DISCOVERY OF A FACT- SECTION 27 OF THE EVIDENCE ORDINANCE

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INTRODUCTION- SCOPE OF SECTION 27

A criminal investigation commences at the point where information relating to the commission of an offence is received by a Police Officer or an inquirer. **Chapter XI** of the **Code of Criminal Procedure Act of 1979** identifies provisions relating to investigation of offences. Once the information is received, it will be recorded under **Section 109** of the Code. Thereafter, the investigation would commence and the statements of persons acquainted with the facts and circumstances of the case would be recorded under **Section 110** of the Code.

In the course of a police investigation, there are two types of statements that would be recorded under **Section 110**,

a) Statements of witnesses,
b) Statements of a suspect

Section 110(3) deals with the use of such statements in Court in subsequent judicial proceedings. **Section 110(3)** of the Code of Criminal Procedure reads as follows;

Statements to a police officer or an inquirer to be used in accordance with Evidence Ordinance.

(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court;

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code.

A suspect may make two types of statements;

a) A statement denying his involvement in the offence,
b) A statement admitting liability.

Where the statement falls under the above category, (b) provisions of **Sections 25** and **26** would automatically operate and the confession would be inadmissible. **Section 126** and **127** of the Code of Criminal Procedure Act, identify the procedural provisions relating to the recording of confessions by Magistrates. The two sections are reproduced below;

No inducement to be offered.

Section 126- Except as provided in Chapter XXI any peace officer or person in authority shall not offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement having reference to the charge against such person. But any peace officer or other person

shall not prevent or discourage by any caution or otherwise any person from making any statement which he may be disposed to make of his own free will.

Power to record statements and confessions.

Section 127.

(1) Any Magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 277 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

(3) A Magistrate shall not record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily, and when he records any such statement he shall make a memorandum at the foot of such record to the following effect; -

“I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him”.

In my view the above two sections ought to be read together with **Section 26** of the Evidence Ordinance.

Section 27 of the Ordinance deals with **"discovery of a fact consequent to any information received from a person accused of an offence".** Accordingly, if any information is received either from a police statement made by a person accused of an offence, and recorded under **Section 110** of the **Code of Criminal Procedure Act of 1979**, the provisions of **Section 27** of the Evidence Ordinance would apply.

Accordingly, if the confession has been made to a Police Officer and recorded under **Section 110,** such confession would remain inadmissible. However, if the information contained in the said statement leads to a discovery of a fact, so much of such information leading to the discovery would be admissible.

In the case of a confession recorded by a Magistrate under **Section 127** of the **1979 Code**, the confession is relevant and admissible and if any discovery of the fact is made consequent to information received from such statement evidence of such discovery is also admissible.

The law would be applied in similar fashion in respect of forest offences and excise offences as per **Section 27(2)**. **Section 27(2)** of the Evidence Ordinance reads as follows;

How much of information received from accused may be proved?

Section 27

(2) Subsection (1) shall also apply mutates 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.

REQUIREMENTS UNDER SECTION 27

Discovery of a fact is admissible under **Section 27** if the following requirements are satisfied;

1) The evidence sought to be led under **Section 27** must be relevant to the fact in issue,
2) The fact discovered ought to have been discovered consequent to the information received from the accused,
3) At the time of making the information known he must be in the custody of the Police Officer,
4) He must be accused of an offence, (even at a later stage)
5) Only the portion of his information which led to the discovery of the fact can be proven.

WHAT IS A FACT?

In **Nambiar v Fernando**[1], the Magistrate wrongly admitted the discovery of a shirt alleged to be stolen in a charge of retention of stolen property punishable under **Section 394** of the **Penal Code**. The shirt was not discovered consequent to a statement made by the accused. It was held that **Section 27** would not be applicable. **"Since the fact was not discovered consequent to a statement made by the accused"**.

