

[IN THE COURT OF CRIMINAL APPEAL]

1957 Present : Basnayake, C. J. (President), Pulle, J., and Sinnetamby, J.

THE QUEEN *v.* R. A. WILBERT PERERA *et al.**Appeals 6–8 of 1957, with Applications 7–11**S. C. 29—M. C. Gampaha, 23,718**Confession—Procedure for recording it—Memorandum at foot of record—Effect of not observing prescribed form—Criminal Procedure Code, s. 134.*

Where a Magistrate purported to record a confession under section 134 of the Criminal Procedure Code but omitted to read over the statement himself to the person who made it and to state that the confession was voluntarily made—

Held, that the omission could be supplied by the oral testimony of the Magistrate. The memorandum prescribed under section 134 cannot be regarded as laying down an imperative procedure that must be observed to the letter.

APPEALS against certain convictions in a trial before the Supreme Court.

Ivan Perera (Assigned), for the 1st Accused-Appellant and Applicant.

J. V. C. Nathaniel (Assigned), for 2nd Accused-Applicant.

Norman Abeysinghe (Assigned), for 3rd Accused-Appellant and Applicant.

Joseph St. George, for 4th Accused-Appellant and Applicant.

K. Charavanamuttu (Assigned), for 5th Accused-Applicant.

April 9, 1957. BASNAYAKE, C.J.—

The five appellants were indicted on charges of conspiracy to commit robbery on the 2nd of March 1955. The facts shortly are that the appellants waylaid a lorry in which one Samaradiwakara, the Manager of a Co-operative Store, was travelling to Colombo with a sum of Rs. 30,529·89 in cash to be deposited in the Bank and robbed the money.

The 1st accused's appeal does not raise any ground of law or fact which may properly be urged in this Court, nor does the 2nd accused's appeal raise any such ground. We therefore dismiss their appeals.

In regard to the 3rd accused, learned counsel submits that the confession made by him to the Magistrate had not been recorded by him in the manner prescribed by section 134 of the Criminal Procedure Code.

The appellant volunteered to make a statement to the Magistrate and was given time to reflect. When even after reflection the appellant expressed a desire to make a statement he was questioned by the learned Magistrate as follows :—

Q. What is your object in making this statement ?

Do you expect any benefit by making this statement ?

A. This is a plea for mitigation.

Q. Do you know that I am the Magistrate of Gampaha ?

A. Yes.

Q. Are you making this statement voluntarily and of your own free will ?

A. Yes.

The Magistrate thereupon proceeded to record the appellant's statement. The statement was made in English, but the record does not show by whom it was taken down. It was read over to the appellant by the Interpreter Mudaliyar and signed by the appellant. At the end the Magistrate appended the following certificate :—

“I hereby certify that the above record is a statement made by G. Morawaka and that it contains the whole of the statement made by him. The statement was made by the deponent in English and it was taken down while he was making his statement. The statement was read over by the Interpreter Mudaliyar to the deponent who admitted that the statement was correctly recorded.”

The above certificate is not in accordance with that prescribed in section 134. The following words were omitted :—

“ (a) I believe that this statement was voluntarily made.”

“ (b) It was taken in my presence and hearing and was read over by me to the person making it.”

It is not clear why the Magistrate departed from the prescribed form. The prosecution sought to supply the omission by calling the Magistrate as a witness. He testified to the fact that he believed that the statement was voluntarily made.

Learned counsel for the 3rd accused contends that the omission of the words at (a) above rendered the confession inadmissible. He relied on the Indian case of *Nazir Ahmad v. King Emperor*¹, where it was held by the Privy Council that a confession made to a Magistrate is inadmissible unless it is recorded in conformity with section 164 of the Indian Criminal Procedure Code which is the section which corresponds to our section 134.

In the case on which counsel relies it was conceded that the Magistrate neither acted nor purported to act under section 164 or section 364 of the Indian Criminal Procedure Code and nothing was tendered in evidence as recorded or purporting to be recorded under either of those sections. The instant case is different. The Magistrate purported to and did in fact act under section 134; but he failed to read over the statement himself to the appellant and make the memorandum prescribed therein. That omission was supplied by his evidence and in our view the confession was rightly admitted in evidence.

The case of *Ram Sanchi v. Emperor*² supports our view. There it was held that when a Magistrate omitted to certify that he believed that a confession recorded under the corresponding section of the Indian Criminal Procedure Code (section 164) had been voluntarily made the omission may be supplied by the oral testimony of the Magistrate.

¹ (1936) A. I. R. Privy Council 253.

² (1911) 12 Criminal Law Journal 15.

We wish to add that Magistrates should be diligent in the observance of the provisions of the Criminal Procedure Code in this regard and that in the instant case the failure of the Magistrate to do so has resulted in the waste of a good deal of public time. Besides the provisions of section 134 are so designed that the statement properly recorded thereunder may be proffered in evidence without the Magistrate having to be called as a witness.

On behalf of the 4th accused it was urged that the learned Magistrate had acted contrary to the provisions of section 134 of the Criminal Procedure Code in that he had not in fact himself read over to the accused the confession made by him.

It is clear from the certificate attached to the recorded confession that the learned Magistrate had not himself read it over to the accused. It was the Interpreter Mudaliyar who had done so. Though it would appear from the form of certificate prescribed in section 134 that the Magistrate himself should read over the confession to the accused, his omission to do so himself is not in our view such a disregard of the provisions of the section as would make the confession inadmissible in evidence.

The requirement of section 134 (3) is that the memorandum made at the foot of the record of the confession should be to the effect prescribed in the section. The prescribed memorandum cannot be regarded as laying down an imperative procedure that must be observed to the letter.

Learned counsel also sought to attack the finding against the 4th accused on the ground of unreasonableness of the verdict having regard to the evidence led against him. He drew our attention to various passages in the transcript and submitted that there was no evidence on which the jury could have reasonably arrived at a verdict against him. We are unable to uphold this contention. Once the confession was admitted there was sufficient evidence before the jury which, if believed, would have rendered the 4th accused guilty of the offences with which he was indicted. This accused is not entitled to succeed in his appeal.

With regard to the 5th accused it was urged that the verdict was unreasonable and the sentence excessive. It was submitted that the jury had taken an unreasonable view of the evidence against him as certain convictions in which he had used a revolver had been led in evidence and that he was prejudiced thereby. These convictions were put in by the 5th accused himself in his defence to prove that he had been falsely implicated in the instant case because a revolver had been used and that the Police were aware that he had been previously convicted of offences in which a revolver was used. There is no substance in this argument and we therefore refuse the application for leave to appeal both on the ground of unreasonableness of the verdict and on the ground of the sentence being excessive.

In the result the applications of all the appellants are refused and their appeals are dismissed.

Applications and Appeals dismissed.