SAMBASIVAM

APPELLANT;

AND

PUBLIC PROSECUTOR, FEDERATION OF MALAYA

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

[JUDICIAL COMMITTEE]

[1950] AC 458

HEARING-DATES: 30, March 10 May 1950

10 May 1950

INTRODUCTION:

APPEAL (No. 32 of 1949), by special leave, against an order of the Supreme Court of the Federation of Malaya (Court of Appeal) (Willan C.J., Hill and Wilkinson JJ.) (April 28, 1949) dismissing an appeal from a judgment of the Supreme Court of Johore (Storr J.) (March 22, 1949) whereby the appellant was convicted of carrying a firearm under reg. 4, sub-reg. 1 (a), of the Emergency Regulations, 1948, and sentenced to death.

The following facts are taken from the judgment of the Judicial Committee:- On the morning of September 13, 1948, the appellant, an Indian Tamil clerk, was travelling on foot in the State of Johore in the company of two Chinese. They met a party of three Malays and a fight ensued, in the course of which one of the Chinese was killed, and the appellant was seriously wounded. The other Chinese escaped and had not, apparently, been heard of since. The Malays, who were armed with knives, alleged that they had been fired on by the Chinese and that the appellant had drawn and pointed a revolver at one of them before he had been wounded and disarmed. In connexion with that incident the appellant was later charged with carrying a firearm and being in possession of ten rounds of ammunition. Those charges were preferred under reg. 4, sub-reg. 1, of the Emergency Regulations, 1948, which read as follows:-

"4. - (1.) Any person who carries or who has in his possession or under his control -

"(a) any fire-arm, not being a fire-arm which he is duly licensed to carry or possess under any other written law for the time being in force; or

"(b) any ammunition or explosives without lawful authority therefor,

shall be guilty of an offence against these Regulations and shall on conviction be punished with death."

By the Emergency (Criminal Trials) Regulations, 1948 (hereinafter referred to as the Trials Regulations), provision was made for a simplified procedure, without any preliminary inquiry, in the case of certain offences within the Federation. The applicability of the Trials Regulations, in so far as material, depended on a certificate being given under reg. 7 thereof, which was in these terms:-

"7. Where a person is charged with any offence against any written law and the Public Prosecutor certifies in writing that the case is a proper one for trial under these regulations, such case shall be tried and disposed of in accordance with the provisions of regs. 8 to 12 inclusive of these Regulations."

By reg. 2 the expression "Public Prosecutor" included a Deputy Public Prosecutor. On November 25, 1948, Mr. McCall, admittedly a Deputy Public Prosecutor, purported to issue a certificate under reg. 7 relating to the offences

charged against the appellant. It would be convenient to quote that document fully for its terms were important and it specified the charges on which the appellant was subsequently tried. It was signed by Mr. McCall and ran thus:-

"The Emergency (Criminal Trials) Regulations, 1948.

"I, William Martin McCall, Deputy Public Prosecutor, in accordance with the provisions of s. 7 of the Emergency (Criminal Trials) Regulations, 1948, hereby certify that the trial of Sivam alias Sambasivam s/o Narayanasamy on the following charges, namely:-

1. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, carried a .38 revolver which he was not duly licensed to carry, and he has thereby committed an offence punishable under reg. 4 (1) (a) of the Emergency Regulations, 1948; and

"2. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, had in his possession ten rounds of .38 ammunition without lawful authority therefor and he has thereby committed an offence punishable under reg. 4 (1) (b) of the Emergency Regulations, 1948,

"is a proper case for trial under the said Regulations and

I hereby designate Johore Bahru as the place where such trial shall be held.

"Dated at Johore this 25th day of November, 1948.

"(Sgd.) W. Martin McCall,

Deputy Public Prosecutor for

Solicitor-General."

On March 2, 1949, the appellant was tried under the emergency procedure prescribed by the Trial Regulations on both those charges in the Supreme Court at Johore Bahru before Laville J. and two assessors. On the second charge - that relating to the possession of ammunition and framed under reg. 4, sub-reg. 1 (b), of the Emergency Regulations - both assessors returned a verdict of not guilty and, the learned judge agreeing with that finding, the appellant was duly acquitted. On the first charge - that relating to the carrying of a firearm and framed under reg. 4, sub-reg. 1 (a) - the assessors also found the appellant not guilty but Laville J. disagreed with that finding and ordered a re-trial. That was done under s. 198 (ii) of the Criminal Procedure Code which provided: "If the court is unable to agree with the opinion of both assessors, ... the proceedings shall be stayed and a new trial held with the aid of fresh assessors."

The re-trial on the first charge took place on March 21 and 22, 1949, before Storr J., and two different assessors. They found the appellant guilty and he was sentenced to death in accordance with reg. 4, sub-reg. 1, of the Emergency Regulations. The appellant appealed against his conviction, but on April 28, 1949, the Court of Appeal dismissed his appeal without calling on counsel for the prosecution and, so far as the record showed, without pronouncing any reasoned judgment.

