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*Present : Jayewardene A.J.***KING v. BILINDA et al.***123, 123A—D. C. (Crim.) Kegalla, 2,386.*

*Confession—Failure of Magistrate to comply with requirements of the Code—No memorandum or signature of accused—Admissibility—Criminal Procedure Code, ss. 134, 302–404.*

Where a Police Magistrate records the confession of an accused person, without complying with any of the requirements of sections 134 and 302 of the Criminal Procedure Code,—

*Held*, the confession was inadmissible in evidence.

*Semle*, in such a case it is not possible to resort to section 424 of the Criminal Procedure Code to make good the omission.

Observations as to the procedure to be adopted when an accused person who wishes to make a confession is produced before a Magistrate by a Police Officer.

THE accused were charged under section 456 of the Penal Code with forgery of a deed. On the deed, purporting to be signed by one Horatala, as grantor, a civil action was brought in the Court of Requests of Gampola. When the civil case was terminated, Horatala, who denied having executed the deed sent a petition regarding it, and a police investigation was directed. As a result of this investigation first accused, the brother of Horatala, was charged with the forgery, together with the fourth accused, who was an attesting witness to the deed. The police arrested the first accused twenty miles away from Kandy, and brought him to the Kandy Police Magistrate to be remanded. Here a confession was made by this accused to the Magistrate. This confession was retracted by the accused in his statutory statement before the inquiring Magistrate and before the District Court. The District Judge of Kegalla found the accused guilty and sentenced them each to three months' rigorous imprisonment. The accused appealed from this conviction and sentence on the ground that the confession has been improperly admitted against them.

*Allan Drieberg, K.C.* (with him *R. L. Pereira* and *Navaratnam*), for first and fourth accused, appellants.—Whatever may be the consequence of the confession, as against the first accused, as regards the fourth accused, this confession—even if rightly admitted—is not evidence as it is a statement made by a co-accused, see *Rex v. Ukku Banda*.<sup>1</sup>

The case of the first accused would depend on whether the confession is admissible or not. A point to be noted is that this accused retracted his confession in his statutory statement before the District Judge of Kegalla.

<sup>1</sup> (1924) 24 N. L. R. 327.

This confession is purported to be recorded under section 134 of the Criminal Procedure Code, corresponding to section 164 of the Indian Code. Defects may be remedied under section 424 in certain circumstances, e.g., the absence of a signature would under section 533, Indian Code, not invalidate a confession if independent evidence is available of accused ratifying his confession, see *Queen Empress v. Raghu*.<sup>1</sup>

Section 424 may be utilized if the defect is only one of form, but it cannot be resorted to make good all omissions. Here the memorandum was signed by the Magistrate two months after the confession; there is nothing to show that the confession was made voluntarily, the accused has not signed his statement, and nothing to show that his statement was read over and explained to him.

The questions put and the answers given, to show whether the statement was a voluntary one, are not recorded as required under section 302 of the Criminal Procedure Code.

The terms of section 134 are imperative. In India, if the provisions are not complied with, section 533 corresponding to our section 424 does not cure the defect, see *Queen Empress v. Viran*.<sup>2</sup>

In the Indian cases the fact that an accused was in police custody is to be reckoned as bearing upon the question as to whether the confession was voluntary or not. Further, no confession should be recorded in the presence of the police officer who has arrested or produced the accused, see *Queen Empress v. Narayan*.<sup>3</sup>

*S. J. C. Schockman, C.C.*, for the Crown.—The confession of the first accused is admissible in evidence against him as sufficient evidence has been led at the trial under section 424, Criminal Procedure Code, to prove that the confession was voluntarily made. This section is intended to remedy the non-compliance with the statutory requirements in the recording of statements and is wide enough to include even the omission to observe all the requirements of section 134. The Magistrate states that he was satisfied that the confession was made quite voluntarily and hence his omission to observe the requirements of form is just such as is curable under section 424. See *23 Bombay 221* where it was held that all cases of omission can be cured by section 533 of Indian Criminal Procedure Code (corresponding to our section 424). The confession may be recorded in narrative form, see *Fekoo Mahto v. The Empress*.<sup>4</sup>

A Court may naturally view with suspicion a statement made by an accused who has been some time in police custody, but in this case such custody was very short, since the confession was made to the Magistrate at Kandy, when the accused was produced before him a short time, after being arrested to be remanded and produced before the Police Magistrate, Gampola.

