1977 *Present:* **Malcolm Perera, J. and Ratwatte, J.**

S. VIVEKANANDAN and ANOTHER, Accused-Appellants

and

S. SELVARATNAM, Respondent

S. C. 285-286/75—M.C. Colombo Fort 52052

Evidence Ordinance, sections 24, 30—Confession by accused—Meaning of word "appears" in section 24—Inducement threat or promise Burden of proof—Extra-judicial confession—Whether admissible against co-accused.

Section 24 of the Evidence Ordinance does not require positive proof of improper inducement, threat, or promise to justify rejection of confession. If the Court after a proper examination and a careful analysis of the evidence and the circumstances of the given case comes to the view that there appears to have been a threat, inducement, or promise offered, though this is not strictly proved, then the Court must refuse to receive in evidence the confession. The burden is on the prosecution to prove that the confession is voluntary and there is no burden of proof on the accused to prove the inducement, threat or promise.

An extra-judicial confession of an accused cannot be used in evidence against his co-accused and is excluded by section 30 of the Evidence Ordinance.

Cases referred to:

King v. Franciscu Appuhamy, 42 N.L.R. 533.

King v. Weerasamy, 43 N.L.R. 152.

Joseph v. Peiris, 24 N.L.R. 485.

Ibrahim v. King, (1914) A.C. 599.

R. v. Thompson, (1893) 2 Q.B. 12.

Emperor v. Panchkari, A.I.R. 1925 Cal. 587.

Rex v. Mansfield, (1884) 14 Cox C.C. 369.

Queen Empress v. Basvanta, (1900) A.I.R. 25 Bom. 168.

Pyare Lal v. State of Rajasthan, (1963) Vol. 50 A.I.R. (S.C.) 1094.

APPEAL from a judgment of the Magistrate's Court, Colombo Fort.

A. H. C. de Silva, Q.C., with *M. Underwood* and *Anil Silva*, for the 1st accused-appellant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatta, N. Dharmadasa* and *Miss P. Senivіratne,* for the 2nd accused-appellant.

Sunil de Silva, Senior State Counsel, for the Attorney-General.

Cur. adv. vult.

December 16, 1977. MALCOLM PERERA, J.

The following three important questions arise for determination in this appeal :

1. Has the learned Magistrate given adequate consideration to the question of the confessional statement made by the 1st accused-appellant to witness V. P. de Silva ?

2. Has the learned Magistrate properly assessed and evaluated the evidence of the main witnesses, Wilfred, Peiris and V. P. de Silva ?

3. Has the learned Magistrate addressed his mind to the question that an extra-judicial confession of one accused person is not evidence against his co-accused who stand this trial together with the confessor ?

The facts of this case are briefly as as follows :

The ship Straat Clement entered the port of Colombo on the 2nd of May, 1971, and was berthed alongside the Bandaranaike Quay. Information had reached the Customs authorities that the vessel was carrying contraband goods, which were to be removed from the ship with the assistance of some Custom's Officers. On receipt of this information witness Pakiaratnam the Assistant Collector of Customs, Colombo, gave instructions to all Custom Guards that they should keep a careful watch on the ship and prevent any Custom Officers boarding that ship. Assistant preventive Officer, witness Joseph was made aware of the preventive measure adopted by Pakiaratnam as Joseph himself was present when the Assistant Collector instructed the guards. Among the Custom Guards who kept vigil that night in civilian clothing were witness Wilfred and Peiris. According to Wilfred he was on duty from 4.10 p.m. on the 4th of May, 1971. He was keeping a watch on the ship along with the witnesses Peiris and another Customs Guard by the name of Dias. When they were thus keeping watch at about 7.30 Wilfred saw the first accused who was in uniform boarding the ship Straat Clement carrying in his hand a bag. Wilfred who was near the crane was keeping a close watch as to the movements of the first accused. Noticing

