[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.**

REGINA *v.* D. M. ARTHUR PERERA *et al.*

APPEALS NOS. 105 AND 106, WITH APPLICATIONS NOS. 162 AND 165 OF 1955

S. C. 3—M. C. Colombo, 14,281

Criminal Procedure Code—Section 233—Meaning of words "all statements"—Non-summary inquiry—Election of accused to give evidence—Is his evidence a "statement"?—Liability of accused to cross-examination—Admissibility, at the trial, of accused's deposition—Sections 134, 157 (1), 160, 161 (2), 164, 233, 286 (1), 302 (1)—Evidence Ordinance, ss. 9, 17, 21, 157.

By section 233 of the Criminal Procedure Code, "All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution".

Held, that the evidence given by an accused person under section 161 (2) of the Criminal Procedure Code in the course of a non-summary inquiry is not a statement within the contemplation of the words "all statements" in section 233. Therefore, the prosecution is not bound to put in and read such evidence before closing its case at the trial of the accused.

The Queen v. Sathasivam (1953) 54 N. L. R. 541, overruled.

Held further, that, when the Clerk of Assize is called to prove certain statements which were put to witnesses in cross-examination, the deposition made by the accused under section 161 (2) of the Criminal Procedure Code is not admissible under sections 9 and 21 of the Evidence Ordinance in order to prove the fact that a statement, which had been made by the accused before a Magistrate under section 134 of the Criminal Procedure Code and which the prosecution has already put in as a confession of the accused, had been retracted by the accused in his evidence at the non-summary inquiry. It is, however, open to the accused to give evidence at the trial and rely on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance.

Obiter : When an accused elects to give evidence on his own behalf at a non-summary inquiry, he is liable to be cross-examined under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof.

Joint trial—Principal and abettor—Confession by abettor—Separation of trials—Factors for consideration—Discretion of Court—Criminal Procedure Code, s. 184.

A confession made by a co-accused and admitted in evidence at the trial does not necessarily vitiate the joint trial of several accused if sufficient warning is given to the Jury that the confession is not evidence against the other accused.

Where several persons concerned in committing an offence are charged together, the question whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Criminal Procedure Code. Once that discretion has been judicially exercised, the Court of Criminal Appeal will not interfere, except when it

2——J. N. B 51209—1,532 (4/56)

appears to it that a miscarriage of justice has resulted from the prisoners being tried together. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case.

Inspection of scene of offence—Propriety of conducting experiments during such inspection—Criminal Procedure Code, s. 238.

In the course of the trial, the Judge, Jurors and Counsel visited the scene of the offence. The 1st accused did not desire to join in the visit, but his Counsel was present on his behalf. During the inspection a police officer stood at a window and, introducing his hand through the grill, demonstrated that a person of the 1st accused's height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. When the Court re-assembled after the inspection, the police officer gave evidence under oath explaining the demonstration.

Held, that the demonstration of the police officer at the scene of the offence was not obnoxious to the provisions of section 238 of the Criminal Procedure Code.

Confession—Voluntarily made before Magistrate—Subsequent allegation by accused that the statement was not voluntary—Admissibility—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80.

At an inquiry held by the trial Judge in the absence of the Jury the 2nd accused, who had made a confessional statement before a Magistrate, gave evidence that he was virtually in the custody of the Police at the time the statement was recorded under section 134 of the Criminal Procedure Code. The Judge, however, found that the statement was made by the accused voluntarily.

Held, that the evidence was admissible in evidence against the 2nd accused.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *J. C. Thurairatnam* (Assigned), for 1st accused-appellant.

G. E. Chitty, with *A. S. Vanigasooriyar*, *Daya Perera*, and *E. A. D. Atukorala* (Assigned), for 2nd accused-appellant.

H. A. Wijemanne, Acting Deputy Solicitor-General, with *A. C. M. Ameer*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 23, 1956. BASNAYAKE, A.C.J.—

The first appellant has been convicted of the offence of murder and the second appellant of abetment of that offence.

Although one of the grounds of appeal was that the verdict of the Jury was unreasonable learned Counsel who appeared for the appellants did not canvass the verdict on that ground. It would appear from the transcript of the proceedings that there was ample evidence which, if believed, proves conclusively the guilt of the appellants.

