SAMSON ATYGALA

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
SIVA SELLIAH, J. AND BANDARANAYAKE, J.
C.A. 61/83 – M.C. PANADURA 76902.
DECEMBER 9, 1985.

Evidence Ordinance, sections 27 and 91 – Administration of Justice Law, section 70 (3) – Code of Criminal Procedure Act, section 110 (1).

Where the only evidence available to the prosecution against the accused was two statements (of which the record was not produced though marked and, only oral testimony was given of them) in consequence of which 114 rice ration books of the 28th series were recovered from the possession of the accused.

Held–

(1) Section 27 of the Evidence Ordinance when it relates to confessional statements operates as a proviso to ss. 25 and 26 of the Evidence Ordinance.

(2) For the purposes of s. 27 of the Evidence Ordinance the person making the statement should be a person accused of an offence, and be in police custody. For requirement (*a*) the test is the position of the maker when the statement is sought to be adduced in evidence and not his position when he made it. For the requirement (*b*) the words "police custody" do not necessarily mean detention or formal arrest. It includes police surveillance and restraining of the movements of the person concerned by the police. The term "custody" has to be interpreted within wide limits.

(3) Unlike under s. 122 (1) of the old Criminal Procedure Code under section 70 (3) of the Administration of Justice Law which was the law applicable at the time (and even under s. 110 (1) of the present Code of Criminal Procedure Act) a police officer making an investigation may examine orally any person acquainted with the facts. He shall reduce into writing any such statement made by the person examined and the person making the statement shall sign the statement thus adopting the statement and making the record of what he said his own. In other words there is a legal requirement that such a statement be reduced to the form of a document. Section 91 of the Evidence Ordinance requires that when any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of it. Section 91 does apply to a statement recorded in terms of s. 70 (3) of the Administration of Justice Law. For this reason such a statement which led to the discovery of a relevant fact made admissible by s. 27 of the Evidence must be reduced to the form of a document and it is only that document that could be proved as evidence in a case. No oral evidence of the contents of such a document is admissible in evidence.

Cases referred to:

(1) *Petersingham v. The Queen (1970) 73 NLR 536.*
(2) *Rajapaksa Manikkunambigedera Nandasena v. Republic of Sri Lanka [1978–79] 1 SLR 26.*
(3) *The Queen v. Sugathapala (1967) 69 NLR 457.*
(4) *Narayanaswamy v. Emperor AIR 1939 P.C. 47.*
(5) *The Queen v. R.P.D. Jayasena (1966) 68 NLR 369.*
(6) *King v. Haramanisa (1944) 45 NLR 532.*
(7) *Rex v. Jinadasa (1950) 51 NLR 529.*
(8) *The Queen v. Murugan Ramasamy (1964) 66 NLR 265.*
(9) *Reg. v. Buddarakkita Thero (1962) 63 NLR 433.*

APPEAL from judgment of the Magistrate of Panadura.

Cecil de S. Wijeratne for appellant.

Mrs. B. Jayasinghe Tillekeratne, S.C. for State.

Cur. adv. vult.

February 14, 1986.

BANDARANAYAKE, J.

This is an appeal from a conviction by the Magistrate upon a charge of wrongful possession of 200 rice ration books of the 28th series, an offence punishable under the Food Control Act. The accused-appellant was the Manager of the Co-operative Society Store at Keselwatta at the time of the commission of the alleged offence.

The only evidence available to the prosecution against the accused was two statements made by the accused to the police in the course of the investigations referred to in the evidence as P6 and P7 in consequence of which information 114 rice ration books of the said series were recovered from the possession of the accused.

Two matters of law were urged by learned counsel for the accused-appellant at the hearing of the appeal. As the first matter of law learned counsel argued that the statements of the accused P6 and P7 which led to the facts deposed to by Sub Inspector Upali Senaratne in connection with the production of 114 rice ration books should not have been admitted in evidence as the deponent was not at the time of recording of the statements P6 and P7 "accused of any offence and

was not in the custody of a police officer". The submission of learned counsel was that in terms of s. 27 of the Evidence Ordinance the informant should have been at the time of giving such information –

(*a*) a person accused of an offence, and

(*b*) in the custody of a police officer.

Section 27 (1) states 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."

It was urged that the two conditions of being accused of any offence and of being in the custody of the police were necessary pre-requisites for the admissibility of any relevant fact discovered in consequence of the information given.

