

1940

*Present : Soertsz J.*ROCKWOOD *v.* DE SILVA.654—*M. C. Kurunegala, 69,011*

*Mischief—Throwing human excreta into the examination room of a surgeon—
Confession retracted—Penal Code, s. 408.*

A person who throws human excreta into the examination room of a surgeon is not guilty of the offence of mischief within the meaning of section 408 of the Penal Code.

A confession made by an accused person is not inadmissible merely because he has retracted it.

A PPEAL from a conviction by the Magistrate of Kurunegala.

Nihal Gunesekera, C.C., for complainant, appellant.

Abeywickreme, for accused, respondent.

October 24, 1940. SOERTSZ J.—

Cur. adv. vult.

This is an appeal, with the sanction of the Attorney-General, from an acquittal on a charge made against the accused-respondent, of aiding and abetting the offence of mischief, by throwing human excreta into the examination room of the surgeon of the Kurunegala Hospital. The charge was laid under sections 102 and 409 of the Penal Code.

The Magistrate acquitted the accused because, he held, that the two confessions alleged to have been made by the accused to the witnesses Kandiah and Fonseka could not be taken into account against the accused, because the confession to Kandiah fell within the meaning of section 24 of the Evidence Act and was, therefore, inadmissible, and the confession made to Fonseka was made under circumstances which made the Magistrate "feel it unsafe to act upon it in view of the fact that it has been retracted".

It is not at all clear to me what exactly the Magistrate means to convey when he uses these words. It cannot be that the Magistrate questions the veracity of the witness Fonseka or is doubtful of his recollection of the facts he spoke to, because the Magistrate says in so many words "I accept the evidence of Mr. Fonseka that the accused made to him the statement which Mr. Fonseka related in Court". The only conjecture I can make in regard to the meaning of the passage I have quoted from the judgment is that the Magistrate means to say that the accused made the confession spoken to by the witness, but that he made it in sanguine expectation of a benefit, and now that this expectation has not materialized, the accused's retraction of this confession results in the confession becoming "unsafe to act on". As a piece of reasoning, I find this very weak and unconvincing. The confession made to Fonseka is, if this witness' evidence is accepted, clear and unequivocal and is legally admissible evidence against the accused. And so is the confession made to the witness Kandiah. It is clearly not within section 24 of the Evidence Act. For one thing, there was no charge, nor were there any proceedings against the accused at the time he made the confessions. For another, there was no inducement, threat or promise by or from either of the witnesses to influence the accused to make the confession.

In my opinion, the accused has convicted himself on these confessions of having abetted Podiya to throw human excreta into the examination room. The retraction of the confessions is unfortunate and worthless.

The only question left is whether when Podiya threw human excreta into the examination room there was such mischief as is contemplated by section 408 of the Penal Code. That section provides that "whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits mischief".

In this case it is clear from the charge made in the summons that the property in respect of which the charge of mischief is laid is the examination room. It is not suggested in the evidence that this examination room has been destroyed by the act of Podiya. That act, therefore, does not come within that part of section 408 which requires "the destruction of any property". Was there then "any such change in" the examination room or "in the situation" of the examination room "*as destroyed or diminished its value or utility or affects it injuriously*"? There has been no change whatever in the "situation" of the room, nor has the value or utility of the room been destroyed. Consequently, that part of the definition goes out of the case. It remains to consider whether there has been "any such change" in the examination room itself as has resulted in "diminishing its value or utility" or in affecting it "injuriously".

In my opinion these words read in the light afforded by the illustrations appended to section 408 contemplate a change of some permanence in the composition, texture, form, &c., of the thing in respect of which the charge is laid, and not such a trivial and temporary change as results from an act such as that complained against in this case. Maine in his book on *Indian Criminal Law* (8th edition, page 616) says, "the change

referred to must be a physical change in internal composition or external form". I do not think it can be said that the act complained of here has resulted in a physical change in the internal composition or in the external form of the examination room. There is not one word of evidence to say or suggest that the value or the utility of the examination room has been diminished, or that it has been effected injuriously.

Moreover, I agree with the Magistrate that on the evidence in this case, it cannot be said that Podiya intended to cause or knew that he was likely to cause wrongful loss or damage to the public or to any person. It is clear that his intention was to annoy Dr. Kulatilleke.

In my opinion, the charge fails. The appeal is dismissed.

Appeal dismissed.
