GAMINI SUGATHASENA AND ANOTHER

v.

THE STATE

COURT OF APPEAL.
RAMANATHAN, J., W. N. D. PERERA, J. AND A. DE Z. GUNAWARDANA, J.
C.A. 20–21/86 – H. C., ANURADHAPURA 1328.
June 27, 28 & 30, 1988.

Evidence–Evidence Ordinance section 145–Procedure that should be followed in marking contradictions–How to ascertain whether a statement made by an accused is a confession–Innocuous portions of a confession are severable, if they can be led in evidence without creating the impression that a confession has been made–Sections 17(2) and 25 of the Evidence Ordinance.

The two accused in this case were indicted on three charges, 1st count was against both accused for conspiracy, to use as genuine a forged document. The 2nd count was against 1st accused, for using a forged document. The third charge alleged that the 2nd accused abetted the 1st accused in commiting the offence in count 2.

The Trial Judge convicted both accused of the respective charges. In appeal the conviction of both accused were set aside as the evidence available did not establish the identity of the 1st accused beyond reasonable doubt.

Although several contradictions were marked when the accused gave evidence, the proper procedure had not been followed. When a witness is to be contradicted, the proper procedure is set out in section 145 of the Evidence Ordinance. This section contemplates that when a witness is to be contradicted his attention must be first drawn to the fact of having made a previous statement, and thereafter, more specifically, to the parts of the statement which are to be used for the purpose of contradicting him. It is only after that, the actual writing with which the witness was contradicted with, can be proved.

"The test whether a statement is a confession within the meaning of sections 17(2) and 25 of the Evidence Ordinance is an objective one, whether to a mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence in question or which suggested the inference that he 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."

Anandagoda's case – 64 NLR page 73 – this is now considered the settled approach to ascertain whether the statement amounts to a confession or not.

Where innocuous portions of confessional statements are separable from the confessional part of such a statement, without giving the impression that the accused has made a confession then those innocuous portions can be used to contradict the

accused as permitted by law. However, we have to be careful not to offend section 25 of the Evidence Ordinance but at the same time we have to be mindful of not depriving the prosecution of the opportunity to use according to law such relevant and admissible evidence.

Cases referred to:

(1) *Anandagoda v. Queen 64 NLR 73.*
(2) *Regina v. Anandagoda 62 NLR 241, 254.*
(3) *Queen v. Abadda 66 NLR 397.*
(4) *Seyadu v. King 53 NLR 251, 253.*
(5) *Rex v. Vasu (1941) 27 CLW 16.*
(6) *Punchibanda v. The State 76 NLR 293.*

APPEAL from High Court of Anuradhapura.

Dr. Colvin R. de Silva with *Miss Chamantha Weerakoon* for accused-appellant.
N. G. Ameratunga Senior State Counsel for Attorney-General.

Cur. adv. vult.

July 29, 1988.

A. DE Z. GUNAWARDANA, J.

The two accused in this case were indicted in the High Court of Anuradhapura on three charges. The first count, which was against both accused was that they conspired between the 24th day of January 1972 and 25th day of January 1972 to use as genuine a forged document, to wit, cheque No. R 214623 dated 25.1.72 for Rs. 28,000 and that in consequence of the said conspiracy, they committed an offence punishable under section 113 (B) read with sections 459, 456 and 102 of the Penal Code.

The 2nd count was against the 1st accused only. He was charged with having used as genuine a forged document namely, the cheque referred to in count 1 and thereby committed an offence punishable under section 459 and read with section 456 of the Penal Code.

The 3rd charge was against the 2nd accused for having abetted the commission of the offence under count 2 and thereby committed an offence punishable under section 102 read with sections 459 and 456 of the Penal Code.

