1978 *Present:* **Pathirana, J., Weeraratne, J., and Colin-Thome, J.**

REPUBLIC OF SRI LANKA

and

G. DON F. N. JAYAWARDENA and ANOTHER,
Accused-Appellants

S. C. 106-107/75—H. C. Negombo 42/75—M. C. Kanuwana 25042

Evidence Ordinance, sections 17, 21, 30—Criminal Procedure Code section 134—Statement by an accused before a Magistrate—Exculpatory statement—Referred to as a confession by trial Judge and witness—Distinction between "admission" and "confession"—Effect of statement being referred to as confession—Whether statement could be used against another accused.

Where two accused were charged with committing robbery and murder, the trial Judge permitted a statement (P11) made by the second accused to the Magistrate to be referred to as a confession. He himself referred to it as such in the course of his directions to the Jury on as many as 84 occasions.

Held: (1) That on an examination of the statement P11 with reference to the provisions of the Evidence Ordinance and the tests laid down in the relevant authorities, it was clear that it was not a confession but an exculpatory statement its manifest purpose being to show that the maker was innocent of the crime for which he was charged.

(2) That therefore, it should not have been referred to as a confession either by the learned trial Judge or by any witness.

(3) That the reference by the trial Judge himself to the statement P11 as a confession when it was in fact not a confession or admission of guilt on the part of the 2nd accused was a misdirection, the effect of which was highly prejudicial to both accused and deprived them of a fair trial.

(4) That it was a misdirection on the part of the trial Judge to have told the jury that this "confession" could be used against the other accused.

Cases referred to :

Anandagoda v. Queen, 64 N.L.R. 73.

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

King v. Cooray, 27 N.L.R. 267.

APPEAL from a judgment of the High Court, Negombo.

T. B. Weerakoon, for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with *E. R. S. R. Coomaraswamy (Jnr.)*, *C. P. Illangakoon* and *R. K. Suresh Chandra*, for the 2nd accused-appellant.

C. M. M. Bogollagama, Senior State Counsel, for the State.

March 28, 1978. PATHIRANA, J.

By the unanimous verdict of the Jury the two appellants were found guilty on the two counts in the indictment.

1. That they did on or about 9.10.72 at Uswetakeiyawa, commit the murder of Kuranage Francis Perera.

2. In the course of the same transaction they committed robbery of a wristlet watch, a gold ring and a gold chain with a cross of the value of Rs. 745 from the possession of the said Francis Perera.

On the 1st count they were sentenced to death and on the 2nd count to 10 years, rigorous imprisonment.

At the conclusion of the argument before us we allowed the appeals against the convictions of both appellants, quashed the convictions and sentences and ordered a new trial in respect of both appellants.

We now give our reasons.

In order to prove the case against the 2nd accused, Dharmadasa Jayasinghe, the prosecution at the trial relied on a statement made by him to the Magistrate which was recorded by the latter on 25.10.72 under section 134 of the Criminal Procedure Code. This was referred to in the back of the indictment in the list of documents as "A confession made by the 2nd accused to the Magistrate at the Negombo Magistrate's Court." In the course of the trial it was produced by the Magistrate who recorded it and was marked P11. We are satisfied that this statement was made voluntarily to the Magistrate by the 2nd accused and was duly recorded by him under section 134 of the Criminal Procedure Code. The admissibility of P11 as a voluntary statement by the 2nd accused to the Magistrate was in fact not challenged before us at the argument and we are satisfied that it was made voluntarily.

The main complaint urged before us by Mr. E. R. S. R. Coomaraswamy, learned Counsel for the 2nd accused-appellant, was that the statement P11 made by the 2nd accused to the Magistrate, which was recorded by him under section 134 of the Criminal Procedure Code, was permitted by the learned trial Judge to be referred to as a confession when in the submission of Counsel it was only an exculpatory statement and was by no means upon any construction put on its contents a confession or an admission or acknowledgment of his guilt by the 2nd accused. The prosecution could have only referred to it as an admission made by the 2nd accused which suggests an inference

as to a fact in issue or a relevant fact and it could have been proved as such against the 2nd accused under section 21 of the Evidence Ordinance. The Sinhala term "පැහැදිලිකරණය" was used in the course of the trial in relation to P11 both by the witness for the prosecution and the trial Judge. It is not disputed that the Sinhala word "පැහැදිලිකරණය" translated into English means "confession". The Composite Glossary published by the Official Languages Department gives one of the Sinhala equivalents of the word "confession" as "පැහැදිලිකරණය". (See Part 1, 1972 Reprint, page 220).

