G.I. P.C.

Judgment 35/1964

IN THE PRIVY COUNCIL No. 24 of 1963

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL, CEYLON

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1
78637

B E T W E E N :

THE QUEEN Appellant

\- and -

MURUGAN RAMASAMY,
alias
Babun Ramasamy. Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal, by Special Leave, from a Judgment and Order of the Court of Criminal Appeal, Ceylon, dated the 17th December, 1962, allowing the Respondent's appeal against his conviction and sentence by the Supreme Court (acting in the exercise of its original criminal jurisdiction) on the 21st December, 1961, on a charge of having shot one Kammalawattegedera Piyadasa with a gun with such intention or knowledge and under such circumstances that had, by the said act, Piyadasa died, the Respondent would have been guilty of murder, and of causing hurt to Piyadasa by the said act, and thereby committing an offence punishable under Section 300 of the Penal Code. p.163 p.159 p.2

The Respondent was found guilty of the said charge by the verdict of the Jury and convicted and sentenced by the trial Judge to undergo ten years' rigorous imprisonment. The Court of Criminal Appeal, in allowing the appeal, quashed the conviction and directed a Judgment of acquittal to be entered. p.159 p.186 l.30

2. The main questions for determination on this appeal are whether, or not, the Court of Criminal Appeal was right -

(a) So to interpret and apply Section 122(3) of the Code of Criminal Procedure and Section

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27 of the Evidence Ordinance as to arrive at the conclusion that the admission in the Trial Court of the evidence of a police officer as to the finding of a gun following a statement made to him by the Respondent which led to the finding of a gun and ammunition was contrary to law and sufficient to quash the conviction and direct an acquittal.

(b) So to interpret and apply Section 122(3) of the Code of Criminal Procedure as thereby impliedly to repeal or nullify Section 27 of the Evidence Ordinance. 10

(c) To arrive at its decision in face of the evidence of eye-witnesses to the Respondent's attack on the said Piyadasa.

(d) To arrive at its decision in view of the provisions of Section 167 of the Evidence Ordinance - to the effect that the improper admission of evidence is not a ground of itself for reversing a decision if, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. 20

(e) To arrive at its decision in face of the doctrine of stare decisis and, in any event, to overrule a decision of the same Court, the Court, in each case, being constituted by a Bench of Five Judges.

3. The relevant Sections of the Evidence Ordinance, the Code of Criminal Procedure, the Court of Criminal appeal Ordinance and the Penal Code are included in an Annexure hereto. 30

4. The facts relating to the attack on the said Piyadasa were thus stated by the Court of Criminal Appeal:-

p.164, l.32.

"Piyadasa, the injured man, was shot on the 1st September at Monte Cristo Estate, Naivalapitiya. The estate had both Sinhala and Tamil labourers, a section of whom had gone on strike a few days before the shooting. The appellant" (present Respondent) "belonged to the group that had gone on strike 40

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while the injured man and the prosecution witnesses Heen Banda and Juwanis belonged to the group that had not. The road to Nawalapitiya runs through the estate. The man or men who shot were in a place below the road which was known as the 'wadiya'. Piyadasa, the injured man, was working along with the witnesses Heen Banda, Juwanis and about 24 others in a section of the estate
10 above the road in field No. 25 in extent about 25 acres. The injured man and the witnesses claimed that they were engaged in weeding at the time the firing took place. This claim was challenged by the Defence as the witnesses were unable to give a satisfactory account of what happened to their tools.

The witnesses say that about 10.30 a.m. the sound of some sort of commotion from the
20 'wadiya' attracted their attention. When they looked in that direction they saw the appellant " (present Respondent) "and two others named Muttiah and Sinniah. The Appellant had a gun and the other two had stones in their hands. As the first shot was fired they took cover. The second shot injured Piyadasa in the region of the chest as he moved from one position to another. A diary in his breast pocket saved Piyadasa's
30 life as the force of the slug which struck him was broken by it. The resulting injury is described by the doctor as 'a lacerated wound skin deep about $\frac{1}{4}$" long on the left side of the chest about the level of the sternum. There was an abrasion 1" long $\frac{1}{2}$" wide around it.

Piyadasa, Heen Banda and Juwanis who were called by the Prosecution stated that it was the second shot that caused the injury and
40 that it was the Appellant" (present Respondent) "who fired it, but Heen Banda departed from that position in cross-examination. He said that he did not see any action on the part of the Appellant when he heard either the second shot or the third shot".