a package about 15 feet from the gangway he sat on it. About 9.00 p.m. he saw the first accused coming down the gangway with the bag in his hands. He however noticed that the bag appeared to be weighing heavier than when he first saw it in the hands of the first accused at the time he boarded the ship. The first accused walked down the gangway and went in the direction of the open space between warehouse one and two and he followed him. In that open space he saw the second accused in his car. The first accused got into the car along with the bag. At this stage Wilfred went up to the first accused and questioned him as to what the bag contains. The first accused told him that there were about five or six bottles of whiskey ; not being satisfied with this answer, it is the position of Wilfred that he took the bag out of the car and the two accused drove away. Before the car drove off Wilfred did not see or hear any conversation between the first and second accused. Wilfred thereupon took the bag to the Preventive Office and informed witness Pakiaratnam on the telephone who instructed him to meet him at his office. The witness Peiris and guard Dias who were present with witness Wilfred during the transaction were given in charge of the bag and Wilfred proceeded to Pakiaratnam's office. Having related to Pakiaratnam all that transpired, Wilfred requested him to go to the Preventive Office and to examine the contents of the bag. Pakiaratnam and Wilfred went to the Preventive Office and there Pakiaratnam informed the higher officer, later the bag was opened and inside the bag there were 566 wrist watches and 36 metal watch straps. Witness Peiris gave evidence and his testimony was to the evidence given by Wilfred.

The prosecution also led the evidence of witness V. P. de Silva who was the Deputy Collector of Customs in May 1971 and through him produced P 21, a confessional statement made by the first accused to him on the 7th of May, 1971, at 10.00 p.m. This was one of the main items of evidence on which the prosecution relied to prove beyond reasonable doubt the following charges :

" 1. that on or about the 4th day of May, 1971, at the Port of Colombo within the jurisdiction of this Court, the first accused above named did unship from the motor vessel 'Straat Clement' goods which are restricted and imported contrary to such restriction, to wit, 568 wrist watches and 36 metal wrist straps valued at about Rs. 105,000 in breach of section 12 of the Customs Ordinance read with section 4

of the Import and Export Control Act, No. 1 of 1969, and has become liable under section 129 of the Customs Ordinance to forfeit a sum of Rs. 315,000 and that he has thereby committed an offence punishable under section 146 of the Customs Ordinance (Cap. 335).

2. that at the time and place aforesaid and in the course of the same transaction the second accused above named did assist the first accused above named or was otherwise concerned in unshipping from the motor vessel, Straat Clement goods which are restricted and imported contrary to such restriction to wit 566 wrist watches and 36 metal wrist watch straps valued at about Rs. 105,000 in breach of section 4 of the Import and Export Control Act, and has become liable under section 129 of the Customs Ordinance to forfeit a sum of Rs. 315,000 and that he has thereby committed an offence punishable under section 146 of the Customs Ordinance (Cap. 235)."

It would be convenient at this point to examine the evidence of witness V. P. de Silva. According to him he had been instructed by the Principal Collector of Customs to hold an investigation into this activity of unshipping goods. He was asked " to go deep into the matter and find out the people who are involved in this alleged smuggling ".

He recorded the statement of several persons. He had summoned the first accused and asked him to make a statement. He asserted in his evidence that the first accused made a voluntary. statement. The first accused's statement has been produced marked P21. I have carefully examined this witness' testimony. No doubt he claimed in examination-in-chief that he did not offer any promise, threat or inducement to the first accused to make a statement. In cross-examination it was suggested to him that by nature he was of a very aggressive disposition. He admitted he was charged in Court several times for intimidation. On one occasion he was charged with having intimidated Mr. Mahesan, an Attorney-at-Law and on that occasion he had apologised to Mr. Mahesan. Going through his evidence I come to the inescapable conclusion that, to say the least, this witness has been most evasive in the manner he had given his evidence. I have been able to discover not less than twelve occasions in cross-examination where he had answered the questions in a most evasive way. Questions were asked from him in rapid

succession one on the heels of the other on the vital issue of the voluntariness of the statement of the first accused. These questions and answers are as follows :

Q. "Do you remember that on the next day the first accused met you for the first time and told you that he was innocent and sought your help ?

