not merely admissible, but must be put in evidence at the trial.

THE facts appear from the judgment.

Brito Muttunayagam, for the accused.—An accused was incapable of giving evidence on oath before the Evidence Ordinance of 1895. Section 120 (4) made him competent, but it was an inroad on the common law rule. It must, therefore, be construed strictly (*1 Bal. 44*). The Police Magistrate intended to act under section 134, Criminal Procedure Code, which cannot be said to come under section 120 (4) of the Evidence Ordinance. The Police Magistrate, therefore, had no power to administer an oath before taking down the confession, and so the confession is inadmissible.

Section 155, Criminal Procedure Code, requires that the accused must be informed of the nature of the charge, and warned, as specifically provided by the section, before he can be asked to make a statement. The confession having been made before the above preliminaries were gone through, cannot claim admissibility under this section.—*The Imbuldeniya Double Murder Case* (*Ceylonese* newspaper, December 12, 1914).

The fact that the accused stood by his confession when questioned under section 155, Criminal Procedure Code, does not make the (otherwise inadmissible) confession admissible (*9 Mad. 224*). If that fact makes it admissible, all inadmissible confessions would be made admissible by getting the accused to assent before a Police Magistrate.

Section 155, Criminal Procedure Code, refers only to "any statement made by the accused" at the time, and not to any statement referred to by him.

Garvin, S.-G., for the Crown.—The fact that the accused was affirmed does not compel him to answer questions if they tend to incriminate him. If the accused goes to a Police Magistrate and makes a confession, there is nothing to prevent the Police Magistrate being called to prove the confession. If the Magistrate has recorded that confession, the record may be proved, as the record is the best evidence of it (see Evidence Ordinance, section 91). Section 424 of the Criminal Procedure Code provides that, if the provisions of the Code have not been fully complied with by the Police Magistrate, the Court may take evidence that such accused duly gave the evidence or statement recorded.

Counsel referred to *King v. Cadramen.*

The statement as recorded by the Magistrate is in any event admissible, as the accused admitted the statement to be correct when it was read over to him. The accused himself said that he had made a full statement, and that he had nothing to add. The Magistrate thereupon read the statement to him, and he admitted that it was correctly recorded.

[DE SAMPAYO J.—If accused said "I made a statement to Punchi Banda, and that is right," can you call Banda to supplement the statement?]

That is not the case here.

[DE SAMPAYO J. referred to *20 N. L. R. 65.*]

Cur. adv. vult.

February 22, 1918. SHAW J.—

This is a point reserved for the consideration of the Supreme Court by my Brother Ennis when presiding as Sessions Judge at Kandy Criminal Sessions.

On the morning of August 28, 1917, the body of one Idroos Lebbe Marikar was found in the Mahaweli-ganga at Talwatta, with injuries upon it that appeared to indicate that the man had been murdered.

On August 30 the Police Inspector, who was engaged in inquiring into the case, arrested one Mudianse and another man on suspicion, and brought them before the Assistant Police Magistrate to have their statements recorded.

The Magistrate then affirmed Mudianse and took down his evidence, as in the case of an ordinary witness, and the evidence was

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signed by Mudianse and endorsed by the Magistrate: "Read over to the witness, Mudianse, and explained in Sinhalese by me, and he put his mark in my presence.

Soon after he had so taken Mudianse's evidence, it appeared to have occurred to the Magistrate that, instead of affirming the man and taking his evidence, he should have recorded his statement as that of an accused under section 134 of the Criminal Procedure Code. He accordingly, at 2 A.M. of August 31, made a further endorsement at the foot of the evidence: "Before taking this statement, after this man told me that he wished to tell the Magistrate what he knew, I said that I was prepared to hear anything he had to say. I believe that statement was voluntarily made, and I certify that it is an accurate one. He admitted its accuracy."

There can be no doubt from the evidence of the Police Inspector that at the time Mudianse's evidence was taken, although he had not been formally charged before the Magistrate, he was an accused person, and as such was incompetent as a witness at the magisterial inquiry. The statement having been taken on oath as that of a witness, it was not in accordance with the provisions of sections 134 and 302 of the Criminal Procedure Code, and therefore would, had nothing further taken place, have been inadmissible against the accused at the trial.

In the afternoon of August 31 the Magistrate resumed his inquiry, and Mudianse was formally charged with the crime and duly addressed by the Magistrate, according to the provisions of section 155 of the Code. He then stated: "Yesterday I made a full statement to the Police Magistrate at his bungalow, and that is the statement I wish to make now. I wish to state that statement is accurate. I have nothing further to add." The Magistrate then had the statement previously recorded read to the accused, and made the further endorsement to it: "Read over and interpreted to the accused in open Court, and admitted by the accused to be correct," and signed and dated the statement "August 31, 1917, 4.30 P.M.". He also endorsed the statutory statement made under section 155: "Statement referred to is herewith attached."

At the trial the counsel for the prosecution proposed to open to the jury and to read in evidence the two statements. This was objected to by the counsel on behalf of the accused, and the Judge reserved the question of the admissibility of the evidence for the opinion of this Court. At the trial it did not transpire that the previous statement had been read over to the accused at the time he made the statement under section 155, which only became apparent when the previous statement was referred to at the present hearing, and this fact differentiates the case from *The Imbuldeniya Double Murder Case*, reported in the *Ceylonese* newspaper of December 12, 1914, cited at the sessions.

I am of opinion that the statements are admissible in evidence. Whether the mere reference in the statutory statement of an accused to a previous inadmissible statement would render evidence of the contents of such statement admissible may be open to some doubt, but in the present case the previous statement was again read over to the accused and identified by him as being the statement he wished to make under section 155 of the Code, and it was attached by the Magistrate to that statement. The effect of what occurred appears to me to be the same as if the accused had himself repeated the words of the previous statement and the Magistrate had written them down afresh.

The previous statement has become incorporated with the statutory statement under section 155, and is, therefore, not merely admissible, but must be put in at the trial under the privisions of section 233 of the Code.

ENNIS J.—I agree.

DE SAMPAYO J.—

For the reasons given in the judgement of my Brother Shaw, I also think that the statement recorded by the Police Magistrate on August 30, 1917, is admissible as an integral part of the statement made by the accused under section 155 during the inquiry.*