1941

Present : **Soertsz J.**

THE KING *v.* WEERASAMY *et al.*

56—M. C. Gampola, 2,172.

Statement recorded under section 134 of the Criminal Procedure Code—Commencement of inquiry—Reading over of charge to accused—Right of inquiring Magistrate to record statement—Scope of Criminal Procedure Code, s. 302—Evidence Ordinance, s. 24.

For purposes of section 134 of the Criminal Procedure Code an inquiry does not commence until the charge is read over to the accused.

In a case where all the accused do not appear before the Magistrate simultaneously it is open to the Magistrate to await the appearance of all the accused, not indefinitely but within reasonable limits, before framing charges and in the meantime to take any evidence that may be adduced.

Section 134 does not debar the Magistrate who in due course would hold the inquiry from recording a statement in accordance with its terms.

Section 134 has not been impliedly repealed by the new provisions regarding inquiries in Chapter 16.

Section 302 of the Criminal Procedure Code implies that an accused may make any statement at any stage of the inquiry to the Magistrate, and it requires the Magistrate to take down that statement in the manner provided unless it be a statement prohibited to be taken down as being one made in reply to a charge.

When objection is taken to a statement recorded as being obnoxious to section 24 of the Evidence Ordinance the burden is upon the Crown to establish the relevancy of the confession by leading some evidence to show that it was made voluntarily.

THIS was a case of the Midland Circuit heard before Soertsz J. and a Jury at Colombo.

E. G. P. Jayatilleke, K.C., Attorney-General (with him *R. R. Crossette-Thambiah, C.C.*, and *O. L. de Kretser (Jnr.), C.C.*), for the Crown.

R. L. Pereira, K.C. (with him *J. R. Jayawardene, P. H. W. de Silva,* and *R. N. Ilangakoon*), for first, second, third, fifth, and sixth accused.

B. G. S. David, for the fourth accused.

December 2, 1941. SOERTSZ J.—

The Attorney-General proposes to introduce, in the course of his opening address to the Jury, and at a later stage, to lead evidence of certain statements made by the second, fifth, and sixth accused to the inquiring Magistrate. Counsel for the prisoners object.

I have examined these statements, and I am of opinion that they amount to confessions as defined in section 17, sub-section (2) of the Evidence Ordinance inasmuch as the second accused in his statement admits in clear terms that he took part in the commission of the offence laid in the indictment. While the statements of the fifth and sixth accused, although they are more reticent in regard to the parts they took in the transaction, suggest the inference that the fifth accused and the sixth accused joined in the commission of the offence charged. These confessions were taken down in writing by the Magistrate who later held the inquiry in the Court below and who committed the prisoners for trial by this Court.

The manner in which the Magistrate set about taking these confessions and the certificate or memoranda, appearing at the foot of the records made by him, show clearly that the Magistrate purported to act and did, in fact, act under section 134 of the Criminal Procedure Code.

Counsel for the prisoners object to these confessions mainly on the ground that they were not taken in accordance with law, inasmuch as they must be heid to have been taken after the commencement of the inquiry and not before its commencement, that being one of the conditions for acting under section 134.

(*b*) That they are obnoxious to section 24 of the Evidence Ordinance and, therefore, irrelevant.

There was also some objection that, in a proper view of the matter, section 134 of the Criminal Procedure Code must be taken to have been impliedly repealed by the new provisions regarding inquiries under Chapter 16. A similar argument was addressed to my brother Wijeyewardene in *The King v. Francis Appuhamy* [1]. My brother took the view that there was some force in that argument but said he could not hold that section 134 had been impliedly repealed. For my part I am quite unable to accede to such an argument.

It was again contended that when section 134 was enacted the Legislature contemplated that the statements and confessions it had in view should be recorded by a Magistrate other than the one due to hold the inquiry. To support this reference was made to a note of a case in *Khanna's All-India Criminal Digest, Column 870,* in which it is said that it was held that section 164 of the Indian Code of Criminal Procedure to which our section 154 corresponds, does not apply to the case of confessions taken by the Magistrate who is actually investigating the case, but to a case where some other Magistrate takes the confession and forwards it to the Magistrate due to inquire into or to try the case. A note like this is not always a safe guide as to what a judgment said or did not say. But if the note correctly summarizes the judgment I am unable to agree with it. Section 134 taken as a whole is wide enough to include the inquiring Magistrate. Sub-section (2) does not in my view create any great obstacle to such an interpretation. It provides, perhaps, somewhat inartistically, for the forwarding of statements and confessions taken by a Magistrate other than the inquiring, to the Court of the inquiring Magistrate. Nor can I see any good or sufficient reason for which the Legislature could have intended to debar the Magistrate, who in due course would hold the inquiry, from recording such statements and confessions.

