

1942

Present : Wijewardene J.

IYER v. GALBODA.

791—M. C. Colombo, 35,280.

Confession—Accused in some sort of police custody—Evidence Ordinance s. 26.

A confession made by an accused person while he was in some sort of police custody is inadmissible.

The King v. Packeer Tamby (32 N. L. R. 262) followed.

A PPEAL from a conviction by the Magistrate of Colombo.

L. A. Rajapakse, for accused, appellant.

H. A. Wijemanne, C.C., for Crown, respondent.

Cur. adv. vult.

November 19, 1942. WIJEYWARDENE J.—

The accused appellant was convicted on a charge of having committed the offence of cheating on January 16, 1942, "by dishonestly inducing Mr. Lloyd Daniels . . . to deliver to him a cheque for Rs. 200 . . . by saying that he was an astrologer who was able to retrieve stolen property".

Early in January, Mr. Daniels lost a brooch and a ring. About the middle of January, Mr. Daniels came in contact with the accused who told him that he was gifted with some occult powers which enabled him through the medium of an *anjanan eliya* to recover lost articles for their owners. He then applied some chemical preparation to a plate and after gazing hard at it said that he saw therein some articles resembling a ring and a brooch. The accused then asked Mr. Daniels for Rs. 300 as he had "to buy some ingredients from Cargills" for an *amalgam* he had to prepare for use in the mystic rites he was going to perform in order to recover the lost articles. Mr. Daniels, who was impressed considerably by the exhibition of his powers given by the accused, handed to him a cheque for Rs. 200 on January 16.

As the accused failed to produce any satisfactory results, Mr. Daniels began to lose faith in him and ultimately asked Mr. Labrooy on January 19 to make a complaint to the Police. An Inspector of Police saw Mr. Daniels at his bungalow on the 19th and again on the 20th at 7.30 A.M. Describing what happened on the second visit the Inspector said,

"I found the accused in conversation with Mr. Daniels on the verandah. I went in civil dress. Mr. Daniels sent him to the end of the verandah . . . The accused got on to the compound twice and Mr. Daniels asked him to stop. On the third occasion he snapped his thumb and fingers and started running . . . I gave chase in my car . . . Then I chased him on foot shouting to people to stop him . . . The accused was ultimately stopped . . . I took him back to the bungalow . . . I left him on the verandah requesting (two persons) to keep watch over him".

Mr. Labrooy happened to go to the bungalow shortly after the accused was brought back. He saw the accused on the verandah and Mr. Daniels talking to the Inspector in the office room. Then the accused told Mr. Labrooy that he was a teacher of Sinhalese and "that he was drawn into this trouble by other people and that he knew nothing of *anjanan eliya*."

The statement made to Mr. Labrooy should not have been admitted in evidence in view of section 26 of the Evidence Ordinance which enacts,

"No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

The statement in question is a confession within the meaning of section 17 (2) of the Evidence Ordinance. The accused was in the custody of a police officer at the time he made the statement. A complaint had

been made against him to the Police. He was brought back by the Inspector when he ran away and the Inspector directed two men "to keep watch over" the accused while he and Mr. Daniels were discussing the matter in an adjoining room. That would be sufficient for the purposes of section 26. It does not matter whether or no the police officer had the right to keep the accused in custody. In *The Queen-Empress v. Kamalia and Another*¹ Birdwood and Jardine JJ. excluded a confession made by persons who were "in some sort of Police custody at the time". That case was followed by Maartensz J. in *The King v. Packeer Tamby*².

The admission of this evidence has prejudiced the accused's case very seriously and I am, therefore, compelled to set aside the conviction and send the case back for a new trial before another Magistrate.

Set aside.



¹ (1886) 10 Bom. 595.

² (1931) 32 N. L. R. 262.