Nandasena v. Republic of Sri Lanka

COURT OF APPEAL.
COLIN-THOME, J., ATUKORALE, J., AND TAMBIAH, J.
S.C. 57/77—HIGH COURT KANDY 74/74.
MARCH 16, 1979.

Evidence Ordinance, sections 24, 25, 26, 27—Meaning of "a person accused of any offence, in the custody of a Police Officer"—Circumstantial evidence—Requirements that accused be informed of reason for arrest and cautioned before examination—Detention for over 24-hour period imposed by law—Whether prejudice caused to accused—Administration of Justice Law, sections 70(4), 90(8), 91(2).

Held

(1) The words "accused of any offence" in section 27 of the Evidence Ordinance is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by secton 27 and does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

(2) The expression "in the custody of a Police Officer" in section 27 of the Evidence Ordinance does not necessarily mean formal arrest. It includes a situation in which the accused can be said to have come into the hands of a Police Officer or can be said to have been under some sort of surveillance or restriction.

(3) Where the circumstances are such, that the accused must know the general nature of the alleged offence for which he is detained, the failure to inform him of the reasons for the arrest in terms of section 90(8) of the Administration of Justice Law is purely technical and causes no prejudice.

(4) The failure to caution an accused in terms of section 70(4) of the Administration of Justice Law in circumstances where he would have been aware, at an early stage of the Police investigations, that he was under suspicion for committing murder, does not prejudice him in regard to his defence on the merits.

(5) Although the accused had been detained for over 24 hours by the Police, this was in the circumstances of this case unavoidable, particularly in view of the distances to be travelled and no substantial prejudice had been caused to him.

(6) In a case of circumstantial evidence, the facts may, taken cumulatively, be sufficient to rebut the presumption of innocence although each fact, when taken separately, may be a circumstance only of suspicion.

Cases referred to

(1) *The State of Uttar Pradesh v. Deoman Upadhyaya*, (1960) 61 Crim. L.J. 1504.

(2) *The State v. Memon Mohamed Husain Ismail and another*, A.I.R. (1958) Bombay 534.

(3) *Petersingham v. Queen*, (1970) 73 N.L.R. 537.

(4) *Pakala Narayana Swami v. Emperor*, A.I.R. (1939) P.C. 47.

(5) *Queen v. Murugan Ramasamy*, (1964) 66 N.L.R. 266; 66 C.L.W. 81; (1965) A.C. 1.

(6) *Queen v. Sugathapala*, (1967) 69 N.L.R. 457.

(7) *Aishan Bibi v. Emperor*, (1935) 36 Crim. L.J. 14.

(8) *Maung Lay v. Emperor*, A.I.R. (1924) Rangoon 173.

(9) *Jallo v. Empevor*, A.I.R. (1931) Lahore 278.

(10) *Allah Ditta v. Emperor*, (1937) 38 Crim. L.J. 1082.

(11) *Umed v. The State of Madhya Pradesh*, (1979) 85 Crim. L.J. 7 (notes).

(12) *Christie v. Leachinsky*, (1947) 1 All E.R. 567; (1947) A.C. 573; 176 L.T. 443; 63 T.L.R. 231.

(13) *Muttusamy v. Kannangara*, (1951) 52 N.L.R. 324.

(14) *Corea v. Queen*, (1954) 55 N.L.R. 457.

(15) *Kuruma v. Queen*, (1955) 2 W.L.R. 223; (1955) A.C. 197; (1955) 1 All E.R. 46.

(16) *Noor Mohamed v. R.*, (1949) A.C. 182; (1949) All E.R. 365; 65 T.L.R. 134.

(17) *Harris v. Director of Public Prosecutions*, (1952) A.C. 694; (1952) 1 All E. R. 1044.

(18) *Bhomanipur Banking Corporation Ltd. v. Sreemati Durgesh Nandini Dasai*, A.I.R., (1941) P.C. 95.

(19) *Perera v. Ja-Ela, Police*, (1959) 61 N.L.R. 260.

(20) *Gadiris Appu v. King*, (1951) 52 N.L.R. 344.

(21) *Mc Greevy v. Director of Public Prosecutions*, (1973) 57 Crim. A. R. 424; (1973) 1 All E.R. 503; (1973) 1 W.L.R. 276.

(22) *King v. Guneratne*, (1946) 47 N.L.R. 145.

APPEAL from a conviction in the High Court, Kandy.

S. K. Sangakkara, for the accused-appellant.

Upawansa Yapa, Senior State Counsel, for the Attorney-General.

Cur. adv. vult.

May 15, 1979.

COLIN-THOME, J.

The accused-appellant was indicted under two counts as follows :

1. With having on 7.2.1974 committed murder by causing the death of D. G. Podiappuhamy of Elamulla, an offence punishable under section 296 of the Penal Code.

2. With committing robbery at the same time and place of a sum of Rs. 120 from the said D. G. Podiappuhamy, thereby committing an offence punishable under section 390 of the Penal Code.

At the close of the trial the jury unanimously found the accused-appellant guilty under both counts. He was sentenced to death under count 1 and to 4 years rigorous imprisonment under count 2.

The prosecution case relied wholly on circumstantial evidence. The post-mortem was held on the deceased on 9.2.1974 at 3.45 p.m. by Dr. D. W. Devasirinarayana, District Medical Officer, Nuwara Eliya. The deceased was a well-nourished man, aged 53 years, 5' 3" in height. He had fifteen injuries. He had eight incised wounds on his head which had fractured the skull and lacerated the brain. An incised wound on the left wrist opening into the joint cavity and two lacerated wounds on the right wrist fracturing the ulna. An incised wound on the left calf muscle and two incised wounds on the right leg, bone deep. A contusion on the right upper arm. Death was due to shock and haemorrhage following multiple injuries on the body together with laceration of the brain.