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	In the Appellant's submission Heen Banda's evidence in cross-examination does not indicate any radical departure from the evidence he had previously given.
	5. Following police investigation the Respondent (herein also referred to as "the Accused") was arrested and tried in the Supreme Court (acting in the exercise of its original criminal jurisdiction) before T. S. Fernando J. and an English speaking Jury, the charge against him, dated the 13th September, 1960, being as follows:- (10)
p.2, l.5.	"That on or about the 1st of September 1960, at Nawalapitiya, in the division of Gampola, within the jurisdiction of this Court, you did shoot Kammalawattegedera Piyadasa, with a gun, with such intention or knowledge and under such circumstances that had you by such act caused the death of the said Kammalawattegedera Piyadasa you would have been guilty of murder and you did by such act cause hurt to the said Kammalawattegedera Piyadasa and you have thereby committed an offence punishable under Section 300 of the Penal Code". (20)
p.2, l.26.	The Accused pleaded Not Guilty.
p.8. p.42. p.63.	6. The case for the Prosecution was supported by the evidence of three eye witnesses, viz: the said Kammalawattegedera Piyadasa (herein also called "Piyadasa") the victim of the shooting, and his two fellow labourers who were working with him at the time of the attack, Kekulangala Mudiyanselaye Heen Banda (herein, also, called "Heen Banda") and Upasaka Gedera Juwanis (herein, also, called "Juwanis"). (30)
p.8, l.20 p.9, l.20 p.10, l.17. p.10, l.21. p.11, l.7. p.11, l.51. p.11, l.52. p.12, l.2.	7. Piyadasa deposed that he had been working as a labourer in the Monte Cristo Estate and, on the 1st September, 1960, at about 1030 a.m. he, Heen Banda and Juwanis were engaged in weeding. Although at the time there was a strike of labourers on the Estate, there were nevertheless about 15 or 20 labourers who continued to work on a 25 acre block. He saw the Accused and two others, Muthiah and Simmiah, coming along a short cut to the main road. (40) He saw that the Accused had a gun in his hand and that the other two had stones. The Accused lowered himself and aimed the gun in the direction in which he (the witness) Heen Banda and Juwanis were working separately in one group. The witness

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took shelter behind a tree and his two companions jumped into a drain. The report of a gun was then heard but nobody received any injury. Attempting to take shelter behind another tree, the witness was injured by a second shot which, he said, in answering a question by the Court, was fired by the Accused. The witness was dazed and fell down and said that he did not know what had happened subsequently. He deposed further that when he was attacked he had a diary in his shirt pocket. He said that he came to know the Accused as Ramasamy about a week after he was employed in the Estate, i.e. about a week after the 1st August, 1960. He also said that certain other people used to show him the Accused when the latter went for his baths and pointed him out by name. He could not remember the names of such persons. The reason why the Accused was pointed out to him as Ramasamy "was that they were the strikers, and as they were going others used to show them".

p.12, 1.23.
p.12, 1.28.
p.12, 1.31.
p.13, 1.10.
p.13, 1.2.
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p.14, 1.8.
p.20, 1.19.
p.20, 1.21.
p.20, 1.29.
p.21, 1.1.
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Cross examined as to the contents of his diary, the witness said that he had written down in it three names; Ramasamy, Jayasena and Mendis. He said that he was given the names of Hayasena and Mendis by a man in the next hospital bed who had also been shot. He said: "At the time I was in the hospital there was a man injured by gun shots in the next bed. At the time Ramasamy shot me Muttiah and Sinniah were with him. Then the man who was in the next bed said that he including others were shot by Jayasena and Mendis and then I thought that I must be making a mistake". In answer to later questions he said that he was not doubtful as to the correctness of his identification of Muttiah and Sinniah because he had seen them (with the Accused) "with my eyes", but that it was "Ramasamy who shot", a gun always having been in his hands.

p.28, 1.4.
p.28, 1.24.
p.28, 1.36.
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p.31, 1.22.
p.35, 1.18.
p.35, 1.25.

8. Heen Banda, also an eye witness, deposed that he had worked on the Monte Cristo Estate for nine years. He had known the Accused for about three or four years. On the 1st September, 1960, he was weeding with Piyadasa (the victim of the shooting) and Juwanis when, at about 10.30 a.m., following a commotion which was heard coming from the labour lines, he saw the Accused, Muttiah and Sinniah approaching, the Accused being armed with a gun and the other two with stones. He saw the

p.42.
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p.43, 1.20.
p.44, 1.5.
p.45, 1.2.
p.45, 1.13.