Counsel brought to our notice that in the course of his directions to the Jury the trial Judge referred to P11 as a confession on as many as 84 occasions. His submission was that P11 was not a confession by reference to its own intrinsic terms. On the contrary it was an exculpatory statement the benefit of which the 2nd accused was entitled to claim before the Jury. The learned trial Judge by permitting a prosecution witness, the Inspector of Police, to refer to P11 as a confession and the reference by the trial Judge himself in his directions to the Jury to P11 as a confession or admission of guilt had the inevitable result of causing serious prejudice to the 2nd accused-appellant in that the Jury would have been left with a strong overpowering impression in their minds that in P11 the 2nd accused had made a confession of his guilt to the Magistrate of the offences with which he was charged. Once they accepted the voluntariness of the confession the Jury may have been inclined to think that they could act on P11 as a confession in order to find the accused guilty of the charges preferred against him. Learned Counsel went on to drive home his contention when he brought to our notice that in the trial which took two working weeks to conclude and after a charge-to-the-Jury lasting five hours, the Jury which retired at 3.20 p.m. to consider their verdict returned at 3.30 p.m., i.e., in 10 minutes with the unanimous verdict of guilty against the appellants on both counts. Counsel's submission was that it may well be that during the short space of 10 minutes the Jury may not have considered the vast volume of evidence led in the case in view of the overpowering impression in their minds that the confession alone made by the 2nd accused was sufficient for them confidently to base their verdict of guilty against the appellants. Before we deal with the submissions we shall now set out the facts of the case.

On 9. 10. 72. at about 9.30 a. m. Mary Pigera, the widow of the deceased Kuranage Francis Perera, saw the deceased, a hiring car driver, leaving his home in his hiring car Ford Prefect No. EN 3754. He had on him a gold chain with a cross, two gold rings and a wristlet watch (P2). At Kandana at about 7.30 p.m. on

the same day the 1st accused, Newton Jayawardene, who came in the hiring car driven by the deceased met the 2nd accused and asked him to accompany him in the car to go to Bopitiya. He got into the car and along with the 1st accused proceeded to Bopitiya, the deceased driving the car. The 1st accused asked the deceased to take the car to a hotel to buy half a bottle of arrack. The 2nd accused bought the arrack, a bottle of Lanka Lime, cutlets and cigarettes from the Central Hotel, Bopitiya. At this stage, the witness Ratnayake had identified the two accused. The accused and the deceased drank the arrack. The car then left Bopitiya Junction towards Uswetakeiyawa.

Marcus Rodrigo, the 1st accused's sister's husband, had heard the sound of the horn of a car near the gate of his compound about 115 feet from his home at a place called Moda Ela, Uswetakeiyawa between 8.30 p.m. and 9 p.m. on the same night. He saw a car reversing towards the gate and then going forward. There followed a big noise as if the car had knocked against something. The car stopped. He saw two persons coming towards the car. Both wore sarongs and shirts. The engine was switched off and the lights put out. He heard the doors of the car opened and closed. He became suspicious and he called out for some persons in the neighbourhood and when they went towards the car the two persons whom he had noticed were, however, not there at this time. Then he saw a person fallen on the driving seat of the car and lying bleeding. He complained to the police at 10.45 p.m. The widow who shortly thereafter came on the scene found the gold chain with the cross, the rings and the wristlet watch worn by the deceased missing.

On 10.11.72 at about 5.30 a.m. the 1st accused, his mistress and baby left the home of Prema Jayawardene with whom they were residing at that time. The 2nd accused later joined them. They went to the house of one Annesley Amarasinghe at Hunupitiya, where the 1st accused wanted the gold chain with the cross sold stating that they have no money to go home. According to Annesley the 2nd accused went to a jeweller at Grand Pass and sold the chain with the cross for Rs. 250. The 2nd accused had the gold chain around his neck and he removed it and gave it. The money was given to the 1st accused. The 1st accused had also asked Annesley to take the 2nd accused to have him treated for an injury. Annesley took the 2nd accused to a retired hospital attendant, Gamage, who applied some medicine on what he described as a cut injury on the wrist. Annesley also stated that he saw the 2nd accused wearing a wrislet watch. The 2nd accused has stated that he desired to exchange that wristlet watch with that of Annesley.