COUNSEL:

1950. March 28, 29, 30. Scott Cairns K.C. and Handoofor the appellant. The first point is that, whereas in respect of the first of the two trials there was a certificate under reg. 7 of the Trials Regulations, for the second trial there was no such certificate. It is necessary in any case where there is a re-trial to have a fresh certificate, because the proceedings have been brought to an end. In particular in this case a fresh certificate is necessary because it is not the same case. The case which was certified in the first instance was a case of two charges - carrying a firearm and being in

possession of ammunition - whereas the case in the second trial is the single charge of carrying a firearm, without reference to ammunition. There was thus a different case requiring a fresh certificate. On a strict construction of the regulations, even if the charge is identical, the case is a different one. A certificate that the trial on these two charges is a proper case is not a certificate that the trial of the same person on the single charge is a proper case.

The second point is that the certificate as given in respect of the first trial was in any event invalid, and therefore none of the proceedings which followed from it were valid proceedings. It is signed by the "Deputy Public Prosecutor for Solicitor-General." The words which make it bad are "for Solicitor-General." It has to be signed by the Public Prosecutor as defined in the Trials Regulations, and under reg. 2, "Public Prosecutor" includes a Deputy Public

Prosecutor. It could therefore be signed by the Public Prosecutor on his own behalf, or by a Deputy Public Prosecutor on his own behalf, but not by the Solicitor-General.

The argument can be divided into three parts: (i.) the certificate is not a valid certificate of the Deputy Public Prosecutor because he has not purported to sign it on his own behalf; (ii.) it is not a valid certificate of the Solicitor-General - it is not a valid certificate through the Deputy Public Prosecutor because (a) the regulation does not authorize the giving of a certificate by an agent, and (b) there is no evidence of authority; (iii.) if that be wrong, and this is to be treated as a certificate of the Solicitor-General, he has no power to give the certificate: he is not a Public Prosecutor under s. 376, sub-s. 1, of the Criminal Procedure Code; he is not a Deputy Public Prosecutor under s. 376, sub-s. 3, of that Code, and, in the absence of evidence that the Attorney-General was away or unable to act, he cannot be said to be acting as Public Prosecutor. The highest that it can be put in relation to the Solicitor-General is to say that under s. 376, sub-s. 2, of the Code he had the powers of a Deputy Public Prosecutor. But it is submitted that the power cannot be delegated because there is no provision for delegation.

The third point is that the appellant's counsel at the second trial was stopped from referring to the previous trial, and thereby prevented from effectively cross-examining one of the witnesses. The main evidence at both trials consisted of the evidence of three Malays, and, as appears from the Record

from the notes of the second trial, when counsel for the appellant tried to put to one of those Malays that he had given different evidence in the first trial from that which he was giving in the second, the judge said that he must not do that - must not refer to the fact that there had been a previous trial. That prevented the witness from being cross-examined and very seriously deprived the appellant of the right of testing the case that was put against him.

The fourth point arises in connexion with a statement alleged to have been made by the appellant to a police inspector, which was admitted in evidence at the second trial. With regard to that statement three points are taken, two of them as to its admissibility, and the third as to its weight. As to admissibility, it is submitted, first, that under reg. 11 of the Trials Regulations it was necessary before any evidence could be given by the police officers to prove the alleged statement of the appellant, that copies of the statements to be made by those police officers as witnesses should be supplied to the accused person two clear days before the hearing, and that was not done. They were not supplied at all. Secondly, the alleged statement of the appellant is inadmissible because, in order that it should be admissible, it had, under reg. 33, sub-reg. 1, of the Emergency Regulations, to be made "to or in the hearing of" a police officer not below the rank of inspector. The police officer who gave evidence with regard to it was a police inspector who did not understand the language in which the appellant made his statement. There was present another police officer who did understand the language of the appellant, which was Tamil, and who translated it from Tamil into Malay, and the inspector then wrote it down in English. The objection under this head is that a statement cannot be said to be made "in the hearing of" a police inspector if the statement is made, though literally in his hearing, in a language which he does not understand. The words are not "in the presence of" or "under the supervision of," but "in the hearing of."

Thirdly, which goes only to weight, but is a matter of no little importance, the alleged statement was made within a few hours after the time when the appellant had been most gravely wounded. He had been left lying in the road by people who, at the time, thought that he was about to die. Evidence that a statement of that kind was made in those circumstances is evidence which no court should believe;

and further, any statement made by a man in that condition is one, if he did make it, on which no reliance should be placed. He said that he never made any such statement at all. In all the circumstances there is so much suspicion and doubt attaching to the statement that any conviction founded on it cannot stand; and the fact that it was given in evidence, is relied on as a main part of the prosecution case, and so treated by the judge in his summing-up, vitiates the trial and means that there has been a grave miscarriage of justice. There appears to be no direct authority on the question whether, where a statement included admissions with regard to the subject-matter of the charge that was being tried and also contained admissions with regard to some other crime, the statement could be used. The nearest case is Rex v. Evans n(1) .

