[IN THE COURT OF CRIMINAL APPEAL]

1960 *Present :* **Basnayake, C.J. (President), Sansoni, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* M. WITTIE

Appeal 128 with Application 145 of 1960

S. C. 36—M. C. Matara, 58214.

Evidence—Confession made by accused to Magistrate—No presumption in law that it was voluntarily made—Evidentiary value of a confession—Right of accused to claim the benefit of any part of it in his favour—Criminal Procedure Code, s. 134—Evidence Ordinance, ss. 24, 80.

(i) When a confession made to a Magistrate and recorded by him in terms of section 134 of the Criminal Procedure Code is led in evidence by the prosecution without objection by the defence, it is wrong to direct the Jury that there is any presumption that the confession was voluntarily made by the accused.

In the course of his summing-up the Judge told the jury more than once that the combined effect of the memorandum of the Magistrate made under section 134 of the Criminal Procedure Code and the presumption enacted in section 80 of the Evidence Ordinance was to place a burden on the accused to show that the confession was not voluntary.

Held, that there was misdirection on the law. Section 134 of the Criminal Procedure Code forbids a Magistrate to record a confession unless he has reason to believe that it was made voluntarily. But the question whether the making of it appears to have been caused by any inducement, threat or promise of the sort described in section 24 of the Evidence Ordinance was for the jury to decide, unhampered by any presumptions and assisted by proper directions from the Judge.

(ii) When the prosecution leads in evidence the confession made by an accused, it becomes evidence for the accused as well as against him, though the Jury may attach different degrees of credit to the different parts. It would be misdirection to tell the Jury that they should not give the accused the benefit of any part of the confession which contains mitigatory or exculpatory matter.

APPEAL against a conviction in a trial before the Supreme Court.

G. E. Chitty, Q.C., with *D. L M. Abeysekera, E. B. Vannitamby* and *A. Nagendra* (Assigned), for Accused-Appellant.

A. C. M. Ameer, Deputy Solicitor-General, for the Crown.

Cur. adv. vult.

September 27, 1960. SANSONI, J.—

The accused was indicted with the murder of one Jinadasa on 10th June, 1959, at Kamburugamuwa. He was convicted of that offence by a divided verdict of 6 to 1, the Jury adding a recommendation for mercy in view of a money transaction which the accused had with Jinadasa.

2——J. N. B 19131—2,033 (9/61)

The two men had been working under K. W. D. de Silva, and though they had left the service of de Silva some time before Jinadasa met his death, they used to meet often at de Silva's house where Jinadasa used to go every evening in order to light a Petromax lamp.

On the evening of 10th June, both men went to that house. According to the accused he left the house along with Jinadasa, while according to a prosecution witness he left earlier than Jinadasa. As to what happened thereafter, the prosecution was able to lead the evidence of only one witness named Jayatilleke, who said that when he was passing the gate at the entrance to de Silva's premises he saw the accused and Jinadasa having a discussion. He heard the accused saying, " Will you give my money or not ? " He did not hear any reply nor did he see anything happen thereafter. The prosecution also relied on the dying declaration made by Jinadasa to the Apothecary at the Government Hospital, Matara, that night on being admitted to the hospital with head injuries. Jinadasa told him that " Wittie " (the accused) hit him with a club. There was nothing in the evidence to indicate that there was any previous enmity between Jinadasa and the accused.

The accused surrendered to the Headman of Kamburugamuwa at 10.30 a.m. on the following day. The Headman took him to the scene and handed him over to Inspector Amarasinghe who was holding an inquiry into the offence. After making a statement to Inspector Amarasinghe, the accused is said to have taken him to a culvert which is about 60 yards from de Silva's house and produced an iron rod which was submerged in about 8 inches of water.