On 11. 11. 72 at 5.30 p.m. the 1st accused, his mistress, the baby and the 2nd accused left the place in a taxi. At the Fort Station they boarded a train to Trincomalee. On 11.11.72 they went to the house of a friend of the 1st accused called Joseph Rodrigo at Trincomalee. The 2nd accused was introduced to Joseph as the brother-in-law of the 1st accused. From there they went to the house of one Punchi Singho at Killivetti in Mutur District saying that they have come to Trincomalee on a pilgrimage. They stayed at Punchi Singho's house for about 5 days. While at Punchi Singho's house the 1st accused told Punchi Singho to sell his wristlet watch as he was in difficulties. Punchi Singho had arranged to sell the wristlet watch to one Gunapala on condition that it could be redeemed later. On the 19th they came to Veyangoda. The 2nd accused surrendered to the police on the 19th after coming home. The 1st accused was arrested at a village called Gomugamuwa in the Kuliyapitiya District about 60 miles from Kandana on the 30th October at 2.05 p.m.

The evidence of the witnesses relied on by the prosecution was mainly circumstantial, but in order to establish the case against the 2nd accused the prosecution used the statement P11 made by the 2nd accused to the Magistrate to bridge the gaps in the case. For the better appreciation of the submissions made by the Counsel we would give the English translation of the entirety of the statement which had been recorded by the Magistrate in Sinhala. The English translation of P11 would read as follows :

> "I came to the Kandana town on the 9th evening. At that time Newton asked me to wait for a short while to go with him to Bopitiya. He came in a car and asked me also to get in. We went in the car to Bopitiya. At Bopitiya Newton asked the driver to take the car near the tavern to buy half a bottle of arrack. Newton asked me to buy a half bottle of arrack for Rs. 5. I bought a half bottle of arrack and gave it to Newton. The doors of the car were opened and we got down. Newton gave the bottle of arrack and a tumbler to the driver and asked him to drink. The driver asked me to get a bite. I bought 4 cutlets and a bottle of barley from a nearby boutique. The driver opened the bottles and poured a drink and drank it. Then he gave the bottle to Newton. Newton had a drink and gave the bottle to me to have a drink. I drank the balance arrack and gave the empty bottle to a friend who was nearby and asked him to return the bottle to the tavern and get Re. 1. The friend brought the Re. 1. I went to the boutique and bought 3 cigarettes. The driver, Newton and I lit the

cigarettes. Then Newton suggested that we go to his brother-in-law's house to bring the rice ration book. Newton wanted the car to be stopped near the first gate and the lights switched off and said that he would go and bring the rice ration book. Then the driver asked did you bring me for this. As he said that I saw the driver bleeding from the chest. Then I opened the door of the car and got down. Newton also got down from the car. Newton held me by the hand. The driver started the car and went near Newton's brother-in-law's house and sounded the horn and reversed the car and was coming when it hit the coconut tree. Then Newton went near the car and cut the wires. After the lights were switched off I saw Newton stabbing the driver twice with the knife. Newton held me by the hand and said if you go and talk about this I will kill you also and showed me the knife. Newton tore off the chain that was on the driver's neck and the wristlet on the hand. Having taken those he came with me to the beach. Newton threw the knife into the sea. He had another spring knife in his hand. He asked me to accompany him, otherwise he would kill me. Then we went directly to their house. They brought a bottle of arrack and made me drink it. I fell asleep there itself. Early morning Newton took me also and went to the house from where he was to get married. He sent me with a boy from that house and asked me to sell the chain which he had snatched. We sold it and came back and handed over the money to Newton. Thereafter Newton went to Trincomalee with me. We were there for 4 days. While we were there Joseph Aiya received two letters to say that the Police were looking out for Newton in connection with a murder. After he received the letters Joseph Aiya asked us to leave the place. Then Newton took me also and went to Muttur. We stayed at a friend's place there. While staying there I told Newton that I cannot stay there and wanted to go back. He asked me not to go to Kandana. I said that I was going to my mother's house and came from there. After I returned I met Weerakoon Ralahamy and narrated the incident to him. That Ralahamy handed me to the Police. This is all I have to say."