A. I cannot recall that but it is quite possible.

Q. You told him that the papers had yet to come ?

A. I cannot remember but it is possible.

Q. The papers came to you in the course of the day ?

A. It is possible.

Q. The first and the second accused met you in the office early in the day ?

A. I cannot clearly recollect but it is possible.

Q. Do you remember the first accused met you and told that he was innocent and he wanted you to reconsider Ediriweera's fine ?

A. It is possible but I cannot recollect.

Q. When they met you, you told them that you cannot believe the story of the first accused to Ediriweera—actually by that time you had Ediriweera's report ?

A. It is possible but I cannot recollect.

Q. You told them that you are interested in getting to the bottom of the matter in smashing the ring behind this smuggling ?

A. It is possible. I can be sure that I told them that before I recorded the statement but I cannot recall where I met them earlier.

Q. I am putting it to you that you told the first accused that he would help him out and you gave the first and second accused time to think over the matter ?

A. I cannot be sure. I deny that I told the first accused to think over the matter and come.

Q. You met them in the morning and sent them away because you were not satisfied with the information which they said they were giving you in order to help you to do what you wanted ?

A. It is possible that I may have had a few words but I really commenced the inquiry when I commenced recording the statements. It is possible that I may have had a few words with them in the morning.

Q. You told the first accused, "Look here, you have not worked under me, look here did you not work under him ?"

A. I cannot remember.

Q. Then you told the first accused you do not know what kind of a man I am ?

A. I have no recollection.

Q. You also told the first accused that you did not want to hear the story that he had already told Ediriweera ?

A. I do not recall."

It is most unfortunate that this witness has displayed an aversion to answer simple questions in a straightforward manner. He has sought too often to seek refuge in his often repeated formula, "it is possible, but I cannot recollect". I cannot overlook his performance, as these questions and answers are most relevant to the vital issue of voluntariness of the statement of the first accused produced as P21.

It transpired from the evidence that the first accused had already made an exculpatory statement to Mr. Ediriweera, another Customs Officer, before P21 was recorded. The defence position is that witness de Silva has stated to the first accused that he did not believe the contents of the statement made to Mr. Ediriweera, and he wanted to know the truth to smash up the smuggling ring. In this context, the defence counsel questioned witness thus :

"*Q.* You further told the first accused I want the complete truth ?

A. I think I might have explained to him the purpose of my investigation and told him that I want the complete truth."

From this answer it is clear, that a person in authority like witness de Silva with his admitted aggressive and stern disposition had demanded the truth, from the first accused.

The question that I have to determine is whether the evidence of witness de Silva, and the surrounding circumstances disclose a probability that there was a threat, inducement or promise offered by de Silva to the first accused to make the statement P21.

Section 24 of the Evidence Ordinance reads as follows:

> "A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."

At the outset, the Court must determine the meaning of the word *appears*. I think what the Court has to decide is not whether it has been proved that there was a threat, inducement or promise, but whether it appears to Court that such threat, inducement or promise, was present. I am inclined to the view that the word "appears" indicates a lesser degree of probability than it would have been, if the word "proof" as defined in section 3 of the Evidence Ordinance had appeared in section 24.

In the case of *Pyarelal v. State of Rajastan,* (1963) S.C. 1094, the Supreme Court of India stated that the crucial word is the word appears, and that the appropriate meaning of it is "seems". It imports the idea of a lesser degree of proof of the fact of the presence of inducement, threat or promise.

In the case of *King v. Franciscu Appuhamy,* 42 N.L.R. 553, Wijewardene, J. (as he then was) stated "It is not necessary for a Court to insist on the high standard of proof contemplated by section 3 of the Evidence Ordinance before it rejects as irrelevant under section 24 of the Evidence Ordinance, a confession on the ground of an improper inducement, threat or force. The use of the word 'appears' in section 24 indicates a much lower standard of proof in a matter of this nature."