According to Dr. L. W. S. Fernando, District Medical Officer, Bikkillagaskada, on 9.2.1974 he examined the accused-apppellant and found the following six injuries on him. Two nail mark abrasions on the front side of the neck ½" × ½". Abrasions on the front of his chest below the collar bone. Abrasions on the left front side of chest. Abrasions on the back of his body on the base of the spinal cord. Abrasions each about 4" long on the back of the left leg. Abrasions 4" long on the back of the right leg.

In the doctor's opinion the first injury could be nail marks. All the injuries were about two days old. Injuries number 3, 4, 5 and 6 could not have been the result of a struggle with another person. They may have been caused by barbed wire or by some pointed object such as a thorn.

W. Leelawathie, widow of the deceased, stated that at the time of the death of the deceased they were living in a colony at Kuda Oya. The accused-appellant and his family lived in the same colony. On the day her husband died he wanted to go with the accused-appellant to Maturata to bring rice and he took Rs. 120 in cash with him. At this time there was a scarcity of rice at Kuda-Oya.

The deceased and the accused-appellant set out along a jungle footpath leading to Maturata at about 12 noon on 7.2.1974. Her husband took two manure bags (P6) to bring the rice. He was wearing a towel (P7) on his head. She identified his sarong (P8) and his coat (P9).

Sometime later the accused-appellant stood at a spot above their house and raised cries saying two Tamils were dragging

Podiappuhamy Mama. Her step-son Patty Mahatmaya with some others left to bring the deceased after persuading her to stay at home.

At about 5 p.m. they brought her husband. He was alive but unable to speak. He opened his eyes and looked at them. His clothes were stained with blood. The accused-appellant also came there. He led the others to the spot where the deceased was. The deceased was removed to hospital at about 5.30 p.m.

D. Sayaneris Silva, son of the deceased, known as Patty Mahatmaya, stated that on the day of the incident before setting out with the accused-appellant the deceased borrowed money from Ratnayake. Between 12.30 and 1.00 p.m. the accused-appellant returned alone and raised cries: "Podiappu mamata demalun kotala adhagena yanawa!"—"පොඩි අප්පු මාමාට දෙමළුන් කොටලා අදගෙන යනවා. !" He went up and asked the accused-appellant what happened and the accused-appellant told him that when he and the deceased were going down a hill two Tamils came up. Then he and the deceased sat down as they were tired. The Tamils cut two clubs and came there. At that stage the accused-appellant went to answer a call of nature. Then he heard a noise and when he came up he found that the deceased had been cut on his head. He went to help the deceased who was about to fall. Then the Tamils tried to stab him and he took to his heels.

At the time when Sayaneris questioned the accused-appellant before they went to the scene, he noticed bloodstains on the accused-appellant's clothes, face and hand. He accompanied the accused-appellant to the spot where the deceased was together with six or seven others. When they approached the spot they heard the deceased crying out "Ammo!, Ammo!" close to the footpath. His father was not able to talk. They brought the deceased back and sent him to hospital.

Under cross-examination he stated that as they came close to the spot where the deceased was the accused-appellant got behind. He noticed signs of a struggle at the spot. The fertilizer bags which the deceased had taken when he set out from his home were not to be seen. The deceased had taken Rs. 120 which he kept in the inside pocket of his coat. He saw the accused-appellant leaving with his father.

Ratnayake M. Ran Banda stated that on the day of the incident the deceased borrowed Rs. 120 from him to buy rice and he gave him Rs 120 consisting of one Rs. 100 note and two Rs. 10 notes. One of the Rs. 10 notes was torn and it was pasted with a piece of stamp edge (P2). He gave this money to the deceased between 12.30 and 1 p.m. on 7.2.1974 and the deceased put the money into his pocket.

M. Sirineris Silva, brother of the deceased, followed the crowd that went to the spot where the deceased was lying fallen. The accused-appellant was among the crowd and he too carried the deceased back to the colony. Sirineris Silva questioned the accused-appellant who told him that when he and the deceased were going to buy rice they met two Tamils and just at that stage he went to answer a call of nature. When he returned he saw the deceased being cut and dragged into the jungle. The two Tamils chased after him and he ran. He did not know the reason for the attack by the Tamils. He said that the deceased had money and when they entered the jungle the deceased gave him Rs. 100. He did not know what further amount of money the deceased had. The accused-appellant's father told the accused-appellant to hand over the Rs. 100 note to him. Sirineris Silva did not observe any injuries on the accused-appellant nor any bloodstains on his body or clothes.

N. M. Ariyasena was another witness who questioned the accused-appellant. The accused-appellant told him that the deceased was cut by two Tamils and that he escaped and came running. He noticed blood on the face and shirt of the accused-appellant and his shirt was torn. It was similar to P3. This was at the time the accused-appellant raised cries that the deceased had been attacked by two Tamils before they carried the deceased back home.

Under cross-examination he stated that the accused-appellant assisted in bringing the deceased back to the colony and there were bloodstains on his hand.