In **King v Gunawardane**[2], it was held that to lead evidence of a discovery of a fact under **Section 27** of the Evidence Ordinance, it is necessary that at the time of making out the information, the accused was in the custody of the Police Officer and where this is not satisfied evidence under **Section 27** cannot be led. In **Justin Fernando v IP Police Slave Island**[3]. The Police Constable was investigating a complaint relating to a Hercules bicycle, the accused was detained as a suspect relating to the investigation. While in custody the accused had made a statement leading to the recovery of another Raleigh bicycle. It was held that if a suspect detained by the Police on one charge gives information relating to a subject matter of a separate charge, he must be

[1] **27 NLR 404**
[2] **44 NLR 189**
[3] **46 NLR 158**

treated as **"an accused in the custody of the Police Officer"**, within the meaning of **Section 27** of the Ordinance.

In **Rex v Jinadasa**[4], the evidence against the accused was purely circumstantial. This was a case of murder using a katty consequent to information given by the accused. The body was found the next morning. In his statement the accused also stated **"I can point out the place where I threw it".** The katty was discovered thereafter. The main question which came up for consideration in this case was whether any oral information given by the accused could be used to prove a discovery of a fact. It was held, that even where a fact had been discovered consequent to an oral information, such evidence can be led.

In **Rex v Packeerthamby**[5], it was held, that even though a confession may be generally inadmissible, any discovery could be proved under **Section 27**.This judgment was cited with approval in **Iver v Galgoda**[6].

In **Rex v Sudahamma**[7], it was held that discovery of a witness would not amount to a discovery of a fact. However, this decision requires very careful attention. The accused in this case was charged with the theft of a savings pass book and a forgery of a withdrawal form. While being in Police custody she pointed out one Bruin as the person who filled up the withdrawal form. It was held that **Section 27** would not apply and that it would have applied only if the accused described such fact during the making of his statement.

The effect of the above judgment is that the discovery of a witness can be proved under **Section 27**, if the name of the witness is disclosed by the accused in the form of an information.

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[4] **51 NLR 529**
[5] **32 NLR 262**
[6] **44 NLR 94**
[7] **26 NLR 220**

Basnayake CJ, refused to follow the above decision in **Queen v Appuhamy**[8], It was held by the Learned Judge that discovery of a witness cannot be considered as a discovery of fact.

SHOULD HE BE ACCUSED OF AN OFFENCE AT THE TIME THE INFORMATION WAS GIVEN?

In **Queen v Ramasamy**[9], the Privy Council, considered an appeal from the Judgment of the Court of Appeal of Ceylon reported as **Ramasamy v Queen**[10]. It was held in this case that it was not necessary for the maker of the statement to be an accused at the point of making the statement which leads to the discovery. Such a statement could either be oral or documentary. It was also held in this case that a limited portion of the statement could be marked in evidence in proving discovery of a fact in terms of **Section 27** of the Ordinance.

In **Queen v Albert**[11], the Learned Trial Judge permitted the evidence of a Police Officer to go into the record in an irregular manner. This was a charge of theft and involved three counts of house breaking at night. On a statement made by the accused some of the items were recovered from his house. The inspector of Police was asked whether the accused pointed out the goods, recovered from his possession. He answered in the affirmative even though the question was objected to by the Defence Counsel. It was held by **L.B. De Silva J**, that such evidence should not have gone in since the evidence amounted to a confession and where the goods are recovered from the possession of an accused as in this case, the words of the accused are not directly or distinctly relevant to the discovery. In **Queen v Jayasena**[12], **Sansoni J**, analysed **Section 27** of the Evidence Ordinance. The question in issue was whether an oral statement made by an accused based on which a bag was discovered would satisfy the requirements of **Section 27**. It

[8] **60 NLR 313**
[9] **66 NLR 265**
[10] **64 NLR 433**
[11] **66 NLR 543**
[12] **68 NLR 369**

was argued by the defence that in view of the provisions of **Section 91** of the Evidence Ordinance where oral evidence on the contents of a document is prohibited, the discovery of the fact envisaged in **Section 27** had arisen consequent to information that had been recorded at that time. The Learned Chief Justice opted to follow the decision in **King v Haramanisa**[13] and held that the discovery of the fact may be proved through the statement recorded from the accused and not by oral evidence.

Etingsingho v Queen[14], was a case of murder, where two accused were indicted, the prosecution led the evidence of a recovery of a club which was hidden under the culvert. The trial judge directed the jury to consider the recovery and if the jury was satisfied that the club recovered is the same that was used to assault the deceased such evidence could be used against the 2nd accused.