The first question, then, is whether the inquiry into this case had begun at the time these confessions were recorded, namely, on May 15, 1941, when the fifth and sixth accused made their confessions. Mr. Perera contends that the inquiry must be held to have begun on May 10, 1941, in view of sections 148 and 153 of the Criminal Procedure Code. His argument is that this proceeding was one instituted under section 148, and that the case having been reported to the Magistrate as one of culpable homicide, he was required by section 153 of the Code to go to the scene of

[1] *42 N. L. R. 553.*

the offence, and, if the accused were present before him, to proceed to hold the inquiry directed by Chapter 16; and that when the Magistrate went to the scene as he did, and there proceeded to take evidence of a number of witnesses the inquiry began, because the present third and fourth prisoners were then before him. But it seems to me that it is a sufficient answer to that argument to point out that at that time the third and fourth prisoners were not before him as accused but as suspects, and the taking of the evidence the Magistrate took on that occasion must, I think, be regarded as the examination referred to in the concluding part of the first paragraph of section 153. I, therefore, hold that on May 10, 1941, proceedings had commenced under Chapter 15 of the Criminal Procedure Code but the inquiry had not commenced under Chapter 16 inasmuch as there were no accused appearing or brought before him.

Mr. Pereira next contended that, even if that was the position on that day, the matter stood differently on May 13, when the two suspects of May 10 and the first prisoner against whom a warrant had been issued, and a man named Maiappen were produced before the Magistrate described as accused. He says that thereupon, at any rate, occasion arose for the Magistrate to hold a preliminary inquiry under section 153 and to commence that inquiry under section 156 by reading over to the accused the charge or charges in respect of which the inquiry was being held.

The record of the proceedings in the Magistrate's Court shows that, in point of fact, no charge was read to any person till June 6, 1941, but it is contended that nevertheless the inquiry had commenced in that there were four persons present as accused. In other words, the contention is that directly an accused person or persons appears or appear before the Magistrate the inquiry begins whether the charge has been framed or not. For this contention reliance is placed upon the ruling in the case of *King v. Ranhamy.*[1] In that case I had occasion to consider a similar question and held that the inquiry contemplated under section 134 of the Code was the inquiry commencing on the appearance of the accused. There, I was examining the point submitted for consideration that an inquiry must be held to begin when an investigation is set on foot under Chapter 12, or, at least when proceedings commence under Chapter 15; and I held that for the purpose of section 134 an inquiry does not commence before the appearance of the accused. It was not necessary for me in that case to examine the further questions whether an inquiry must be regarded as having commenced directly the accused or any of the accused, where there are several accused, appears or appear without anything more being done. Now that that question has arisen I am of opinion that section 156 of the Criminal Procedure Code enacts that the inquiry under Chapter 16 commences when the charge is read over to the accused. That section enacts that "The Magistrate conducting the preliminary inquiry shall at the commencement of such inquiry read over to the accused the charge or charges in respect of which the inquiry is being held", &c. It does not oblige the Magistrate to read over the charge or

[1] *42 N. L. R. 221.*

charges directly the accused appear. The word "forthwith", not unfamiliar to the framers of the Code, is significantly absent. Cases are easily conceivable in which a Magistrate may not be in a position adequately to frame a charge or charges on the appearance of the accused without taking further evidence, and on a reasonable interpretation of section 156 all that is required is that the Magistrate should read over the charge or charges as early as it may be practicable to do so. There may be instances, and this case affords one such instance, in which all the accused persons do not appear simultaneously before the Magistrate. In such cases it seems to me that it is open to the Magistrate to await the appearance of all the accused not indefinitely, of course, but within reasonable limits before framing charges and in the meantime to take any evidence that may be adduced. All such evidence will, of course, have to be read over to the accused as, and when, they appear to enable them to cross-examine the witnesses who had given evidence in their absence.

In this case, on May 13, 1941, which was the second date on which it was taken up the second accused, for whose arrest a warrant had been issued, did not appear and for that reason, in my opinion, the point of time contemplated by section 155 was not reached. Section 155 says, "When the accused appears". It envisages a case against a single accused. To meet the case of several accused the logical extension of section 155 can legitimately be taken as far as "When the accused appear" meaning all the accused, in virtue of the Interpretation Ordinance, for if it was intended to limit that extension and to fix the crucial point of time as that at which in the case of several accused "any one of them appear," one would expect a definite statement to that effect. I must not be understood to mean that as a hard and fast rule a Magistrate must wait till all the accused appear before he frames a charge. All I say is that he may wait till then in an appropriate case while in another case he may think fit to frame a charge when only some of the accused are before him: But in either case the inquiry contemplated in Chapter 16 begins only after the charge has been read over by the Magistrate.