H. Chandradasa, Sub-Inspector, Maturata Police Station, stated that he received a message from the Nuwara Eliya Police Station on 7.2.1974 at 8.15 p.m. about the death of the deceased. He left Maturata at 8.15 p.m. and reached Nuwara Eliya at about 1 a.m. on 8.2.1974. Nuwara Eliya was about 30 miles from Maturata. When he reached the Nuwara Eliya Police Station, the accused-appellant was seated in the verandah. His shirt P3 was handed over to him by the Reserve Officer. He came back to the Maturata Police Station but did not take the accused-appellant into custody immediately. At Nuwara Eliya he questioned the accused-appellant and after questioning him he took him to the Maturata Police Station where he recorded his statement at about 3.30 a.m. on 8.2.1974. At that time he took the accused-appellant into custody. After he recorded his statement he rested for about one hour and thereafter went to the scene of the incident with the accused-appellant and two other police officers.

As a result of statements made by the accused-appellant Inspector Chandradasa recovered certain productions. The accused-appellant stated: "I can show the police where the knife is hidden" (X1). In consequence of this statement Inspector Chandradasa recovered a pruning knife (P1). "I can show the place where the towel and the empty manure bags were hidden" (X2). In consequence of this statement he recovered the towel (P7) and two empty manure bags (P6). Below X2 the accused-appellant stated: "I can show them to the police". In consequence of this statement Chandradasa recovered two Rs. 10 notes with stains like blood (P2).

He recovered the knife (P1) from under the roots of a tree about 20 feet from the footpath and about 500 feet away from the place of the incident. There were stains like blood on the knife. The towel and two empty bags were recovered from under a stone which was like a cave about 40 feet from the road. The two Rs. 10 notes were recovered about 1½ miles away from the place of the incident in the direction of the colony under a rock called Laula gala. Near the rock there was a bush and the two Rs. 10 notes were found there. At the scene of the incident there were signs of a struggle and stains like blood on a tree by the side of the road to the height of about 3 feet. The grass was damaged and appeared to have bloodstains. There were bloodstains on some bushes as well.

Weerapura colony was about 4 to 5 miles away from the place of the incident. Chandradasa forwarded P1, P2, P3 and P4 with samples of the blood of the deceased to the Government Analyst for report. He took charge of the clothes of the deceased—P8, P9 and P10—at the post mortem examination.

Under cross-examination Chandradasa conceded that he produced the accused-appellant before the Magistrate only on 10.2.1974 outside the 24 hour limit. He was unable to produce him earlier as he had no time to do so. He denied that he assaulted the accused-appellant. On 9.2.1974 he got the accused-appellant examined by the doctor. He had no time to do so on 8.2.1974.

He denied the suggestion that he had introduced the productions at the scene in order to fabricate a case against the accused-appellant. He stated that the witness Sirineris handed to him the Rs. 100 note (P2).

Inspector Siriwardene, Officer-in-charge of the Nuwara Eliya Police Sation, stated that the accused-appellant came to the Nuwara Eliya Police Station on 7.2.1974 and he commenced recording his statement at 6.30 p.m. He took charge of the shirt worn by the accused-appellant (P3). He informed the Maturata Police Station about this incident as it had taken place within

the Maturata Police area. Thereafter when the Maturata police officer came to the Nuwara Eliya Police Station the accused-appellant was handed over to him.

According to the Government Analyst's report fairly heavy human bloodstains were identified on the surface of the curved knife (PI). There were small but fairly thick human bloodstains on the shirt P3. The very thin stains in the areas marked in red on the surface of the three currency notes P2 (one Rs. 100 and two Rs. 10) gave an elementary but positive reaction. But nevertheless as the bloodstains were not sufficient these were not confirmed by other analyses for blood.

At the close of the prosecution case the accused-appellant called his father R. M. Peter Silva as a witness. He said that on the day of this incident on 7.2.1974 between 12 and 12.30 p.m., the deceased came to his house and told his son, the accused-appellant, : " Keep this money for the rice. " So saying he gave Rs. 100 to the accused-appellant who put it in his trouser pocket under his sarong. when the deceased came he had a bag similar to P6. Thereafter the two left. Later he heard a commotion and saw people going into the jungle and he too went. Thereafter he met the accused-appellant at the time the deceased was being brought. He saw his son giving something to the witness Sirineris Silva.

Under cross-examination Peter Silva was contradicted by an extract from his police statement X5, where he had not specified the sum as Rs. 100. He had also made his statement to the police belatedly on 9.2.1974.

The accused-appellant gave evidence after that. He denied that he committed the murder. He admitted that he made a statement to the Nuwara Eliya Police. He denied that he made a second statement to the Maturata Police. On 7.2.1974 between 12 noon and and 1 p.m. the deceased asked him to get ready to go to Maturata to bring rice. Even prior to that occasion he had done so at the request of the deceasd. The deceased gave him Rs. 100 and asked him to keep it to purchase rice. On earlier occasions too the deceased had given him Rs. 200 or Rs. 300 to buy rice. He kept the Rs. 100 in his trouser pocket under his sarong and at that time the deceased had another Rs. 20 with him which he said that he would keep for expenses.

They proceeded about 3 or 4 miles along the jungle footpath. While going inside the jungle they met the two Tamils. They asked something from the deceased who gave them beedies and a box of matches. When they were talking it became necessary for him to answer a call of nature. When he was attending to this function he heard a cry " Ammo ! " and when he came back he

saw the deceased bleeding from his head. One of the Tamils was holding him by his neck and he had a knife in his other hand. This person tried to cut him with the knife but he warded it off. The knife alighted on a tree and was thrown off. Then he struggled with that person and he could not say whether anything got smeared on his body while he was struggling with him. He ran to the village to inform the people.