This question has been the subject of judicial consideration in several cases both in Sri Lanka and in India. In the case of *Petersingham v. The Queen* (1) the question as to whether the party making the statement should have been an accused before his statement was recorded or whether the fact that he is an accused at the trial was sufficient to satisfy the section was exhaustively considered but was left open. This question of law was agitated once again in the case of *Rajapaksa Manikkunambigedera Nandasena v. Republic of Sri Lanka* (2) and the judgment of Sharvananda, J. (as he then was) determined the question whether the party making the statement should have been both *"accused* and *in custody"*. After reviewing the earlier authorities the reasoning revolved around a consideration as to whether s. 27 could be interpreted by itself or whether it ought to be considered with the two preceding ss. 25 and 26. This question had been examined by H. N. G. Fernando, C.J. in *The Queen v. Sugathapala* (3). It was held by Sharvananda, J. that s 27 is by way of a proviso to s. 25 and s. 26 which prohibits proof of a confession to a police officer or a confession made while the person is in police custody. It was further held that –

"in the scheme of the three sections the words 'a person accused of any offence' will have to be given consistently one meaning and that the words cannot have one sense in s. 25 and another in s. 27.

So if a person making a statement should have been accused of an offence at the time he made it then s. 25 would be rendered nugatory, as confessions made to a police officer by a person before he was accused of an offence would not be excluded by s. 25. Such a construction would circumvent the rule of exclusion embodied in s. 25 and the rationale of the rule will be rendered meaningless."

The case of *Narayanaswamy v. Emperor* (4) was cited where it was considered that s. 25 covers a confession made to a police officer before any investigation had begun. It was not necessary that at the time the confession was made the maker should have been an accused person. The confession will be inadmissible if the maker subsequently became an accused person. The test is the position of the maker when the statement is sought to be adduced in evidence and not his position at the time when he made it. So this construction of the words "accused of an offence" in s. 25 was held to apply equally well to the words in s. 27 which has an exception to s. 25. For these reasons the submissions of learned counsel must fail on this aspect of the case.

It may be pertinent to point out that s. 27 is not only a mere proviso to ss. 25 and 26 as s. 27 is not restricted to confessional statements. In this sense it has a more extensive application than ss.25 and 26. But when one is dealing with confessional statements its relationship to ss. 25 and 26 is that which renders the fact discovered admissible.

As to whether the deponent should be in the custody of the police in order to make a statement leading to the discovery of a relevant fact admissible it was held by Sharvananda, J. that for the purposes of s. 27 the words "police custody" do not necessarily mean detention or formal arrest. It includes police surveillance and restraining of the movements of the person concerned by the police. The term "custody" has to be interpreted within wide limits.

In the instant case, the evidence is that in the course of the investigations the police wanted to question the accused regarding the loss of the rice ration books and so they sent a message asking the accused to appear at the police station. It was in consequence of that message that the accused appeared before the police. It must be remembered that in this case the accused was the Manager of the Co-operative Society Store and in the course of his duties he would come into the possession of rice ration books and he had to perform

certain duties in respect of those books. Having regard to the nature of the charge the accused would have been in a position to provide vital information to an investigator. It is in this setting that the accused appeared before the police. Now s. 23(1) of the Code of Criminal Procedure Act 15 of 1979 sets out how an arrest may be made. In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. It is relevant to bear in mind in this instance whether there has been a submission to custody by the accused in his coming to the police station, being interrogated and his statement being recorded. The evidence is that upon his arrival at the police station the accused was first interrogated and then his statement was recorded. Two passages from that recorded statement were referred to in evidence as P6 and P7. The passage 'P6' was as follows:

" ඒ අනුව මා ඉදිරිපිට පොත් සය ' බී ' කොටස් වින් එකක දමා මගේ ගෙදර වත්තේ සඟවා තිබුණා. ඒවා සඟවා ඇති ස්ථානය මට පොලීසියට පෙන්වීමට පුළුවන්. "

The next passage 'P7' was as follows:

" වීකක් වින් එකක දමා සඟවා ඇති අතර වීකක් සමුපකාර කඩේ ගෝනියක් අස්සේ සඟවා ඇත. "

The police then accompanied the accused to his house. There the accused picked up a tin which was in a drain near his house and gave it to the police officer. The officer opened the tin and in it he found 90 rice ration books of the 28th series, and thereafter the police officer accompanied the accused to the Co-operative Store and the accused went inside the Store and from a gunny bag which was amongst other gunnies with goods in them the accused pulled out 24 rice ration books and handed them over to the police officer.

From the above evidence it is clear that from the time the accused submitted himself voluntarily at the police station for the purposes of the investigation that was afoot, he was not free to go away. It is a compelling inference that as a result of the interrogation the police had got vital information which they then proceeded to record so that at the time the accused gave this information to the police it could fairly be said that he was in police custody, and that at the time the information was reduced to writing he was in police custody. These facts therefore satisfy in my view the requirements of s. 27. In this view of the facts the submission of learned counsel for the accused-appellant that the appellant was not an accused in custody is without merit and fails.

