
NUWAN DE SILVA
V
THE ATTORNEY GENERAL

SUPREME COURT
S. N. SILVA, CJ
BANDARANAYAKE, J
YAPA, J.
DE SILVA, J AND
JAYASINGHE, J
SC APPEAL NO. 18/2003 (TAB)
H. C. COLOMBO NO. 267/99
16TH MARCH AND 7TH AND 28TH MAY, 2004

Criminal Law - Penal Code - Kidnapping a boy (with the object of extorting money) and the boy's murder in the course of extracting ransom - Sections 354, 296 and 375 of the Penal Code - Conviction based on circumstantial evidence and confession - Sections 127 and 24 of the Code of Criminal Procedure Act - Was the accused guilty of murder or culpable homicide not amounting to murder?:

Witness Anoma had seen the deceased boy Sadeepa who returned from school as usual, in a van (about 1.45 p.m.) walking to his house on 8.10.1999. She also saw the accused speaking to the boy.

According to the boy's uncle, the boy had his meal, went out and returned. Thereafter he watched television and left again. The boy was not seen thereafter. The boy's father Jayantha de Silva, a gem and jewellery shop owner, received unidentified telephone calls to say that the boy had been abducted and to pay Rs. 2.5 million for his release by keeping the money on a particular telephone booth whereupon the boy could be collected from a given point. Jayantha de Silva told the caller that the sum will be given in foreign currency.

Witness Kanishka who had also telephoned Jayantha de Silva on the accused's request was told by the accused that he was getting the money in foreign currency, which supports Jayantha de Silva's story. On the next Sunday, Jayantha de Silva, took the money with a note made by him regarding the details of the currency and kept it on the telephone booth; but the boy was not released.

However, on information provided by a relative of Jayantha de Silva the police had monitored the telephone calls and the movements of the witness (Jayantha de Silva) and arrested the accused with the money. On a statement

made by the accused, the police were taken to the boy's grandmother's home close by. Thereafter the accused showed the place where the body of the boy was concealed, namely in a cess-pit.

The accused was arrested and remanded with four others. After about 10 days of remand the accused wished to make a confession to the Magistrate who recorded the confession under section 127 of the Code of Criminal Procedure Act, (the Code) after giving the accused numerous opportunities to consider the matter. The Magistrate satisfied herself that the confession was voluntary and not vitiated by any inducement, threat or promise. At a *voir dire* inquiry, the High Court was satisfied about the voluntary nature (validity) of the confession and admitted it in evidence.

The accused told the Magistrate that he had a love affair with a girl but as he had no job the marriage was objected to. This was the motive for kidnapping the boy (on his experience of what he had watched on television), to obtain quick money as ransom. He enticed the boy to his grandmother's house by offering birds' feathers and telephoned the boy's father Jayantha de Silva. As the boy was next to the accused at the time, the accused closed his nose and mouth and took him to a room where the boy fainted. Believing that the boy had died, the accused strangled the boy until he really was dead and dumped him in the cess pit having placed the body in a fertilizer bag.

The accused also told the Magistrate that the reason for the confession was his sense of guilt and to free four others, his friends, who were also in remand but not involved in the crime. The accused was convicted of the offences charged despite his denial by evidence at the trial which was rejected.

Held:

1. The conviction of the accused was justified on the oral and circumstantial evidence and/ or the confession.
2. The confession was voluntarily made in terms of section 127 of the Code read with section 24. Factors such as the accused's knowledge of the strength of the case against him and known to the police or the desire to free his friends are irrelevant. Voluntary in ordinary parlance means "of one's own free will."
3. The burden of proving that the confession was not vitiated by section 24 of the Code is on the prosecution.

4. Having regard to all the factors including the strangulation of the boy and the concealment of the body of the boy in a cess pit, there is no doubt as to the murderous intention. Hence the offence of causing the boy's death amounted to murder and not culpable homicide not amounting to murder.