Of the 18 other grounds raised in the notice of appeal of the first appellant Counsel argued only the fourth, sixth, and seventh. They are set out as follows :—

" (4) The failure to put in and read in evidence before the close of the case for the prosecution the statement made by the 2nd accused in the Magistrate's Court under section 161 of the Criminal Procedure Code rendered illegal the entire trial and in any event gravely prejudiced the accused ;

(6) It is respectfully submitted that there should have been a separation of trials ; and

(7) Portions of a statement alleged to have been made by the 1st accused to the Police were illegally admitted into the case ".

Of those grounds learned Counsel very strongly urged the first. It arises in this way. At the magisterial inquiry into the case, the second appellant, on being addressed under section 160 of the Criminal Procedure Code said " I am not guilty ", and on being immediately thereafter addressed under section 161 of the Code stated " I wish to give evidence here " ; but expressed no desire to call witnesses on his behalf. Thereupon the Magistrate proceeded to take his evidence. Earlier this appellant had made a statement which was recorded under section 134 of the Code. It was produced in evidence as document P38. In that statement this appellant described in elaborate detail how the first appellant whom he had known for twelve years planned and carried out the murder of the deceased and confessed the part he had played in the entire transaction. In his evidence he alleged—

(*a*) that he was assaulted by the Police and coerced into making the statement he made to the Magistrate,

(*b*) that the statement was false, and

(*c*) that he knew nothing about the crime.

At the trial, after the statement of the appellants under sections 160 and 161 had been read, but before the close of the case for the Crown, the pleader for the second appellant, in the absence of the Jury, made an application—

" that the evidence given by the second appellant before the Magistrate at the Non-summary proceeding be also led in evidence ".

He relied on the case of *Queen v. Sathasivam* [1]. Learned Counsel for the Crown said that he did not propose to put in the evidence of the second appellant and cited in support of his contention the judgment of this Court in *King v. Punchimahatmaya* [2]. The learned trial Judge after hearing argument ruled that the Crown was not bound to put in under section 233 of the Code the evidence given by the second appellant before the Magistrate at the inquiry under Chapter XVI of the Code.

[1] *54 N. L. R. 541.* [2] *44 N. L. R. 80.*

Counsel contended that the evidence given by the second appellant before the Magistrate was a statement within the contemplation of the words " all statements " in section 233 of the Code. That section reads—

" All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

Counsel's contention was that the expression " statement " includes both a statement on oath and a statement not on oath and evidence being a statement on oath is included in the expression " all statements ". But while the word " statement " may in certain provisions of law to which our attention was drawn be wide enough to include evidence, the question that arises for determination is whether in the context in which the expression " all statements " occurs in section 233 of the Code it must be given that wide meaning or whether it must be restricted to all statements made by an accused in the course of the non-summary inquiry in contradistinction to evidence given by him. That question has to be decided by reference to the provisions of the Code dealing with non-summary inquiries as contained in Chap. XVI thereof.

It is common ground that prior to the amendment of the law relating to non-summary inquiries by Ordinance No. 13 of 1938, the expression " all statements " in section 233 of the Code could only have meant statements of an accused recorded in the course of the non-summary inquiry other than evidence, since there was no provision then for an accused to give evidence on his own behalf at the inquiry. The amending Ordinance was designed to provide for direct committal by a Magistrate for trial by a higher Court of cases which a Magistrate has no power to try summarily. While retaining the existing provision under which, at the close of the evidence for the prosecution, when a *prima facie* case is made out on that evidence, the Magistrate is required to explain the charge to the accused and give him an opportunity of making an unsworn statement after cautioning him that whatever he says would be recorded and put in evidence at his trial, the legislature at the same time made provision enabling an accused to give evidence and for the recording of such evidence should he elect to give such evidence. It is clear from section 161 (2) that the object of the new provision was to enable the accused to place before the Court at that stage of the inquiry the evidence he would be able to give himself so that in deciding whether the case should be committed the Magistrate may, subject to the provisions of section 164 of the Code, take into account such evidence and also the arguments of his Counsel or pleader, and not to allow that evidence to be read at the trial in terms of section 233 of the Code.

We also wish to state that an accused electing to give evidence on his own behalf would be liable to cross-examination under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof. Although the question arose only incidentally, and it was not contended before us that the legal position is otherwise, we have thought it fit to express our opinion on the point as there appears to be uncertainty as to the practice hitherto adopted by Magistrates when an accused gives evidence at a non-summary inquiry.