The defence of the 1st accused, Newton, who gave evidence on oath was that on the night of the 9th at about 11 p.m. the 2nd accused came to him and told him that he had got into trouble, got involved with a fight with a police officer and asked him to save him. The 1st accused then said that he would take him away, that there were some people at Wattala and

he could go there and stay for two or three days but there was no money for this purpose. The 2nd accused however agreed to look after the expenditure. They went to Wattala where the 2nd accused told him that he did not have money but that he had brought his wife's chain which they could pawn and raise some money. The 1st accused said that in order to save the 2nd accused he arranged to sell the chain through Annesley at the request of the 2nd accused. It was sold for Rs. 250. He admitted that they went to Trincomalee and to Kilivetty. At Kilivetty as the 2nd accused had no money he pawned his wristlet watch. He denied any participation in the murder of the deceased, or robbery of the articles from the deceased.

The 2nd accused also gave evidence on oath and his defence was substantially on the same lines outlined in the statement he made to the Magistrate, P11.

At the commencement of the trial after the pleas of the accused were recorded and before the trial Judge addressed the Jury under section 211 of the Administration of Justice Law, Counsel for the 2nd accused at the trial quite properly sought clarification from the prosecuting Counsel whether he proposed to use P11 as an admission of the 2nd accused under section 17(1) of the Evidence Ordinance or as a confession against him under section 17(2). In a commendably precise, short and effective submission, Counsel took up the position that P11 was not a confession or an admission of guilt although it was referred to in the back of the indictment as a " confession ". State Counsel while conceding that P11 could be a statement which is an admission admissible against the 2nd accused under section 17(1) read with section 21 of the Evidence Ordinance, went a step further and stated that P11 was in fact a confession as it was an admission of guilt. The trial Judge thereupon ruled that he accepted State Counsel's position that it was an admission under section 17(1) and section 21. He also took the view that P11 should be considered as a confession under section 17(2) of the Evidence Ordinance. The trial Judge had made it quite evident that P11 was a confession when he stated that section 30 of the Evidence Ordinance applied to P11. Under section 30 where more persons than one are tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court shall not take into consideration such confession against such other persons. The learned trial Judge thereafter permitted the Magistrate who

recorded the statement to refer to P11 as a confession. The Inspector of Police who sent the 2nd accused to the Magistrate for the purpose of recording the statement also referred to P11 as a confession. As we remarked earlier the trial Judge in the course of his directions to the Jury too referred to P11 as a confession.

Under section 134(1) of the Criminal Procedure Code the Magistrate has the power to record any statement made to him by any person before the commencement of an inquiry or trial. Section 134 envisages two kinds of statements, non-confessional statements and confessional statements. If it is a confessional statement the Magistrate will record it only if he is satisfied upon questioning the person who makes the confession that it was made voluntarily. Of course, the Magistrate before he proceeds to record a statement under section 134 would naturally question the person who makes the statement to find out whether it is a confession or not. If it is a confessional statement he will first satisfy himself that it was a voluntary statement before recording it. The more prudent course, however, would be to satisfy himself that the statement is a voluntary statement even if upon interrogating the person the statement appears to be non-confessional in character, for the simple reason that while in the process of actually recording the statement it may eventually turn out in the context to be of a confessional nature. The Magistrate, however, in this case apparently recorded the statement of the 2nd accused as a confession as this is evident from the questions he had put to the 2nd accused to satisfy himself that it was made voluntarily.

The question for our consideration is whether P11 is a confession or admission or acknowledgement of guilt made by the 2nd accused to the Magistrate and whether the trial Judge was entitled to and justified in treating it as a confession in the sense of an acknowledgement of guilt by the 2nd accused.

In order to construe the meaning of the word "'confession" in section 134 of the Criminal Procedure Code we would think that judicial decisions on the meaning of the word "confession" as used in contradistinction to the word "admission" in the Evidence Ordinance would provide helpful guidelines.

There is an important distinction between the terms "admission" and "confession" in the Evidence Ordinance. Under section 17(1) a statement made by a person which suggests an inference as to any fact in issue or relevant fact is an admission

and it may be proved against such person under section 21. Unlike the Indian Evidence Act, our Evidence Ordinance in section 17(2) defines a confession as follows:

> "A confession is an admission made at any time by a person accused of any offence and suggesting *the* inference that he committed such offence."