The fifth and last point is whether, on the evidence, the appellant: could be said to be carrying a firearm within the meaning of the regulation, which, it is submitted, must mean carrying a firearm with the intention of using it as such. The regulation refers to "carries or who has in his possession or under his control." There would be no offence unless the appellant not only knew that he was carrying a firearm, but intended to use it. Some assistance in this connexion may be obtained from the Indian cases: Emperor v. Harpal Rai n(2) ; Madho Lal v. Emperor n(3) ; Emperor v. Muhammad Hasan n(4) Aratoon Malcolm v. Emperor n(5) .

Casswell K.C., J. G. Le Quesne and A. M. I. Austin for the respondent. These were emergency regulations which were passed in July, 1949, to meet a very great danger in the Federated Malay States. The Ordinance in question says quite clearly "any person who carries .... any firearm, ..."; whether he has the intention to use it or not, if he is carrying it he is guilty of an offence under that regulation. Intent to use it is not a necessary ingredient of the offence, but, even if it were, there is abundant evidence of that intention in this case. With regard to the certificate, there was no need for a second one. That which was given was to the effect that it was a proper case to be tried and disposed of. And when once he has been committed, the fact that the appellant has been acquitted on one charge in the case has not disposed of the case: he is still in peril. He needs no further

n(1) [1950] W. N. 111.

n(2) (1902) I. L. R. 24 A. 454.

n(3) (1908) 13 Cal. W. N. 124.

n(4) (1924) I. L. R. 47 A. 267.

n(5) (1933) I. L. R. 60 C. 445, 450.

committal for trial; he has been neither acquitted nor convicted; the case has not been disposed of; and there fore no fresh certificate will be needed. That which was given for both counts was good for either.

It was next said to have been given by the wrong person. The effect of the words "for Solicitor-General" is either that the Solicitor-General was signing and that the Deputy Public Prosecutor was signing on his behalf - and the Solicitor-General was perfectly entitled to do so: s. 376, sub-s. 2, of the Criminal Procedure Code; or that he has delegated to the Deputy Public Prosecutor, who is signing because he had authority from the Solicitor-General to make up his mind whether the case was one in which a certificate should be given Those words cannot invalidate the certificate, and the court is not deprived of jurisdiction under the Trials Regulations because of the form of the certificate.

The question of counsel having been stopped was not taken at the trial or on the petition for special leave; it appears for the first time in the appellant's printed case, and it is not right that the Board should be asked to say at this stage that the trial judge stopped the cross-examination.

Next, the statements to be made by the police officers as witnesses were not the sort of statements copies of which should, or need, be sent to the defence: reg. 11. There was here perfectly good evidence by the Malays supporting the charge which the judge and the assessors who saw them must have believed.

With regard to the statement made by the appellant, in any case, it was made "to" the inspector within the meaning of the regulation; the interpreter was a mere conduit pipe. It has never been suggested that the police officer was biased. That being so, this was in fact a statement made "to" an inspector although he did not understand it himself.

If that be wrong, then it is submitted that this is an irregularity which has been cured or waived by the fact that counsel for the accused said that he could not object to the statement. The arguments that have been put forward for the appellant would be very important in argument before a court of criminal appeal, but none of them shows that there has been a miscarriage or a denial of justice.

J. G. Le Quesne following. The omission to mention at the second trial the fact that the appellant had been acquitted at the first trial on the charge of being in possession of ammunition

has not led to any injustice sufficient to bring the Board's jurisdiction in criminal matters into operation.

Scott Cairns K.C., in reply. If the evidence was that the appellant was not in a fit condition to make the alleged statement, it was the duty of the court itself to call medical evidence: Mehr Singh and Banta v. The Crown n(1) ; Jit Singh v. The Crown n(2) . The failure to have any evidence from the prosecution to prove the condition of the appellant when making his statement was something which caused a grave miscarriage of justice. If the evidence of the Malays had stood alone, without the statement, one does not know whether there would have been a conviction or an acquittal here.

With regard to the expression "to" the inspector, all the arguments used in opening are equally applicable in that connexion.

The prosecution is bound to bring to the notice of the judge and the assessors the fact that there has been a previous trial; and, quite apart from any duty on the prosecution, it is clear that the previous acquittal was within the knowledge of the court, which should have directed the assessors that in those circumstances that part of the statement which was said to have been made in respect of having ammunition must be taken to be a statement of the accused admitting something which he was found not to have done. The acquittal is conclusive of the innocence of the appellant on that matter.

The point on the stopping of the cross-examination was mentioned at the hearing of the petition for special leave.