Learned Counsel relied strongly on section 157 (1) in Chapter XVI of the Code which refers to the evidence of witnesses as "statements on oath", but it is not without significance that such statements are referred to in the subsequent provisions in the same chapter as either "depositions" or "evidence" while the expression "statements" is used only to denote statements other than evidence.

Section 157 deals with the manner in which the evidence of witnesses other than an accused at a non-summary inquiry shall be taken, and the fact that in sub-section (1) thereof that evidence is referred to as statements on oath is not, in our opinion, a convincing reason for interpreting the expression "all statements" in section 233 as including evidence given by an accused under section 161.

Learned Counsel for the second appellant, whose petition of appeal contained a ground of appeal in the same terms as the one under consideration, sought to reinforce the arguments addressed to us on this ground of appeal by reference to certain other provisions of the Code outside Chapter XVI where, in his submission, the expression "statement" includes evidence. In this connection he was able to refer us specifically only to section 286 (1) and section 302 (1). Even assuming that the expression "statement" in section 286 (1) includes any evidence given by an accomplice who, having accepted a tender of a pardon, is examined as a witness under section 283 (3), it does not follow that the same interpretation must be given to the expression "statements" in section 233. The meaning of that expression must, as already stated, be gathered from a consideration of the provisions of Chapter XVI of the Code. In regard to section 302 (1), although Counsel went to the length of saying that evidence given by an accused at an inquiry under Chapter XVI of the Code must be recorded in the manner set out in that section, in our opinion this argument is quite untenable since it is clear that the section deals (though not expressly) with statements other than evidence, and where an accused gives evidence at the inquiry the manner of recording it is governed by section 298 and not section 302 (1). Section 302 (1) is, thus, an instance where the expression "statement" is used in the Code in a sense other than evidence.

Although the Crown relied on the case of *The King v. Punchimahatmaya* (*supra*) both at the trial and before us the precise question under discussion did not arise in that case.

While the answer to the question which we are called upon to decide is not entirely free from difficulty, we have considered all the arguments which were addressed to us in support of the contrary view, and we are of the opinion that the expression "all statements" in section 233 of the Code means all statements of an accused, other than his evidence recorded under section 161, for the recording of which express provision is contained in Chapter XVI. This ground of appeal, therefore, fails.

The conclusion which we have reached seems to be in accordance with the English practice, as stated in Phipson on Evidence [1], of putting in at the trial, as part of the case for the prosecution, the statements (commonly referred to as statutory statements) made by an accused at

[1] *Phipson on Evidence, 9th Edn, pp. 532–533.*

the preliminary inquiry whether such statements tell for him or against him. Although under the provisions of the Criminal Justice Act, 1925, relating to the procedure at the preliminary inquiry, some of which are closely analogous to the provisions in Chapter XVI of the Code, an accused is a competent witness for the defence, there appears to be no provision which obliges the prosecution to put in evidence at the trial any evidence given by the accused at the inquiry.

The next point learned Counsel for the first appellant argued was that the appellants should not have been tried jointly. At the trial no application was made for a separation of trials, but the learned Judge appears to have taken upon himself the question of considering the matter and deciding that the case did not call for separation. Whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Code. Once that discretion has been judicially exercised, as it has been done in the instant case, this Court will not interfere, except where it appears to it that a miscarriage of justice had resulted from the prisoners being tried together[1]. Where, as in this case, there has been no application to separate the trials, much less would it be possible to interfere [2]. In the instant case the joint trial has not resulted in a miscarriage of justice. As the question of separation of trials appears to need clarification, we wish to take this opportunity of making a few observations thereon. *Prima facie* when the essence of the case is that the accused persons were engaged in a common enterprise it is proper that they should be jointly indicted and tried, and generally speaking it would be as much in the interests of the accused as in the interests of the prosecution that they should be. There is no rule of law that where it appears that the essential part of one accused's defence amounts to an attack upon another there should be separate trials. The matter is entirely, as stated above, at the discretion of the trial Judge, exercised with due regard to the interests of the prosecution and the interests of the accused. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case [3]. If it should appear that there is a real danger that a separation of trials may so hamper the Crown in its presentation of the case as to lead to a miscarriage of justice by the acquittal of guilty persons, that is a consideration which may outweigh the consideration of prejudice to the accused [4].