While every confession is necessarily an admission, every admission does not necessarily amount to a confession. Wigmore on Evidence, Vol. 3, 3rd Edition, page 245, section 821, gives a useful definition of the word "confession".

> "1897, Wolverton, J., in *State v. Porter*, 32 Or, 135, 49 Pac. 964: "We take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, '"I am guilty of this"; and this imports the admission of all the acts constituting guilt.' It is necessary, however, that the accused should speak with an '*animus confitendi*', or an intention to speak the truth touching the specific charge of guilt; and when he, with such intention, narrates facts constituting a crime, the guilt becomes matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions."

This passage cited by Wigmore is quoted with the approval by the Privy Council in *Anandagoda v. Queen*, 64 N.L.R. 73, to which we shall refer later.

Wigmore also at the same page cites another decision which brings out the distinction between a confession and an admission as applied in the Criminal Law.

"1919, Holloway, J. in *State v. Guie*, 56 Mont. 435, 186. Pac. 329: "The distinction between a confession and an admission, as applied in Criminal Law, is not a technical refinement, but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused and, by the very force of the definition, excludes an admission, which of itself, as applied in Criminal Law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction".

As learned Counsel's submission in this case is that P11 is an exculpatory statement and not a confession it will be useful to refer to the clarification of this distinction made by the Privy Council in *Narayana Swami v. Emperor*, (1939) A.I.R. P.C. 47 at 52.

".....in their Lordships' view no statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e.g. an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

We do not think that since the Indian Evidence Act does not define a "confession" while our Evidence Ordinance does so in section 17(2) by adopting Stephen's definition of a confession in Article 22 of the "Digest of the Law of Evidence", this would make any difference to the conclusion we have in our minds in this case.

Monir in "Principles and Digest of the Law of Evidence," 4th Edition, Vol. 1, at page 115 after referring to *Narayana Swami's* case refers to the distinction between a confession and an admission.

"The real point to remember, when distinguishing an admission from a confession, is that the statement alone, and dissociated from the other evidence in the case, has to be looked at to determine whether it amounts to an admission of guilt or of substantially all the facts which constitute

the offence. If it does, it is a confession ; if it does not, it is not a confession. If the statement contains an admission of a fact in issue or relevant fact, but by itself it neither amounts to an acknowledgement of guilt nor an admission of substantially all the facts which constitute the offence, the statement is merely an admission and not a confession."

We would now refer to the Privy Council decision in *Anandagoda v. Queen* (*supra*). In this case the appellant was found guilty of murder on 14.3.1954 of a young woman called Adeline Vitharana. The body of the deceased, seven months' advanced in pregnancy, was found late at night on 14th March, 1959, near the 27th Mile Post on the Anuradhapura-Puttalam Road. The case for the prosecution was that the death was caused by a motor car being deliberately driven over her body at least twice.

The prosecution at the trial proved certain admissions made by the appellant to a police office where he admitted that the deceased was his mistress for two years and she had a child by him. She had insisted that she should marry him but he was putting it off. She was disgracing him and she became unbearable and a nuisance to him. He also admitted that on the 14th he started in his car with the deceased for Anuradhapura via Puttalam. They reached a Muslim hotel at Puttalam towards 8 and 9 p.m. On the 15th of March he got a car and came to Anuradhapura via Puttalam. At about 3 or 3.30 p.m. on the 15th of March, he said he passed the scene of murder, that is the place where the body was. He slowed down and noticed people and police officers there. The admissibility of these statements was objected to on the ground that they constituted a confession or confessions within the meaning of section 17 (2) and section 25 of the Evidence Ordinance. Their Lordships of the Privy Council approved the test adopted by the Court of Criminal Appeal and held that these statements considered by themselves did not amount to confessions of guilt within the meaning of section 17 (2). There was no admission that the appellant was driving the car at the time of the offence, or that if he was driving the car that in running over the deceased the appellant was acting deliberately both of which elements would be necessary to constitute the crime of murder. Their Lordship approved the following passage from the judgment of Garvin, A.C.J. in *King v. Cooray*, (1926) 27 N.L.R. 267, as setting out the correct view in regard to section 17 of the Evidence Ordinance.