I now turn to a more compelling submission of law made by learned counsel for the appellant. That is, that the statements P6 and P7 which were elicited in the course of oral testimony were not produced at the trial in the form of documents. It was submitted by learned counsel for the appellant that the written record of the oral statement which led to the discovery of the fact must be proved and that no evidence could be given of it except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. Learned counsel relied strongly on the decision of the Court of Criminal Appeal in the case of *The Queen v. R. P. D. Jayasena* (5). Counsel referred court to the evidence in the instant case where the police officer S. I. Senaratne has referred to the contents of P6 and P7 which are now found in his evidence in the record. The witness has also said that he is producing those two statements as P6 and P7. But for some strange reason the matter has stopped there. Certified copies of P6 and P7 have not been produced as documents at the trial. The question therefore is whether the oral evidence of the Sub-Inspector which is now found in the record of the case and which has reference to marking which the prosecution no doubt intended to give the certified extracts of these statements are sufficient as proof of the contents of the documents without proof of the documents themselves. It was the decision of Sansoni, C.J. in the case cited *Queen v. Jayasena (supra)* that inasmuch as the statement made to a police officer by any person in the course of an investigation under Chapter 12 of the Criminal Procedure Code–Cap 20 of the Legislative Enactments of Ceylon (since repealed) must be reduced to writing, s. 91 of the Evidence Ordinance debars any evidence being given of it except the document itself. Accordingly if it is a statement falling under s.27 of the Evidence Ordinance, and in fact is deposed to as discovered in consequence of the statement, oral evidence of such statement is inadmissible. The relevant portion of s. 91 reads:

> "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 such matter except the document itself or secondary evidence of its contents etc".

In the course of his reasoning Sansoni, C.J. referred to the view taken by the Court in the case of *King v. Haramanisa* (6) which held that by reason of s.91 of the Evidence Ordinance only the written record of a statement made to a police officer in an investigation under Chapter 12 of the Criminal Procedure Code–Cap 20 of the Legislative

Enactments of Ceylon is admissible in evidence, and to the contrary view taken by the Court in *Rex v. Jinadasa* (7) which held that oral evidence of the statement of an accused falling under s.27 of the Evidence Ordinance was admissible. Reference was also made to the case of *The Queen v. Murugan Ramasamy* (8) where the Privy Council confirming the construction given to s. 122(3) in *Reg v. Buddarakkita Thero* (9) held that s. 122(3) of the Criminal Procedure Code prohibited the admission in evidence not only of the written record but also the use of oral evidence of any information given. To this extent it overruled the decision in *Jinadasa's case (supra)*. It was also held that s.122(3) did not exclude evidence being given under s.27 of the Evidence Ordinance. No express decision was given by the Privy Council on the question as to whether the written record or oral evidence should be led under s.27 but in fact it was the written record that was produced in *Jayasena's Case (supra)*. Sansoni, C.J. went on to say that the correct mode of proof of a s.27 statement was the production of the written record, and following the decision in *King v. Haramanisa (supra)* aforesaid held that as a statement made under s.122(1) of the Criminal Procedure Code must be reduced to writing the imperative provision of s.91 required that no evidence could be given of it except the document itself. The Inspector of Police therefore should not have been allowed to give oral evidence as to what the accused told him and there was no justification for a departure from the rule contained in s.91. As I have said learned counsel for accused-appellant in the present appeal relies strongly on the reasoning set out above.

The decision in the case of *Queen v. Jayasena (supra)* aforesaid was made at a time when the earlier Criminal Procedure Code was operative. At the time of the trial in the instant case chapter II of the Administration of Justice Law No. 44 of 1973 was the operative law in regard to Criminal Procedure. Now, in regard to the recording of statements of persons in the course of investigations a significant difference between the earlier Code and the Administration of Justice Law is apparent, i.e. the difference between s. 122 (1) and s. 70 (3) of the Administration of Justice Law. Bearing this in mind I now propose to examine the decision of the Court in the case of *Queen v. Jayasena (supra)*. The Court in *Jayasena's case (supra)* took the decision of the Privy council in the case of *Queen v. Murugan Ramasamy (supra)* aforesaid to mean that all aspects of the decision of the Court in the case of *Rex v. Jinadasa (supra)* should not be followed.

