[IN THE COURT OF CRIMINAL APPEAL]

1964 *Present:* **Basnayake, C.J. (President), Herat, J., and Abeyesundere, J.**

THE QUEEN *v.* H. MARTIN SINGHO

APPEAL NO. 49 OF 1963, WITH APPLICATION NO. 50

S. C. 121/62—M. C. Colombo, 7343/B

Confession recorded by Magistrate—Voluntary nature of such statement—Question of fact for jury to decide—Criminal Procedure Code, ss. 134. 244 (1) (c), 245 (c)—Evidence Ordinance, ss. 21, 24, 25, 26—Summing-up—Duty of Judge not to refer to any evidence given in absence of jury.

The question whether a confession recorded by a Magistrate in terms of section 134 of the Criminal Procedure Code was in truth voluntarily made is a question of fact for the jury to decide. The fact that the trial Judge has to determine that very question of fact before he permits the evidence of the confession to be given does not entitle him to withdraw that question from the jury.

The Judge is not entitled to refer in his summing-up to statements made to him by an accused person in the course of a preliminary inquiry held in the absence of the jury. The jury are not free to act on evidence not given before them.

APPEAL against a conviction in a trial before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva*, *P. O. Wimalanaga* and *K. Charavanamuttu* (assigned), for Accused-Appellant.

S. S. Wijesinha, Crown Counsel, for Attorney-General.

Cur. adv. vult.

July 27, 1963. BASNAYAKE, C.J.—

The accused in this case has been indicted with the offence of murder and by a verdict of five to two found guilty and sentenced to death.

The oral testimony at the trial established the fact that the accused was not at the scene of the murder on the night of the alleged offence, and the learned Commissioner directed the jury thus :

" ....So you are left in the unfortunate position of having all the witnesses who testified before you as persons whom you may consider as unworthy of credit. If that is the view you take, in so far as oral testimony is concerned on relevant circumstances, there is no reliable evidence."

Learned counsel made no complaint against that part of the direction, but he submitted that the learned Commissioner in directing the jury to accept as evidence against the accused a statement made by him to the Magistrate under section 134 of the Criminal Procedure Code withdrew from the jury the question whether it was voluntarily made or not, and he said—

> " The question whether this statement is a competent statement, is a voluntary statement, to be put before you in evidence is a matter that I have to decide and you will recall that I decided that when you were away from the jury box. The question of competency and the voluntary nature of the statement made by the accused was decided by me and the statement was put to you, but that does not absolve you from certain duties in regard to this statement."

Then he went on to refer to certain matters deposed to by the Magistrate as to the manner in which the statement was recorded and the precautions that were taken in recording it, and said—

> " All that procedure was gone through in order that you may take cognizance of the facts that were deposed to and any other fact which was given in evidence before you in order to decide what is your duty in this case, namely, what weight can we place on the contents of this document. Is it a truthful document, the truth being not that he made the statement but that what he deposed thereto is in fact the truth ? This matter you will have to decide. In order to decide that you will have to take all the evidence led in this Court bearing upon this matter."

A statement recorded under section 134 of the Criminal Procedure Code does not become admissible in evidence merely because it is recorded by the Magistrate under that section. To be admitted as evidence it must be relevant under the Evidence Ordinance. A confession being a species of the genus admission, is relevant and may, under section 21 of the Evidence Ordinance, be proved against the person who makes it, unless it is a confession which is barred by sections 24, 25 and 26 of that Ordinance. Under section 134 a Magistrate may record statements made not only by accused persons but by others. He may record statements which are confessions and statements which are not. But a condition precedent to the recording of a statement which is a confession is that upon questioning the person making it he must have reason to believe that it is made voluntarily. If he does not believe that it is voluntarily made, he is forbidden to record it. If he has reason to believe that it is voluntarily made, he is bound to record it and append the prescribed certificate. That certificate is conclusive of the fact that the Magistrate had reason to believe that the confession was voluntarily made, but it is not conclusive of the fact that it was in truth voluntarily made. That fact has to be determined at the trial when it is sought to prove the confession in evidence. In such a case the burden is on

the prosecution to prove beyond reasonable doubt (*Stuart v. The Queen*[1]) facts necessary to make the confession not irrelevant under section 24. Now that is the point at which the question of "voluntariness" has to be determined. The word "voluntary" is not a satisfactory expression in this connexion, because at the trial the question for decision is whether the confession is obnoxious to section 24 of the Evidence Ordinance which does not use the word "voluntary". The Latin expression "*sua sponte*" would better satisfy the requirements of that section. It reads—

> "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 proceedings against him."

In discussing the corresponding Indian section the Privy Council observed—

> "A statement made under section 164, Criminal Procedure Code, can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement." [(1949) A.I.R. (P.C.) 257 at 259].

The jury being the Judges of fact and it being their duty to decide all questions which according to law are to be deemed questions of fact [sec. 245 (*c*) Criminal Procedure Code], all the questions of fact stated in the section have to be decided by the jury and it is only if they resolve them against the accused that they can act on a confession recorded under section 134 and which the prosecution has been permitted by the trial Judge to produce in evidence. No doubt the trial Judge too has to determine those very questions of fact before he permits evidence of the confession to be given ; [S. 244 (1) (*c*) *ibid*] but that does not bind the jury and they are free to form their own conclusion.

In the absence of the jury the accused gave evidence and described the acts of violence committed on him by the police to compel him to make a statement and the promises made to him to induce him to do so. He also called other evidence in support of his testimony. The learned Commissioner disbelieved the evidence of the accused and his witnesses and allowed the prosecution to prove the statement, and withdrew from the jury the questions of fact they were bound to consider and come to a decision before acting on the confession.

[1] *101 Commonwealth L. R. I.*

A further complaint of learned counsel is that the learned Commissioner in the course of his summing-up referred to statements made by the accused in the absence of the jury. Clearly the learned Commissioner was not entitled to refer in his summing-up to statements made by an accused person in the course of what was a preliminary inquiry by the Commissioner. The jury are not free to act on evidence not given before them, and the learned Commissioner did wrong in referring to the statements made by the accused in the absence of the jury.

The absence of evidence to support the conviction, the withdrawal of the decision of the fact whether the confession was made " *sua sponte* ", and the reference by the learned Commissioner to evidence not given before the jury vitiate the conviction. We accordingly quash it and direct that a judgment of acquittal be entered.

Before we part with this judgment we wish to point out that the circumstances which lead up to an accused person's appearance before a Magistrate to make a confession are no less important than the circumstances surrounding the actual making of it. We say so, because it is often the practice to confine the inquiry at the trial to the circumstances surrounding the actual making of the confession and not to the circumstances which led up to an accused person's appearance before the Magistrate.

Accused acquitted.