In this case the confession of the second appellant, the abettor, was admitted in evidence subject to the warning given by the trial Judge to the Jury that it was not evidence against the first appellant. The only ground on which it was contended that the trial Judge should have ordered a separation of trials was that this warning to the Jury, though admittedly given in adequate terms, would not have entirely removed

[1] *Rex v. Gibbin, 13 Cr. App. R. 134.*

[2] *Daniel Youth v. The King, (1945) A. I. R. Privy Council 140.*

[3] *Rex v. Kritzinger and another, 1932 (4) S. A. L. R. 651.*

[4] *Rex v. Marian Grondkowski and Henryk Malinowski, (1946) 1 All E. R. 559*

the possibility of prejudice being caused to the first appellant. The same question was considered in the case of *Daniel Youth v. The King* [1] where the following observations were made by Lord Porter in delivering the judgment of the Privy Council :—

> "It is true no doubt that in all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to admit such evidence, leaving it to the presiding Judge to warn the Jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible."

This ground of appeal, therefore, fails.

The last ground of appeal set out earlier was not pressed by Counsel for the first appellant and need not be discussed here.

Counsel also submitted that, in view of the fact that this Court had intimated in a recent judgment that it was proper for Counsel to draw the attention of the Court to any matter which affects the validity of the conviction even though it has not been raised in the petition of appeal, he wished to bring to the notice of the Court certain irregularities which, he alleged, occurred at the visit to the scene by the Jury though they were not included in the grounds of appeal. The visit was suggested by learned Crown Counsel who addressing the Court said—

> "My Lord, I think it is desirable to lead the evidence of the Government Analyst after visiting the scene. The evidence of Inspector Syms could also be led after that".

The view of the scene was accordingly fixed for the next day at 9.30 a.m. Crown Counsel made the following further application :—

> "Your Lordship might instruct Mr. Syms to mark out the position in which the bed and the bedside table of the deceased were and also to put back these two flower boxes".

The Judge made order as follows :—

> "The flower boxes could be taken there by the Fiscal officers. If there is anything else which you wish to suggest you could see me in Chambers".

The Court then adjourned for the day. Thereafter in Chambers learned Counsel defending the first appellant made an application to the Judge which is recorded thus :—

> "Mr. Aelian Pereira on behalf of the 1st accused informs me that the 1st accused does not desire to join in the visit to the scene tomorrow morning, apparently because he does not wish to be seen by the crowd. Since his Counsel will be present on his behalf the 1st accused need not accompany the Court. He can be kept in custody in Court till our return".

[1] *Daniel Youth v. The King, (1945) A. I. R. Privy Council 140.*

When the Judge, Jurors, Counsel, the Court staff, and the appellants assembled at Hultsdorf the next day at 9.30 a.m. prior to the drive to the scene the learned Judge addressed the Jurors in the presence of the Clerk of Assize, in whose charge they were placed during the visit, and requested them not to discuss, except with him, any matter concerning the trial at the scene. What happened at the scene is thus recorded :—

> " The room in which the deceased slept on the night of the incident is pointed out by Inspector Syms who also indicates the position of the bed on which the deceased slept marked with chalk lines. The position of the bed-table on which was the reading lamp. The height of the bed is shown marked on the wall and the height of the bed-table just below the switch. The height of the window sill on the inside is indicated. The Inspector is asked to stand outside the window through which the shot is alleged to have been fired with the flower boxes placed in the position in which they were said to have been at the time of the incident, and insert his hand through the grill over the flower box at the left hand corner of the window.
>
> The lobby, and the lights in the lobby with the light switches are shown, the bell switches and the bell itself, the back door for the use of the servants, the lock of the door of the deceased's room are also shown. The Inspector is also asked to stand at the window outside and the Jury see the position from outside the house. The new building of Proctor Thenuwara, the brother of the deceased, is shown. The Clerk of Assize is asked to stand on the short parapet wall in front of the window of the deceased's bed-room, looking into it. The gate at the entrance to the sandy lane is shown and the lamp post opposite the gate. The gate of No. 108 at which the witness Gurusamy stood is also indicated. The Court then returns by the route said to have been taken by the accused's car on the return trip from the deceased's house after the shooting ".

When the Court re-assembled after the visit to the scene at 10.45 a.m. the same day, Mr. Sirimanne the Government Analyst was called as a witness. He said that he visited the scene of the offence, for the first time on the day after the murder and several times thereafter, and carried out certain experiments to test whether the deceased could have been shot from the place the prosecution alleged he was. His opinion was that a man of 5' 9" in height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. The first appellant is 5' 11" and Mr. Sirimanne is 5' 11½".