He denied that he hid the Rs. 20 and the manure bags. There were streams in the jungle but it did not strike him to wash off the blood at that time. He did not have time to do so. He ran to the colony and raised cries and several people came. He told them briefly what had happened when he went to answer a call of nature. Thereafter he came to the place of the incident along with those people and showed them where the incident occurred. He assisted them to take the deceased back to the village and at that time the blood of the deceased got smeared on him.

On the way back from the jungle he gave the Rs. 100 to the deceased's younger brother. From there he went to the Nuwara Eliya hospital and then to the Nuwara Eliya Police Station where his statement was recorded. At about 2 a.m. on the following day he was brought to the Maturata Police Station. After that he went to the place where the deceased was attacked and where the Tamil person tried to cut him. He showed the police the place where the knife was thrown. He did not hide the knife. He was produced before the doctor on the following day. He was assaulted by the police but he could not remember when he was produced before the Magistrate. He could only sign his name. He could not read or write. He had been to school only up to the Lower Kindergarten. He could count. He did not show any productions to the police nor did he hide them.

Under cross-examination he stated that the deceased gave him the Rs. 100 in the compound in the presence of his father. He added that he had passed half the distance of the compound when the money was given to him. He denied that he told the Nuwara Eliya police that the Rs. 100 was given to him on the way to Maturata along the footpath. He was then pointedly asked whether he made this statement to the Nuwara Eliya Police: "I then proceeded about 2 miles along with him through a footpath which is a short cut to Maturata. On our way he gave me a Rs. 100 note and asked me to keep it." He denied making this statement to the police and this contradiction was marked X6.

The accused-appellant stated that when one of the Tamil persons raised a knife to cut him he warded off the blow. That blow alighted on a tree and may have dropped there. Thereafter he struggled and came running after escaping from him. At that

time he was held by the collar. The accused-appellant was then asked the following question:

"*Q*: Did you tell the police: 'When I went to run away the person who was with the knife held me by my shirt from behind'?"

A: I was held on the back of my neck with the shirt."

He stated that when the deceased was being brought from the scene the blood got smeared on his face. He did not know that blood was smeared on his hand and body when he first came out of the place of the incident along the footpath. He admitted that he did not tell his counsel that he was assaulted by the police. He was shown the knife P1 and he said that he had never seen it before. The Tamil person had a long knife not a curved knife like P1.

Inspector Siriwardene was re-called by the defence and a certified copy of the accused-appellant's statement which was recorded by him was produced marked D1.

In the course of D1 the accused-appellant had stated that at about 1.15 p.m. on 7.2.1974 the deceased and he left for Maturata. When they were proceeding the deceased gave him an empty bag. He said: "I then proceeded about 2 miles along with him through a footpath which is a short cut to Maturata. On our way he gave a Rs. 100 note to me and asked me to keep it. He then told me that he had Rs. 20 with him. Then both of us from this spot walked about another 2 miles. Then at about 2.30 p.m. two persons dressed in khaki trousers and white shirts came in the opposite direction. At this spot Podiappuhamy lit a beedi and I then went into the thicket to answer a call of nature. When I was proceeding I observed the two persons walking back towards Podiappuhamy and one person wanted a box of matches having had a beedi in his mouth. Podiappuhamy then gave him a box of matches. Then the other person wanted a beedi from Podiappuhamy. These three persons were chatting with each other. I was asked by Podiappuhamy to come back early. At this stage I was answering a call of nature. I then heard a loud cry and on hearing it I rushed up to the spot and observed bleeding injuries on Podiappuhamy's head and one person holding him by his neck and another person having a knife. The person who was with a knife came to stab me and in consequence of this it alighted on a tree and the knife fell on the ground. When I went to run away the person who had the knife held me by my shirt from behind. I then rushed to the village and informed the villagers."

The main submissions of substance of learned Counsel for the accused-appellant were:

1. That the facts deposed to by S.I. Chandradasa in connection with the production of the knife (P1), two Rs. 10 notes (P2), two manure bags (P6) and the towel (P7) established that these articles were not discovered in consequence of information received "from a person accused of any offence, in the custody of a police officer." The evidence of S.I. Chandradasa, therefore, contravened section 27(1) of the Evidence Ordinance and was inadmissible and vitiated the whole trial.

2. There was no evidence that the charge had been explained to the accused-appellant by S. I. Chandradasa before arresting him without a warrant. It was submitted that this was a fatal irregularity which contravened section 90(8) of the Administration of Justice Law, No. 44 of 1973.

3. There was no evidence that S.I. Chandradasa before examining the accused-appellant informed him that he was bound to answer truly all questions relating to the case, except such questions as have a tendency to expose him to a criminal charge, as required by section 70(4) of the Administration of Justice Law.

4. The accused-appellant was arrested without a warrant on 8.2.1974 at 1 a.m. but he was produced before the Magistrate on 10.2.1974. S.I. Chandradasa could have produced him before the M gistrate on 9.2.1974 as he had gone to Nuwara Eliya with the accused-appellant for the post mortem examination. Therefore, the accused-appellant had been illegally detained over the 24 hour limit by Chandradasa contravening sections 85(5) and 91(2) of the Administration of Justice Law. The learned trial Judge had not directed the jury about this illegal detention which could have influenced the jury to doubt the credibility of the Sub-Inspector when he stated that the accused-appellant had pointed out to him certain productions at the scene.