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p.45, l.31. p.45, l.21. p.46, l.11. p.46, l.18. p.47, l.11. p.47, l.16.	Accused aim the gun in his direction and heard the report of a gun followed by a second gun shot which came from the same direction. The second shot struck Piyadasa. He heard a third shot and later saw the Accused - still carrying a gun - and his two companions walking on a footpath close by.
p.54. p.54, l.8. p.54, l.16.	In cross examination, the witness was asked whether, in the Magistrate's Court, when the Accused, together with two others, Jayasena and Mendis, were facing a different charge, he had said that he did not see the Accused and others approaching the place where he was weeding. He replied: "I did not say so. What I said was that I saw". In further cross examination he said that he had lowered himself into a drain after the first shot and that he did not see any action on the Accused's part thereafter. (10)
p.63. p.63, l.18. p.64, l.2. p.64, l.13. p.65, l.18. p.66, l.16.	9. Juwanis, the third eye witness, in supporting the Prosecution case deposed that he had worked on the Monte Cristo Estate for about 13 or 14 years and had known the Accused for about 8 years. He said that he had continued to work while a strike was going on; and that on the 1st September 1960, he was working with Piyadasa and Heen Banda. On that day he saw the Accused come in their direction, together with Sinniah and Muttiah. The Accused carried a gun. The other two had "some things in their hands" but, apart from saying that they did not carry a gun, he could not say what they carried. He saw the Accused fire in his direction. He then hid. A second shot was fired and this struck Piyadasa. He saw that too. It was fired by the Accused. (20) (30)
p.74, l.27. p.75, l.1.	The witness stated, in cross examination, that he did not accompany Piyadasa to the hospital. It was put to him that he had deposed in the Magistrate's Court that he had accompanied Piyadasa to the hospital in a lorry. He denied that this was correct. (40)
p.92.	10. In further support of the Prosecution case Police Sergeant Jayawardene was called for the purpose of deposing to a portion of the statement made by the Accused in consequence of which the gun was discovered.

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The admissibility of this evidence - a major question for determination on this appeal - was the subject of submissions made to the Court by both sides in the absence of the Jury. These submissions, together with the views of the learned trial Judge thereon, will be found on pages 92 to 96 and 108 to 111 of the Record. The learned Judge held that the gun was discovered as a result of a statement made by the Accused after he had 10 been arrested and as such the evidence was admissible.

pp.92 - 96
pp.108 - 111
p.111, l.25.

In examination in chief the Police Sergeant said that he arrested the Accused at 2.10 p.m. on the 1st September, 1960. He recorded the statement of the Accused who volunteered to make it. It was recorded in his note book. He said that in the course of his Statement the Accused had told him:-

p.95, l.13.
p.95, l.22.

"I am prepared to point out the place where 20 the gun and cartridges are buried".

p.112, l.10.

Thereafter, the witness and the Accused proceeded to the place indicated by the latter ("a spot near line 6") where the Accused unearthed some rubbish and the witness "discovered the gun, broken into three parts and a cloth bag containing 12 cartridges". Examining the barrel of the gun the witness said he smelt fouling.

p.112, l.15.

In cross examination the witness said that the Accused's statement was recorded before the 30 discovery of the gun and that his previous reply that it was recorded after the discovery was a mistake. He said that he had not recorded any Statement of the Accused after the said discovery. He had questioned the Accused before the discovery of the gun and had recorded that fact in his diary.

p.122, ll.7-19.
p.129, l.3.

In re-examination he again said the Accused's Statement was recorded before the discovery of the gun, and that the fact of the dis- 40 covery was recorded in his diary.

p.128, ll. 28-34.
p.128, l.24.

