

MARIADAS
v.
THE STATE

COURT OF APPEAL.

GUNASEKERA, J. AND

YAPA, J.

C.A. NO. 146/93

H.C. COLOMBO NO. 49, 1/91

M.C. PANADURA NO. 953/93

OCTOBER 13, 14, 19, NOVEMBER 15, 16 AND 18, DECEMBER 02 AND 18 1994.

Criminal Law – Conspiracy to commit murder – Prevention of Terrorism Act – Confession to S.S.P. – S.16 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1978 – Section 24 of the Evidence Ordinance.

Held:

A confession made by an accused person to a Senior Superintendent of Police recorded under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1978 may be proved against the maker if such statement is not irrelevant under Section 24 of the Evidence.

Where the accused denied making a statement to the Senior Superintendent of Police though he had signed it under assault, the typist who typed the statement should have been called. Further the evidence of the typist was very material because in his declaration he has noted that he correctly typed the statement as dictated by G. P. S. Ariyasena thus giving the impression that what was typed was what S.S.P. Ariyasena dictated and not what accused stated.

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 made under inducement, promise or threat (S. 24). The evidence of assault on the accused by the Police has not been sufficiently rebutted.

A doubt necessarily arises as to whether the confession is a verbatim record of what was uttered by the accused.

Case referred to:

1. *Vivekanandan v. Selvaratnem* 79 N.L.R. 337, at 343 and 344.

APPEAL from conviction and sentence entered by the High Court of Colombo.

R. I. Obeysekera, P.C. with Anil Silva, K. P. Thavarasa and Mrs. G. Thavarasa for accused-appellant.

C. R. de Silva, D.S.G. with S. Samaranyake, S.C. for the Attorney-General.

February 08, 1995..

YAPA, J.

The accused-appellant was indicted with Rajalingam Aravindan alias Rasiah Aravindan alias Paul Fernando, alias Visu, Aloysius Leon alias Peter, Kandiah Sivakumaran alias Arebu and others unknown to the prosecution with having conspired between the 1st day of June, 1989 and the 13th of July, 1989 at Colombo to commit murder by causing the death of a specified person to wit, Appapillai Amirthalingam, a Member of Parliament, an offence punishable under Section 3 read with Sections 2(1)(a) and 3(b) of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 as amended by Act No. 10 of 1982.

After trial before the learned Judge of the High Court, sitting in the High Court, Colombo and the High Court, Panadura, the accused-appellant was convicted of the said charge on 19th November 1993, and was sentenced to 7 years rigorous imprisonment. It is against the said conviction and the sentence that the accused-appellant has preferred this appeal.

The prosecution led in evidence, the confession made by the accused-appellant to the Senior Superintendent of Police G. Ariyasena, and further the evidence of Security Officer T. A. Nissanka, Assistant Superintendent of Police Ananda Galgamuwa, Dr. Mrs. Kariyawasam, Dr. Premaratne and Dr. Somasunderam Niranjana. It is to be noted that when the confession made by the accused-appellant was sought to be led in evidence by the prosecution, it was objected to by the defence, and therefore an inquiry was held for the purpose of deciding the voluntariness of the confession. After the inquiry, when the Court ruled that the said confession had been made by the accused-appellant voluntarily, permission was granted to lead the confession as evidence in the case. However at this inquiry the accused-appellant gave evidence and the position taken up by him that no such confession was made by him.

In the confession which was marked and produced by the prosecution as P1, some portions were specially marked, in order to

show that the accused-appellant was an active member of the L.T.T.E. organization and that he supported the activities of the said organization. Further that the accused-appellant while staying at Anderson Flats Colombo, associated with Visu, Aloysius, and Sivakumaran and that about five days before the 13th of July 1989, they had met at the accused-appellant's flat and Visu had drawn a sketch depicting the house, the entrance road, and the by roads leading to Amirthalingam's house, and discussed a plan to shoot Amirthalingam and Sivasithambaram. There is also material in the confession that Visu had stated in the discussion that, when they go to this house, Amirthalingam, Sivasithambaram and Yogeswaran would be there, and that Visu would shoot Amirthalingam, Aloysius would shoot Sivasithambaram, and at that stage the accused-appellant had told Visu, that if they do not shoot Yogeswaran there would be a problem, and therefore suggested that at least Yogeswaran should be shot on the leg, to cause a minor injury.

According to the evidence of Assistant Superintendent of Police Galgamuwa, it was revealed that two packets containing gelignite, a red coloured detonator cord, and five electric cords with wire, were recovered from the flat in which the accused-appellant was residing. Further the witness stated that when the flat in which Aloysius Leon, and Aravindan alias Visu were residing was searched, a sketch drawn on a letter pad cover and a letter written by the accused-appellant was recovered. The sketch and the letter were produced marked P2 and P3. This witness also stated that from the same flat in which Aloysius Leon and Aravindan at that time were residing, a hand bomb, two pistols, and two boxes containing empty cartridges, were recovered.