Cases referred to :

1. *Ibrahim v R*.1924 AC 599 at 609
2. *Queen v Cecilin* 58 NLR 473 at 475
3. *R v Rennie* (1982) 1 All ER 385, 388

APPEAL from the judgment of the High Court (TAF

Ranjith Abey Suriya, P. C. with K. S. Ratnavale and Thanuja Rodrigo for accused appellant.

Dappula de Livera, Senior State Counsel for Attorney - General

September 09, 2004

SARATH N. SILVA, C. J.

This is an appeal from the conviction entered and sentences imposed on the accused appellant (the accused) at a Trial at Bar of the High Court. In terms of Section 451(3) of the Code of Criminal Procedure (Amendment) Act, No. 21 of 1988, the appeal has to be heard by a Bench of not less than 5 Judges of this Court.

The accused was charged on 3 counts of, having kidnapped a boy named Sadeepa Lakshan, (an offence punishable under section 354 of the Penal Code), committing the murder of the boy (an offence punishable under Section 296 of the Penal Code) and of extorting Rs. 2.5 million from Nihal Jayantha de Silva being the father of the boy (an offence punishable under Section 375 of the Penal Code), between the 8th and 11th of October 1999.

The High Court convicted the accused on all 3 counts and he was sentenced to death on the count of murder and to terms of imprisonment and fines on the other counts.

The prosecution relied on a confession made by the accused to the Magistrate recorded in terms of Section 127 of the Code of Criminal Procedure Act, No. 15 of 1979 and on several items of circumstantial evidence.

Prior to the commencement of the trial a *voir dire* inquiry was held to decide on the admissibility of the confession. The prosecution led the evidence of the Magistrate and several other witnesses at that inquiry. The accused did not adduce evidence and the High Court ruled that the confession is admissible in evidence.

At the trial the accused gave evidence denying any involvement in the incident. The High Court has disbelieved the evidence of the accused.

Learned President's Counsel for the accused did not make any submission as to the reliance placed by the High Court on the items of circumstantial evidence or as to the reliance placed by the High Court on the items of circumstantial evidence or as to reliance the rejection of the evidence of the accused. He submitted that the confession was not voluntary and vitiated by Section 24 of the Evidence Ordinance. As an alternative, he submitted that in any event the conviction for the offence of murder should be reduced to culpable homicide, since the finding on *murderous intention* cannot be sustained.

Learned Senior State Counsel, whilst supporting the admissibility of the confession submitted that in any event the items of circumstantial evidence adduced by the prosecution leads to the necessary inference of guilt on all charges. He further submitted that the evidence as to the manner in which death was caused and the relevant circumstances established beyond reasonable doubt that the accused acted with a *murderous intention*.

The material facts as disclosed in evidence are as follows:

The deceased, being an eight year old boy, travelled to school regularly in a van from which he alighted on his return from school, at the top of the road leading to his house at Beruwala, along Galle Road. He had to walk about 100 feet to his house, located on the road leading to a large tourist hotel. Witness Anoma Anjalie Priyalatha worked in a shop situated

at the turn off to the deceased boy's house. She has stated that usually the deceased returned around 1.45 p.m. to 2.00 p.m. and that she was in the habit of saying a few words to the boy. According to her evidence on 8.10.1999, being the day on which the boy was last seen alive, she remembered seeing the boy alight from the van as usual round 1.45 and walking down the road leading to his house. At that time she saw the accused who was living in the vicinity going to the boy on a bicycle. She had seen the accused speaking to the deceased boy. This did not seem unusual to her since the accused was frequently seen in the neighbourhood.

Witness Shanie de Silva, a maternal uncle was the only person in the house when the boy returned. He stated that the boy came home at the usual time, changed his clothes and had a meal of rice and curry. Thereafter he went out to a nearby house to play. The boy had returned shortly, watched television for sometime and left again. He did not see the boy thereafter.