At 12.15 p.m. that afternoon the accused was produced by the Police before the Magistrate of Matara in open Court. The Magistrate put him in the custody of a Fiscal's Officer, who kept the accused in the Court cell until 2 p.m. At 2 p.m. the accused was kept in the Magistrate's Chambers, also in Fiscal's custody, and at 3.15 p.m. the Magistrate recorded the accused's statement. The statement is as follows :

" I know deceased H. R. Jinadasa. I gave him a loan of Rs. 500 before New Year of this year. Yesterday at about 6.30 p.m., I went to the house of Liyana-mahattaya—K. W. D. de Silva. When I was there deceased Jinadasa came there. Both deceased and I work for this Liyana-mahattaya. The deceased lighted the lamps in this house. After this the deceased and I came to the main road. The deceased was pushing a cycle. Then I told the deceased, " I am now unemployed ; as such return my Rs. 500. " Then he uttered, " Yakko, are you in such haste to get the money ? " and struck a blow with his fist on my temple. Then I told him, " Having lent you money should I get assaulted ? " Then he gave me two more blows—one on the nape of my neck and another on my head. After giving me blows he was going. Then I looked round and I saw an iron rod planted near a plantain bush in Liyana-mahattaya's land. I took this iron rod and gave the deceased three blows. Shown an iron rod, this is the rod. (I mark

it P1) I left the rod near the culvert close to scene of assault and went away. I came to Matara. I came to Matara and roamed about. Then I went to Kamburugamuwa and surrendered to the V. H. After I was taken to the scene, I showed this rod to the Police. The Police could not have seen this rod and I put it into a water pool by the culvert."

Before recording it the Magistrate explained to the accused that he was not bound to make a statement, but if he made one it would be recorded and may thereafter be used against him as evidence. He also asked the accused whether of his own free will he wished to make a statement and the accused said, "I am making a statement of my own free will and no one has requested me to make a statement." He was asked whether the Police induced him to make a statement and he answered "No". He also said, "I am speaking to what took place. There is no need to suppress it."

The accused gave evidence on his own behalf at the trial. He explained that he had met the deceased on the 1st June, and had asked him to return the Rs. 500. The deceased had then asked him to come to de Silva's house that evening. The two of them left the house together, and at the gate when the deceased got on to the bicycle the accused asked him for his money. The deceased then abused him addressing him as "Yakko" and struck him on his left temple. The accused said that he was taken aback by this because they had been good friends until then. When he protested, he was struck two or three more blows, and the deceased threatened to kill him and put his body into the tank. The accused said he was then held by his throat, but he released himself and picked up a piece of stick and struck the deceased some blows with that. He said he did that through fear. He denied that he used an iron rod, or that he struck the deceased when the latter was going away. He said that he was provoked by the language which the deceased used towards him. He admitted that he picked up an iron rod from a drain when the Police Officers asked him to look in the drain and pick it up. He said that he made the statement he did to the Magistrate, because the Headman and the Police asked him to make it in that way.

Several objections were taken by Mr. Chitty when he came to deal with the summing-up, particularly to the learned Judge's directions on the law, but it is not necessary to refer to more than two.

At the commencement of the trial, the accused's proctor informed the Court that he was not objecting to the production of the accused's confession. This meant that the confession could properly be led in evidence without any preliminary inquiry as to whether it was admissible or not. But it did not mean that the defence conceded that the confession was either voluntary or true. In the course of his summing-up the learned Judge told the jury more than once that the combined effect of the memorandum of the Magistrate made under section 134 of the Criminal Procedure Code and the presumption enacted in section 80 of the Evidence

Ordinance was to place a burden on the accused to show that the confession was voluntarily made. One passage from the summing-up reads :

" So the law says, that where a responsible officer like a Magistrate has taken down a statement and has appended his certificate, you shall presume that the circumstances mentioned by him are true, namely, that the admission was made voluntarily. Now when the law says that you shall presume, it means that you must regard such fact as proved unless and until it is disproved. Now when you are faced with this question ' Was this statement made voluntarily ? ' the law says that you must presume that it was made voluntarily unless and until upon the evidence given by the accused that presumption is displaced ; in other words, it is disproved . . . . it is entirely a question of fact for you to decide, whether the presumption that the statement was made voluntarily has been displaced by the evidence of the accused. "

In our view, this is not the law. Section 134 of the Code forbids a Magistrate to record a confession unless he has reason to believe that it was made voluntarily. But the question whether the making of it appears to have been caused by any inducement, threat or promise of the sort described in section 24 of the Evidence Ordinance was for the jury to decide, unhampered by any presumptions and assisted by proper directions from the Judge. Section 80 of the Evidence Ordinance reads :

" Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—(1) that the document is genuine ; (2) that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and (3) that such evidence, statement, or confession was duly taken. "

This section merely creates a presumption of genuineness with regard to documents taken in the course of a judicial proceeding, and embodies the maxim *omnia praesumuntur rite esse acta*. The presumption is that all the necessary formalities purporting to have been performed have, in fact, been performed. The section says nothing and implies nothing about the voluntary or the truthful nature of the contents of the document. It was, therefore, wrong to direct the Jury that there was any presumption that the confession was voluntary. In view of this direction of the learned Judge the jury, even if they had reason to doubt the free and voluntary nature of the confession, might have thought that they were bound to act upon it because the accused had not displaced the presumption that it was voluntary.

Another direction which the learned Judge gave the Jury with regard to the confession was as to the evidentiary value they might attach to it. In dealing with that matter he said :

> " Gentlemen, we now come to an important principle of law. Not only in the courts of criminal jurisdiction but also in other courts you find two parties, so to speak, in litigation. One party asserts one thing, the opposite party asserts a different thing. The party that has to prove its case says, ' These are the facts. ' In those cases by long experience it has been found that if A is litigating against B, an admission made by B, in regard to the existence of a fact relied on by A, can be taken as sound proof that what A says is true. In this case the prosecution says that the accused is prima facie guilty of murder because he must have had the murderous intention because he used a dangerous weapon. The prosecution says, " I will prove it through your mouth. You said to the Magistrate that you used an iron rod. " Therefore when a statement like this is produced, the entire statement is, no doubt, put before you, but the prosecution is entitled to draw from that the admission of any fact favourable to the prosecution. I will give you a hypothetical case. Suppose a man is found dead with stab injuries on the road and shortly afterwards a man is arrested with a knife, with his clothes bloodstained. He tells the Police Officer who arrests him, " Take me to a Magistrate ; I want to make a statement, " and he tells the Magistrate, " When I was walking along the road this dead man came up to me and attempted to rob me on the highway between sunset and sunrise and I stabbed him and killed him. " Now the prosecution can bring that statement to a jury and tell a jury, " Here I have proved what the law requires me to prove. I rely on this man's admission that he stabbed and killed that man who was found lying on the road. " But in answer to that can the accused merely from the dock say, " Yes, but look at that statement fully. I should be acquitted because I said in that statement that I had to kill him because I was about to be robbed " ? The law does not allow that. Why ? Because that is a statement made in his own favour. But in that hypothetical case the accused can get into the witness-box and say, " This is what happened. Believe me because I give my evidence on oath, and what is more, as soon as I was taken to the Magistrate I gave my defence. " So that ultimately if circumstances of exculpation or mitigation are to be established, then that has to be through the mouth of the accused in the witness-box, and of course it must be believed. "

In effect, therefore, the learned Judge directed the Jury that although the prosecution relied on the accused's confession as part of its case, they were not to give the accused the benefit of any part of that confession which contained mitigatory or exculpatory matter.

In our view this is not a correct direction on the law. The confession led in evidence by the prosecution must be taken and considered as a whole, and the accused is entitled to claim the benefit of any part of it in his

favour. In *The King v. Edwin*[1] and in *The King v. Sathasivam*[2], it was pointed out that where the prosecution leads in evidence the confession made by an accused, it becomes evidence for the accused as well as against him, though the Jury may attach different degrees of credit to the different parts. In view of the learned trial Judge's direction to the Jury, the accused was deprived of the benefit of that part of his confession which set out how he came to strike the deceased. This would have caused grave prejudice to him in his defence, and the prejudice was all the greater in this case where the accused alone was able to speak to the circumstances under which he struck the deceased man.

Mr. Chitty submitted that if the jury had been properly directed by the learned trial Judge they might well have convicted the accused not of murder but of culpable homicide not amounting to murder. We accept this submission.

We accordingly substitute for the verdict of murder a verdict of culpable homicide not amounting to murder, and substitute for the sentence passed on the prisoner a sentence of ten years' rigorous imprisonment.

Verdict altered.