The security officer, T. A. Nissanka gave evidence and stated that on 13.07.89 he was working as a personal security officer to Amirthalingam, and three persons entered the residence of Amirthalingam, and they were allowed to come into the house without a search at the instance by Yogeswaran. Thereafter the witness said that two of these persons went upstairs and were talking to Yogeswaran and the other person remained in the ground floor. Shortly thereafter Amirthalingam, Sivasithambaram, and Senadhirajah joined the two persons who were talking to Yogeswaran. After some time the witness

stated that he heard gun shots, and when he noticed that these two persons who were at the discussion, were coming out from a room, shooting at persons, he shot at them in return. Further the witness stated that he shot at the other person who was in the ground floor, and thereafter he informed the police who were in a jeep that was parked near the River Valleys Development Board. The witness finally stated that due to this incident of shooting, Amirthalingam, and Yogeswaran, and the three persons, who came to Amirthalingam's residence that day, died.

Dr. (Mrs.) Kariyawisam who held the post-mortem examination of Visu; Dr. Premaratne who held the post-mortem examination of Aloysius, and Dr. Somasundaram Nirranjan who held the post-mortem examination of Sivakumaran, stated that the accused-appellant identified the bodies of these three persons as persons known to him.

After the prosecution case was closed and when the defence was called, the accused-appellant remained silent.

At the hearing of the appeal one of the submissions made by the learned President's Counsel was that the alleged confession that was produced in the case was not made by the accused-appellant. The learned President Counsel submitted that, before a confession was admitted under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 as amended it was necessary for the prosecution to prove that the confession was in fact made, to a police officer not below the rank of an Assistant Superintendent of Police and that it was after such proof, that the question of irrelevance under Section 24 of the Evidence Ordinance arose. The learned Counsel submitted that the accused-appellant in this case was arrested on 14.07.89, and was kept in police custody, and he was interrogated during the course of about two weeks and notes were recorded by him in a note book. It was the contention of the learned Counsel that according to the prosecution the alleged confession came to be recorded several days later, namely on 10.08.89, 11.08.89, 12.08.89 and 13.08.89. However the position of the accused-appellant was that he did not agree to make a confession, and that he never made such a confession, but a typed document was given to him and he was made to sign.

To support this contention the learned President's Counsel referred to the failure of the prosecution to produce the note book in which S.S.P. Ariyasena had taken down notes, when he questioned the accused-appellant for two weeks regarding his involvement. In other words what the learned President's Counsel was seeking to show was that the material obtained by questioning the accused-appellant for two weeks was typed in the form of a confession and thereafter the signature of the accused-appellant had been obtained. As submitted by the learned Deputy Solicitor-General certainly the material that is available in the confession could not have been put into the confession unless all this material came from the accused-appellant in some form. Further if the accused-appellant was made to sign the prepared confession as alleged by the defence, it would possibly have been on 13.08.89. However this position cannot be accepted having regard to the sketch that was produced in the case marked P2, which clearly bears the initials of the accused-appellant dated 12.08.89. This document P2 gives credence to the fact that the accused-appellant has placed his initials on 12.08.89, when he was shown the sketch, at the time of recording the confession. It was the position of S.S.P. Ariyasena that the note book he used during interrogation did not contain material relating to the confession, but contained other matters connected with the investigation of the accused-appellant's involvement. If that was the position, we are of the view that the production of the note book and making it available to the defence, which disclosed that it contained only the material referred to by S.S.P. Ariyasena, would have enhanced his credibility specially in regard to the recording of the confession.

Another point raised in this appeal by the learned President's Counsel was the failure of the prosecution to call the typist who recorded the confession. His contention was that this failure affected the prosecution, whose burden was to prove the making of the confession by the accused-appellant beyond reasonable doubt. We observe that the typist S. A. Peiris who typed the confession of the accused-appellant was a witness for the prosecution and his name appears in the indictment. Under normal circumstances this witness would have certainly provided corroborative evidence in regard to the material that was placed before the Court through S.S.P. Ariyasena. For some unexplained reason, his evidence was not led

by the prosecution at the trial. The evidence of this witness would have been very material in view of the various allegations made by the defence in regard to the confession that was permitted to be led in the case. Briefly some of the allegations made by the defence in this case in regard to the confession are the following:

- i. That the alleged confession that was produced in the case was not made by the accused-appellant and that he was only made to sign a typed document.
- ii. The accused-appellant did not have sufficient knowledge of English to make such a confession.
- iii. The accused-appellant was sick and had been subjected to assaults, and further that he had not been properly fed.
- iv. That on each day after recording the confession it was not read over to the accused-appellant and that it was not signed by him.