The next date in the case is May 15, 1941, and on that date the second accused was produced and made his confession. The case was not due to be called on that date and, so, only the second accused was before the Magistrate. That means, again that on that occasion, too, the Magistrate was free to treat the case as one in which the accused were not adequately before him within the meaning of section 155 and, therefore, not even the first condition for the commencement of the inquiry was satisfied, or at least, he was free to treat it as a case in which they were not adequately before him for the purpose of framing a charge under section 156.

The confessions of the fifth and sixth accused were taken on May 16, 1941, in the absence of the other accused, and there was no material change in the state of relevant things on that date.

For these reasons I hold that at the time these confessions were recorded the inquiry contemplated by section 134 had not commenced and that the Magistrate was acting conformably with the law when he took them in the manner in which he did. I would add that even if Mr. Pereira's

contention that the inquiry had commenced, and that for that reason section 134 did not apply, was sound, he would still be enmeshed in section 302 of the Criminal Procedure Code. That section, as I understand it, clearly implies that an accused may make any statement at any stage of the inquiry to the Magistrate and it requires the Magistrate to take down that statement in the manner provided unless, of course, it be a statement prohibited to be taken down as being one made in reply to a charge. Section 302 says " Whenever in the course of any inquiry under Chapter 16 an accused makes a statement to a Magistrate ", &c. The first word is " whenever " not merely " when ", and that, to my mind. implies that but for any expressed prohibition the accused may make a statement at any time.

Mr. Pereira contends that section 302 of the Criminal Procedure Code only provides for the manner in which statements made under Chapter 16 shall be taken down and that the occasions when the accused may make a statement must be found within the other provisions of Chapter 16. I have examined Chapter 16 and the only occasion mentioned in Chapter 16 is the opportunity afforded by section 160. If, therefore, Mr. Pereira's argument is sound the obvious thing for the Legislature to have said was :—" When an accused makes a statement under section 160 " or words to that effect. Mr. Pereira says that that is only a vagary of diction on the part of the Legislature. It seems to me, however, that the Legislature while debarring an accused from requiring a statement made by him in reply to a charge to be taken down, and, while requiring the Magistrate to give him an opportunity to make a statement if he chooses to do so at the close of the case for the prosecution, thought fit to leave it open to an accused to make a statement at any other stage. Indeed, I think it would have been harsh to debar him from such a right for, conceivably, there can be cases in which it would serve the accused to make a statement in the course of an inquiry.

In passing, I would observe that in this view of the matter the Magistrate erred when he refused the application made to him on June 6 to record further statements of the second, fifth, and sixth accused, but that default is of no material consequence at this stage of the case. The resulting position is dilemmatic for Mr. Pereira. If the confessions are not admissible under section 134 of the Criminal Procedure Code read with section 80 of the Evidence Ordinance, they are admissible under sections 302 and 233 of the Criminal Procedure Code. These confessions have been recorded in conformity with the requirements of both section 134 and section 302 of the Criminal Procedure Code.

I, therefore, rule that these confessions are admissible in that way. They may be produced in any manner the Crown elects provided they come from proper custody. It will, of course, be open to the defence to rebut the presumption arising under section 80 of the Evidence Ordinance.

The next objection taken is that these confessions are obnoxious to section 24 of the Evidence Ordinance and, therefore, irrelevant.

As I indicated in the case *King v. Ranhamy*[1], a Magistrate's certificate under section 134 is not decisive of the question whether or not confessions were voluntary. This certificate only vouches the fact that that the confessions *vis-a-vis* the Magistrate were voluntary confessions, but that does not preclude the existence of an earlier taint or some original sin.

I, therefore, rule on this point that the Crown must establish the relevancy of these confessions by leading some evidence to show that they were made voluntarily. I think that section 104 of the Evidence Act puts that burden upon the Crown. If the Crown establishes a prima facie case on that point I shall hear any evidence the prisoners may wish to adduce and any submissions their Counsel may desire to make in regard to that matter.

[S. B. Thoradeniya, Inspector of Police, is called at this stage.]

Mr. Pereira : At this stage the Jury must be here.

Court : If you wish the Magistrate also called on the point I will call him myself.

Mr. Pereira : My submission is that the Jury ought to be here when that part of the evidence is led.

Court : The Jury will be here later. They will be recalled again with regard to what weight the Jury are prepared to attach to the evidence. I am still on the question of admissibility. I think the more satisfactory course is that the Jury should not be here at this stage, as it may be necessary to elicit something in regard to the text of the confessions themselves from the witnesses in order to consider the question whether there were promises, inducements or threats employed. It will be difficult to confine it within the limits, and as such it should be held in the absence of the Jury.

Mr. Pereira : I am entitled to put certain questions which will be of material assistance to my defence when the Jury are present.

Court : I will call the Magistrate for that purpose.

Mr. Pereira : If that is so, I have no questions to put to the Magistrate or the Police.

Court : Still, that does not exempt the Crown from the burden it has to discharge.