[COURT OF CRIMINAL APPEAL.]

1947 *Present:* **Howard C.J. (President), Wijeyewardene and Jayetileke J.J.**

THE KING *v.* EDWIN *et al.*

APPLICATIONS 102-104

*S. C. 3—M. C. Gampaha, 30,237*

*Confession—Charge of murder—Confessions by some accused—Extenuating circumstances disclosed in confession—No evidence given by accused—Confessions admissible to prove the extenuating circumstances—Applicability of English law—Evidence Ordinance, ss. 21 and 17 (2).*

Where the prosecution seeks to lead in evidence a confession made by an accused, the whole confession must be taken even though it contains matter favourable to the accused. The Jury may, however, attach different degrees of credit to the different parts. The principles of the English law are not inconsistent with the provisions of sections 17 (2) and 21 of the Evidence Ordinance.

APPLICATIONS for leave to appeal against three convictions in a trial before a Judge and Jury.

*U. P. Weerasinghe* (with him *A. P. de Zoysa, E. A. G. de Silva* and *C. Jayawickrema*), for the first accused.

*E. A. G. de Silva,* for the second accused.

*H. V. Perera, K.C.* (with him *Nihal Gunasekera* and *E. A. G. de Silva*), for the third accused.

*M. F. S. Pulle, Acting Solicitor-General* (with him *H. Deheragoda, C.C.*), for the Crown.

*Cur. adv. vult.*

July 7, 1947. HOWARD C.J.—

In this case the first and second accused were convicted of the offence of murder and the third accused of abetment of the first and second accused in the commission of that offence. The conviction of the first and second accused rests on confessions made by them to the Magistrate. In those confessions they admitted that they assaulted the deceased, but at the same time they gave details of the circumstances in which the assault took place. If the Jury believed that the assault took place in such circumstances there was a possibility that they might have considered that the offence did not amount to murder, but to culpable homicide not amounting to murder. The first and second accused in their confessions stated that they committed the assault on the deceased at the request of E. de S. Wijeratne, one of the witnesses called by the Crown It has been contended by Counsel for the first and second accused that the conviction for murder cannot stand as the learned Judge has failed to direct the mind of the Jury to the fact that if the circumstances in which the assault took place were as stated by the

first and second accused in their confessions, they might come to the conclusion that the assault was committed under grave and sudden provocation and the offence amounted not to murder, but to culpable homicide not amounting to murder. The Acting Solicitor-General, Mr. Pulle, has argued that, although the first and second accused in their confessions have related the circumstances in which the assault took place, the confessions cannot be employed by the accused to prove such circumstances. The Crown can prove from the confessions the fact of the assault on the deceased but the accused on the other hand cannot by reason of the provisions of section 21 of the Evidence Ordinance call in aid in their defence the confessions. It would have been different if the first and second accused had testified in the witness box as to the circumstances in which the assault took place. This they did not do, the second accused remaining silent while the first accused made a statement from the dock disclaiming any participation in the assault. Mr. Pulle has also contended that as the first and second accused have confessed to the fact that at the request of Wijeratne they went to Mahara, Nugegoda, with the intention of assaulting the deceased, they cannot be heard to say that the assault took place only after they had been provoked. We do not consider there is any force in this last contention. If the whole of the confessions were admissible in evidence the first and second accused were entitled to ask the Jury to say that the circumstances were such as to reduce the gravity of the offence. No doubt it would be open to the Jury to consider whether the circumstances in which the first and second accused proceeded to the scene of the assault precluded any question of such assault taking place as the result of grave and sudden provocation.

In support of his argument that the confessions were admissible in evidence to prove the circumstances in which the assault took place Counsel for the first and second accused have referred us to Archbold 31st edition, p. 377 and the 8th edition of Phipson on Evidence, pp. 253-254. The latter authority states 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 parts. We were also referred to the cases of *R. v. Clewes*[1] and *R. v. Jones*[2] In *R. v. Jones,* Bosanquet, Serjeant, who was trying the case with a Jury stated as follows:—

> "There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the Jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory to another".