The first information that the boy was missing was received by the father of the boy, witness Nihal Jayantha de Silva, being a wealthy businessman who owned a gem and jewellery shop at the nearby Aluthgama town.

He stated that at about 3.30 p.m. on 8th, he received a telephone call at this shop. The unidentified caller said that a child of his has been kidnapped and threatened that if this was revealed to anybody including the Police, the family would be finished off. The caller demanded a ransom of a sum of RS. 2.5 million to release the child. He did not identify the voice of the caller. Thereafter he made inquiries about his children and decided to check on the whereabouts of the deceased boy, being the youngest and was informed by his brother-in-law that the boy had left the house in the manner stated above and not returned. He got the second ransom call" at about 5.30 p.m. from the same person. He pleaded with the person to release the boy and stated that the money would be given. He inquired as to the place to which the money should be brought to which the caller replied that it cannot be done in a rush.

Thereafter he set about to collect money which turned to be difficult since the banks were closed. He did not get any further calls and sat by the telephone the whole night.

The next morning at about 9.15 he got another call from the same person and thereafter several other calls in the course of which he indicated his difficulty to raise the full ransom of 2.5 million and pleaded that the amount be reduced to 1.3 million being the amount he had collected. This was refused. Subsequently, he received a call on Sunday afternoon being the 11th. At that time he indicated that the amount of Rs. 2.5 million was ready and that some money was in foreign currency. He received several calls as regards the payment of the ransom culminating in a call shortly after 11 in the night on Sunday. He was asked to go to a point about 1250 meters from his shop where there was a telephone booth, situated in front of Thelma Studio and to keep the money in the manner indicated. He was further informed that thereafter he should go to another point at which place the boy would be released to him. He complied with the demand and placed the money in the telephone booth, as directed. The boy was not returned although he stayed at the given point for about 1/2 an hour. He was then informed that the police had arrested the person who took the ransom.

Although the father of the boy, witness Jayantha de Silva, did not inform the Police of the matter, a relative of his who worked in the shop did in fact inform the Police and it appears that the police kept tab of all the calls and the movements of the witness. In this way they were able to arrest the accused shortly after the ransom was removed by him and money including a note made by Jayantha de Silva of the currency that was kept by him, was found in the possession of the accused. The accused made a statement that he could point to the Police the place where the body of the deceased was concealed. Consequent to the statement the Police found the body inside a cess pit of a house within close proximity to the house of the deceased along the same road.

The prosecution adduced evidence that this house belonged to the grand mother of the accused who had given it out to certain persons who were working in a hotel. These persons were usually away from the house during day time. Since there were several inmates, the key was kept concealed in a place known to the accused, as well.

The prosecution also adduced the evidence of one Gayan Kanisha, a friend of the accused, who had at one point spoken to the father of the deceased on the phone. He stated that he spoke over the phone at the

request of the accused and said to be a person at the other end," to do the job fast without "behaving like a child". Prior to the intervention, he heard the accused talking about the money being in foreign currency. This supports the evidence of Jayantha de Silva, who refers to one occasion when another person spoke and uttered the words repeated by witness Gayan Kanishka.

Thus it is seen that the items of circumstantial evidence implicate the accused with having talked to the boy shortly before the time he disappeared. He is linked up with the ransom calls to the deceased boy's father. The ransom money including the note in the handwriting of the father was found in his possession. He knew the place where the body was concealed and had access to that house.

The accused failed to explain anyone of these items of circumstantial evidence. His evidence was a total denial which is clearly unacceptable. I am of the view that the High Court rightly rejected his evidence.

Learned President's Counsel for the accused did not make any submission that the evidence of the accused being a total denial should be accepted even to the slightest degree.

I am inclined to accept the submissions of the learned Senior State Counsel that the strong items of circumstantial evidence unexplained by the accused would in itself be adequate to establish the charges against the accused. However, since the High Court has laid reliance on the confession and learned President's Counsel submitted that the Court erred in placing such reliance, I would now consider the submissions in this regard.