Mr. Syms was called next. He said, that he entered the room of the deceased only at 5 a.m. of the day on which the deceased had been shot and that although he had come earlier he was unable to enter it as it was locked. He made careful observations of the room and its contents. Then he examined the outside, observed the windows, and the two flower boxes on the window sill at a height of 5' 2". He found the plants disturbed and some uprooted. Then he proceeded to describe the house by reference to certain photographs produced in evidence. The witness

then described how he stood by the window and put his hand through the grill and he said he did it with a fair amount of ease. He was then asked—

"*Q.* Actually this morning when the Court visited the scene you introduced your hand into that room over the flower box ?

A. Yes.

Q. You could do it without much effort ?

A. Yes.

Q. Standing on the ground ?

A. Yes.

.....

Q. This morning you accompanied the court when they went to the scene ?

A. Yes.

Q. On the order of His Lordship you pointed out certain spots to the court ?

A. Yes.

Q. The position of the bed, the actual height and width of which you had actually marked on the wall at the bottom of the window ?

A. Yes.

Q. You showed the position of the bedside table on which the lamp P66 and the book and purse were found ?

A. Yes.

Q. You also indicated the switch-board which contained all the switches to the other parts of the house and the passage leading to Mrs. Thenuwara's room ?

A. Yes.

Q. And also the bells and bell switches ?

A. Yes.

To Court :

Q. You showed us the points where the bells ring ?

A. Yes.

Examination continued.

Q. You also showed the actual window through which it is alleged the shot was fired ?

A. Yes.

To Court :

Q. You stood at that window and introduced your hand while the Jury were inside the room and you remember standing there again outside the door so that the jury could see you standing ?

A. Yes.

Examination continued.

Q. Could you introduce your hand without straining ?
A. Yes.
Q. You also pointed out the spot where the car was and the spot where Gurusamy said he was at the time he heard the shot ?
A. Yes. "
.....

Cross-examined by pleader for the second appellant, Inspector Syms gave the following evidence :—

" *Q.* You went and stood by the window-sill this morning and put your hand through the grill work ?
A. Yes.
Q. You did that with ease being 6 ft. 2 inches in height ?
A. Yes.
Q. You could only insert your hand up to about the wrist through the grill work ?
A. No. I could put my hand in as far as my arm extended.
Q. How much of your hand was protruding on the inner side of the bedroom ?
A. About 7 inches ".

Counsel submitted that what was done at the scene was open to serious objection on the ground that there was no authority in section 238 of the Code, for the taking of evidence or the carrying out of tests when the Jury views the scene of the offence. He further submitted that in this instance the illegality was even more serious as the tests were conducted in the absence of the first appellant. Before we discuss the submissions of learned Counsel it will be helpful if the section of the Code is first set out. That section reads—

" 238. (1) Whenever the Judge thinks that the Jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the Jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.

(2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any of the jury ; and unless the Court otherwise directs they shall when the view is finished be immediately conducted back into Court ".

The section does not require that the Judge, Counsel, and accused should accompany the Jury. It only provides for a view of the scene by the Jury who will be conducted under the care of an officer of Court. As the officer of Court is not likely to know where the scene of the offence would be it also provides for the appointment by the Judge of a person who shall show the Jury the scene of the crime.

The question which remains for consideration is whether the act of Inspector Syms in standing at the window and introducing his hand through the grill in the presence of the Judge, Jury, and Counsel at the instance of the Judge is irregular and if so whether it is such an irregularity as to vitiate the conviction. Learned Counsel for the second appellant strenuously argued that the irregularity was so serious that it, in the words used in *Ibrahim's* case [1], "tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future".

Generally speaking the conducting of experiments at an inspection of the scene of the offence is fraught with danger and should be avoided unless it is necessary to do so in the interests of justice.

