1940 *Present :* **Nihill J.**

THE KING *v.* DE SILVA *et al.*

67—M. C. Kalutara, 44,756

Criminal Procedure Code, s. 122 (3)—Statement made to a Police Officer in the course of an investigation into offence—Use of statement for corroboration of evidence—Right of accused to elicit in evidence statement made to support defence—Evidence Ordinance, s. 157.

Section 122 (3) of the Criminal Procedure Code applies to statements made by all persons whether they are or whether they subsequently become accused persons or not

The written record of a statement made to a Police officer in the course of an investigation into an offence cannot be used to corroborate a statement for the defence

A Police officer may, however, be asked by the defence whether the accused made a statement to him, which indicated the line of defence taken up by the accused at the trial and the Police officer may use the document to refresh his memory for the purpose of answering the question.

The prohibition in sub-section (3) is directed against the use of the statement as a document.

CASE heard by a Judge and jury before the 3rd Western Circuit held at Kalutara.

R. L. Pereira, K.C. (with *V. F. Gunaratne*), for first and second accused.

U. A. Jayasundera (with him *H. A. Chandrasena*), for third and fourth accused.

G. E. Chitty, C.C., for the Crown.

August 19, 1940. NIHILL J.—

Mr. Chitty has objected to Mr. R. L. Pereira putting questions to Sergeant Kannangara on the statement made to him by the first accused on his arrest on the grounds that this would amount to a violation of section 122 (3) of the Criminal Procedure Code. Mr. R. L. Pereira contended that the section does not apply to an accused person and that as he intends to call the first accused to speak to what he told the Police Sergeant he is entitled to obtain corroboration under section 157 of the Evidence Ordinance.

With regard to Mr. Pereira's first point I hold that the section has general application to statements made by all persons whether they are or whether they subsequently became accused persons or not. I base my finding on the recent Privy Council decision in *Swami v. King Emperor*[1] wherein it was clearly held by Their Lordships that section 162 (1) of the Indian Criminal Procedure Code (which corresponds in principle with our section 122 (3)) had such general application. From the judgment of Lord Atkin it would appear that during the course of the argument it was contended that to give the section general application would be to repeal section 27 of the Indian Evidence Act (see section 27 of our Ordinance) for a statement giving rise to a discovery could not then be proved. Mr. Pereira's argument raises a similar dilemma in the case of section 157 of the Evidence Ordinance. Mr. Chitty's answer to that is that, whilst section 157 makes the statement relevant, section 122 (3) of the Criminal Procedure Code renders it inadmissible. Lord Atkin in the course of his judgment pointed out that section 27 of the Indian Evidence Act and section 162 (1) of the Indian Criminal Procedure Code could stand together but did not decide whether if a discovery of fact was made in a statement taken under section 162 (1) of the Indian Code whether the statement would still remain inadmissible. On the facts in the Swami case it was not necessary for their Lordships to do so, nor was it necessary for them to consider the relationship between section 162 (1) of the Indian Criminal Procedure Code and section 157 of the Indian Evidence Act. It will be seen therefore that beyond assisting me in forming my view as to the scope of section 122 (3) the case does not carry in the present instance.

Mr. Chitty contended that if section 157 over-rules the plain meaning expressed in section 122 (3) of the Code then it should be open to the

[1] *(1939) 1 A. E. R. 396*

prosecution to corroborate its witnesses as well. There is Ceylon authority to the effect that this cannot be done. (*Hamid v. Karthan*[1] and the *King v. Soysa*[2].)

It might be argued that what is sauce for the goose must be sauce for the gander as well but I am not certain that a different attitude would be unwarranted when it is the interests of an accused person that is at stake. It has however been held in India that section 157 of the Indian Evidence Act must be taken to be controlled by the special provisions of section 162 (*see Sohoni (13th edition), page 326, paragraph 10*) 'As a general rule written records of statements previously made by a witness to a Police officer in the course of an investigation cannot be used as evidence; (2) such written records of the statement cannot be used (*a*) to corroborate the statement of a witness for the prosecution or (*b*) to corroborate a statement for the defence '.

On the view that I have come to with regard to the scope of section 122 (3) I feel bound to hold that neither the prosecution nor the defence can make use of the statement except as provided for in the sub-section. There still remains however the question as to how far it is my duty to apply the words 'shall not be used otherwise' to the circumstances of this trial. In my view taking section 122 as a whole the statement is a statement reduced to writing and the prohibition in sub-section (3) as I see it is directed against the use of the statement as a document.

In the present trial Mr. Pereira I understand intends to call the first accused to testify *inter alia* that he raised the plea of self defence at the earliest opportunity. It seems to me that the position of the accused may be gravely prejudiced if the jury are not allowed to hear from the lips of the Police Sergeant that that was so because a suspicion might remain in their minds that he was not speaking the truth, particularly in view of the fact that the accused made no mention of such a defence in their statutory statements to the Magistrate. I therefore propose to allow Mr. Pereira on his undertaking to call the first accused to put the following questions and these only :—

(1) Did the first accused make a statement to you at the time he surrendered to you?

(2) Did he in the course of that statement tell you that he was attacked by the deceased?

The witness in his answer can make no use of the document except to refresh his memory if necessary. Mr. Jayasundera has also raised the point that the statement of the first accused is admissible on behalf of his clients under section 32 of the Evidence Ordinance because it is a statement with regard to a relevant fact by a person who for Mr. Jayasundera's purpose has become incapable of giving evidence. In view of my ruling as to the questions I am prepared to allow Mr. Pereira to put I hope it may not be necessary for me to rule on this point. If it is I shall have to hear further legal argument.

[1] *4 C. W. R. 363.*

[2] *26 N. L. R. 324.*