As noted above, the confession was recorded by the Magistrate in terms of Section 127 of the Criminal Procedure Act. The accused was arrested late in the night of 11th October and he was held in custody on a detention order (which was permissible at that time) upto 17th October. On that day he was brought before the Magistrate and he was ordered to be remanded until the 27th.

On 17th October when the accused was produced before the acting Magistrate, he expressed the desire to make a confession. He was then

informed that a confession could be made on the next date when the case came up before the permanent Magistrate. On the 28th the accused was brought from prison, but could not be produced in Court since there was a mass demonstration around the Kalutara Courts. People were agitated by the incident that had taken place and were gathered outside demanding that justice be meted out. The Magistrate, at that stage, had quite rightly decided not to record the statement in Court, but requested the prison authorities to produce the accused at her residence at 5.00 p. m. When the accused was brought to the residence, the Magistrate noted that the accused was agitated by the commotion that had taken place near the Courts. Thereafter she postponed the recording of the confession to the next date and directed that the accused be produced at her chambers at 10.30 a. m. Since there was normalcy around the courthouse on that day, the Magistrate had put several questions to the accused to ascertain whether the confession was being made voluntarily. She thereafter allowed time to the accused to reflect on the matter of making a confession and questioned him once again 1 1/2 hours later. On that occasion too the Magistrate asked a series of questions from the accused to ascertain whether the statement was being made voluntarily and on being satisfied as to voluntariness commenced recording the statement which took about 1 1/2 hours.

The accused in the statement revealed the entire incident from the point at which he decided to commit the offence of extortion. He had a love affair with a girl in the area and there was an objection on the part of the girl and her mother to the continuance of the affair, since he had no job. At that time he had seen on television the news of an incident of abduction and ransom, where a large sum of money had been paid out. He decided that he could make quick money in this way and picked on the deceased boy as a person who could be kidnapped and his father being a wealthy businessman as the person from whom ransom could be obtained. He enticed the boy who was well known to him to come to the grandmother's house on the pretext that he could give him some birds' feathers. After the boy came there he telephoned the father. He has stated that he suspected that father identified his voice and attempted thereafter to keep the boy in concealment. He kept his hand on the mouth and nose of the boy and took him to a room inside. At that stage the boy fainted. He thought that the boy had died and strangled the boy till the breathing stopped. Thereafter he put the body in an empty fertilizer bag and dropped it in the cess pit which was covered with a concrete slab.

The contents of the confession with regard to the 'ransom calls' and other particulars are consistent with the other evidence adduced by the prosecution. The accused has also admitted the arrest, the finding of the money and the dead body.

Learned President's Counsel submitted that the questioning done by the Magistrate as to voluntariness does not satisfy the requirements in Section 24 of the Evidence Ordinance and is inadequate to constitute a proper test as to voluntariness. A strong point has been made in the written submissions that in the final question as to whether the statement is being made voluntarily which appears at the end of both sessions of questioning, the record does not contain any answer of the accused.

It is submitted that the Magistrate erred in deciding on voluntariness in the absence of an answer to this pointed question. I have to note straightaway that I have checked with the original record and that in both instances the accused has specifically given the answer "Yes", indicating that the statement was being made on his own free will. Learned Counsel may have not noted these answers appearing at the bottom of pages 221 and 222 in the original record.

As regards the general submission that the confession should have been ruled out as being irrelevant in terms of Section 24 of the Evidence Ordinance, I would deal with the applicable law and circumstances material to the case.

Section 127 of the Code of Criminal Procedure Act, No. 15 of 1979 empowers any Magistrate to record any statement made to him before the commencement of an inquiry or trial.

Section 127 (3) specifically deals with the recording of a statement, being a confession. It requires the Magistrate not to record any such statement "unless upon questioning the person making it he has reason to believe that it was made voluntarily". This provision requires the Magistrate to make a signed memorandum at the end of the statement, recording his belief that the statement was voluntarily made. This requirement is coupled with the provisions of Section 24 of the Evidence Ordinance which provides an exception to the general rule of the relevancy of admissions and confessions.