In the case of *The King v. Seneviratne* [2] the Privy Council declined to lay down as a general proposition that on a view by the Jury experiments should under no circumstances be conducted. In the case of *Samaranayake v. Wijesinghe* [3], the whole question of the scope of a visit to the scene of offence and the carrying out of experiments has been discussed. What was done in the instant case was a demonstration which was not intended to be evidence in itself but was designed to assist the Jury to better understand the evidence, for it was only after the visit that the evidence of the Government Analyst and Inspector Syms was taken. Both of them gave evidence bearing on the theory of the prosecution that the deceased was shot by a man of 5' 9" or over in height from outside the window shown to the Jury. Where, as in this case, a view of the scene has been followed by the evidence of the witness who gave the demonstration and indicated the various matters the Jury were expected to view there can be no valid objection to the procedure adopted even though the first appellant did not in person accompany the Judge or Jury. Though it is not necessary in every case that the observations made at an inspection *in loco* should be put before the Court in the form of a statement from a witness who is called, or recalled, after the inspection has been made, it is usual in some jurisdictions when the hearing is resumed, after an inspection, to call, as in this case, witnesses to give evidence in open Court under oath as to the demonstrations given, explanations made and as to the matters indicated by them at the inspection. Learned Counsel for the appellants relied on the case of *Samaranayake v. Wijesinghe* (*supra*) and *The King v. Seneviratne* (*supra*). What was done in the instant case does not come within the range of experiments which both those decisions have pronounced as irregular. The extent and scope of an inspection *in loco* is a much discussed subject [4]. But it is not necessary to elaborate the matter further for the purpose of this judgment.

[1] *Ibrahim v. King-Emperor, (1914) A. C. 599 at 615.*

[2] *The King v. Seneviratne, 38 N. L. R. 208.*

[3] *Samaranayake v. Wijesinghe, 52 N. L. R. 516.*

[4] *Vol. LXVIII South African Law Journal, p. 8—February, 1951; Vol. 213 Law Times Journal, p. 161—21st March, 1952.*

Scott v. Numurkah Corporation, (1954) 91 Commonwealth Law Reports 300 at 309 et seq.

Wigmore on Evidence, 3rd Edn. 1940. Vol. IV. p. 268 (Sec. 1162), et seq.

Learned Counsel for the second appellant also submitted that the statement of the second appellant (P38) recorded under section 134 of the Criminal Procedure was a confession and was improperly recorded by the Magistrate and admitted by the learned trial Judge. His submissions under this head he classified as follows :—

"(*a*) It (the statement) was made while the 2nd accused was actually or constructively in Police custody and the Magistrate had not adequately ensured that the accused was free from duress or influence by the Police and had not adequately questioned the accused to ascertain whether any promise or inducement had been offered to him for the making of the confession.

(*b*) The circumstances under which the Police brought the 2nd accused before the Magistrate and remained in or about the precincts of the Court during the recording of the confession and before and after it and obtained immediately from the Magistrate a copy of the confession are strongly indicative that circumstances existed which vitiated the taking of the confession and which would serve also to exclude the confession by virtue of the provisions of section 24 of the Evidence Ordinance.

(*c*) The circumstances under which a Proctor purporting to represent the 2nd accused was present in the Magistrate's chambers during the recording of the confession far from ensuring that the 2nd accused had independent legal advice strongly suggest that he had no such advice and that his presence in no way enured to the benefit of the 2nd accused or served the purpose of his interests but rather served only to give the Magistrate an unjustified sense of confidence that the interests of the 2nd accused were adequately safeguarded by legal advice. Upon the admissions of this Proctor alone it is clear that he neither advised the 2nd accused nor gave himself an adequate opportunity of acquainting himself with the matters relevant to the interests of his client before he was present at the recording of the confession.

(*d*) It should have been obvious that a man who is allegedly confessing to murder could have had no interest to be served by the presence of a Proctor at the recording of the confession, even if the Proctor had as this Proctor had not, been fully instructed as to what the 2nd accused was about to tell the Magistrate. The presence of the Proctor provided him with neither protection nor independent advice nor could it have mitigated the full rigour of the consequences of such a confession ".

We are unable to agree with learned Counsel that the provisions of section 134 of the Criminal Procedure Code have not in this instance been satisfied. Section 134 reads—

"134. (1) Any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

(3) No Magistrate shall record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect :—

I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.

(Sgd.) A. B.
Magistrate of the Magistrate's Court of . . . . "

According to the record the learned Magistrate appears to have questioned the accused before he recorded the statement and satisfied himself that it was voluntary. These are the questions he asked him—

"*Q.* Are you making this statement due to any inducement ?
A. No.
Q. Have you been threatened or assaulted to make a statement ?
A. No.
Q. Have you been offered any relief if you make this statement ?
A. No.
Q. Why are you making this statement ?
A. Injustice has been done and I wish to make this statement ".