<sup>1</sup> *23 Bom. (1898) 221.*<sup>2</sup> *9 Mad. 224.*<sup>3</sup> *25 Bom. 543.*<sup>4</sup> *14 Cal. 539.*

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This case raises a question with regard to the admissibility of a confession made by the first accused. The first accused and three others were charged in this case with the forgery of a deed of sale. The first and the fourth accused have been convicted and sentenced to undergo three months' rigorous imprisonment. Both accused appeal, and it is contended for them that the confession on which the conviction is based has been wrongly admitted in evidence by the learned District Judge. The impugned deed was produced in a civil case before the Court of Requests of Gampola. One Horatala who is described as the grantor of this deed denied having executed it. After the termination of the case he sent a petition regarding the forged deed, and a police investigation was directed. In the course of their investigations the police arrested the first accused Belinda, brother of Horatala. He was brought to Kandy under arrest and was produced on February 3 last year to be remanded. Before he was brought to the Police Court at Kandy, he had made a statement amounting to a confession to the police, and immediately before he was produced before the Magistrate the Inspector of Police recorded the confession. When he produced the accused before the Police Magistrate he informed the latter that the accused wished to make a statement. The Magistrate inquired from the accused whether it was so, and on his answering in the affirmative, he proceeded to record the statement marked X2 in which the accused stated that he was taken to Kegalla, given something to eat, and induced to forge Horatala's name to the impugned deed. Later, criminal proceedings were instituted against this accused and three others in the Police Court, and in his statutory statement he retracted his confession. The confession was produced as part of the evidence in the case. At the trial before the District Court, when the prosecutor proposed to read the confession in evidence, objection was taken that it was inadmissible as the requirements of section 134 had not been complied with in recording it. The Police Magistrate of Kandy who recorded the confession, and his Interpreter Mudaliyar were called under section 424 of the Criminal Procedure Code to prove that the requirements had been complied with, although the record did not show it. The learned District Judge disallowed the objection and admitted the confession in evidence. The conviction of both accused is based on the confession. I may at once say that as against the fourth accused-appellant the confession being a statement made by a co-accused is not evidence, even if the confession had been rightly admitted: *Rex v. Ukku Banda (supra)*. There was other evidence in the case, but that evidence was in the opinion of the Judge not strong enough to base a conviction on, and the learned Judge in the course of his judgment said, "I may say at once that if this confession is not admitted then there is against

none of the accused any adequate evidence. The whole case in my opinion turns on the admissibility or otherwise of this confession."

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The fourth accused-appellant is therefore entitled to be acquitted. His conviction is accordingly set aside.

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As regards the first accused-appellant, if the confession is admissible his conviction must stand. Is the confession admissible? That depends on the question whether the requirements of section 134 have been complied with? Now section 134 runs as follows:—

" 134. (1) Any Police Magistrate may record any statement made to him at any time before the commencement of an inquired or trial.

" (2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Police Court by which the case is to be inquiry into or tried.

" (3) No Magistrate shall record any such statement, being a confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect:—

" I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.

(Signed) A. B.,

Magistrate of the Police Court of \_\_\_\_\_."

Section 302 requires a Police Magistrate to record in full the whole of the statement made by an accused including every question put to him, and every answer given in the language in which the person is examined or if that is not practicable in English, "and such record shall be shown or read to him or if he does not understand the language in which it is written shall be interpreted to him in a language he understands and he shall be at liberty to explain or add to his answers.

"(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing and contains accurately the whole of the statement or examination of the accused.

"(3) The accused shall sign or attest by his mark such statement or examination; and in the event of his refusing to do so the Magistrate shall record such refusal."

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In the present case none of the requirements have been complied with except that the confession itself was placed on record. The learned Judge has tabulated the omissions and they may be summarized thus :

- (a) The memorandum required by section 134 (3) was not made at the time the confession was recorded. The memorandum which now appears below the confession was made two and a half months later.
- (b) The questions put, and the answers given, were not recorded as required by section 302, and the record does not show that the Police Magistrate questioned the accused as required by section 134 (3) to enable him to form the opinion that the confession was made voluntarily.
- (c) The accused has not signed the statement.
- (d) There is nothing to show that it was read over and interpreted or that an opportunity was given to explain or add to the answers.