As to the form of the certificate, the case consisting of two charges is disposed of at the end of the first trial. It is conceded that the manner in which the certificate is signed makes it ambiguous, and the very fact that it is ambiguous makes it a bad certificate. This is a case in which there has been not a mere technical defect, but a real miscarriage of justice.

March 30.

PANEL: LORD SIMONDS, LORD MACDERMOTT, LORD REID,SIR JOHN BEAUMONT and SIR LIONEL LEACH

JUDGMENTBY-1: LORD SIMONDS

JUDGMENT-1:

LORD SIMONDS : announced that their Lordships would humbly advise His Majesty that the appeal should be allowed, and that they would give their reasons later.

May 10. The reasons of their Lordships for allowing the appeal were delivered by

JUDGMENTBY-2: LORD MACDERMOTT,

JUDGMENT-2:

LORD MACDERMOTT, : who stated the facts set out above and continued: In connexion with the

n(1) (1917) A. I. R. (Lah.) 175.

n(2) (1949) A. I. R. (E. Punj.) 334.

decision of the Court of Appeal, it should be observed, first, that the grounds of appeal to the Court of Appeal were confined to points bearing on the value and weight of the evidence, the main ground being that "the statement of the accused was recorded in a manner and in circumstances which makes this statement valueless and irregular," and secondly, that many of the submissions on behalf of the appellant which their Lordships have had to consider were not advanced before either the Court of Appeal or the trial judge.

The second trial, like the first, was held without a preliminary inquiry on the basis that the relevant Trial Regulations continued to apply. The certificate given by Mr. McCall on November 25, 1948, was produced by the prosecution and relied on as justifying this procedure. The first point made on behalf of the appellant before the Board was that this certificate was then spent and no longer effective to authorize a trial under the Trial Regulations. It was contended that "the case" to which it related was not the case dealt with at the second trial, that the acquittal on the charge of being in possession of ammunition had produced a new situation which was substantially different from that considered by the Deputy Public Prosecutor when he certified, and that the second trial was irregular and without jurisdiction in the absence of a further certificate given after the acquittal and directed solely to the charge of carrying a firearm.

In the opinion of their Lordships, this point is without substance. "The case" in respect of which Mr. McCall certified is defined in his certificate as the trial of the appellant on the two charges therein specified. Regulation 7 of the Trial Regulations directed that the case thus certified should "be tried and disposed of in accordance with the provisions of regs. 8 to 12 inclusive of these regulations." Their Lordships cannot regard the first trial as disposing of more than a part of the case as certified. The re-trial of the first charge was ordered according to law and the second trial was, in the

view of the Board, as plainly within the words "shall be tried and disposed of" as was the first that. Different considerations would arise if, on its true interpretation, reg. 7 only enabled a certificate to be given in respect of a single charge. Their Lordships cannot, however, so construe the regulation. They see no reason why it should not apply to a case in which several charges may properly be joined for trial together. There is nothing in the Trial Regulations to

cast doubt on this view; on the contrary, it finds strong support in reg. 8, sub-reg. 4, which empowers the Public Prosecutor in any emergency procedure case - that is a case certified under reg. 7 - to alter or redraw the charge or chargesor to frame an additional charge or charges.

The next point taken on behalf of the appellant was that Mr. McCall's certificate was from the beginning invalid and of no effect. This submission was based entirely on the words "for Solicitor-General" which appear below Mr. McCall's signature and following the description "Deputy Public Prosecutor." It was urged that the certificate could not be regarded as that of Mr. McCall as he had purported to sign, not on his own account, but for the Solicitor-General, and, further, that it could not be treated as the certificate of the Solicitor-General as there was nothing to show that Mr. McCall had authority to act on his behalf.

Their Lordships think this objection ill-founded. They are satisfied from the opening words of the certificate that it was given by Mr. McCall in his capacity as a Deputy Public Prosecutor, and not as agent for the Solicitor-General, and that this appeals so clearly that the words "for Solicitor-General" may properly be regarded as mere surplusage and incapable of vitiating the document.

Another submission on behalf of the appellant, which may be conveniently considered now, was directed to the nature of the offence of carrying a firearm of which the appellant was convicted. It was contended that an intent to use the firearm in question as an offensive weapon, or to have it so used, was an essential ingredient of this offence and that the evidence fell short of establishing such intent. Several decisions of Indian courts were cited in support of this argument, but they relate to different enactments and their Lordships do not find them of assistance in determining the present point, which must depend on the true construction of reg. 4, sub-reg 1, of the Emergency Regulations. The material words are: "Any person who carries .... any fire-arm, not being a fire-arm which he is duly licensed to carry .... shall be guilty of an offence ...." It was conceded on behalf of the Crown - and rightly, in their Lordships' opinion - that "carries" here means "carries to his knowledge," and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision.

But the regulation says nothing of any special intent, and their Lordships are unable to find any ground on which such an intent should, as a matter of implication, be regarded as an element of the offence. The Emergency Regulations form a drastic code designed to meet a state of grave disorder and their Lordships see no reason to suppose that reg. 4, sub-reg. 1, was not intended to strike at the carrying of firearms simpliciter, if engaged in knowingly and without lawful authority.