11. Other evidence for the Prosecution was as follows:-

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p.6 p.6, l.20.	Dr. Senarath Rajendra Gunaratne, District Medical Officer, deposed that on the 1st September 1960, he had examined Piyadasa and found him to be suffering from a lacerated wound, skin deep about ¼ inch long on the left side of the chest at about the level of the sternum, with an abrasion 1 inch long by ½ inch wide around it. This injury could have been caused by a pellet from a gun.	
p.85 p.88, l.7.	Abeysinghe Mudiyanselage Podimahatmaya deposed that two weeks prior to the 1st September the Accused showed him a gun which was like the Exhibit in Court, P.1.	10
p.96 p.97, l.25. p.99, l.3. p.99, l.6.	Police Inspector Perera deposed that on the 1st September, 1960, he had, at the Monte Cristo Estate, recorded Statements from witnesses and had then gone to the hospital where he had recorded a Statement made by Piyadasa and had taken into custody from him a shirt, a banian and a pocket diary.	
p.105.	Police Constable Dayananda Senaratne deposed that he had visited the Monte Cristo Estate on the 1st September, 1960, and had prepared a sketch of the scene of the attack, in the presence of the witnesses Juwanis and Heen Banda.	20
p.131. p.131, l.30 p.132, l.28. p.132, l.10. p.133, l.1.	12. The Accused himself did not elect to give evidence. The only witness called by the Defence was the Clerk of Assize, Supreme Court, Kandy, who produced the records in M. C. Gampola 2636 (not this case but a different Prosecution arising out of the same circumstances, in which the persons prosecuted were the Accused in the present case and two others, Jayasena and Mendis) and in M. C. Gampola 3082 (this case in the Magistrate's Court). The record in M. C. Gampola 2636 showed that in his evidence before the Magistrate the witness Heen Banda (see paragraph 8 hereof) had said: "I did not see the 1st Accused and others approaching the place where we were. I saw them only after the first shot". And, the record of the present Prosecution in the Magistrate's Court (M.C.Gampola 3082) showed that Juwanis, in that Court, had said "Piyadasa was removed to the hospital in the lorry. I too accompanied Piyadasa to the hospital in the lorry".	30 40
p.133	13. In his summing up to the Jury, the learned trial Judge (T.S. Fernando J.) said that:-	

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"the Prosecution must prove to you that it was this Accused who shot at Piyadasa" and "at the time this Accused shot Piyadasa the Accused had a murderous intention". p.134, 1.30.

He explained to them the respective functions of the Judge and Jury in a trial such as this and the presumption of innocence of an accused person. He warned them that the burden of proof was at all times upon the Prosecution and that it must be proof beyond reasonable doubt. p.134, 1.41. p.136, 1.10. p.136, 1.27. p.136, 1.33.

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Referring to the Prosecution case he said:-

"How does the Prosecution seek to prove that it was this accused Ramasamy who caused the injuries or who shot at Piyadasa? The Prosecution seeks to do that in this case by calling three witnesses, first Piyadasa the injured man, second Heen Banda a man who was working along with Piyadasa weeding the 25 acres black and thirdly witness Juwanis who was also working along with Heen Banda and Piyadasa. That is the main evidence in the case". p.137, 1.28.

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14. As to the Prosecution evidence which was concerned with the Accused's possession of the gun and the finding of the gun and ammunition by the police, the learned trial Judge said:-

"There are two other bits of evidence in the case, gentlemen, as learned Counsel for the Defence said, of a circumstantial nature, that is the evidence given by witness Podimabatmaya", (see paragraph 11 hereof) "who said that he had seen some two weeks prior to 1st September, 1960, a gun with the accused Ramasamy, and secondly Sergeant Jayawardene" (see paragraph 10 hereof) "that at about 3.30 or to be exact between 3.30 and 3 in the afternoon of the 1st September this Accused, after he had been arrested, took Jayawardene along to some place near line Set No. 6 and there dug up the earth underneath which Jayawardene found this gun P1, at that time in three parts along with some bag containing 14 live cartridges. Now, these two men, Podimabatmaya and Jayawardene, their evidence falls into the category of p.137, 1.39.

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> what we call circumstantial evidence. Now, I think learned Counsel for the Defence said that I might give you a direction on that evidence as to how to approach it. I do not think I need bother you with that in this case because this case does not rest on circumstantial evidence alone. As I shall tell you later, if you take the two bits of circumstantial evidence by themselves, apart from the evidence of the eye-witnesses, I want to say that those two circumstances by themselves cannot lead you to any inference of guilt of the accused Ramasamy in the shooting of Piyadasa.
> Therefore the most important bit of (evidence) so far as the prosecution is concerned in this case is the evidence of the eye-witnesses, the direct evidence."

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p.139, l.29-
p.149, l.43.

