

1944

*Present: de Kretser J.*

FERNANDO, Appellant, and SERGEANT SAMATH, Respondent.

882—*M. C. Colombo, 34,773.*

*Confession to Police Officer—Statement by Police Officer in cross-examination—  
Confession inadmissible—Evidence called by Magistrate after close of  
defence.*

The accused was charged with the theft of a battery. In cross-examination of the Police Constable, who investigated the case, Counsel for the defence asked the question, "Why did you question W?". The reply was: "Because the accused had told me that he removed the battery at W's suggestion".

*Held*, that the statement contained in the answer was inadmissible as being a confession made to a Police Officer.

*Held*, further, a Magistrate is not justified in calling evidence after the defence is closed.

*Idroos v. David, 45 N. L. R. 300* followed.

**A** PPEAL from a conviction by the Magistrate of Colombo.

*Nihal Gunsekere* for the accused, appellant.

*H. A. Wijemanne, C.C.*, for the respondent.

*Cur. adv. vult.*

November 16, 1944. DE KRETZER J.—

The accused was charged with the theft of a battery from a Military lorry, and convicted on the charge.

The case is rendered difficult by reason of the way the trial shaped and the way in which the Magistrate has dealt with it.

It would appear that one Podisingho informed the driver of the truck that he had seen the accused removing the battery. The accused was then questioned and pointed out where the battery had been hidden. The case would have been quite easy had Podisingho stood by his information but he did not, and at the trial he said that he did not see the accused meddling with anything in the lorry but he had seen him bending over the footboard of the lorry, holding something like a wire and feeling his legs. He denied having said more. The Magistrate seems to have treated Podisingho's original statement as if it were substantive evidence and that was wrong. The driver did not say what the accused had told him before he pointed out the battery. In the cross-examination of the Policeman who investigated, defending Counsel asked, "why did you question Wimalaratne?" and he got the reply, "Because the accused had told me that he had removed the battery at Wimalaratne's suggestion." Counsel objected to this answer being recorded as he contended it was a confession to a Police Officer; but the Magistrate recorded it, justifying his doing so with the reasoning that the witness was obliged to answer the question, which was a relevant one, and also because it contradicted the accused's defence which had been stated to him. The Magistrate did not, however, take this statement into consideration when arriving at his verdict. Even if the statement was admissible to contradict the accused, the accused had first to give evidence before he could be contradicted. Confessions may not be proved *against* the accused. The persons who would do so would be the party or parties interested in the prosecution. But might not an accused himself prove a confession? It is admitted he might.

So the position is whether the accused can object to evidence which he has himself elicited? What would be the position of a witness faced with a question such as was asked in this case? He cannot refuse to answer it and he must speak the whole truth. His answer could be "Because of a statement" accused made but that would be misleading and wrong, exactly what the defence wished him to say.

The accused's position at the trial was that it was Wimalaratne who stole the battery and the accused was aware of the place where it was secreted. Whatever the idea of the accused was the statement was clearly a confession. The prohibition against its admission is absolute and the accused was not seeking to prove it. It may have been relevant as explaining the conduct of the Police but no exception is made on the ground that it is relevant. The Magistrate was right, therefore, in not considering it.

Lastly, when the accused gave evidence he was questioned by the Court with regard to statement made to Corporal Baker of the Military Police and he said that he told the Corporal he had seen Wimalaratne placing

the battery in the particular spot. The Magistrate called the witness at the close of the defence. It seems to me he acted irregularly and he was not justified in calling the witness when the case had been closed. The cases of *S. I. Idroos v. David*<sup>1</sup> and *G. S. Theas, Police Vidane v. Michael Thalimal*<sup>2</sup> are in point.

The case against the accused, apart from the evidence which is objected to, stands as follows:—The battery is stolen; its loss is discovered soon afterwards; Podisingho at least gives information that the accused was quite close to the lorry in a suspicious attitude; the accused is questioned and points out the battery; as a result of what he tells the police, Wimalaratne is questioned; what the accused said prior to the battery being pointed out is not proved and his statement might have been that he was aware of where Wimalaratne placed the battery, but the military corporal says that Podisingho told him the accused had removed the battery, and he is believed. Podisingho, therefore, said more than he now says, but, of course, he may have said that falsely in order to protect Wimalaratne, or for some other reason. There is no suggestion made in cross-examination that the accused had involved Wimalaratne as the thief or in any way exculpated himself. Podisingho admits he pointed out only the accused to the corporal. The accused says he did not see Wimalaratne take the battery from any lorry and he did not suspect him when he saw him place the battery inside a bush. He was with Wimalaratne in the latter's lorry and then saw Wimalaratne secrete the battery and that only the two of them were then present. He does not refer to Podisingho, nor explain what he was doing bending over the footboard with a wire in his hand. According to the accused, Wimalaratne must have stolen the battery. Podisingho saw the accused near the truck containing the battery. Why did he or both he and Wimalaratne go to that truck? No explanation is given. The Magistrate disbelieved the accused's evidence and that disbelief is justifiable. What then results? The accused may have been constructively in possession of the stolen property immediately after the theft; Wimalaratne may have been in possession and the accused may have known of that fact; both Wimalaratne and he may have been in possession of it. The case against the accused cannot then be raised beyond one of very strong suspicion. He must, therefore, be acquitted. The conviction is set aside and the accused acquitted.

*Set aside.*

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<sup>1</sup> 45 N. L. R. 300.

<sup>2</sup> 2 C. L. J. 297.