Another of the grounds of appeal to their Lordships' Board arose out of a ruling given by Storr J. in the course of the second trial. It is thus stated in the appellant's printed case: "the said judge was in error in forbidding, during the course of the cross-examination of an important prosecution witness, the appellant's counsel to mention the fact that this was a re-trial, and in thus preventing the veracity of that and other witnesses being tested by reference to the earlier statements they had made." The incident so referred to occurred during the cross-examination by Mr. Charry, the counsel assigned to the appellant, of one Abdul Aziz Bin Tampok, the third of the Malays to give evidence on behalf of the Crown. The relevant part of the judge's note is as follows:

"Cross-examined - by Charry - The pistol in the Indian's hand came from his waist. I thought it was definitely a pistol. I cannot say if he drew something from his left hand trouser pocket. I did not see. As far as I know I did not see if he took out anything from his left trouser pocket. I did not search him. I saw him draw the pistol from his waist. I did not see well if there was anything wrapped around the pistol when he drew it from his waist.

"(Charry mentions this is a re-trial. I inform him he must not mention such a thing. Intld. P.S.)"

In relation to this aspect of the case their Lordships were referred to the evidence of the same witness as recorded at the first trial, and he seems then - that is, some nineteen days earlier - to have been positive that he had seen the appellant draw the revolver with his left hand from his left trouser pocket. It can hardly be doubted that Mr. Charry's cross-examination was conducted with the witness's previous testimony in mind and with a view to ascertaining how far he would adhere to it. The witness having departed from his earlier evidence as to what he saw the appellant do, Mr. Charry was entitled to cross-examine as to what the witness had said at the first

trial so as to demonstrate to the court the fact and extent of the discrepancy. If this was what the learned judge intended to stop, he was wrong, and his intervention (which appears to have ended the cross-examination) may have prevented a full testing of the witness's credibility and powers of observation. But it is not clear that this was the nature of the ruling. The mere fact that there has been a previous that is usually irrelevant and, therefore, inadmissible on a re-trial. This does not mean that it is never permissible to refer to an earlier trial, for it may well be necessary to do so to establish some relevant fact as, for example, in identifying the occasion on which some particular statement or admission was made. But it may be that Mr. Charry had made, or that the judge thought that he had made, some unjustifiable reference to the fact that the trial was a re-trial. The note does not settle the matter. The context suggests that Mr. Charry was working up to a reference to what the witness had sworn previously, but the words of the note - "Charry mentions this is a re-trial" are capable of referring to more than this. Their Lordships find it impossible to be certain as to the precise nature of this incident, which was not mentioned in the grounds of appeal to the Court of Appeal and on which therefore they have not the benefit of the views of the judges who formed that court. But, even assuming that the judge intervened wrongly and so as to prevent this witness's credibility from being more fully tested, their Lordships are not satisfied, in the circumstances, that they would be justified in interfering with the verdict on this ground alone. Had it been felt at the time that the ruling had led or contributed to a miscarriage of justice their Lordships cannot but think that it would have been complained of on appeal to the Court of Appeal.

The remaining submissions advanced before the Board on behalf of the appellant all relate to a statement alleged to have been made by the appellant to the police on September 13, 1948, which was put in evidence by the Crown at the second trial. This is the statement already mentioned in referring to the main ground of appeal to the Court of Appeal. For an understanding of the issues raised regarding it the relevant facts and circumstances must now be stated in more detail.

The affray in which the appellant was wounded occurred about 10 a.m. on September 13, 1948. His injuries were not the subject of medical testimony, but it was not disputed

that they were of a grave nature. At the second trial the Malay who disabled him described the wounding thus: "I stabbed him many times. The first time I stabbed on his left forehead. The second time on the back, the third time in the abdomen. By that time he was almost hopeless." And on cross-examination: "After I had stabbed three times the accused fell down. After he fell down I stabbed him some more." The appellant was left at the scene of the fight until the Malays returned with the Penghulu. He was then carried to Bukit Kepong and thence to the police station at Lenga where, according to the police evidence, he arrived about 4.30 p.m. From there he was taken to the hospital at Muar and there he remained until February, 1949, when he was fit enough to be brought before a magistrate.

At the first that on March 2, 1949, the Crown led evidence on both charges. The principal witnesses were the three Malays, two of whom swore to seeing the appellant with a revolver. Saebun, the Malay who stabbed the appellant, said he had examined the revolver and that it was loaded with six bullets. He also deposed that four more bullets were found in a bag which he said the appellant was carrying. There can be no doubt that the charge in respect of the ten rounds of ammunition was based on the view that the appellant had possession of what was alleged to have been found in the revolver and in this bag. A police inspector named Krishnan was also produced to prove a statement taken fl om the appellant at Muar hospital on September 20, 1948, i.e., a week after the date of the alleged offences. The original of this statement was not forthcoming and Laville J. refused to admit a copy in evidence. No other statement of the appellant was referred to by the prosecution during the course of this trial, including the cross-examination of the appellant, who gave evidence on his own behalf.