"The term "admission" is the genus of which "confession" is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person

accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence."

They also cited with approval the passage we have quoted earlier from Wigmore's Law of Evidence. Their Lordships then proceeded to lay down the test to distinguish a confession from an admission in the following terms.

"The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen, J. in *Seyadu v. King*, (1951) 53 N.L.R. 251 at p. 253," The test of whether an 'admission' amounts to a 'confession' within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms" is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is none the less a confession even although the accused at the same time protests his innocence."

Our task, therefore, is to apply the principles laid down in the decisions we have referred to, in order to determine whether P11 is a confession. Does P11,

(*a*) admit in terms the offence or at any rate substantially all the facts which constitute the offence (Narayana Swami's case), or

(*b*) contain any direct acknowledgment of guilt on the part of the accused (Wigmore), or

(*c*) contain an admission of a fact or a bundle of facts from which guilt is directly deducible or which within and of themselves import guilt (Wigmore), or

(*d*) to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it could be said to amount to a statement that the accused committed the offence considered in its own terms without reference to extrinsic facts (Anandagoda's case), or

(*e*) suggest the inference and not any inference that the accused committed the offence. (*King v. Cooray*), or

(*f*) by reference to its own intrinsic terms is a confession (*Seyadu v. Queen*), or

(*g*) by itself sufficient to authorise a conviction (Wigmore), or

(*h*) dissociated from other evidence in the case whether it amounts to an admission of guilt or an admission substantially of all the facts which constitute the offence (Mouir) ?

In our view these tests are relevant and helpful to determine whether a statement is a confession under section 134 of the Criminal Procedure Code.

Applying these tests we hold that P11 is not a confession. It is not an admission or acknowledgment of guilt of the offence for which the 2nd accused stood his trial. It is an exculpatory statement and its manifest purpose is to show that he was innocent of the crime for which he was charged, namely, murder and robbery. At most it amounts to an acknowledgment of subordinate facts not directly involving guilt. We are accordingly of the view that the learned trial Judge was wrong in ruling that P11 was a confession and thereafter in permitting the learned Magistrate who recorded P11 and a police office to refer to P11 as a confession made by the 2nd accused.

The question we have, therefore, to consider is whether the erroneous and unwarranted reference by the trial Judge to the statement made by the 2nd accused to the Magistrate contained in P11 as a confession or admission of guilt by the 2nd accused could have had the effect of seriously prejudicing the minds of the Jury giving them the overpowering impression that the 2nd accused in fact had made a confession or an admission of his guilt to the Magistrate when in fact P11 was not a confession or an admission of guilt.

The Magistrate in his evidence had stated that the 2nd accused had informed him that he wanted to make a confession and throughout his evidence he has referred to P11 as a confession made by the 2nd accused. Inspector Mendis in his evidence stated that he submitted a report to the Magistrate on 21.10.72 and requested him to take down the confession the 2nd accused was prepared to make.

We shall next refer to some of the more crucial out of the 84 instances where the trial Judge referred to P11 as a confession in his directions to the Jury.

After the indictment was read to the Jury the trial Judge in complying with section 211 of the Administration of Justice Law in explaining to the Jury the principles of law relevant to the case, told the Jury that the prosecution expected to produce a confession of the 2nd accused made to the Magistrate and that the confession was only admissible against the 2nd accused and would not be admissible against the 1st accused. He reiterated, however, that the confession was only admissible against the 2nd accused. In complying with the provisions of section 138(1) of the Administration of Justice Law as the 1st accused at this stage was not represented by Counsel and in explaining the principal points of evidence of the prosecution against the 1st accused the trial Judge referred to the 2nd accused's confession and quite properly told him that that confession would not be admissible against him. The implication being that it could be used against the 2nd accused. In the course of his direction he referred to the fact that the prosecution had no direct evidence as to the persons who committed the offence of murder but that the prosecution was relying on circumstantial evidence. He then remarked that the prosecution was seeking to establish the case against the 2nd accused by his confession which had been read a number of times in Court. Later in the course of his directions the trial Judge referred to P11 as a confession made to the Magistrate as an important item of evidence relied on by the prosecution. He then explained that although it is referred to as a "කෙළෙඹිකරුණ" (confession) it was according to the Evidence Ordinance an admission of guilt. He then referred to the power of the Magistrate under the Criminal Procedure Code to take down a confession or an admission of guilt from an accused person and that was what the Magistrate had done as a part of his duty. The Magistrate also had followed the necessary rules before taking down that confession and had administered the necessary caution to the accused before he took down the confession. He cautioned the Jury that this confession was only admissible in evidence if it was given voluntarily. The trial Judge then went on to explain the meaning of "confession" according to the Evidence Ordinance as "an admission of guilt". When the trial Judge read P11 to the Jury in its entirety he again referred to it as a confession. The trial Judge having referred to instances where an admission could amount to a confession by inference although the person making the admission did not directly confess that he committed the offence asked the Jury to consider whether P11 by inference was a confession of guilt, although the 2nd accused did not pointedly state that he was involved in the crime. Nevertheless, he concluded by telling the Jury to consider that P11 was a confession or admission of guilt and not to use it against the 1st accused. Finally,