The case for the prosecution was that on 25.1.72 the 1st accused presented the said cheque No. R 214623 to the cashier Kiribanda

Dissanayake who was at the paying counter of the People's Bank, Anuradhapura, for payment. This cheque which was marked P1 came from cheque book P4, which had been issued to one Thambiappa the holder of the account No. 3471. When the cheque was presented for payment by the 1st accused, the 2nd accused who was working in the said Bank as a stenographer, had come up to the counter and informed the cashier Kiribanda Dissanayake that the person who presented the cheque was known to him and to cash the cheque soon. The cheque that was presented by the 1st accused had been endorsed for payment by the ledger clerk and the manager having placed the relevant seals. As the cashier Dissanayake did not have sufficient cash at the counter he called for and obtained additional money from the manager. Thereafter, having obtained the signature of the person who tendered the cheque, he paid the sum of Rs. 28,000 due on the cheque in the currency notes of the following denominations:

Rs. 1000 in Rs. 100 notes,
Rs. 2000 in Rs. 50 notes and
Rs. 25,000 in Rs. 10 notes.

Before going for lunch Dissanayake balanced the account and handed over the relevant documents to the ledger clerk. The ledger clerk having checked the relevant documents had found that there were no funds in account No. 3560 on which the cheque P1 was drawn, to have paid Rs. 28,000 and had informed the ledger officer of this fact and the ledger officer had in turn informed the then manager Herbert Rodrigo. The said Manager Rodrigo is now deceased. The manager had caused an immediate investigation and had informed the Head Office of the People's Bank in Colombo.

One Lucian Fernando, an officer who investigates into such frauds had been sent from Colombo to make the necessary inquiries. On the following day at about 5 p.m. the manager had made a complaint to the police. The police having commenced investigations had taken into custody the cashier Dissanayake, who paid the money on the cheque and the 2nd accused. The 2nd accused had made two statements to the police. His second statement was made on 28.1.72 at about 9 a.m. As a consequence of the said second statement police visited Paramount Hotel in Anuradhapura town and took into their custody a travelling bag P5 which was with witness Gunapala. According to

Gunapala the 2nd accused had given this bag to him to be kept by him as it contained some old clothes. When the bag was opened in the presence of the police officers there was found in it Rs. 14,000 in Rs. 10 notes. The prosecution relied on the denomination of the notes to identify the cash. This cash is marked P2. On further disclosures made by the 2nd accused in his statement, the said Lucian Fernando, Kiribanda Dissanayake the cashier, and the 2nd accused, with some police officers and I.P. Sarap had gone to Kirindiwela in search of the 1st accused. On their way to Kirindiwela they had sought the assistance of I.P. Thahir of Gampaha Police to locate the house of the 1st accused. He had arrived at the first accused's house at about 2 a.m. When they knocked at the front door of the 1st accused's house the 1st accused himself opened the door. I.P. Thahir and the 2nd accused, according to I.P. Sarap, identified the 1st accused. The police thereafter brought the 1st accused to Anuradhapura and his statement was recorded. As a consequence of his statement I.P. Sarap had gone back to the house of the 1st accused at Kirindiwela and had recovered a sum of Rs. 5000 in Rs. 10 notes wrapped in a cellophane bag and buried in a betel enclosure. Here too, the prosecution relied on the denomination of the notes to identify the cash. This money was produced marked P3. Cashier Dissanayake who had travelled along with the other officers to the 1st accused's house on the 1st occasion had not been able to identify the 1st accused immediately but had done so only on the following day. Witness Premachandra who was also a cashier at the Bank on the relevant date, had identified the 1st accused as the person who presented the cheque P1 for payment at first to him on 25.1.72, when he directed him to cashier Dissanayake.

Both accused have given evidence and denied the charges against them. They have taken up the position that these are false allegations brought against them as a result of the said Lucian Fernando conspiring with the police to falsely implicate them in a criminal charge.