At the second trial the principal witnesses were again the three Malays, but no attempt was made to prove the alleged statement of September 20, 1948. Instead, a statement purporting to have been made by the appellant on September 13, the day he was injured, was put in evidence for the first time, and two new witnesses, Abdullah Bin Omar, a senior inspector of police stationed at Muar, and Kasipellai Raja, a constable interpreter, were produced to prove it. According to these witnesses they visited the appellant in Muar hospital about 9 p.m. on September 13, with the

permission of the medical authorities. He was in bed and was described by the inspector as clear minded and knowing what he was talking about. He was cautioned by the inspector and then was said to have made the statement quite voluntarily and without questioning. Later he was questioned, and his answers were written down. (These answers were not relied on by the Crown and do not form part of the record. They need not be mentioned again and references to the statement must be read as excluding them.) The statement was signed by the inspector, but not by the appellant. The evidence, however, was to the effect that after it had been made and recorded it was read back to the appellant who

agreed that it was correct. The appellant speaks Tamil, but the inspector did not understand that language and the course pursued, according to his testimony and that of the interpreter, was that the latter translated what the appellant said into Malay and the inspector then wrote it down in English. The statement is a document of considerable length. It contains a detailed account of the appellant's movements from September 9, 1948, and of his contacts with Ah Kow, the Chinese who was killed. It then proceeds to deal with the events of September 13, 1948, and becomes to all appearance a frank confession not only of carrying a firearm but of being in possession of ammunition. As the terms of this statement were much canvassed it may be set out fully. It reads thus:

"Malayan Police.

Statement during Investigation.

This information is displayed unformatted - please refer to the original. Report No.: 11/48 Police Station: Lenga Statement of: Sivam Father's name: Narayanasamy Nationality: Indian; male Place of birth: India Age: 27 years Occupation: Ex-Tamil School Address: LU Club, Segamat Teacher: J. L. Estate Taken by: Sr. Inspr. Abdullah

at hospital on September 13, 1948, at 9.00 p.m. Interpreter: D.P.C. 823 from Indian-Malay into English.

"Before taking the statement Sivam was warned under the Emergency Regulations, 1948, that whatever statement given will be used as evidence for his trial.

"I was a clerk in the L.U. Segamat. When it was closed I was left unemployed. About 11/2 months ago I went to Singapore to visit a friend whose name was Malachasamy, a labourer of Municipal Singapore. He was staying at

Block No. 28 Anderson Road. I stayed with him for four days. Then I went to B.P. to see a friend by the name of Kolandasamy. He was staying at the L.U. Club B.P. On the same day I went to Muar and met Mr. Parrerra at the L.U. Club Muar. I slept at the Club for a night and then I went back to Segamat for some days.

"On September 9, 1948, I went to Muar and then by bus to Pagoh. I arrived Pagoh at 6.00 p.m. on the same evening. While I was standing on the five-foot way in front of a Chinese coffee shop on the left side towards Lenga, I happened to meet a Chinese whose name was Ah Kow. He was known to me as a member of L.U. Club at Segamat. I did not know his official duty of being a member at the Club but I happened to meet him there always. On meeting me he inquired me as to why I came to Pagoh. I told him that I was looking for a job. He asked me to stay at Pagoh that night as he wanted to find me a job in a chetty estate at Segamat. After meeting me for a quarter of an hour he then left and proceeded to Muar. Before leaving he informed me that he would come and see me at Pagoh on September 11, 1948. So that night I slept on the five-foot way at Pagoh village.

"At about 9.00 a.m., 11/9/48, Ah Kow came to Pagoh and met me at the same place where I first met him. He said that he wanted to go to Segamat on September 13, 1948. He invited me whether I like to accompany him to Segamat. I replied that I agreed to accompany him. After telling me this he went away. At about 3.00 p.m., 11/9/48, he came again to see me again and asked me to accompany him. I followed him by way to the right side of Pagoh village through rubber estate and then came to a river. From here he hired a sampan manned by an unknown Malay. We then arrived at Bt. Kepong at 9.00 p.m. 11/9/48. When arrived at Bt. Kepong we slept at a vacated hut in the village. The next morning we went to a Chinese coffee shop at Bt. Kepong. He told me to stay at the coffee shop as he wanted to go to his house for his private business. As there was no Indian in the village, I went round the Malay Kampong for sight seeing and after that I came back to the same coffee shop to drink. At about 12.00 n. Ah Kow came to see me. He told me that he wanted to leave for Segamat on 13.9.48. He then went away. I then returned to the same vacated hut for the night. Ah Kow did not