[1] *(1834) 172 E. R. 678.*

[2] *(172) E. R. 285.*

The same principle was formulated in *R. v. Clewes* by Littledale J. who at p. 681 stated as follows :—

> "With respect to the prisoner's confession, I think you must take it altogether; and by that it appears, that though the prisoner was present, he did not act in the murder of Richard Hastings; and if it is to be said that the prisoner did more than is stated in his confession, there should be some evidence of that, which is not to be found in this case."

It has been urged by Mr. Pulle that, having regard to the statutory provisions of our law, namely, sections 17 (2) and 21 of the Evidence Ordinance, the English decisions to which I have referred are not relevant. A definition of a confession is to be found at p. 248 of Phipson. There it is stated as follows :—

> Stephen states that "a confession is an admission made *at any time* by a person charged with a crime, stating, or suggesting the inference, that he committed the crime."

These words are reproduced in section 17 (2) of the Ceylon Evidence Ordinance (Cap. 11). Moreover section 21 of the same Ordinance relating to self-serving evidence sets out the English Law. This will be seen from a perusal of Chapter XVII of Phipson. The principles of English law to which reference has been made would therefore seem to be applicable. The fact that the burden of proving that an accused person comes within one of the exceptions to section 294 of the Penal Code is cast on such person would not preclude the application of this principle.

It now becomes relevant to consider whether the learned Judge has put the issue as to whether the confessions of the first and second accused taken as a whole and in conjunction with the other evidence in the case have established the fact that, when they assaulted the deceased, they were acting under grave and sudden provocation. The learned Judge seems throughout his summing-up to have been of the impression that the deceased man was sleeping. There is, however, no evidnce that he was struck when he was asleep. The doctor's evidence is that he was probably lying down. At pp. 11-12 the learned Judge states as follows :—

> "I said then, and I tell you now, that I do not propose to leave the question of grievous hurt to you. If I am wrong I will be set right. It would be a case of misdirection on my part in a case of this kind where, if you accept the facts, a sleeping man is struck down with heavy instruments, to suggest to you the possibility of a verdict of grievous hurt, and I do not propose to leave it to you. So, gentlemen, with regard to the first and second accused there are three verdicts open to you according to the facts; guilty of murder according to the intention—murderous intention. If you negative that, then there is the question of culpable homicide not amounting to murder if they had knowledge that their act was likely to cause death, and lastly not guilty if you are not satisfied beyond reasonable doubt that the first and second accused did this."

There is no mention of a verdict of culpable homicide not amounting to murder by reason of the fact that the assault was committed after grave and sudden provocation.

Again on page 30 the learned Judge states that the doctor's evidence is that the deceased was struck down while he was asleep. On p. 31 also there is a reference to the deceased being asleep. On p. 34 are passages about the shifting of the burden of proof and on pp. 36-37 it is stated as follows :—

> "If a person kills another when he is labouring under grave and sudden provocation given by the deceased man in hot blood then what otherwise would be murder would be reduced to culpable homicide not amounting to murder. Again the burden of proving that is on the accused. That is to establish that by a preponderance of probability or on the balance of evidence. What is the provocation ? The provocation must be grave and it must be sudden. Is there any provocation which is grave and sudden which justified anybody from taking firewood sticks or heavy rice pounders and hitting the man and killing him? The Crown submits that that defence has not been established. Then the only other thing I can think of is killing in a sudden fight without premeditation. People fall to fighting and one man kills the other in hot blood. There the law taking the infirmities of human nature into consideration says that in a case like that the offence is reduced from murder to culpable homicide not amounting to murder. Well, was there a sudden fight? On their own showing each man says the deceased was sitting on his bed. How can there be a fight when one man is sitting on his bed? Well, that is the case against the first and second accused. I do not propose to come back to the case of the 1st and 2nd accused except at the end of my summing up when I shall recapitulate briefly the evidence."