15. The learned Trial Judge then narrated the evidence of the eye-witnesses and continued as follows :-

p.149, l.44.
p.151, l.3

> "I have summarised to you all the main features in the evidence of the eye-witnesses. Your verdict must surely rest in this case upon your belief or disbelief of the witnesses Piyadasa, Heenbanda or Juwanis."

p.150, l.16-

As to the evidence of Podimahatmaya (see paragraph 11 hereof), that the Accused had shown him a gun two weeks prior to the 1st September, the learned Judge referred to the fact that the witness had been locked up by the Police before making a statement. He advised the Jury that it would be safer to leave out evidence elicited in that way.

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16. As to the evidence of the said Police Sergeant Jayawardene (see paragraph 10 hereof) the learned Trial Judge said :-

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p.151, l.42.

> "Well, the Defence has challenged Jayawardene and said he is nothing more than a liar in uniform. That is the suggestion. The Defence alternatively argues, even if that suggestion of the

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Defence is not accepted, but Jayawardene is believed when he says that the Accused pointed out the gun, the statement of the Accused is that he could point out a place where a gun and cartridges are buried. The Defence therefore argues, that means nothing more than that the Accused was aware of where a gun and cartridges were buried, not necessarily buried by him. I did not understand the Prosecution as placing the case any higher than placed by the Defence Counsel himself. The Prosecution does not say that it proves anything more than showing a place where a gun and 14 cartridges were buried, and this was about 3.25 or 3.30 that the cartridges were unearthed. Well, gentlemen, that is the evidence in this case."

17. The learned Trial Judge then put to the Jury the case for the Defence which he introduced as follows :-

"Now what does the Defence say in regard to that? They have attacked the credibility of Piyadasa, Heen Banda and Juwanis, all three Prosecution witnesses of the actual shooting. I do not want to recapitulate all the criticisms but some suggestion was made that they were not witnesses of this shooting in the circumstances that they alleged in this Court.
The Defence maintains that they did not see the shooting in this way at all but that the shooting took place in other circumstances and that the assailant is unknown, and therefore a false case has been cooked up against Ramasamy this Accused." p.152, 1.16.

Continuing the learned Judge referred to the various Defence arguments in detail and later directed the Jury as to the law. p.152, 1.31- 1.155, 1.17. pp.155-158.

18. The Jury brought in an unanimous verdict of "Guilty" within about seventeen minutes of their retirement. The Court sentenced the Accused to undergo rigorous imprisonment for ten years. p.159, 1.4. p.159, 1.22.

19. The Accused appealed against his conviction and sentence to the Court of Criminal Appeal on the several grounds mentioned in his Notice and Grounds of Appeal, dated the 1st January, 1962, printed on pp.159 to 163 of the Record. p.159.

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p.163. 20. The appeal came up for hearing in the Court of Criminal Appeal before a Bench consisting of Basmayake C.J. (President) and Tambiah, Herat, Abeysundere and G.P.A. Silva,

p.186. JJ, who, by their Judgment and Order, dated the 17th December, 1962, allowed the appeal, quashed the conviction and directed a Judgment of acquittal to be entered.

21. Delivering the main Judgment of the Court of Criminal Appeal, Basnayake P. (with whom the four other Judges agreed) said that:- 10

p.164, l.24. "The main ground of appeal urged by learned Counsel for the Appellant is that the Judgment of the Court before which the Appellant was convicted should be set aside on the ground that a statement made by the Appellant to Police Sergeant Jayawardene had been illegally admitted in evidence."

p.164, l.31.
p.165, l.38.
p.166, l.36.

The learned President then referred briefly to the material facts, to the respective cases for the Prosecution and the Defence, and, on the "main ground" of appeal 20

p.169, l.36. said that the Court was in agreement with the submission made on behalf of the Accused that a statement made to a police officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code (hereinafter referred to as "the Code") falls within the prohibition in Section 122(3) of the Code. The learned 30

p.170, l.15. President expressed the view that Section 27 of the Evidence Ordinance (which the Prosecution had urged permitted the proof of the Accused's statement to Police Sergeant Jayawardene) should be read as permitting the proof of only those statements that do not fall within the prohibition of Section 122(3) of the Code.