turn up on September 12, 1948. At 9.00 a.m. September 13, 1948, he came to see me at the corner of the village taking with him a guni sack containing something. He was accompanied by an unknown Chinese. We then walked through a track towards a jungle for a distance of one mile and there stopped. Ah Kow took out a revolver fully loaded and handed over to me for my possession. He had also given me another 6 rounds of life ammunitions as an extra and at the same time he took out two cut rifles of which one was given to the Chinese who had accompanied him, and the other cut rifle was used by Ah Kow himself, I did not [know] whether the two cut rules were loaded but I saw about 30 rounds of .303 life amms in the guni sack. After giving the arms Ah Kow warned us to shoot anyone who tried to obstruct our way. I put the revolver in my left-hand trouser pocket. The two cut rifles were hung on each of their shoulders while they were carrying, and could easily be seen by anyone passing by. We then proceeded on the track for another one mile where we happened to pass three Malays who came from the opposite direction. After passing us five or six steps the three Malays lushed on us. The three Malays were armed with parangs. One of the Malays rushed on Ah

Kow, who then tried to shoot him. The Malay then cut him with his parang. The other two Malays attacked me and the other Chinese. Before I could pull out my revolver from my trouser pocket to shoot him I was punched by the Malay several times. I felt giddy and fell down. The Malay took possession of my revolver and then cut me with his parang several times. I did not know what had happened to the other Chinese. The Malays had taken the guni sack and escaped.

"At about 3.00 or 4.00 p.m. some Malays came to the scene and arrested me. I was then taken to Muar Hospital.

(Sgd.) Abdullah 13/9,

C.R.O. Muar."

The appellant gave evidence and was the only witness called for the defence. His testimony amounted to a denial of carrying the revolver and of making the statement in question. He said that he lost consciousness on being stabbed, regained it two or three days later, and did not know what happened after he got to hospital. No evidence was called from the hospital staff as to the appellant's condition on admission. It is to be observed that counsel on either side referred to this

in their addresses to the trial court at the conclusion of the evidence, Mr. Charry commenting on the fact as a defect in the Crown case and Mr. McCall replying that Mr. Charry could have called a doctor for the accused.

This last matter leads to a consideration of one of the two grounds on which their Lordships were asked to hold that the statement of the accused was inadmissible in law. It was said that reg. 11 of the Trials Regulations had not been complied with by the prosecution in that no statements of the evidence to be given by inspector Abdullah and the interpreter had been furnished to the accused or his advisers before the second trial. Regulation 11 reads as follows: "11. In every emergency procedure case the prosecution shall, not less than two clear days before the date fixed for the trial of the case, furnish to the accused person or his advocate and solicitor, if any, a copy of the statements made to the police during the police investigation of all persons whom it is intended to call as witnesses for the prosecution at the trial."

Their Lordships will assume, in dealing with this argument, that the witnesses in question made statements to their superiors as to the taking of a statement from the appellant. If so, the case would seem to fall within reg. 11 for, as was indeed conceded, its terms are wide enough to apply to police witnesses. Their Lordships will also assume that, as regards these witnesses, the prosecution failed to comply with this regulation. There is nothing in the record to indicate that it did comply. It is true that the judge's note shows that at the commencement of the trial Mr. McCall stated that he proposed putting in a statement of the accused taken by a police officer and had served Mr. Charry with a copy, and Mr. Charry is recorded as saying, "I have duly received a copy." This, however, does not refer to the statements of those in a position to depose as to the circumstances in which the accused made his statement and, apart from any question of length of notice, cannot be regarded as satisfying the requirements of reg. 11.

On these assumptions two questions arise. The first is whether, as counsel for the appellant contended, compliance with reg. 11 is a condition precedent to the reception of the evidence concerned. In the opinion of the Board it is not. Their Lordships consider the regulation to be directory in character and not such as to preclude the trial judge, in the exercise of his discretion, from admitting testimony in respect of which the requisite notice has not been given. That, it

must be added, is not to say that the provisions of the regulation are to be regarded lightly, or that failure to comply therewith cannot imperil a verdict favourable to the prosecution. Regulation 11 was obviously intended for the protection of an accused person against surprise and to afford him at least some of the advantages provided under the normal procedure by the preliminary inquiry. While failure to observe the regulation is to be regarded as an irregularity rather than a fundamental defect, evidence tendered in breach of its requirements ought not to be admitted readily cr so as to deny the accused any real benefit which compliance would have conferred. The second question is whether this irregularity can in itself be said to have caused a miscarriage of justice.