It is true that the prosecution placed some evidence to counter these allegations through the evidence of S.S.P. Ariyasena and Dr. Salgado, but we are of the view that the evidence of the typist who recorded the confession was all important and if he gave evidence, and if he corroborated some of the matters spoken to by S.S.P. Ariyasena, it would have enhanced the credibility of this prosecution witness.

Further we observe that the evidence of the typist was very material for yet a another reason. The declaration made by the typist S. A. Peiris at the end of the alleged confession reads as follows:

"I, S. A. Peiris declare that I have typed the above statement of V. W. Mariadas correctly as dictated by G. P. S. Ariyasena from pages 1 to 27". According to the plain meaning of this declaration it appears that the statement that has been recorded by the typist has been what was dictated to him by S.S.P. Ariyasena and not what was spoken to by the accused-appellant. This declaration in the absence of an explanation or clarification from S. A. Peiris goes contrary to

evidence given by S.S.P. Ariyasena and tends to support in some way, the stand taken by the accused-appellant that he never made this confession.

The learned Deputy Solicitor-General sought to give a meaning to this declaration, stating that what the typist in fact recorded was what was uttered to him by the accused-appellant himself. We are unable to accept this submission in the absence such evidence from the typist himself. We are of the view that the evidence of the typist was so vital to the prosecution case, and that the failure of the prosecution to call him to give evidence has affected the prosecution case. Therefore there is substance in the argument of the learned President's Counsel in regard to the failure of the prosecution to call the typist to give evidence in the case.

Another submission was made by the learned Presidents Counsel, that the allegations made against the police officers, such as A.S.P. de Alwis, S.I. Nilabdeen and Wimalaratne, should have been rebutted by the prosecution. In other words the learned Counsel was adversely commenting on the failure of the prosecution to call as witnesses some of the officers against whom allegations of assault on the accused-appellant, a few days prior to the recording of the confession, was made. The learned Deputy Solicitor-General argued that the prosecution has placed before the Court the evidence of Dr. Salgado and his two medical reports, indicating that the accused-appellant had no external injuries, when he was examined by the doctor on 10.08.89 and on 14.08.89. Further it was his submission that the doctor has stated that the accused-appellant did not complain of any assault or threats and that he was mentally fit to make a statement.

It is to be noted that Section 16(1) of the Prevention of Terrorism (Temporary Provisions) Act has permitted the admissibility of a statement made to a police officer above the rank of an Assistant Superintendent of Police unless such a statement is irrelevant under Section 24 of the Evidence Ordinance. Section 16(2) of the said Act states that the burden of proving that such a statement is irrelevant under Section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant. **Section 24 of the Evidence Ordinance** reads as follows:

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 the inquiry regarding the voluntariness of the confession the accused-appellant gave evidence stating that he was seriously ill as he was a diabetic patient and that he was even admitted to the Army hospital for treatment. This fact was admitted by the prosecution, but their position was that at the time of making the confession, the accused-appellant's diabetic condition had been brought under control. Further it was the evidence of the accused-appellant that after his arrest, when A.S.P. de Alwis was questioning him in the presence of S.I. Nilabdeen, and Wimalaratne and when he stated that he knew nothing about the incident, he was assaulted by A.S.P. de Alwis. He also stated that S.I. Nilabdeen and Wimalaratne assaulted him with hands and legs and later he was assaulted with clubs, and these blows alighted all over his body. The prosecution sought to rebut this evidence by calling for Dr. Salgado who stated that when he examined the accused-appellant on 10.08.89 and 14.08.89, he had no external injuries. The question that arises here is whether Dr. Salgado's evidence was sufficient to rebut the burden placed on the prosecution, in view of the accused-appellant's evidence. Whether these assaults by the police if true, caused any inducement, threat, or promise on the accused-appellant, who was a sick person, to make the alleged confession was certainly a heavy burden placed on the prosecution to rebut. These allegations have an added significance as S.I. Nilabdeen was present throughout the recording of the confession. He was the officer who produced the accused-appellant for recording the confession and he was also the officer to whom the accused-appellant was handed over each day after recording the statement, except for a single occasion on 13.08.89 when accused-appellant was brought

from the Slave Island Police Station by S.I. Wimaladasa. Has the prosecution discharged this burden by merely leading the evidence of Dr. Salgado? The learned Deputy Solicitor-General submitted that these allegations of assault were false as according to Dr. Salgado, the accused-appellant had not external injuries and further that he had not complained of any assault to the doctor. It is to be noted that the accused-appellant's evidence on this matter was that he complained to the doctor only about his diabetic condition and not of any assault by police, as he was told not to do so by the police. One cannot disregard this evidence of the accused-appellant, who was in police custody, and who says he did not complain of any assault by the police due to fear, to the doctor. Therefore we are of the view that it was very necessary for the prosecution to have placed the evidence of at least some of the officers against whom these allegations of assault were made, so as to rebut the position taken by the accused-appellant. This has not been done by the prosecution.