22. The learned President continued as follows :- 40

p.170, l.19. "In the case of Buddharakkita (supra)[1] it was held that Section 122(3) extends to both oral and written statements made in the course of an inquiry under Chapter XII" (of the

[1] 63 N.L.R.433

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Code) "The result of the decision in Buddharakkita's Case is that the oral statement made to a police officer in the course of an inquiry under Section 122 can no longer be proved under Section 27" (of the Evidence Ordinance). "We are in entire agreement with that decision and we are unable to agree with the decision in Rex v. Jinadasa (supra)[2] that although the written statement falls within the prohibition in Section 122(3) the oral statement does not, and may be proved under Section 27 of the Evidence Ordinance. The learned Solicitor-General relied on the following passage in the judgment of Buddharakkita's Case as approving Rex v. Jinadasa (supra):

[2] 51 N.L.R.529

> '...no decision of the Supreme Court of this Court has been cited to us in which it was argued and expressly decided that statements made by an accused person to an officer investigating a cognizable offence under Chapter XII may be proved contrary to the prohibition in Section 122(3) except in a case to which Section 27 of the Evidence Ordinance applies.'

"We are unable to agree with his view of that passage. If the language lends itself to such an impression, we wish to make it clear that it should not be understood as implying that the Court held that a Statement which cannot be used under Section 122(3) may be proved under Section 27. Our decision in the instant case is in accord with Buddharakkita's Case, and the decision in Jinadasa's Case must not be regarded any longer as binding. It is convenient at this point to dispose of The Queen v. O.A.Jinadasa (Supra)[3], the other case on which the Solicitor-General relied. The questions that arise for decision here did not arise there, and if any passage in that judgment is in conflict with our decision in the instant case, that case should, to that extent, be regarded as overruled."

[3] 59 C.L.W.97

23. The learned President further held that the opinion which the Court had formed was "consistent with the view taken by the Privy Council on the

p.171, 1.19.

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	corresponding provisions of the Indian Evidence Act and Criminal Procedure Code". He referred to the Judgment of the Board (delivered by Lord Atkin) in Pakala Narayana Swami v. Emperor
[1] Ind. Ap.	(1939) A.I.R. (P.C) 47[1] at p. 52 and in Pulukuri Kottaya v. Emperor (1947) A.I.R.
[2] Ind. Ap.	(P.C.) 67[2]
p.177, l.48.	24. The learned President next considered "whether the conviction should be set aside on the ground of improper admission of Sergeant Jayawardene's evidence, or, whether while upholding the point taken by learned Counsel, the appeal should be dismissed on the ground that no substantial miscarriage has actually occurred."
p.178, l.9.	He held that the Crown had failed to discharge the onus (which was upon it, as the Court had decided against the admissibility of Sergeant Jayawardene's evidence) that no substantial miscarriage of justice had occurred. He said further that "the material before us discloses that a substantial miscarriage of justice has actually occurred."
p.178, l.15.	Turning to this aspect of the appeal, the learned President said that there was "no evidence that the parts of a gun dug up from the rubbish heap near line No.6 are the parts of the crime gun", "no evidence that the parts of a gun recovered by Sergeant Jayawardene constituted a gun that could be fired" and no evidence that the Ex. P.1, constituted a gun formed from the
p.178, l.33.	parts recovered from the rubbish heap". He concluded that "there cannot be said to be proof that the gun consists of the parts of a gun recovered from the spot pointed out by the Appellant and no inference against him can be drawn from the circumstance of his pointing out and dragging up the rubbish heap near line No.
p.178, l.40.	6". Continuing, he said that "Jayawardene's evidence that the Appellant said in a statement which he volunteered, 'I am prepared to point out the place where the gun and the cartridges are buried' has gone to the Jury as containing a reference to the crime gun." The learned
p.179.	President then referred to certain passages in the summing-up of the Trial Judge where references had been made to "this gun" and "the gun" and said:-

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"It was urged by learned Counsel that the repeated reference both in the evidence and the summing-up to the gun and this gun was gravely prejudicial to the Appellant if Jayawardene's evidence was meant to prove nothing more than that the Appellant was aware of where a gun and cartridges were buried, not necessarily buried by him. He further submitted that the way in which the evidence was presented to the Jury is likely to have had the effect of influencing the Jurors to attach that amount of weight which they might not otherwise have attached to the evidence of Piyadasa, Heen Banda and Juwanis. In our opinion this submission is well-founded." p.179, l.48.

It is respectfully submitted that the Court was in serious error in its inferences as stated above, and in its conclusion that the Accused had been prejudiced by the summing-up and the way in which the evidence was presented to the Jury.