Section 24 provides that a confession made by an accused person is irrelevant in criminal proceedings if it 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 any person in authority, or from any other person in the presence of the person in authority and which is sufficient in the opinion of the Court to give the accused person grounds for supposing that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him.

This exception which renders a confession irrelevant in criminal proceedings is based on English Law and Coomaraswamy has noted that Section 24 is similar to Article 22 of the *Stephen's Digest (The Law of Evidence)* E. R. S. R. Coomaraswamy, Vol I, page 404). In English Common Law, the exception is stated in the oft quoted dictum of Lord Sumner in *Ibrahim vs R*⁽¹⁾ which reads as follows:

"..... no statement by an accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it had not been obtained from him either by fear of prejudice or hope or advantage exercised or held out by a person in authority."

Following on the lines of the position in the English Law, it has been constantly held by our Courts that it is the burden of the prosecution to establish beyond reasonable doubt that the confession is not rendered irrelevant by any inducement, threat or promise as stated in Section 24. If it appears to a Court that any of the vitiating factors of Section 24 appears to have caused the accused to make the statement, the Court should rule that the statement is irrelevant.

E. H. T. Gunasekera, J., in the case of *Queen vs Cecilin*⁽²⁾ observed that the provisions of the Criminal Procedure Code referred to above and of Section 24 should be read together. On this basis he stated as follows:

" In my opinion a confession is made voluntarily if it is made in circumstances that do not render it inadmissible by reason of the provisions of Section 24 of the Evidence Ordinance....."

Therefore a Magistrate recording a statement in the nature of a confession in terms of Section 127 of the Code of Criminal Procedure Act has to be mindful of the factors set out in Section 24 of the Evidence Ordinance, which would result in a confession being irrelevant in criminal proceedings. The foremost in the series of vitiating factors is the role of a person in authority in relation to the accused which would mean in normal circumstances police officers connected with investigations. Since the question relates to a possibility of any inducement, threat or promise emanating from such a person in authority or from any other in the presence of such person, it is necessary to ascertain the circumstances relevant to the period in which the accused person, was in the custody of the police officers or the period in which such police officers had access to the accused person.

The line of questioning by the Magistrate should be directed at ascertaining whether the person was sufficiently removed from the pervasive influence of the Police or of any person in authority and the decision to make the confession has been of his own free will.

Section 24 of the Evidence Ordinance vitiates a confession where from the circumstances it appears that there was an inducement, threat or promise from a person in authority on the basis of which the accused could have reasonably assumed that he would get an advantage or avoid any evil in reference to the proceedings against him by making the confession. On the other hand if the accused decides to make a confession devoid of any inducement, threat or promise preceding from a person in authority, on the basis of a process of his own reasoning, Section 24 would not vitiate the confession even if he expected thereby to get an advantage or avoid any evil to himself or to any other person.

In the sequence of questions addressed by the Magistrate, she has specifically asked the question as to why he is willing to make a statement? In both instances when this question was asked by the Magistrate the accused had given similar answers. They are to the effect that according to his conscience he was aware that he did a wrong thing and that he wanted to save his four friends by making this statement. This answer clearly indicates the state of mind of the accused. He has

been persuaded by an innate sense of guilt and a desire to save four of his friends who were taken into custody and were according to the evidence detained in the same cell in the prison.

Following upon that answer the Magistrate has specifically asked the question whether there was any inducement, threat or promise by the Police or any person in authority. Both questions have been answered in the negative.

In a case in England *R vs. Rennie*⁽³⁾ the Court of Appeal considered a somewhat similar situation where it was stated that the accused decided to admit guilt because he expected that if he did so the police would cease inquiries into the part played by his mother.