Thereafter the Magistrate proceeded to record the statement of the second appellant which runs into six and a half manuscript and eight and a half typewritten pages.

Under section 80 of the Evidence Ordinance whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

(i) that the document is genuine ;
(ii) that any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true ; and
(iii) that such evidence, statement, or confession was duly taken.

In the instant case the prosecution without relying on the presumption created by the section led evidence in order to prove that the statement was voluntary. At an inquiry held by the Judge in the absence of the Jury the second appellant gave evidence and stated that the statement was not voluntary and that he was forced to make it by the Police under threats and that the statement was false. It was urged on behalf of the second appellant that he was virtually in the custody of the Police at the time he made the statement because Police officers were about the

place and were constantly using the telephone in the passage which gave access to the room in which the second appellant was detained till he was called into the adjoining room in which the Magistrate was.

It would appear from the learned trial Judge's order that all these matters were considered by him when he decided to admit the statement and we see no grounds for holding that he was wrong.

Counsel for the second appellant also complained that when the Clerk of Assize was called to prove certain statements which had been put to witnesses in cross-examination the trial Judge had refused to allow the second appellant's deposition before the Magistrate to be produced in evidence. The application of the second appellant's pleader and the ruling of the trial Judge are recorded as follows :—

> " At this stage Mr. Weerakoon makes a formal application to have the deposition of the second accused made a part of the defence case and read. The Court disallows the application ".

It was contended by Counsel for the second appellant that the disallowance of this application was wrong and that even if the deposition was not admissible under section 233 of the Code it was admissible in order to prove the fact that the statement P38, which the prosecution had already put in as a confession of the second appellant, had been retracted by him in his evidence at the non-summary inquiry. When asked to state under which section he sought to have the statement admitted he referred us to section 9 of the Evidence Ordinance.

Evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence in a subsequent proceeding except in accordance with the provisions of the Evidence Ordinance or the Criminal Procedure Code. Learned Counsel for the second appellant did not seek to come under any provision of the Criminal Procedure Code. A previous deposition may be proved if relevant under sections 32, 33, 155 (*c*) and 157 of the Evidence Ordinance. It was not argued before us, however, that any of these provisions permitted the use of the second appellant's evidence in the manner in which it was sought to be put in at the trial. While the evidence in question would be an admission as defined in section 17 (1) of the Evidence Ordinance, it does not appear to be one which could have been proved on behalf of the second appellant under either of the paragraphs (*a*) or (*b*) of section 21 of that Ordinance. With regard to paragraph (*c*) of section 21, as stated above, section 9 was the only provision of the Evidence Ordinance under which Counsel urged that the evidence was relevant, otherwise than as an admission. That section declares as relevant, *inter alia*, facts " which rebut an inference suggested by a fact in issue or relevant fact ". In so far as the evidence of the second appellant at the inquiry may have been relevant under this section to rebut any inference that the Jury may have drawn against him from the alleged confession of his which had been put in evidence by the prosecution, its relevancy could have arisen only on the basis that the facts deposed to in that evidence were true, and not otherwise. Learned Counsel urged on us, however, that the evidence in question was relevant

and admissible apart from the truth or falsity of the facts deposed to in it. But we fail to see how the Jury could possibly have been invited to assess the weight to be placed on the alleged confession by merely taking into account the bare fact that it had been subsequently retracted by the second appellant and without considering the truth or falsity of what was stated by him on that occasion. We are unable, therefore, to agree with the proposition of learned Counsel and we are of the opinion that the application made on behalf of the second appellant was rightly disallowed by the trial Judge.

It was plainly open to the second appellant to have given evidence at the trial and relied on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance. Having chosen not to do so he could not be permitted to achieve a result in a manner not provided by the Evidence Ordinance, namely, by substituting for evidence which he might have given at the trial, the evidence which he gave before his commitment by the Magistrate.

If the second appellant had made only a statement from the dock when called upon for his defence at the trial and in that statement he retracted the confession, the terms of section 157 of the Evidence Ordinance would have precluded him from reading as part of the defence his evidence at the inquiry. If, as it happened, the second appellant did not even make an unsworn statement it would be surprising that he should be in a position to mark his evidence before the Magistrate as part of his defence at the trial.

For the above reasons the appeals are dismissed and the applications are refused.

Appeals dismissed.
Applications refused.