5. The learned trial Judge had misdirected the jury on the assessment of contradictions.

6. The circumstantial evidence did not establish the charges against the accused-appellant beyond reasonable doubt.

In *The State of Uttar Pradesh v. Deoman Upadhayaya* (1) at 1508 and 1512, four of the five Judges of a Full Bench of the Supreme Court held that: "the expression, 'accused person' in section 24 (of the Evidence Act) and the expression 'a person accused of any offence' in section 25 have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding ..... The expression, 'accused of any offence' in section 27, as in section 25, is also descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by section 27 of the

Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability." *Per* Shah, J.

Hidayatullah, J. stated at p. 1524 that: "the law was framed to protect a suspect against too much garrulity before he knew that he was in danger which sense would dawn on him when arrested and yet left the door open to voluntary statements which might clear him if made but which might not be made if a caution was administered. Without the caution being announced the suspect is not in a position to know his danger, while a person arrested knows his position only too well."

Dealing specifically with section 27 at p. 1525, the learned Judge added: "In English Law, the caution gives him the necessary warning and in India the fact of his being in custody takes the place of caution which is not to be given. There is, thus, a clear distinction made between a person not accused of any offence nor in the custody of a police officer and one who is."

Hidayatullah, J.'s learned analysis is the key to the explanation why the disjunction 'or', which originally connected the expressions 'a person accused of any offence' and 'in the custody of a police officer' in section 150 of the Indian Code of Criminal Procedure as amended by Act VIII of 1869, was omitted in the corresponding section 27 of the Indian Evidence Act of 1872. The relevant portion of section 27 of the Indian Evidence Act of 1872, which is identical with section 27 of Evidence Ordinance of Sri Lanka, reads: 'from a person accused of any offence, in the custody of a police officer.'

The construction in *Deoman's case* (*supra*) was adopted earlier in *The State v. Memon Mohamed Hussain Ismail and another* (2) at 536, where it was held that the words information received from 'a person accused of any offence' in section 27 cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him.

In *P. P. Petersingham v. The Queen* (3) Alles, J. after considering the above and other cases stated that he did not think it was necessary to decide which interpretation of the words 'accused of any offence' in section 27 is correct. However, he expressed the view at p. 543 that: "it is reasonable to argue that the words 'person accused of any offence' in section 27 does not necessarily mean a person against whom a formal accusation for an offence is made." In this case an important item of the evidence was the discovery of certain articles by a police officer in consequence of a statement (P43) made by the appellant and

recorded by the police officer when the appellant was under suspicion and in the custody of the police officer. It was only thereafter that the appellant was brought to his house, the charge was explained to him and he was arrested. It was contended that the statement P43 was not admissible as it did not conform to the provisions of section 27(1) of the Evidence Ordinance since the appellant was not 'accused of an offence' at the time he made the statement which led to the discovery of the articles. Alles, J., held that even assuming that evidence under section 27 of the Evidence Ordinance could be led only if the appellant was a person accused of an offence at the time he gave the information, the statement P43 made by the appellant was relevant and admissible for the reason that, before he made it, he was well aware that a charge of murder was being investigated against him and that he was being accused of the offence.

Sections 24 to 30 of the Evidence Ordinance deal with the admissibility of confessions. By section 24 a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been produced under the stimulus of any inducement, threat or promise, having reference to the charge and proceeding from a person in authority. Under section 25 there is an absolute embargo against proof at the trial of a person accused of an offence of a confession made to a police officer. The partial ban under section 24 and the total ban under section 25 apply equally whether or not the person against whom evidence is sought to be led in criminal trial was at the time of making the confession in custody or whether or not he had been accused of any offence at the time he made the confession. It is clear, therefore, that the words 'accused person' in section 24 and 'a person accused of any offence' in section 25 (the identical words appear in sections 25 and 27) have the same connotation and are descriptive of the person against whom evidence is sought to be led at a criminal proceeding. In *Pakala Narayana Swami v. Emperor* (4) at 52, Lord Atkin observed that: "Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation."

Section 26 prohibits proof of a confession by a person whilst in custody of a police officer, unless it is made in the immediate presence of a Magistrate. Section 27(1) which is in the form of a proviso states:

> "27(1) Provided 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."

Section 26 and section 27 do not necessarily deal with evidence of the same character. By section 26 a confession made in the presence of a Magistrate is made provable in its entirety. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts, and only that much of the information is admissible as distinctly relates to the fact discovered.

Section 27 is based on the doctrine of confirmation by subsequent facts. Even though evidence relating to confessional or other statements made by a person, whilst in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is, therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Only that portion of the information can be proved which relates distinctly to the facts discovered.

As Viscount Radcliffe observed in *The Queen v. Murugan Ramasamy* (5) at 268:

> "Section 27, on the contrary, envisages a situation in which circumstances themselves vouch for the truth of certain statements made by an accused person, even though they are made in conditions that would otherwise justify suspicion. These are those statements that have led to the actual discovery of a proven fact when the information supplied by the accused has been the cause of the discovery. The principle embodied in section 27 has always been explained as one derived from the English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century, see *R. v. Warickshall, (1783) 1 Lea. 263 and R. v. Butcher,* (1798) *1 Lea. 265n.* The principle was stated by Baron Parke in the trial of *Thurtell and Hunt* (1825) (See *Notable British Trials, page 145*), where he said "A confession obtained by saying to the party 'You had better confess or it will be worse for you' is not legal evidence. But, though such a confession is not legal evidence, it is every day practice that if in the course of such confession that party states where stolen goods or a body may be found and they are found accordingly, this is evidence, because the fact of the finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats that may have been held out to him."