It was held that such a motivation should not result in the confession being excluded. The following observations are relevant to the facts of this case -

“Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self generated. If so, it is irrelevant, even if it provides the dominant motive for making of the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.”

We do not understand the speeches delivered in the House of Lords in *DPP vs Ping Lin* to require the exclusion of every such confession

It is unnecessary and undesirable to complicate the question by consideration of whether conduct was 'improper' or constituted an "inducement". The sense and spirit of the principle are more important than the particular wording in which it is expressed. Above all it is to be applied with common sense. The person best able to get the flavour and effect of the circumstances in which the confession was made is the trial judge, and his findings of fact and reasoning are entitled to as much respect as those of any judge of first instance.

How this principle is to be applied where a prisoner, when deciding to confess, not only realises the strength of the evidence known to the police and the hopelessness of escaping conviction but is conscious at the same time of the fact that it may well be advantageous to him or, as may have been so in the present case, to someone close to him, if he confesses? How, in particular, is the judge to approach the question when these different thoughts may all, to some extent at least, have been prompted by something said by the police officer questioning him?

The answer will not be found from any refined analysis of the concept of causation nor from too detailed attention to any particular phrase in Lord Sumner's formulation. Although the question is for the judge, he should approach it much as would a jury, were it for them. In other words, he should understand the principle and the spirit behind it, and apply his common sense, and, we would add, he should remind himself that 'voluntary' in ordinary parlance means 'of one's own free will'."

It is seen from these observations that an inquiry into voluntariness should not be hemmed in by an endeavour to make a refined analysis as to the contents of Section 24. The Court should be guided more by the broad principle contained in the section and ascertain whether the statement is being made by the accused on his own free will. If it is established that the police or a person in authority did not use any inducement, threat or promise to cause the statement to be made, the other circumstances or the motivation that prompted the accused to make the statement would not be material factors to exclude the confession in terms of Section 24.

In this instance it is quite clear that the statement has been made after the accused was in remand custody for more than 10 days. He has had ample opportunity to reflect on the consequences of making a statement. In his own words he was induced to make a statement, pricked by his own conscience to make a clean breast of his involvement in the commission of any of the offences.

I am of the view that there is no merit in the submission of learned Counsel as to the conclusion arrived at by the Magistrate on the question of voluntariness and the finding of the High Court as to the absence of any factors that would result in the confession being irrelevant under Section 24 of the Evidence Ordinance.

I have now to deal with the submission of learned Counsel that the conviction for the offence of murder cannot be sustained and the findings, if at all should be of culpable homicide not amounting to murder on the basis of knowledge.

The evidence in the case clearly establishes that the accused was motivated by the overriding consideration of making quick money through extortion. He has been led to the state of mind by publicity given in the media to another instance of extortion, where a large sum of money had been collected as ransom. He decided to commit the offence in the vicinity of the place where the victim and he lived. No plan had been made to take the boy to a distance away from his home. The boy was well known to him and in the scheme of things, if he was released alive the accused would surely have been denied of the fruits of his offence of extortion.

In these state of facts the accused had to necessarily kill the boy in order to get away with the ransom money. According to the medical evidence the boy had been killed shortly after the time he is said to have left the house. It appears that the accused enticed the boy to come to the grandmother's house and thereafter made the ransom call to the father. Shortly after he made the call the boy was killed. The manner in which he was killed, manual strangulation, leaves no doubt as to the state of mind of the accused. He immediately put the body into a sack, tied the sack

and dumped it into a covered cesspit, leading to no inference other than that he intended to commit the murder of the boy. Therefore I see no merit in the submission of learned Counsel that the conviction should have been for culpable homicide on the basis of knowledge.

For the reasons stated above the appeal is dismissed and the conviction entered and the sentences imposed affirmed.

BANDARANAYAKE, J. – I agree

YAPA, J. – I agree

DE SILVA, J. – I agree

JAYASINGHE J. – I agree

Appeal dismissed.