In the case of *Queen Empress v. Basvanta,* (1900) A.I.R. 25 Bombay 168, it was held that section 24 does not require positive proof (as defined in section 3 of the Act) of improper inducement to justify the rejection of the confession, the word "appears" indicating, a lesser degree of probability than would be necessary if proof had been required.

I should rather think that the legislature has decidedly used the word "appears" to guarantee to accused persons in criminal proceedings, absolute fairness. Thus section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the Court after a proper examination and a careful analysis of the evidence and the circumstances of the given case, comes to the view that there appears to have been a threat, inducement or promise offered, though this is not strictly proved, then the Court must refuse to receive in evidence the confession. I should venture to think that a strong possibility that the confession was made under the stimulus of an inducement, threat or promise, would be sufficient to attract the exclusionary provision of section 24 of the Evidence Ordinance.

On an examination of the reasons given by the learned trial Judge, I am of the view that he has failed to analyse the evidence of witness de Silva, and he has not addressed his mind sufficiently to the question of voluntariness. Dealing with P21 and the evidence of the witness he says:

"It was suggested by the defence that this statement was made under a promise. Mr. V. P. de Silva denied that the statement was made under a promise and he further stated that it was a voluntary statement made by the first accused." I do not see here a careful scrutiny of the evidence of the witness. Further the learned Judge has considered only the question whether there was a promise given by the witness to the accused. He has not examined the question of threat, which arises from the evidence and surrounding circumstances of this case. The defence had taken pains to establish the aggressive nature of the witness, and the manner and the circumstances under which the accused appeared before witness de Silva. De Silva's conduct, acts and words also must be taken into consideration. The learned Judge has failed to do so.

He has been content merely to accept what the witness said, without an examination of his testimony, for in the judgment he says "and he (de Silva) further stated that it was a voluntary statement made by the first accused."

Under our law, the accused is not bound to prove the inducement, threat or promise, but the burden is on the prosecution to prove the voluntariness of a confession to establish its relevancy. If the Judge entertains a doubt as to the voluntariness he must reject the confession. Vide *King v. Weerasamy,* 43 N.L.R. 152.

The learned trial Judge appears to have considered whether the contents of P21 were true or not, and his decision on the question of voluntariness has been influenced by his finding that P21 was a truthful statement.

I must state it here most explicitly, that the mere fact that the contents of a confession are true, does not necessarily mean that the confession is free from taint and hence relevant.

The Judge must carefully analyse the evidence, weighing all the circumstances, and examine the accused person's denial of making the confession, assessing the probabilities. If after such a process it seems to the Judge that the confession has been made under the stimulus of an inducement, threat or promise, then the exclusionary provision of section 24 is attracted, and no matter how true the confession may be, the Judge is required by law to exclude it. The reason for this has been succinctly stated by Williams, J. in *Rex v. Mansfield,* 1884, 14 Cox C.C. 369, as follows :

> " It is not because the law is afraid of having the truth elicited that these confessions are excluded, but because the law is jealous of not having the truth."

In the case of *Emperor v. Panchakari,* A.I.R. 1925, p. 587, Mukherji, J. said " *I am not concerned with the question of truth or falsity of the confession.....* I am only concerned with the question, as to whether they are admissible in evidence. If they are voluntary they are admissible. Of course if *prima facie* they are false, inconsistent, improbable or absurd, that might suggest that they are not voluntary, but I can see none of these characteristics in these two confessions. The contents of these two confessions do not help me at all in determining the question one way or the other.

On the other hand instances are not known—in fact they are not uncommon in a certain class of cases of voluntary confessions being absolutely false. If the present confessions were of that character, that is to say, they were voluntarily made, I would be bound to admit them. *Again even if I am perfectly satisfied as to the truth of the confession, but if I doubt its voluntary character, I am bound to exclude it under the law. It is true that a such a rejection amounts to excluding truth from a Court of Justice,* but it cannot be helped."