In the case of *Vivekanandan v. Selvaratnam*⁽¹⁾, Malcolm Perera, J. in dealing with Section 24 of the Evidence Ordinance said "At the outset, the Court must determine the meaning of the word 'appears'. I think what the Court has to decide is not whether it has been proved that there was threat, inducement or promise, but whether it appears to Court that such threat, inducement or promise was present. I am inclined to the view that the word 'appears' indicates a lesser degree of probability than it would have been, if the word 'proof' as defined in Section 3 of the Evidence Ordinance had appeared in Section 24."

"I should rather think that the legislature has decidedly used the word 'appears' to guarantee to accused persons in criminal proceedings, absolute fairness. Thus Section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the Court after proper examination and a careful analysis of the evidence and the circumstances of the given case, comes to the view that there appears to have been a threat, inducement or promise offered, though this is not strictly proved, then the Court must refuse to receive in evidence the confession. I should venture to think that a strong possibility that the confession was made under the stimulus of an inducement, threat, or promise, would be sufficient to attract exclusionary provision of Section 24 of the

Evidence Ordinance." Therefore it is clear that the accused-person has very much a lighter burden to discharge, to bring himself under Section 24 of the Evidence Ordinance.

A submission was also made by the learned President's Counsel that before recording the confession under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act, the accused appellant should have been told of his right to legal advice, and of his right to make a statement to the Magistrate instead of making a statement under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act. Further the learned President's Counsel complained that the accused-appellant during the period when his confession was recorded, he was kept in the custody of Police Officers who interrogated him. **Section 16 of the Prevention of Terrorism (Temporary Provisions) Act** reads as follows:

(1) Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether –

- (a) it amounts to a confession or not;
- (b) made orally or reduced to writing;
- (c) such person was or was not in custody or presence of a police officer;
- (d) made in the course of an investigation or not;
- (e) it was or was not wholly or partly in answer to any question,

may be proved as against such person if such statement is not irrelevant under Section 24 of the Evidence Ordinance;

Provided, however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.

(2) The burden of proving that any statement referred to in subsection (1) is irrelevant under Section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.

(3) Any statement admissible under subsection (1) may be proved ~~as against any other person charged jointly with the person making the statement, if, and only if,~~ such statement is corroborated in material particulars by evidence than the statements referred to in subsection (1).

An examination of this section reveals that it has been drafted in such wide terms so as to include any statement whether it amounts to a confession or not, made orally or reduced to writing if made to a police officer not below the rank of an Assistant Superintendent of Police, and if it is not irrelevant under Section 24 of the Evidence Ordinance. Further it is provided that the burden of proving that the statement is irrelevant under Section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant. It must be pointed out that this provision is an exception to Section 25 of Evidence Ordinance which says that no confession made to a police officer shall be proved against a person accused of any offence. Therefore as pointed out by the learned President's Counsel it was all the more necessary that there should be some safeguards to be adhered to when recording such a confession. Unfortunately there are no such provisions in the Prevention of Terrorism (Temporary Provisions) Act. As submitted by the learned Deputy Solicitor-General even the recording of a confession under Section 16 of said Act has to be done by recourse to sections 109 and 110 of the Code of Criminal Procedure Act, No. 15 of 1979. Therefore when a Court is called upon to give a ruling regarding the voluntariness of a confession recorded under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act it is of utmost importance to examine and evaluate the evidence so as to guarantee to the accused person in criminal proceedings absolute fairness.

In our view it is not necessary to make any pronouncement with regard to the submission of the learned President's Counsel on this aspect. Since we are of the view that there is a grave doubt as to whether the document P1 which was produced as the confession made by the accused-appellant was in fact made by him specially in view of the fact that the officer who is alleged to have typed the statement has not been called as a witness. On a plain reading of his certificate which is appended to P1, a doubt necessarily arises as to whether P1 contains a verbatim record of what was uttered by the accused-appellant or which was dictated by S.S.P. Ariyasena.

For the reasons stated, we are of the view that the prosecution has failed to prove beyond reasonable doubt that the confession was in fact made by the accused-appellant. Thus in our view it is not safe to allow the conviction to stand. Therefore we set aside the conviction and sentence of the accused-appellant and acquit him.

GUNASEKERA, J. – I agree.

Conviction set aside and accused acquitted.