Until pp. 94-95 are reached the cases of the first and second accused do not receive any further consideration in the charge. On these pages the case against them is summed up as follows :—

> "Well, gentlemen, I have done. You have got the cases against the 1st and 2nd accused. The possible verdicts are the 1st and 2nd accused are not guilty, if you are of opinion that they were acting in self-defence and did not exceed the right of self-defence by using more force than was necessary. I have pointed out to you that there is nothing on the evidence on which a foundation for the self-defence could be raised. You will acquit them also if you for some reason reject the statements X 1 and X 2. It is my duty to point out to you that X 1 and X 2 have not been attacked and that the 1st and 2nd accused could have given evidence but they have not. They will be guilty of murder if you find that they caused the death of the deceased by doing an act with the intention of causing death or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death.
>
> If you are prepared to absolve them of that murderous intention you will consider the question of knowledge. If they caused the death

of the deceased by doing an act with the knowledge that their act was likely to cause death then the offence would be not murder but culpable homicide not amounting to murder.

The prosecution submits to you that to strike a sleeping man with a heavy weapon splintering his skull to fragments and breaking his chest in the manner described by the doctor you will have no hesitation in holding that the 1st and 2nd accused were actuated not only by knowledge but actually with a murderous intention. In such a case however unpleasant the duty may be it will be your bounden duty to find the accused guilty.

The benefit of every reasonable doubt must be given to the 1st and 2nd accused. The statements X 1 and X 2 and the unsworn statement of the 1st accused are only evidence against the makers and must not be utilised even unconsciously to the detriment of the co-accused."

The learned Judge has not in the summing up anywhere asked the Jury to examine the confessions of the 1st and 2nd accused and consider whether those statements indicate that the assault was committed after grave and sudden provocation. Such an issue is withdrawn by reason of the fact that according to the doctor the deceased was struck down when asleep, and also the inference to be drawn from the passage on p. 36 where the learned Judge says :—

"Is there any provocation which is grave and sudden which justified anybody from taking firewood sticks or heavy rice pounders and hitting the man and killing him ?"

Again on p. 37 it is stated "How can there be a fight when one man was sitting on the bed ?" Nowhere has the learned Judge asked the Jury to consider whether X1 and X2 indicate provocation and was it grave and sudden. In our opinion this issue should have been put to the Jury. The verdict of guilty of murder against the 1st and 2nd accused cannot in the circumstances be sustained and we set it aside and substitute therefor a verdict of guilty of culpable homicide not amounting to murder for which offence we impose a sentence of 15 years' rigorous imprisonment.

The argument put forward by Mr. H. V. Perera on behalf of the 3rd accused rests on very different grounds. The 3rd accused was charged with abetting the 1st and 2nd accused in committing the offence of murder that is to say causing the death of Gamage Jamis Singho. The confessions made by the 1st and 2nd accused are evidence against these accused only and are not evidence which can be taken into consideration when the guilt of the 3rd accused is being examined. The learned Judge has on several occasions during the couse of his summing up directed the Jury accordingly. Such a direction, however, according to the contention of Mr. Perera is not sufficient. Mr. Perera contends that without such confessions there is no evidence to prove that the 1st and 2nd accused caused the death of the deceased. In these circumstances Mr. Perera maintains that the charge of abetment of murder against the 3rd accused should have been withdrawn from the Jury. The evidence against the 3rd accused can be summarised as follows :—

(1) Testimony indicating that the 3rd accused on his return from India in September was annoyed with the deceased because

the latter had employed William at the estate. According to Pineris, the 3rd accused scolded the deceased. It was also in evidence that the 3rd accused abused the deceased who was the driver of his car because of his bad driving.

(2) The evidence of Pineris that about a week before the 27th October the 1st accused came and told the 3rd accused that the deceased had written a letter to Wijeratne. The 3rd accused is then said to have told the 1st accused to assault the deceased and drive him away. The 1st accused then returned to the estate. A week later according to Pineris the 1st accused again came to the dispensary about 9 or 10 A.M. The 1st accused went upstairs and spoke to the 3rd accused in the hearing of Pineris. The 3rd accused asked the 1st accused if the deceased was there. On the 1st accused replying in the affirmative the 3rd accused said "You alone cannot do" and called to the 2nd accused. When the 2nd accused came the 3rd accused said "Both of you go to the estate and while the driver is asleep beat him and kill him. If you are involved in a case I will save you". The fact that the 1st accused came to the dispensary and went upstairs to see the 3rd accused on the morning of the 26th October is corroborated by the witness Tennekoon, a salesman in the dispensary.