25. The learned President next considered, in some detail, the evidence of Police Sergeant Jayawardene. He dwelt particularly on the fact that, having regard to his own notes of the inquiry and the evidence he had given in Court, this witness appeared to contradict himself as to whether the Accused had volunteered to make a statement, and whether he had recorded the said statement before or after the finding of the gun. The learned President said :- pp.180-186. p.183, l.22.

"Sergeant Jayawardene's evidence, when compared with what is recorded in his note book discloses a reprehensible attempt on his part at suggestio falsi et suppresio veri. His notes speak of the same gun being discovered twice, once before, and a second time after, the Appellant's statement was recorded................ p.184, l.43.

"Now the learned Judge omitted to warn the Jury that they should approach his evidence with caution as he had contradicted himself so many times in the course of his evidence on a vital point in the case." p.185, l.46.

It is respectfully submitted that the learned President here misdirected himself and that there was no inherent contradiction; that, although the

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witness might have given confused answers as to the sequence of events, the Court was not entitled to draw the conclusion that he was a deliberately untruthful witness; and that in any event, in view of the uncontradicted evidence of the eye-witnesses, the Police Sergeant's evidence was not concerned with a "vital point" in the case.

26. Finally, the learned President referred to the conduct of the Prosecution in the following terms: 10

p.185, l.51.

"...Of the two statements recorded as coming from the Appellant in regard to the gun and cartridges, one does not indicate that the Appellant was the person who used the gun while the other carries that implication. The Crown sought to prove that one implying guilt when in the course of that very statement the Appellant had stated the circumstances 20 in which he found the gun and denied that he had shot anyone.

p.186, l.9.

It is difficult to escape the conclusion that the Prosecution has not been conducted in the instant case with that fairness and detachment with which Prosecutions by the Crown should be conducted. With the statement of the Appellant, in which he had expressly denied that he shot, before him, learned Crown Counsel 30 despite the Trial Judge's warning of the perils of the course he was seeking to adopt, insidiously persisted in placing before the Jury a statement alleged to be made by the Appellant which, when taken out of its context, tended to create the impression that he had confessed to the crime and that he had hidden the crime gun himself after the shooting by him. 40
That officers on whom the Court is entitled to rely for assistance in the administration of justice should consciously seek to mislead it, is deplorable. There is no question that the appeal must be allowed and the conviction quashed, and we accordingly do so and direct a Judgment of acquittal to be entered."

Record

It is respectfully submitted that these reflections upon the conduct of Crown Counsel were wholly unjustified. Crown Counsel did no more than to call before the Jury evidence of the discovery of the gun as the result of information given by the Accused. He did so in the manner directed by the learned Trial Judge. No objection, other than as to admissibility, was taken by Counsel for the Defence; and, apart from admissibility, both sides were agreed - as was pointed out by the learned Trial Judge in his summing-up (see paragraph 16 hereof) - that the evidence of the Police Sergeant proves no more than that the Accused was aware of where a gun and cartridges were buried. There was, therefore, no foundation for the statement that an Officer of the Court had consciously sought to mislead the Court.

27. Against the said Judgment and Order of the Court of Criminal Appeal this appeal is now preferred, the Appellant, having obtained Special Leave to Appeal, by an Order-in-Council dated the 11th April, 1963. p.187.

In the Appellant's respectful submission this appeal ought to be allowed and the Judgment and Order of the Court of Criminal Appeal, dated the 17th December, 1963, set aside, for the following, among other

R E A S O N S

(1) BECAUSE so much of the information given by the Accused to Police Sergeant Jayawardene as resulted in the discovery of a gun and ammunition was clearly admissible in evidence under Section 27(1) of the Evidence Ordinance.

(2) BECAUSE the opening words of the said Section 27(1) - "Provided that" - are reasonably construed as meaning "Notwithstanding any other provision to the contrary" and take effect, when properly applicable, to any provision of any law in force in Ceylon.

(3) BECAUSE the said Section 27(1) is applicable to both of the preceding Sections 25 and 26 and not to Section 26 alone.

(4) BECAUSE Section 122(3) of the Criminal Procedure Code does not, on any true interpretation and application thereof to the circumstances of this Case, render inadmissible the information

given by the Accused to the said Police Sergeant which led to the discovery of the gun and ammunition.

(5) BECAUSE the "statement" referred to in the said Section 122(3) must, on any reasonable interpretation, be deemed to refer only to a statement which is recorded in writing by the police and not to oral information given to them during the course of an investigation. 10

(6) BECAUSE construed as indicated above the said Sections 27(1) and 122(3) are not in conflict and this is a sufficient ground in law for rejecting any interpretation of the two Sections which has the effect of one impliedly repealing or nullifying the other.