Counsel for the appellant submitted that the identification of the 1st accused has not been properly established and that the evidence available does not prove the identity of the 1st accused beyond reasonable doubt. There is much merit in this submission. According to the main prosecution witness Kiribanda Dissanayake, he was taken to the house of the 1st accused at Kirindiwela on the night of the 28th

of January, 1972. However, he failed to identify the 1st accused at his home. The 1st accused and witness Dissanayake travelled back to Anuradhapura in the same vehicle. It was only after they came back to Anuradhapura that he identified the 1st accused. Witness Dissanayake states that he could not identify the 1st accused at first, because he had a moustache at the time he presented the cheque for payment, and at the time of the arrest that moustache had been shaved. This is the explanation he has given for his failure to identify the 1st accused when he saw him at his house. It is seen from the evidence that the 1st accused and the witness Dissanayake have been travelling together for at least 10 or 12 hours in the same vehicle. The counsel also submitted that the 2nd accused, the police officers and the bank officials who were travelling along with them would have discussed the case while they were travelling. Furthermore according to the accused they were questioned while they were travelling in the vehicle. All these conversations could undoubtedly have prompted the subsequent identification of the 1st accused by witness Dissanayake. Thereafter, the value that can be attached to his identification is diminished.

The other witness who identified the 1st accused is U. Premachandra who was the cashier at the People's Bank, Anuradhapura on the relevant day. It was in fact Premachandra who directed the 1st accused to cashier Dissanayake when the 1st accused first presented the cheque for payment to Premachandra. Premachandra had seen the 1st accused for the first time when the cheque was presented to him and it is questionable whether he had sufficient opportunity to make adequate observations regarding the identity of the 1st accused to recognise him when seen subsequently. Furthermore, Premachandra had in fact identified the 1st accused when he was produced in the Magistrate's Court after about one week of the incident. Counsel submitted that not much credence could be placed for this dock identification. In the circumstances of this case it would have been prudent for the investigators to have presented the 1st accused for an identification parade. Unfortunately this has not been done. Hence the identification by Premachandra is greatly reduced in value.

The denomination of the notes of the cash recovered from the accused was suggested as a pointer to the identity of the accused. But currency being an item available to anybody, we are of the view that, that alone is an equivocal factor.

This being the evidence of identification available against the 1st accused, we are inclined to the view that such evidence is not satisfactory, and that there is no proof beyond reasonable doubt in regard to his identification.

The resulting position is that count 1 which is a charge of conspiracy will fail against 1st accused. When the 1st accused goes out on count 1, the 2nd accused will also be entitled to an acquittal because it is impossible for only one person to commit the offence of conspiracy.

Count 2 being a charge against 1st accused for using as genuine a forged document also fails when identity of the 1st accused is not established. In this regard it must be noted here that the prosecution has alleged in that charge that the 1st accused knew that the cheque had not been signed by L. B. Karunaratne or by his authority. L. B. Karunaratne was not called as a witness nor was the endorsement on the cheque sent to the Examiner of Questioned Documents for his opinion as to the genuineness of the endorsement on the cheque. Therefore there is a lacuna in the prosecution case, in their failure to prove this ingredient. Perhaps, it would have been pertinent for the investigators to have sent the handwriting of the 1st accused to the Examiner of Questioned Documents for examination along with the endorsement on the cheque P1. If the Examiner of Questioned Documents identified the endorsement as the writing of the 1st accused that could have buttressed the prosecution case. However, as the investigators have failed to take this obvious step, in addition to the fact that the identity of the 1st accused had not been established beyond reasonable doubt, would render the evidence available against the 1st accused insufficient to sustain a conviction on count 2. Therefore we are of the view that 1st accused should be acquitted on count 2 also.

This leaves us with count 3 which is a charge of abetment against 2nd accused. In count 3 the 2nd accused is charged with having abetted the 1st accused in the commission of the offence in count. 2. The allegation specifically here is that the 2nd accused abetted the 1st accused, and not a person unknown to the prosecution. As the prosecution failed to identify the 1st accused as the person who committed the offence alleged in count 2, then the question of abetting the 1st accused does not arise. Therefore the 2nd accused would be entitled to an acquittal on count 3.

Although the criminal proceedings initiated against the accused in this case are thus logically terminated, yet we are of the view that the two questions regarding the reception of evidence raised by the Counsel of the accused appellants merits our consideration.

