1942 *Present :* **Moseley S.P.J.**

THE KING *v.* PUNCHI BANDA

45—M. C. Dandagamuwa, 9,536A.

Admission by accused as witness—Admissible against him in subsequent charge against him—Confession prompted by suggestion from Police Sergeant—Hope of advantage—Evidence Ordinance, ss. 21 and 24.

A statement which is made by an accused person in the course of proceedings against other parties in respect of the same incident and which amounts to a confession is admissible under section 21 of the Evidence Ordinance, unless it is otherwise tainted.

A confession which is prompted by a suggestion from a Police Sergeant that some advantage would be gained by the accused if he spoke the truth is obnoxious to section 24 of the Evidence Ordinance.

IN this case the accused was charged with murder at the 1st Midland Circuit, 1942, before Moseley S.P.J. and a Jury.

Nihal Gunesekera, C. C., for the Crown.

Sextus Coorey, Proctor, for accused.

Cur. adv. vult.

July 14, 1942. MOSELEY S.P.J.—

The accused was charged with murder. At the outset, the jury having been asked to retire, Counsel for the defence objected to the admission of two statements made by the accused, each of which is in the nature of a confession. The first (P 15), was made by him in the capacity of witness in the course of proceedings against other parties in respect of the same incident; the second (P 39), when he was subsequently charged with the offence. On the latter occasion, the Magistrate, who had recorded the evidence of the accused in the previous proceedings, had entered the witness box, with a view to testifying to the first statement of the accused, and had been affirmed, when the accused stated that he was "willing to make the same statement". Certain "preliminary precautions" were taken, and upon the accused "persisting that he is anxious to make the statement" the acting Magistrate expressed himself as "inclined to belive" that the statement about to be made was to be made voluntarily. The statement was then recorded and a Memorandum made in the form prescribed by section 134 (3) of the Criminal Procedure Code.

In regard to the first statement, Counsel for the accused argued that it is not the statement of an accused recorded in the course of an inquiry and does not, therefore, come within the scope of section 233 of the Criminal Procedure Code, but he was unable, on the facts then before him, to advance any further objection against its admission. His contention is sound in regard to the inapplicability of section 233, but it seems to me that, unless the statement is otherwise tainted, it is clearly admissible under section 21 of the Evidence Ordinance as an admission by the accused.

The point was then taken that the second statement, P 39, had been made in circumstances which offend the provisions of section 24 of the Evidence Ordinance, which makes irrelevant any confession which has been caused by any inducement, threat, or promise proceeding from a person in authority.

My attention was drawn to a passage towards the end of the statement, which is as follows:—"At the Police Station . . . . when I was questioned, I denied any knowledge about this matter. Then the Sergeant told me to tell the truth if I knew anything about this *and to get out of it*. Then I came out with the truth . . . . Then the Sergeant asked me to tell the truth before the Magistrate and to beg for pardon. Therefore, I spoke the truth before the Magistrate". These words definitely imply that the confession was prompted by a suggestion by the Sergeant that some advantage would be gained by the accused if he told the truth. In the face of them, however, the learned Acting Magistrate expressed himself as believing that the statement was voluntarily made. Unfortunately, he was unaware of the rules issued by the Legal Secretary for the guidance of magistrates in recording statements and confessions under section 134 of the Criminal Procedure Code. Had he been aware of the instructions, and as Abrahams C.J. said, in *The King v. W. Mudiyanselage Ranhamy and others*[1], "probed with the greatest care into the motives which led the accused to make

[1] *2 C. L. J. 104.*

this statement", it is highly improbable that the statement would have been made. Moreover, the statement was recorded in the Magistrate's Chambers, and not in open Court, as advised in the Rules, and the accused was not given any time to reflect upon his position as is considered desirable and advisable. I do not suggest that the Rules have any legislative sanction. They are, as described inanticipation by Abrahams C.J., "Rules of prudence". But it seems to me that they set out the precautions which, where practicable, should be regarded as a minimum. I may mention that, in the recent case of *The King v. W. K. Franciscu Appuhamy*[1], Wijeyewardene J. thought that the "Magistrate should have allowed a much longer interval than 45 minutes to elapse before he recorded the confession." In the present case, no time at all was allowed. It appears to me, to express myself no more strongly, that the confession P 39 was caused by an inducement proceeding from a person in authority and is irrelevant and, therefore, inadmissible.

Having arrived at that conclusion at the close of the argument, it became necessary for me to consider whether the first statement P 15 was tainted in similar manner. Counsel for the accused put the latter into the witness box. He said that he was arrested on September 5 and kept in custody until the 11th, the date upon which he appeared as a witness and made the statement incriminating himself. He alleged that he was assaulted by Sergeant Lewis Appuhamy and promised an acquittal if he would say what he was told to say.

A witness, Dingiri Banda, called in support, also alleged that he himself was knocked about by Sergeant N. X. Perera "from 4.30 P.M. to 4 A.M." in order to induce him to tell the truth. The accused also alleged that he spent the night before making the statement P 39 (*i.e.*, October 13) at Kuliyapitiya Police Station and was there coached by Inspector Sivasampu and Sergeant Lewis Appuhamy as to the statement which they wished him to make. It is noteworthy that on September 29 Inspector Sivasampu had informed the Court that the 6th suspect (*i.e.*, accused) wished to make a statement.

The latter informed the Court that he was not willing to make a statement.

All these allegations were denied by the police officers concerned, and I should be very reluctant to believe that they were guilty of the conduct imputed to them. In regard to the alleged incident on the night of October 13, the Fiscal's Marshal swore that the accused was brought from Negombo remand goal to the M. C., Dandagamuwa, direct on the morning of October 14. In that case, the accused could not have been at Kuliyapitiya Police Station as alleged by him. Moreover, Sergeant Lewis Appuhamy denied that accused was in custody until September 11, when he appeared as a witness. Be that as it may, it is conceded by the Sergeant that he questioned the accused twice, viz., on September 5 and 7, and that at that time the Police were at a complete loss in regard to evidence against any of the persons then suspected, including the accused. The Sergeant says that accused then came to him on the 9th and said that he wished to tell the whole truth, and that he thereupon made a statement which, it can be assumed, was on the lines of his

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

subsequent evidence. It should be noted that when he began to incriminate himself in the witness box he was questioned by the Magistrate and warned that he was equally liable, with the other suspects, for the offence. He said that he was giving evidence voluntarily and realized the implications. Even so, it is difficult to imagine why a person in the position of the accused, who must have known that there was no evidence against him, should deliberately provide that evidence, unless some inducement were offered to him. Seeing that his first public appearance in the proceedings was in the character of a witness, it is not difficult to believe that he had been told that that would be the part he would play throughout the proceedings and that no harm would befall him. This supposition is confirmed by the passage from P 39, which I have quoted above. I hold, therefore, that P 15, like P 39 and for the same reasons, is inadmissible.

Objection upheld.