It was held that when a fact is discovered and such evidence is led under **Section 27** the only inference that could be drawn was to arrive at a finding that the accused had the knowledge of where the weapon was and nothing more. **T.S. Fernando J**, referred to the case of **Kottaya v Emperor**[15] at Page 70 and cited the following passage;

" ***In Their Lordships' view it is fallacious to treat the' fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ' I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the***

[13] **45 NLR 532**
[14] **69 NLR 353**
[15] **1947 AIR PC**

fact discovered is very relevant. But if to the statement the words be added ' with which I stabbed A ' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

In **Queen v Sugathapala**[16], the Prosecution, in a case of murder, attempted to lead discovery of a knife, arising out of information provided by the Accused, while he was in Fiscal's custody. It was held that such evidence should not have been allowed since the custody of the Fiscal Officer cannot be considered as being in the custody of a Police Officer referred to in **Section 27** of the **Evidence Ordinance**. Similar decision was made in **Queen v Jayasinghe**[17]**.**

In **Petersingham v Queen**[18], the Prosecution led evidence of the discovery of certain articles. It was argued by the Defence that at the time the Accused made the statement he had neither been arrested, nor the charges had been explained to him. It was argued that in such circumstances, he cannot be treated as a person accused of an offence. This was rejected by **Alles J**, who held that what is relevant is for the Accused to be charged at some point of time.

A slightly different view was taken in **Nallathamby v Muttukrishnan**[19], where it was held that a statement made prior to the arrest would not attract **Section 27** of the **Evidence Ordinance**. Whenever evidence under **Section 27** is admitted, there is a clear duty on the trial judge to explain to the jury that the only matter that arises under **Section 27** is that the Accused knew where the fact discovered was, and such discovery does not amount to a situation where an inference may be drawn that the Accused has consented. The above decision was followed in **Heen Banda v Queen**[20]. However, where the recovery does not take place in circumstances mentioned in **Section 27**, such a warning would be necessary, as held in **Wijewantha v Attorney General**[21]**.**

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[16] **69 NLR 457**
[17] **71 NLR 574**
[18] **73 NLR 537**
[19] **74 NLR 95**
[20] **75 NLR 54**
[21] **1983 2 SLR 418**

The Court of Appeal considered the Application of **Section 27** in full, in the case of **Samson Atygala v Attorney General**[22]**.**

It was held as follows;

Held -

(1) **Section 27** of the Evidence Ordinance when it relates to confessional statements operates as a proviso to **Sections25** and **26** of the **Evidence Ordinance**.

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

(3) Unlike under **Section 122 (1)** of the old Criminal Procedure Code under **Section 70 (3)** of the Administration of Justice Law which was the law applicable at the time (and even under **Section110 (1)** of the present **Code of Criminal Procedure Act**) a police officer making an investigation may examine orally any person acquainted with the facts. He shall reduce into writing any such statement made by the person examined and the person making the statement shall sign the statement thus adopting the statement and making the record of what he said his own. In other words, there is a legal requirement that such a statement be reduced to the form of a document. **Section 91** of the Evidence Ordinance requires that when any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of it. **Section 91** does apply to a

[22] **1986 1SLR 390**

statement recorded in terms of **Section 70 (3)** of the Administration of Justice Law. For this reason, such a statement which led to the discovery of a relevant fact made admissible by **Section 27** of the Evidence Ordinance must be reduced to the form of a document and it is only that document that could be proved as evidence in a case. No oral evidence of the contents of such a document is admissible in evidence.

SECTION 27

A few years earlier in **Nandasena V Republic of Sri Lanka**[23]a similar decision had been made regarding the requirement of being in **"Police Custody"**. It was held in this case, that a formal arrest is not necessary to satisfy the purposes of **Section 27**.

It is relevant to note that a conviction cannot be obtained by way of evidence of a recovery made under **Section 27** of the Ordinance. Even though the discovery of such fact becomes relevant, the only inference that the Court can draw in such an instance is only that the Accused knew where the "thing" recovered was.

[23]**1978-79 2 SLR 235**