This view does not appear to be justified for the reason that there were separate and distinct matters which were decided in the case of *Rex v. Jinadasa (supra)* and the question that was decided by the Privy Council in *Murugan Ramasamy's case (supra)* which had the effect of overruling a decision in *Jinadasa's case (supra)* related only to one of the matters that was decided in *Rex v. Jinadasa (supra)*, namely, the construction and scope of s. 122 (3) of the Criminal Procedure Code in relation to s. 27 of the Evidence Ordinance, viz. whether the statutory bar in s. 122 (3) applied only to the written record or to an oral statement as well. But in the case of *Rex v. Jinadasa (supra)* findings were also made as to the bearing of s. 91 of the Evidence Ordinance on s. 27 of that Ordinance and on s. 122 (3) of the Criminal Procedure Code. In *Jinadasa's case (supra)* it was pointed out by Dias, S. P. J., that when s. 122 (1) required an oral statement to be reduced to writing it did not mean that s. 91 of the Evidence Ordinance applied to such a statement for the reason that it was not intended that the oral information given under s. 122 (1) was to be converted in its form to the form of a document. Under s. 122 (1) no oath was to be administered to the deponent nor was the statement to be signed by the deponent. Such an intention to convert the document to be the maker's own and adopted by him could be seen upon a comparison of s. 120 (1) of the Criminal Procedure Code with s. 91 of the Evidence Ordinance which requires that an information given orally be reduced to writing and be read over and be signed by the person giving it so that the document then is adopted by and becomes the document of the person who signed it and not a mere record by a police officer of what somebody said. So under s. 120 (1) to wit: a first information recorded, becomes the document of the person who made it and is adopted by him as his own and it forms the foundation for an investigation by public authorities. This is an important distinction. It is convincing in principle and reconcilable with the opinion of the Privy Council aforementioned. Eminent writers support this view–vide G. L. Peiris–"Law of Evidence in Sri Lanka" p.172 et seq. In my view it would be wrong to say that the Privy Council overruled this point which was decided in *Jinadasa's case (supra)*. In fact this point was left untouched. In the result, the conclusion in *Jayasena's case (supra)* referable to a repealed enactment and based as it is upon a misinterpretation cannot be called in aid as binding precedent. I say this with respect to that Court. A statement recorded under s. 122 (1) was not governed by the rule in s. 91 of the Evidence Ordinance and for that reason to say that s. 91.

governs a statement recorded under s. 122 (1) which led to the discovery of a relevant fact and rendered admissible under s. 27 of the Evidence Ordinance would not be justifiable.

But as I said earlier the difference between the provisions of s. 122 of the Criminal Procedure Code, Cap 20 of the Legislative Enactments of Ceylon, and s. 70 (3) of the Administration of Justice Law which was its successor is of particular significance to the underlying argument of learned counsel for the appellant. Under s. 70 (3) of the Administration of Justice Law a police officer making an investigation may examine orally any person acquainted with the facts. He shall reduce into writing any such statement made by the person examined and the person making the statement shall sign that statement. In such circumstances it is correct to determine that when a person makes a statement under s. 70 (3) he adopts the statement and makes the record of what he said his own. In other words there is a legal requirement that such a statement be reduced to the *form of a document.* Section 91 of the Evidence Ordinance requires that when any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of it. It is quite different to a statement that was recorded by a police officer under s. 122 (1) of the earlier Criminal Procedure Code which was repealed. So we see that at the time the investigations into the instant case were done the operative law dealing with criminal procedure was the Administration of Justice Law which required that the information that the accused gave should be reduced to the form of a document. It is my view therefore that s. 91 does apply to a statement recorded in terms of s. 70 (3) of the Administration of Justice Law. For this reason such a statement which led to the discovery of a relevant fact made admissible by s. 27 of the Evidence Ordinance must be reduced to the form of a document and it is only that document that could be proved as evidence in a case. No oral evidence of the contents of such a document is admissible in evidence. The admission of oral evidence would be an unwarranted departure from the statutory requirement. It may be observed that the current provision contained in s. 110 (1) of the Code of Criminal Procedure Act which succeeded the Administration of Justice Law is similar to that in s. 70 (3) of the Administration of Justice Law. Applying the principles discussed and decided in *Jinadasa's case (supra),* the accused-appellant is entitled to succeed in this appeal for the reason that evidence of the contents of statements recorded by the police referred to as P6 and P7 remain

in the realm of oral testimony and have not, in fact, been proved by the production of certified extracts of the statement that was recorded. I therefore quash the conviction of the accused-appellant. In this case, however, the facts that were discovered in consequence of information given by the accused himself tend to establish that the accused knew of the whereabouts of the corpus delicti suggesting his connection in the crime. If believed it is in the nature of presumptive evidence which shifts the burden of proof to the accused. Therefore the appropriate order that should be made is that this case be sent back to the Magistrate for re-trial. I accordingly remit the case to the Magistrate for a trial de novo.

SIVA SELLIAH, J. – I agree.

Case sent back for re-trial.