Firstly, learned Counsel for the appellants admitted that although several contradictions were marked when the accused gave evidence, the proper procedure had not been followed. When a witness is to be contradicted the proper procedure is set out in section 145 of the Evidence Ordinance. This section contemplates that when a witness is to be contradicted his attention must be first drawn to the fact of having made a previous statement and thereafter, more specifically, to the parts of the statement which are to be used for the purpose of contradicting him. It is only after that, the actual writing from which the witness was contradicted with, can be proved. It has not been done in this case. The attention of the witness had not been drawn to the portions of his statement, through which he was sought to be contradicted. This procedure is irregular. In the present case when the 1st accused was in the witness box, contradictions marked P7 and P8 have been marked without specifically drawing his attention to the portions of his previous statements. It becomes more incumbent to do so in this case, when the position of both accused was that they had not made any statements to the police. In the case of the 2nd accused, only in respect of contradiction marked P11 was his attention drawn to the portion of the recorded statement. The contradictions P12 and P13 have beeen marked without specifically drawing his attention to his written statement. In our view the procedure adopted by the prosecutor in this case is irregular.

Secondly it was contended by the learned counsel for the appellants that the portions marked and produced in this case were from confessional statements of the accused appellants. He submitted that it is not permissible to extract parts of a confessional statement and use them to contradict the accused. His view was that when a statement contains a confession the whole of that statement is excluded and cannot even be used to contradict. He further submitted that the prohibition enunciated in section 25 of the Evidence Ordinance is applicable to the whole of that statement.

At the outset we propose to examine the contradictions marked in this case carefully to see whether they come within the definition of a

confession as contained in section 17(2) of the Evidence Ordinance. Section 17(2) of the Evidence Ordinance states;

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

In construing this section it is now settled law as set out in the Privy Council decision in *Anandagoda's case* (1).

"The test whether a statement is a confession within the meaning of sections 17(2) and 25 of the Evidence Ordinance is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence in question or which suggested the inference that he 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. 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 though the accused at the same time protests his innocence."

This is now considered the settled approach to ascertain whether a statement amounts to a confession or not. Further more, in *Anandagoda's case*(2) itself, when it earlier came up before the Court of Criminal Appeal as reported in 62 N.L.R. page 241 at 254, Justice H.N.G. Fernando held that:

> "If then each of the admissions of the appellant, considered by itself, was relevant and admissible, all taken together were equally admissible."

We will now apply the above criteria, to the contradictions marked in this case to ascertain whether they would fall within the provisions of section 17(2) of the Evidence Ordinance.

The Following are the contradictions marked from the statments of the 1st accused.

The first contradiction marked as P7 from the statement of the 1st accused stated that he knew the 2nd accused Somapala Perera. The 2nd contradiction marked P8 is a portion of the statement which stated that the 2nd accused had sent a letter on 22.02.72 to the 1st accused asking him to come and meet the 2nd accused at Anuradhapura. P9 is the 3rd contradiction from the statement of 1st accused in which the 1st accused had said that he came in the Yaldevi train on 23.01.72 to Anuradhapura at 8.30 p.m. and met the 2nd accused Somapala. P10 is the 4th portion of the statement of the 1st accused in which he stated that the 1st and 2nd accused met at Paramount Hotel. There were 3 contradictions marked from the statement of the 2nd accused, 1st contradiction which was marked as P11 stated that the 2nd accused had said in his 2nd statement that the 1st statement he made is false. The 2nd contradiction which is marked P12 is that the 2nd accused had stated that he knew Kirindiwela Sugathasena, the 1st accused. In the portion marked P13 the 2nd accused had stated that on 24.01.72 at 9.30 p.m. he met Sugathasena the 1st accused. On a careful examination of these statements individually, it is clear that they do not state or suggest the inference that the accused committed the alleged offences. On the other hand these statements taken collectively also do not in our view amount to a confession. Therefore in our view these statments would be admissible and would not offend the provisions of section 25.