It must be taken as settled, therefore, by Ramasamy's case that section 27 of the Evidence Ordinance is an exception and a proviso to all the three preceeding sections 24, 25 and 26. See *The Queen v. Sugathapala* (6) at 459 (per H. N. G. Fernando, C. J.)

For the reasons enumerated above, I am in respectful agreement with the interpretation of the majority of the Judges in *The State of Uttar Pradesh v. Deoman Upadhyaya* (*supra*) and I hold that the words 'accused of any offence' in section 27 of the Evidence Ordinance is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by section 27 and that 'it does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.'

With regard to the expression 'in the custody of a police officer' in section 27 it does not necessarily mean formal arrest. In *Aishan Bibi v. Emperor* (7) at 15, where a person had not been formally arrested but had been a suspect from the beginning and had apparantly been treated as an accused person and much restraint on his movements was not imposed as he could hardly have absconded, it was held by the Lahore High Court that he was in police custody and that the statements given by him in consequence of which recoveries were made could be proved under section 27 of the Evidence Act.

This case adopted the same principles followed in *Maung Lay v. Emperor* (8) and *Jallo v. Emperor* (9). *In Maung Lay v. Emperor* (*supra*) it was held that as soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is, therefore, in custody within the meaning of sections 26 and 27 of the Evidence Act. In other words, a detention of a person by the police as a suspect amounted to his being in police custody.

In *Allah Ditta v. Emperor* (10) at 1085 it was held that: (*a*) in order that a statement under section 27 be admissible, the maker of the statement should be in the custody of the police, but that custody need not be a formal arrest; (*b*) in the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Criminal Procedure Code their presence with the Police under some restraint amounts to 'custody' which is contemplated by section 27; and (*c*) if a statement made by a person in the above circumstances, leads to the discovery of any matter, it is admissible.

In a recent case *Umed v. The State of Madhya Pradesh* (11) it was held that the word 'custody' in section 27 cannot be said to mean only when the accused is actually taken into custody by the police officer. It also includes such state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction.

The above principles, with which I agree, have to be applied to the facts of the instant case. It is true that S. I. Chandradasa stated in evidence that at the Maturata Police Station: "I recorded his statement at about 3.30 a.m. on 8.2.1974. At that time I took him into custody." However, all the circumstances in the case have to be examined in order to decide this question.

According to Inspector Siriwardene on 7.2.1974 the accused-appellant made a statement at the Nuwara Eliya Police Station which was recorded at 6.30 p.m. After recording this statement D1 the accused-appellant's shirt (P3), which was torn and according to the Government Analyst's report had thick stains of human blood, was taken charge of by Inspector Siriwardene. Thereafter, he sent a message to the Maturata Police Station and the accused-appellant was handed over to S. I. Chandradasa at 1 a.m. on 8.2.1974. Chandradasa questioned the accused-appellant and took him in a jeep to Maturata which was about 30 miles away.

It is clear from the evidence that from the moment the accused-appellant's statement was recorded at Nuwara Eliya and his bloodstained and torn shirt was taken charge of he was suspected of the alleged offence of murder. He was, therefore, under police surveillance from then onwards and continued to remain in the presence of police officers until he was produced before the Magistrate on 10.2.1974, and throughout this period his movements were restricted. I, therefore, hold on a consideration both of the direct and circumstantial evidence that the accused-appellant from the time he made his statement at Nuwara Eliya and his shirt taken charge of he was in the custody of a police officer and he continued to remain in the custody of Chandradasa until he was produced before the Magistrate on 10.2.1974. I hold, therefore, that the facts deposed by S. I. Chandradasa as discovered in consequence of information received from the accused-appellant, as they related distinctly to the facts thereby discovered, did not contravene section 27 (1) of the Evidence Ordinance and were admissible.

Learned Counsel's next submission was that there was no evidence that the charge was explained to the accused-appellant by S. I. Chandradasa before he was taken into custody and that this omission was a fatal irregularity as it contravened section 90 (8) of the Administration of Justice Law which lays down that "where a person is arrested without a warrant the person making the arrest shall at the time of the arrest inform such person, as far as practicable, of the reasons for his arrest."

In *Christie v. Leachinsky* (12) (House of Lords) at 572, Viscount Simon laid down certain propositions as follows:

> "If a policeman arrests without a warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not a true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized."

The learned Viscount laid down a further proposition that:

> "The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained."

These propositions were adopted by Gratiaen, J. in *Muttusamy v. Kannangara* (13) at 331 and in *D. H. R. A. Corea v. The Queen* (14) at 463. In *Petersingham v. The Queen (supra)* Alles, J. held that as the appellant was well aware that a charge of murder was being investigated against him and that he was being accused of the offence the omission to charge the accused formally at the time he made his statement was in the circumstances purely technical.

In the instant case, in view of the direct and circumstantial evidence already specified, the accused-appellant must have known the general nature of the alleged offence for which he was detained and, therefore, the failure to observe the requirements of section 90(8) that the accused-appellant should have been informed of the reasons why he was arrested was in the circumstances only technical and caused no prejudice to the accused-appellant.

Learned Counsel also submitted that there was no evidence that S. I. Chandradasa observed the provisions of section 70(4) of the Administration of Justice Law which required him to inform the accused-appellant before examining him that he was bound to answer truly all questions relating to the case except such questions as have a tendency to expose him to a criminal charge. This submission is connected with the earlier submissions on the law and the facts.