(3) It is in evidence that the 2nd accused went to the estate on the morning of the 27th October. He and the 1st accused were seen in the compound on the estate by the witness Podinona on the morning of the 27th. The 2nd accused was also seen on the compound by Podinona at 9.30 A.M. on that day. The 1st and 2nd accused were also seen on the estate with the deceased at about 6.30 P.M. that evening by the witness Noris Appu. On the following morning this witness went to the estate about 8.30 A.M. and found the deceased lying injured on a sofa face upwards. There were no signs of the 1st and 2nd accused.

(4) Evidence as to the movements of the 3rd accused just prior to and after the assault on the deceased. This evidence according to the Crown indicates that the 3rd accused was not only shielding the 1st and 2nd accused, but also privy to the commission of the offence. According to the witness Peter Wijenaike the 3rd accused came to his garage at Chilaw on the evening of the 27th October accompanied by William and Pineris. Most of the night was spent driving round Colombo. The Crown draws the inference from this strange behaviour on the part of the 3rd accused that the latter wanted to keep William from returning to the estate at a time when the 1st and 2nd accused would be executing the 3rd accused's commission to kill the deceased. On the 28th October Peter and the 3rd accused came to the dispensary about 7 A.M. The 1st and 2nd accused arrived about 9 A.M. and went upstairs. They left 10 minutes later. A little later the 3rd accused and Peter picked up the 1st and 2nd accused at Bambalapitiya junction.

The 1st and 2nd accused were left at Maradana Station and later picked up at Madampe. They reached Peter's garage at Chilaw about 4.30 or 5 P.M., and then went to a temple. In the middle of the night the 3rd accused insisted on them all going to Anuradhapura. The three accused and Peter arrived there at 5.30 A.M. and stayed with the witness Herat Banda. The 3rd accused had come without any clothes. Peter went to fetch the 3rd accused's clothes and returned to Anuradhapura on the 5th November. The three accused were still there. On the 6th November, Peter and the 3rd accused went to Trincomalee returning the same day. On the 7th November, the 3rd accused and Peter returned to Chilaw leaving the other two accused at Anuradhapura. The 3rd accused then returned to Colombo. On the 8th November Peter went to Anuradhapura and fetched the 1st and 2nd accused who were then taken into custody by the Police.

It is contended by Mr. Perera that the evidence that I have summarised raises only an element of suspicion so far as the complicity of the 3rd accused in causing the death of the deceased is concerned. If the Jury had been told that they could not take into consideration the statements of the 1st and 2nd accused as to how the deceased met with his death, there was no evidence to prove this fact. Hence there was no evidence to establish the charge of abetment of this particular murder. The position created by the evidence in this case is both anomalous and artificial. But we think that Mr. Perera's contention is legally correct and the learned Judge should have either withdrawn this particular charge from the Jury or else directed them that there was only circumstantial evidence as to how the deceased met with his death. The circumstances detailed in this judgment do supply a chain of evidence which although providing material for suspicion do not point unequivocally to the guilt of the 3rd accused. If the Jury had been directed properly with regard to the evidence relating to the death of the deceased it is impossible to say they would have arrived at the same verdict. The evidence of Pineris the chief witness against the 3rd accused must have been viewed with suspicion by the Jury particularly as it was 5 months before he made a statement to the Police in spite of the fact that Inspector Senanayake visited the dispensary on several occasions and asked him if he knew anything about the matter. In the circumstances the conviction of the 3rd accused on the charge of abetment of murder is set aside. We are not ordering a re-trial on this charge because we do not consider that such a trial would result in a conviction. We consider, however, that the Crown have proved that the 3rd accused has committed an offence under section 108 of the Penal Code, namely, abetment of an offence punishable with death, if the offence be not committed, in consequence of the abetment. We find him guilty of this offence and impose a sentence of 7 years' rigorous imprisonment.

*Convictions of 1st, 2nd and 3rd accused varied.*