(7) BECAUSE the decision in R. v. Jinadasa (1950) 51 N.L.R. 529 as to the interpretation and effect of both of the said Sections was approved in R. v. Buddharakkita (1962) 63 N.L.R. 433 and being a correct decision by a Bench of five Judges of the Court of Criminal Appeal was wrongly overruled in this case by the same Court constituted by a Bench of no more than five Judges. 20

(8) BECAUSE even if it be held that the information given by the Accused to the Police Sergeant which led to the discovery of a gun and ammunition was inadmissible in evidence there still remained the evidence of the eye-witnesses which was ample evidence of the Accused's guilt but which, if it was considered at all, was incorrectly or insufficiently appreciated by the Court of Criminal Appeal. 30

(9) BECAUSE the said Court appears to have overlooked the provisions of Section 167 of the Evidence Ordinance to the effect that the improper admission of evidence is not a ground of itself for reversing a decision if independently of the evidence objected to, and admitted, there was sufficient evidence to justify the decision. 40

(10) BECAUSE the said Court should have dismissed the appeal on the ground that by the Accused's conviction and sentence no miscarriage of justice had occurred.

(11) BECAUSE in arriving at its decision the said Court might well have been influenced by its erroneous view as to the part played by Crown Counsel in relation to the presentation of the prosecution evidence as to the finding of the
10 gun and ammunition and, generally, in the conduct of the prosecution.

DINGLE FOOT

V.S.A. PULLENAYEGAM

R.K. HANDOO

RALPH MILLNER

ANNEXURE

EVIDENCE ORDINANCE - Sections 25, 26, 27 & 167

Confession made to a police officer not to be proved against an accused person.

25. (1) No confession made to a police officer shall be proved as against a person accused of any offence.

Confession made to a forest officer or an excise officer not to be proved against person making confession.

(2) No confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or to an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession.

Confession made by any person while in custody of a police officer not to be proved against him.

26. (1) No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Confession made by any person while in the custody of a forest officer or an excise officer not to be proved against him.

(2) No confession made by any person in respect of an act made punishable under the Forest Ordinance or the Excise Ordinance, whilst such person is in the custody of a forest officer or an excise officer, respectively, shall be proved as against such person, unless such confession is made in the immediate presence of a Magistrate.

How much of information received from accused may be proved.

27. (1) Provided that, when any fact is deposed to is 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

(2) Subsection (1) shall also apply mutatis mutandis, in the case of information received from a person accused of any act made punishable under the Forest Ordinance, or the Excise Ordinance, when such person is in the custody of a forest officer or an excise officer, respectively.

* * * * * *

No new trial for improper admission or rejection of evidence

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

CODE OF CRIMINAL PROCEDURE - Section 122(3)

Statements to police officer or inquirer not to be admitted in evidence.

(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordnance, section 161 or section 145, as the case may be, shall apply.

Nothing in this subsection shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code.

Right of appeal in criminal cases.

4. Any person who is convicted on a trial held before the Supreme Court under Chapter XX or section 440A of the Criminal Procedure Code, or in pursuance of an order made by the Chief Justice under section 29 of the Courts Ordinance, may appeal under this Ordinance to the Court of Criminal Appeal -

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be sufficient ground of appeal; and

(c) with the leave of the Court of Criminal Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law.

Determination of appeals in ordinary cases.

5. (1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Ordinance, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment of acquittal to be entered:

Provided that the Court of Criminal Appeal may order a new trial if they are of opinion that there was evidence before the jury or the judges, as the case may be, upon which the accused might reasonably have been

convicted but for the irregularity upon which the appeal was allowed.

(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

(4) Nothing in this section shall affect the power (which is hereby declared) of the Court of Criminal Appeal to order a new trial when the trial at which the conviction was had was a nullity by reason of any defect in the constitution of the court or otherwise.

CEYLON PENAL CODE

Cap. 15

Section 300

Attempt to murder

Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable to imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine.

Illustrations

(a) A shoots at Z with intention to kill him under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section; and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping. A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

No. 24 of 1963.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL, CEYLON.

B E T W E E N :

THE QUEEN — Appellant

- and -

MURUGAN RAMASAMY
alias
BABUN RAMASAMY — Respondent

CASE FOR THE APPELLANT

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