Thus for a confession to be admissible it must be voluntary. As was stated by Cave, J. in the leading case of R. v. Thompson (1893—2 Q.B. 12, at 15) :

> " To be admissible a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority it is inadmissible. On this point the authorities are unanimous. "

In the case of *Ibrahim v. Emperor,* (1914) A.C. 599, the Privy Council reviewed the case law and stated :

> " It has long been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless if it is shown by the prosecution to have been a voluntary statement, in the sense, that it had not been obtained from him either by fear or prejudice or hope of advantage, exercised or held out by a person in authority. The principle is old as Lord Hale. "

I therefore hold that the extra-judicial confession P21 has not been made voluntarily and it must be rejected.

I am unable to escape from the conclusion that the mind of the learned Judge has been greatly influenced by P21, even though towards the end of his judgment he states, " I do not think it necessary for me to comment on the confession of the first accused marked P21 in the case, as there is independent evidence, which prove the case beyond any reasonable doubt against the first accused. "

However earlier in his reasons the learned Judge has taken into consideration P21 and sought to explain the conflict of P21 with the oral evidence of witnesses Wilfred and Peiris.

The question that I have to decide is whether the learned Judge has properly examined and evaluated the evidence of the witnesses Wilfred and Peiris.

At the outset I shall set out the comments of the learned Judge regarding the evidence of the these two witnesses. They are as follows :

(1) " When P21 is taken into account, there is a conflict in the prosecution version in so far as the evidence of the two witnesses Wilfred and Peiris are concerned. It may be that they did not notice another person, accompanying the first accused or *that they are suppressing from Court an important piece of evidence.*"

(2) "The two guards Wilfred and Peiris in my view did not speak the whole truth and attempted to shield the second accused and Sumanadasa another Assistant Preventive Officer."

(3) "I cannot accept this testimony of these two guards."

It will thus be seen on the Judge's own findings that both these witnesses are not trustworthy, on important matters in the case.

However referring to another part of the evidence of the witness Peiris, the learned Judge says "There is no reason to disbelieve the evidence of the witness Peiris. His evidence stands uncontradicted on material points." I am unable to understand how the learned Judge comes to say this of witness Peiris, who has already been found to suppress important evidence from Court and who did not speak the truth. It is unsafe to act on the evidence of both Wilfred and Peiris.

To say the least, I think a reasonable doubt as to the truth of the prosecution version arises in this case.

Now I come to the third point that an extra-judicial confession of an accused, cannot be used in evidence against his co-accused under section 30 of the Evidence Ordinance. The section reads as follows:

> "When more persons than one are being tried jointly for the same offence, and confession made by one of such persons affecting himself and some other of such person is proved, the Court shall not take into consideration such confession as regards such other persons".

In the case of *Joseph v. Peiris*, 24 N.L.R. 485, the complainant charged the two accused with theft of certain articles. One of the circumstances on which the conviction of the first accused was based was that the second accused made statement to a person in authority, a district engineer, implicating first accused. It was held that the confession made by the second accused, outside Court to the district engineer was inadmissible in evidence against the first accused, in view of the provisions of section 30.

De Sampayo, J. said "I am bound to hold that in view of that provision, the confession made by the second accused to the district engineer was inadmissible and does not furnish any evidence against the first accused."

It is most unfortunate that the learned Magistrate did not consider this aspect of P21. It is quite clear from his judgment that, when he came to consider the case of the second accused he was influenced by P21.

The oral evidence of Wilfred and Peiris even if accepted does not implicate the second accused. They said that when first accused got into the car they did not hear him saying anything to the second accused. There are no proved circumstances from which one draws the irresistible conclusion of the complicity of the second accused.

In the result the appeals of the accused-appellants must succeed.

I accordingly set aside the convictions and sentences of both accused-appellants and acquit them.

These are the reasons that led us to acquit the accused-appellants on the 1st of July, 1977, at the conclusion of the argument of learned Attorneys on both sides.

RATWATTE, J.—I agree.

Appeals allowed.