In *Kuruma, Son of Kainu v. The Queen* (15) (Privy Council) the appellant was tried on a charge of being in unlawful possession of ammunition contrary to regulation 8A(1) (b) of the Emergency Regulations, 1952, of Kenya. Evidence of the search of and the discovery of the ammunition on the appellant was given by two police officers who, not being of or above the rank of Assistant Inspector had (it was alleged) by virtue of regulation 29 of the Emergency Regulations no power to search the appellant. It was held that the evidence was properly admitted. At p. 226, Lord Goddard, C.J., stated that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned how it was obtained .....There can be no difference in principle for this purpose between a civil and a criminal case. No doubt, in a criminal case the Judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused." This principle was emphasized in *Noor Mohamed v. King* (16) at 191-2 and in *Harris v. Director of Public Prosecutions* (17) at 707.

Applying these principles to the facts of this case, I hold that although section 70(4) of the Administration of Justice Law was not fully complied with, as the accused-appellant, at an early stage of the police investigations, would have been aware that he was under suspicion for committing murder the error in not cautioning him in terms of section 70(4) did not prejudice him in regard to his defence on the merits. Therefore, the facts deposed to by S. I. Chandradasa were admissible under section 265 of the Administration of Justice Law and as they were relevant to the matters in issue, under the provisions of the Evidence Ordinance.

Learned Counsel's next submission was that the accused-appellant was illegally detained by S. I. Chandradasa over the 24-hour limit contravening section 91(2) of the Administration of Justice Law. He was arrested on 8.2.1974 at 1 a.m. but was produced before the Magistrate Nuwara Eliya only on 10.2.1974.

Learned Counsel pointed out that on 9.2.1974 Chandradasa was present at the post mortem examination held in Nuwara Eliya at 3.45 p.m. He could, therefore, have produced the accused appellant before the Magistrate on that day. Learned Counsel also complained that the learned trial Judge had not adequately dealt with this illegal detention in his charge to the jury. It was a matter that went to the root of the credibility of the Sub-Inspector.

According to the evidence on 8.2.1974 at 1 a.m., the accused-appellant was handed over to S. I. Chandradasa. After questioning him he went back to Maturata Police Station which was about 30 miles away at dead of night. After he reached Maturata he commenced recording the accused-appellant's statement at 3.30 a.m. He took a rest for about an hour and then went to the scene of the incident. This was about 5 miles away from the Weerapura colony and this journey had to be made on foot. Chandradasa had to walk a minimum of about 10 miles that day and at the scene he made a search for various productions which would have taken time as they were widely scattered. Thereafter, he went back to the Weerapura colony at about 4 p.m. on the 8th and he recorded the statements of about seven witnesses till about 6 p.m. When he got back to the Maturata Police Station it was about 10.30 p.m. On 9.2.1974 he continued to record the statements of Leelawathie and her son commencing at 8 a.m. He also got the accused-appellant examined by a doctor at Rikilligaskada which was about 12 miles away from Maturata. This again would have taken much of his time. In the afternoon at 3.45 p.m. he attended the post mortem examination at Nuwara Eliya which commenced at 5 p.m. Thereafter, he collected the clothes of the deceased.

It could be seen, therefore, that S. I. Chandradasa was working round the clock from 8.2.1974 until he produced the accused-appellant before the Magistrate on 10.2.1974. Section 91(2) of the Administration of Justice Law states that:

> "No police office shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."

In view of the long distances between Maturata and Nuwara Eliya, the scene of the incident and Rikillagaskada, I hold that although S. I. Chandradasa exceeded the 24 hour limit it was unavoidable in the circumstances and no substantial prejudice was caused to the accused-appellant.

The learned trial Judge had directed the jury that the prosecution had to prove its case beyond reasonable doubt and that they had to consider the credibility of each witness. Chandradasa had been closely questioned about the delay in producing the accused-appellant before the Magistrate and he had given his explanation. There was no special obligation on the learned trial Judge in the circumstance of the delay in this case to direct the jury that because section 91(2) of the Administration of Justice Law was contravened the credibility of Chandradasa was in doubt purely on this fact in isolation from the rest of his evidence.

A further submission by learned Counsel was that the trial Judge had misdirected the jury on the assessment of contradictions. Our attention was drawn to the following passage in the charge:

> "If the contradiction is on a trivial point you may ignore it altogether. But if the contradiction is on a material point you can reject the evidence on that material point of that witness and accept the other evidence if that is corroborated. Or, you may reject the entire evidence on the ground that because the witness has been contradicted on a material point his entire evidence is unreliable."

In *Bhomanipur Banking Corporation, Ltd. v. Sreemati Durgesh Nandini Dasai* (18) at 98, Lord Atkin, observed that the fact that a witness is unreliable as some of his evidence is found to be untrue only means that a statement made by such a witness cannot be relied on unless supported by independent evidence. This principle has been adopted in decisions of the Courts of Sri Lanka. See *G. A. Perera v. Ja-Ela Police* (19) and *Gardis Appu v. King* (20) at 348, where it was held that where false evidence has been introduced into the case for the prosecution, it is open to the jury to say that the falsehoods are of such magnitude as to taint the whole case for the prosecution, and that they feel it would be unsafe to convict at all. On the other hand, it is equally open to them, if they think fit to do so, to separate the falsehoods from the truth and to found their verdict on the evidence which they accept to be the truth.

I hold that the passage referred to in the trial Judge's charge is in conformity with the principles laid own in the above cases and that there was no misdirection on the law.