The appellant has not satisfied their Lordships that it had this result. It was submitted that had due notice been given the defence might have produced medical or other evidence to show that the accused was not in a fit condition to make a statement on the evening of September 13, or that no statement had then been taken. In the somewhat unusual circumstances of this case it is regrettable that the court had not before it some evidence from the hospital as to the appellant's mental and physical state on the evening of the day on which he was injured and during which he must, on any view, have suffered a very considerable degree of exhaustion and shock. But their Lordships are not in a position to say whether such evidence was available or could have been obtained by the time of the second trial. Half a year had then elapsed since the crucial date and local conditions may have been far from normal. It may or may not be the case

that both prosecution and defence were faced with similar difficulties in this respect. But it is certainly not clear that compliance with reg. 11 would have enabled the appellant to muster witnesses for this purpose. And, apart from that, it must be observed that the admission of the statement does not appear to have been resisted on this ground. Nor was any adjournment sought by the defence, or any point based on a breach of reg. 11 taken before the Court of Appeal. Once again their Lordships cannot but feel that had the irregularity aroused any substantial sense of grievance at the time the matter would have been ventilated at a much earlier stage.

The next submission as to the admissibility of the statement was based on reg. 33, sub-reg. 1, of the Emergency Regulations which, in so far as material, is as follows: "33. - (1.) Where

any person is charged with any offence against these regulations or with any offence specified in the Schedule to these Regulations, any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of inspector shall, notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:"

The contention here was that the statement had not been made "in the hearing of" Inspector Abdullah, as he was unable to understand the language spoken by the appellant, and consequently, that it should not have been received in evidence. Their Lordships are of opinion that this argument must fail. They do not find it necessary to consider the precise meaning of the words referred to as those which immediately precede them provide au alternative, and they are satisfied on the evidence that if the statement was made it was made "to" the inspector and none the less so because he required the services of the interpreter to follow what was said.

The remaining submissions advanced on behalf of the appellant related to the weight to be attached to the statement which he is alleged to have made. It may truly be said that the circumstances already mentioned were such as to provoke comment and even suspicion about the taking and content and belated production of this important part of the prosecution's case. But the weighing of evidence is essentially a matter for the trial court and it is not the practice of their Lordships' Board, in the exercise of its criminal jurisdiction, to usurp this function or to interfere with a verdict reached after a satisfactory trial merely on the ground that evidence sufficient to permit of the verdict ought not to have prevailed. Their Lordships have no desire to depart from this practice, which recognizes the difficulty of assessing evidence at a distance from the scene and without the intimate knowledge of local conditions possessed by the responsible courts of the country concerned. But there is one feature of the present

case which must now be mentioned and which, though it bears directly on the weight to be accorded to the statement under discussion, involves an important principle of the criminal law to such an extent that, in the opinion of the Board, the conviction appealed from ought not to be allowed to stand.

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

These considerations do not appear to have received the attention they deserved at the second trial. Thus one of the police witnesses (P.W. 5) was re-examined so as to elicit the fact that the revolver concerned was loaded with 6 rounds; and in his summing-up, Storr J., in reference to a point made by Mr. Charry, told the assessors to dismiss the question of ammunition from their minds, though it would seem that Mr. Charry's submission was, in effect, a suggestion that the person responsible for the ammunition might well be the person responsible in respect of the revolver that could fire it; and that, whatever may be said of its cogency, was an argument which the acquittal had made a possible line of defence.

More important than these matters, however, was the reliance of the prosecution on the statement of September 13, which, if accepted as the truth, went to prove the appellant guilty of the charge of which he had been acquitted as clearly as it proved him guilty of the offence the subject of the second

trial. This circumstance might well have been made a ground for excluding the statement in its entirety, for it could not have been severed satisfactorily. But the point was not taken and the statement was left to the assessors, with ample warning, it is true, of the dangers of acting on a retracted confession, but without any intimation that the prosecution could not assert, or ask the court to accept, a substantial and important part of what it said.

The fact appears to be - and the Board must judge of this from the record and the submissions of counsel who argued the appeal - that the second trial ended without anything having been said or done to inform the assessors that the appellant had been found not guilty of being in possession of the ammunition and was to be taken as entirely innocent of that offence. In fairness to the appellant that should have been made clear when the statement had been put in evidence, if not before. Their Lordships do not attempt to attribute or apportion responsibility for the omission. They do not know how far, if at all, the judge's earlier ruling as to mention of the fact that the trial was a re-trial may have discouraged counsel from referring to the previous proceedings; and they are uncertain from the record whether the judge was himself aware of the acquittal. But they cannot avoid the conclusion that the effect of the omission was to render the trial unsatisfactory in a material respect. Had the assessors realized that only a part of the statement could be relied on, they might have attached greater weight to the other criticisms regarding it and rejected it altogether. And had they done so it by no means follows that they would have been prepared to accept the testimony of the Malays in preference to that of the appellant. What they would have done had the statement been excluded from evidence or its effect qualified by an unequivocal direction as to the appellant's acquittal and the effect thereof must, of course, remain a matter of conjecture. But the uncertainties are sufficiently reasonable to jeopardize the verdict reached and to justify the view, already expressed, that it ought not to stand.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be allowed and the conviction and sentence set aside.

SOLICITORS:

Solicitors: Stanley Johnson & Allen; Burchells.