the trial Judge in summarising the evidence against the 2nd accused under three heads referred to one of them as the confession or an admission of guilt of the 2nd accused.

We are, therefore, satisfied that the manner and circumstances in which the trial Judge repeatedly referred to P11 as a confession, when in fact it was not a confession, and his failure to invite the Jury at any stage in his directions to consider P11 as an exculpatory statement, the benefit of which the 2nd accused was entitled to in the consideration of his defence, have caused serious prejudice to the 2nd accused and had deprived him of a fair trial. We are inclined to the view that the consequence of P11 being referred to as many as 84 times by the trial Judge as a confession would have virtually had the effect of brainwashing the Jury's thinking into the belief that the 2nd accused had confessed his guilt to the Magistrate in regard to the crimes for which he was charged. We are also inclined to agree with learned Counsel's submission that considering the fact that the Jury took only 10 minutes to bring an unanimous verdict of guilty in respect of two serious charges of murder and robbery in a case which took two working weeks to conclude with the trial Judge's summing-up lasting 5 hours in a case where the facts were by no means uncomplicated, could be attributed to the Jury having been disposed to rest their verdict solely on P11 as a confession made by the 2nd accused without the necessity of considering, sifting and analysing the other evidence in the case.

The next question is how far the reference by the trial Judge to P11 as a confession by the 2nd accused could have prejudicially affected the 1st accused in the minds of the Jury.

The learned trial Judge told the Jury that the 2nd accused's confession P11 could not by itself be used against the 1st accused. Proceeding on the assumption that P11 was confession by the 2nd accused he went to say that as the 2nd accused had given evidence in this case his confession could be used against the 1st accused. This direction in our view would have been impeccable if P11 was in fact a confession and the evidence given by the 2nd accused on oath in which he adopted his statements in P11 was confessional in content. But in the view we have taken that P11 is not a confession, this was a serious misdirection which has prejudiced the 1st accused too. Although in his evidence the 2nd accused had adopted what he had stated in P11 he had, however, not in his evidence on oath made any confession or admission of his guilt. His was an exculpatory defence denying that he committed the offences with which he was charged. It was, therefore, a misdirection on the part of the trial Judge to have told the Jury that the 2nd accused's confession could

be used against the 1st accused. In this situation the Jury may well have thought that as the 2nd accused in his evidence had made a confession incriminating himself and the fact that the 2nd accused both in P11 and in his evidence on oath incriminated the 1st accused, P11 as a confession could be used against the 1st accused. We are inclined to think that if the Jury on the directions of the trial Judge had considered that P11 was a voluntary confession or admission of guilt made by the 2nd accused they would have been justified to use it against the 1st accused as an item of evidence with an enhanced credibility value being a voluntary confession.

The reference, therefore, by the trial Judge to P11, the statement made by the 2nd accused to the Magistrate, as a confession when it was in fact not a confession or admission of guilt on the part of the 2nd accused, was a misdirection, the effect of which was highly prejudicial to both accused and it deprived them of a fair trial.

For these reasons we quashed the verdict of the Jury in respect of both accused-appellants on the two charges on which they were found guilty, and we directed a fresh trial in respect of the said charges against both accused-appellants.

WEERARATNE, J.—I agree.

COLIN-THOME, J.—I agree.

Re-trial ordered.