It was contended by the learned Counsel for the appellants that even if the portions of the statements produced in this case do not state or suggest the inference that the accused committed this offence these poritons were not admissible in evidence because they are not severable from the confessionary parts of the statments. He cited in support of his argument, the case of *Queen v. R. D. Abadda* (3). In this case Chief Justice Basnayake took the view that;

> "The expression confession in the context is not confined to the incriminating words. It includes the entire statement of which those words are a part. It is not open to the prosecution to take out of their context what appear, when taken by themselves, to be innocuous sentences and then seek to prove them as admissions."

This would mean that if the statement contains a confession the whole of that statement will not be admissible in evidence, including the parts which do not state or suggest the inference that the accused has committed an offence and are separable.

The learned Senior State Counsel drew our attention to a different view taken by Justice Gratiaen in the case of *Seyadu v. King* reported in 53 N.L.R. page 261 at page 253 where he stated that—

> "We do not doubt that if, in the course of making a 'Confession' to a police officer an accused person makes certain additional statements which do not fall within the ambit of section 25 the reception in evidence of those latter statements would not be objectionable provided (*a*) that they are otherwise relevant and admissible, *Rex v. Vasu* (5) and (*b*) that in the context in which the statements relied on were made, they are demonstrably separable from those parts which were confessional in character, so that their contents may be made known without indirectly revealing the confessional character of the remaining parts. This latter test should be cautiously applied and if the court be left pin doubt as to whether the 'confessional' and 'non confessional' statements to the police officer can reasonably be described as independent of one another, the 'non confessional' evidence should also be rejected."

When we apply the test set out above to the statements sought to be admitted in this case, it is clear that those contradictions are relevant and admissible and that they are demonstrably severable and could be led in evidence without creating an impression that a confession had been made. Therefore in our view those portions of the statements have been properly admitted.

There appears to be a line of authorities supporting this view. In the case of *Rex v. Vasu*—referred to above, similar objection was taken on the basis that certain statements put to the accused came from confessional statements made to a police officer. In dealing with the objection, Howard, C.J. said:

> "It is true that certain statements made by the applicant to a police officer were put in evidence and that those statements were made at the same time as an alleged confession. The statements which were put in did not in any way amount to a confession and were properly admissible in evidence."

In the case of *Punchibanda v. State* (6) G.P.A. Silva SPJ stated at page 302 that;

> "The crux of the matter seems to be not that a completely innocuous portion of a statement made by an accused to the police in the course of a confessional statement cannot be proved, but that if the portion of the statement with which the accused is sought to be contradicted in any way suggest the inference that he committed the offence, such portion cannot be proved."

Prof. G. L. Peiris has expressed the opinion that, "The better view is that severance is permissible" and has adopted the test set out in the case of *Rex v. Seyadu.* (See The Admissibility of Confessions in Criminal Proceedings: A Comparative Analysis of the Law of South Africa and Sri Lanka, Vol. 97. The South African Law Journal, page 432 at 641.)

Having considered the above authorities we are inclined to the view, that in a confessional statement made by an accused person, where innocuous portions of such a statements are seperable from the confessional part of such a statement, then those innocuous portions can be used to contradict the accused as permitted by law. In applying the aforesaid test to ascertain which parts of a confessional statement are admissible we have to be careful not to offend the protection given to an accused under section 25 of the Evidence Ordinance, but at the same time we have to be mindful of not depriving the prosecution of the opportunity, to use according to law, the relevant and admissible evidence, which can further the ends of justice. If, however, there is a doubt regarding the severability of such a portion of a statement without creating an impression on the jury that the accused had made a confession, then such doubt should always be resolved in favour of the accused, and the whole of such statement should be excluded.

In view of the unsatisfactory nature of the evidence in regard to the identity of the 1st accused and the resulting consequences as set out in our reasons above, we quash the convictions of both accused and acquit them.

RAMANATHAN, J.—I agree.

W. N. D. PERERA, J.—I agree.

Conviction quashed.
Both accused acquitted.