This wholesale omission to comply with the requirements of sections 134 and 302, it is contended, can be remedied under section 424, by evidence being led to prove that the requirements were in fact complied with at the time the confession was made. These omissions lead me to the conclusion that the learned Police Magistrate who recorded the confession did not purport to do so under section 134. The Magistrate appears to have known that he had the right to record confessions made before an inquiry or trial, but he had forgotten the fact that they had to be recorded under section 134. Now section 424 empowers a Court before which a deposition of a witness, or a statement of an accused, is tendered in evidence to take evidence that the witness or the accused gave the evidence or made the statement recorded, if it finds that the provisions of the Code have not been fully complied with by the Police Magistrate recording the evidence or statement. Here no attempt had been made to comply with any of the requirements of section 134, and in view of the imperative terms of the section, my opinion is that section 424 cannot be resorted to make good all these omissions. The defect here is more than one of mere form, it is not a confession recorded under section 134 at all. There is no local case dealing with this point, but there are several Indian cases in which under similar circumstances confessions have been rejected: *Queen Empress v. Viran (supra)* and *Queen Empress v. Bhairab Chunder Chuckerbutty*,<sup>1</sup> which are cited with approval in *Amiruddin Ahmedr. King Emperor*.<sup>2</sup> It is not, however, necessary to base my decision on this ground, for, in my opinion, the oral evidence called fails to prove that the statement of the accused was read over and explained or interpreted to him, or that the Magistrate questioned the accused

<sup>1</sup> (1898) 2 C. W. N. 702.<sup>2</sup> (1917) 45 Cal 557.

to find out whether the confession was voluntary. It is the Interpreter Mudaliyar who usually explains and interprets whatever is recorded, but he is unable to say whether he read and explained this confession to the accused. There is no certificate under the hand of the Judge that the statement was taken in his presence, and in his hearing, and that it contains accurately the whole of the statement of the accused. The accused has not signed it or attested it by his mark. As the learned Judge remarks, it is strange that if the statement was read over to the accused it was not signed by him. I find therefore that the statement was not read over and interpreted to the accused and that he had no opportunity of explaining or adding to it. Then did the Magistrate question the accused and thereby have reason to believe that the statement was made voluntarily? The record shows that the Magistrate did not write down the questions put to the accused or the answers given by him. He says that he had reason to believe that the accused made the statement voluntarily. He did not make the memorandum required by section 134 at the foot of the record at the time he took down the statement. What the Magistrate did was this: When he was informed by the Inspector of Police that the accused wished to make a statement, he merely asked the accused if he wished to make a statement and proceeded to record the statement. According to the Interpreter Mudaliyar's evidence in the Police Court, the Inspector of Police who produced the accused was near the accused when the statement was made. On these facts it cannot, in my opinion, be said that on questioning the accused the Magistrate had reason to believe that the statement was voluntary. There has been no attempt whatever to question the accused to ascertain whether the confession was voluntary or not. The Magistrate ought to have put suitable questions to satisfy himself that the accused was a free agent, and that he had not been deceived or forced into making the confession. Such questioning was imperative in this instance as the accused was produced from police custody and the Police Inspector was standing near him when the statement was made. For, as was said in an Indian case, "the fact and duration of police custody is very properly regarded as having a material bearing on the question whether a confession is voluntary or not." In India very strict rules have been made regarding the presence of Police Officers when statements are being recorded under section 164 of the Criminal Procedure Code, which corresponds to section 134 of our Code, and an order has been issued that no confession or statement should in any case be recorded in the presence of the Police Officers who have arrested or produced the accused. This rule might with advantage be adopted locally. In my opinion the Magistrate failed to question the accused to satisfy himself that the confession was voluntary, and I can see no ground for saying that he had reason to believe that it was in fact voluntary.

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There has been a failure to comply with the letter or the spirit of section 134 which is framed in very imperative terms. The so-called confession is, therefore, inadmissible in evidence, and ought to have been rejected. It was, as I have already stated, retracted when the accused was called upon to make his statutory statement at the preliminary inquiry under Chapter XVI. of the Criminal Procedure Code.

In the result, the conviction of the first accused also must be set aside. The appeals are allowed.

*Convictions set aside.*

