COURT OF CRIMINAL APPEAL

1948 *Present :* **Jayetileke S.P.J. (President), Canekeratne and Gratiaen JJ.**

THE KING *v.* SATHASIVAM

APPEAL No. 72 OF 1948

S. C. 8—M. C. Jaffna, 10,091

Court of Criminal Appeal—Charge of murder—Confession of accused—Jury may believe part and disbelieve rest.

Where an accused makes a statement, part of which incriminates him while part is exculpatory, the whole confession must be taken and it is open to the jury to attach different degrees of credit to the different parts.

[1] (*1919*) *6 Ceylon Weekly Reporter 89 at 91.*

APPEAL from a conviction in a trial before a Judge and Jury.

S. Sharvananda, with *A. Jayasuriya* and *G. A. Thavathuray*, for the appellant.

J. A. P. Cherubim, Crown Counsel, for the Crown.

Cur. adv. vult.

September 24, 1948. JAYETILEKE S.P.J.—

The appellant was convicted at the Jaffna Assizes on August 25, 1948, of murder and was sentenced to death.

The deceased was the wife of one Kandiah, a dhoby, who washed for the appellant and the members of his family. The prosecution led evidence to prove that the appellant went to Kandiah's house on the morning of the tragedy with a message from his mother requesting the deceased to come for her wages, and the deceased went with the appellant. A little later one Ponniah, a boutique-keeper, went into a palmyrah grove hearing cries of murder and saw the appellant running away from it and the deceased lying fallen in a dying condition. The prosecution proved further a confession made by the appellant to one Suppiahpillai that he had killed a woman, and another confession (P9) made by him to the magistrate. In P9 the appellant has stated that two or three days before the tragedy the deceased abused him for not paying a sum of Rs. 2 which he owed her, and attempted to strike him with an ekel broom. On the day of the tragedy he met the deceased when he went to cut palmyrah leaves, and the deceased abused him again. He then lost his temper and stabbed the deceased. The prosecution led evidence to prove that there was no quarrel between the deceased and the appellant two or three days before the tragedy, but it was unable to lead any evidence as to the circumstances under which the appellant inflicted injuries on the deceased.

The presiding Judge in his charge to the jury pointed out that there was no motive for the crime and invited the jury to consider whether the circumstances under which the appellant inflicted the injuries were such as to reduce the offence from one of murder to culpable homicide not amounting to murder. He said :—

> " Once the Crown has discharged the burden, then *prima facie* it will be a case of murder. Then you will go on to consider, on all the evidence, that these blows were delivered upon grave and sudden provocation while the accused was deprived of his power of self-control. And you will bear in mind that the only evidence as to the circumstances in which they were delivered, is his confession to the Magistrate. But, of course, it is open to you, if you feel like that, to find that that confession was a fabrication, and you will bear in mind the evidence of Kandiah, who certainly contradicts some of the earlier parts of that confession. Of course, nobody was in a position to contradict the part which immediately dealt with the offence."

At the argument before us two points were taken by Counsel for the appellant—

(1) That the Court was bound to accept the confession (P9) as a whole and that it could not reject a part of it as inherently incredible.

(2) That the verdict of the jury is unreasonable.

On the first point Counsel relied on a judgment of a Divisional Bench in *Balmakund v. Emperor*[1] in which it was held that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. We are of opinion that this judgment does not apply to the facts of this case because there is evidence which, if accepted by the jury, would show that a portion of the exculpatory element in P9 is false. Even if it does apply, we are of opinion that we should not follow it because it seems to us that it is wrong in principle. The learned Judges have based their decision on *Rex v. Jones*[2] in which it was held that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true. This principle has not been accepted in two later decisions which were cited to us in the argument. They are *R. v. Higgins*[3] and *R. v. Clewes*[4].

In *R. v. Higgins* the prisoner was charged with larceny in stealing two yards of woollen cloth. It appears that the prosecutor was at an inn at Berkeley, and that, having the piece of cloth with him, he left it on a chair in one of the rooms in the inn while he went out, and that, on his return, he missed the cloth. It was proved that about four hours after the loss of the cloth the prisoner sold it at a place about 8 miles distant from Berkeley. The prosecution read as evidence the statement made by the prisoner before the Magistrate. In it the prisoner said "that the cloth was honestly bought and paid for". In summing up Parke J. said—

> "In this case the prosecutor has given evidence of what the prisoner said before the Magistrate. Now, what a prisoner says is not evidence, unless the prosecutor choose to make it so, by using it as part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it. If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if from his selling the cloth so very soon after it was lost and that, too, at a distance of eight miles, you feel satisfied that the statement of his buying it is all false, then you must find him guilty."

In *R. v. Clewes* a confession made by the prisoner was read in evidence by the prosecution. In the course of his summing up Littledale J. said—

> "If a prisoner, charged with murder, says in a confession which is read in evidence against, that he was present at the murder, but

[1] *A. I. R. (1931) Allahabad at p1.*
[2] *(1827) 2 C. and P. 629.*
[3] *(1929) 3 C. and P. 603.*
[4] *(1930) 4 C. and P. 221.*

took no part in the commission of it, this is evidence for him as well as against him ; but the Judge will not direct an acquittal as the jury may believe one part of the confession, and disbelieve another."

Archbold[1] says that the better opinion is that expressed in *R. v. Higgins* and *R. v. Clewes*. Phipson[2] takes the same view. He says that the whole confession must, in general, be taken even though containing matter favourable to the prisoner though the jury may attach different degrees of credit to the different points.

On the second point we are unable to say that the verdict of the jury is unreasonable. The burden of proving the existence of circumstances which would bring the case within exception 1 to section 296 of the Penal Code was upon the appellant, and the jury were obviously not satisfied with the evidence adduced by him. They may not have believed that there was any provocation or they may have thought that the alleged provocation was not grave. We would, accordingly, dismiss the appeal and the application.

Appeal dimissed.