The final submission of learned Counsel was that the circumstantial evidence in the case did not establish the charge of murder against the accused-appellant beyond reasonable doubt.

The evidence at the trial established the following facts:

The accused-appellant was the last person seen with the deceased on 7. 2. 1974. On his own admission he was present at the scene when the deceased was attacked with a knife. He admitted that the Rs. 100 note he had in his possession after the incident belonged to the deceased and was taken by the deceased for the purchase of rice at the commencement of the journey. According to the witness D. Sayaneris Silva there were bloodstains on the accused-appellant's face, hands and clothes before the accused-appellant helped to carry the deceased back to the Weerapura colony. Ariyasena also observed bloodstains on the accused-appellant's shirt, face and hands before he helped to carry the deceased. He also observed that the accused-appellant's shirt (P3) was torn. At the trial the accused-appellant himself suggested that bloodstains may have got smeared on his body while he was struggling with a Tamil person and he had no time to wash off the blood in a jungle stream. Thereafter he ran to the colony and raised cries. When the accused-appellant went to the Nuwara Eliya Police Station at about 6 p.m. it was observed that his shirt was bloodstained and torn. According to the Government Analyst's report his shirt P3 had thick stains of human blood.

The explanation of the accused-appellant that his clothes may have got bloodstained when struggling with a Tamil person was rejected by the jury as the accused-appellant in his statement D1 made to the Nuwara Eliya Police on 7.2.1974 stated that the Tamil person held him by his shirt from behind. There was no reference to a struggle between the two. Similarly his explanation that he may have got bloodstains on his clothes and body because he helped to carry the deceased back to the colony was rejected by the jury because the bloodstains on his clothes and person were observed by Sayaneris Silva and Ariyasena before he had helped to carry the deceased.

According to the medical evidence the accused-appellant had several abrasions on his body including nail marks on his neck. At the trial his explanation of the nail marks on his neck was that the Tamil person in the course of the struggle held him by his collar and neck. However, in his statement D1 he mentioned that the Tamil person held him by the shirt from behind. The reference to his collar and neck at the trial was to fall in line with the medical evidence. The jury rejected his explanation.

At the trial the accused-appellant admitted that he was aware that the deceased had not only a Rs. 100 note but also two Rs. 10 notes. The accused-appellant's explanation that the deceased gave

him Rs. 100 to purchase rice while he kept the two Rs. 10 notes for expenses was highly artificial, especially as the accused-appellant was illiterate and the deceased had at the commencement of the journey kept the Rs. 100 note in the inside pocket of his coat according to Sayaneris Silva.

Peter Silva, father of the accused-appellant, at the trial, stated that the deceased gave the accused-appellant the Rs. 100 note on the compound of Peter Silva's house just before the journey. The accused-appellant repeated this version. However, this version was contradicted by the accused-appellant's statement D1 where he stated : " I then proceeded about 2 miles along with him through a footpath which is a shortcut to Maturata. On our way he gave the Rs. 100 note to me and asked me to keep it." The accused-appellant claimed that the Tamlis held the deceased by his neck in the course of the struggle to kill him, but in the post mortem report there was no reference to any nail marks on the deceased's neck.

I hold that on this overwhelming evidence alone the jury were justified in bringing their unanimous verdict of murder and robbery. However, I have already held that S. I. Chandradasa's evidence relating to the discovery of certain productions was admissible. Chandradasa stated that the accused-appellant pointed out to him at the scene where the knife P1, two empty bags P6, two Rs. 10 notes P2 and a towel P7 were found. According to the Government Analyst's report the knife P1 was heavily stained with human blood. The towel P7 was identified by the deceased's widow as the deceased's towel. The accused-appellant admitted that the deceased took two empty manure bags in order to bring rice. With regard to the two Rs. 10 notes witness Ratnayake M. Ran Banda identified one of the notes as the note he had given the deceased on the morning of the incident by a tear over which was pasted a stamp edge. It is significant that the knife, two Rs. 10 notes, towel and bags were discovered in widely scattered places which were known to the accused-appellant. The two Rs. 10 notes were found hidden under a stone 1 miles away from the scene of the incident in the direction of the Weerapura colony. It was most unlikely that the two Tamil persons would have come towards the colony from the scene in order to hide these notes.

The prosecution suggestion was that the accused-appellant's motive for killing the deceased was robbery. He had taken possession of the Rs. 100 note and hidden the two Rs. 10 notes under a stone so that he could collect them later. The jury accepted this submission.

Learned Counsel for the accused-appellant submitted that the accused-appellant by his conduct revealed his innocence. It was he who first informed the people in the colony of the attack on the deceased and it was he who made the first complaint to the police. He had also helped to carry the deceased back from the scene to the colony and accompanied him to hospital. The submission of the prosecution was that he did so in order to glance suspicion away from himself. This submission was accepted by the jury.

In *McGreevy v. Director of Public Prosecutions* (21) it was held that in a trial in which the case for the prosecution depends wholly on circumstantial evidence no duty rests on the judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (*a*) consistent with the guilt of the defendant and (*b*) exclude every possible explanation other than the guilt of the defendant.

In *King v. Guneratne* (22), it was held that in case of circumstantial evidence the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.

For the reasons stated and the compelling circumstantial evidence I hold that the prosecution proved its case beyond reasonable doubt and that the verdict of the jury was reasonable.

The appeal is dismissed. The convictions and sentences are affirmed.

ATUKORALE, J.— I agree.

TAMBIAH, J.—I agree.

Appeal dismissed.