

1940

*Present : Cannon J.*POULIER *v.* ABEYGUNAWARDENE.806—*M. C. Galle, 23,242.*

Confession—Statement made to Assistant Government Agent—Accused brought in custody of Police—Confession inadmissible—Evidence Ordinance, ss. 26 and 167 (Cap. 11).

The accused was produced by an Inspector of Police before an Assistant Government Agent in his office. The latter sent the Inspector outside and asked one of the officers at the Kachcheri and another person to be present. The Assistant Government Agent then asked the accused if he wished to make a statement, pointing out that there was no need to make a statement and there was no offer, threat or inducement made to him. The accused then made a confession. The accused was thereupon handed back to the custody of the Police.

Held, that the confession was inadmissible under section 26 of the Evidence Ordinance.

A PPEAL from a conviction by the Magistrate of Galle.

N. E. Weerasooria, K.C. (with him *E. B. Wickramanayake*), for accused, appellant.

E. H. T. Gunasekera, Crown Counsel, for the Attorney-General.

April 23, 1940. CANNON J.—

Section 26 of the Evidence Ordinance provides as follows:—“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 the person.” In the case before the Court a confession of guilt (P 14) by the accused was admitted as evidence and he appeals under that section on the ground that the confession was made whilst he was in the custody of the Police. There was no Magistrate present acting as Magistrate and that point does not arise.

The first question then to consider was whether this accused was in the custody of the Police at the time he made his confession. Mr. Weerasooria for the appellant has submitted that he was and it is a necessary submission, being the basis of the appeal, and Mr. Gunasekera for the Attorney-General contends that he was not. To decide whether he was in custody or not, one must look at the record. Two days before this submission was made, according to the evidence for the prosecution, the accused wrote a letter to the President of the Village Tribunal in which he admitted his guilt (P 3). The President's evidence at marginal page 12 of the record reads as follows:—

“The Government Agent questioned me about the defalcation. I showed him the letter P 3 and the other papers and explained to him what had happened. He took the papers into custody and asked the Galle Police through the Nagoda Police to take steps in the matter.”

The Government Agent's evidence at page 19 of the record reads :—

"I handed the file to Mr. Hingley, Assistant Government Agent. The Police arrested the accused, and Mr. Hingley recorded the statement of the accused."

At page 22 of the record Mr. Hingley says this :—

"Mr. Rogerson held an inquiry into a suspected case of defalcation at the Nagoda Village Tribunal. This accused was produced before me the same day by the Inspector of Police in my office. I sent the Inspector outside and I asked one of the officers of the Kachcheri to be present as a witness. I believe that person was the Extra Office Assistant, Mr. Kanapathipillai. I also called in Mr. W. H. Perera to be present. I then asked this accused if he wished to make a statement. I pointed out to him that there was no need to make a statement and I made it clear to him that I was making no offers, threats or inducements."

And in cross-examination this witness says at marginal page 25 :—

"The accused was produced before me in Police custody and given back to the Police after the statement was made to me."

That is the evidence of the witnesses independently of the accused—witnesses called for the prosecution. The accused himself gave evidence and he says at marginal page 96 this :—

"On January 13, 1939, a Sub-Inspector of Police and the Assistant Superintendent of Police came and brought me to the Kachcheri. I was questioned by Mr. Hingley. The Attapattu Mudaliyar and the Sub-Inspector of Police only were present. The Office Assistant was also there. The Assistant Superintendent of Police was there. From the time I left my house I was in the custody of the Police."

At page 97 he says this :—

"After the inquiry I was removed to the Police Station and there I was bailed out. I then realized I was on a criminal charge."

The Magistrate himself in his judgment says at marginal page 111 of the record :—

"On January 13, 1938, the Government Agent visited Nagoda for electing the Chairman of the Nagoda Village Committee. The President was questioned by him and he then showed the letter P 3 sent by the accused to him. The Government Agent put the Police on the track of the accused and he was produced before the Assistant Government Agent, then Mr. Hingley."

This evidence tends to show that the witnesses were under the impression that the accused was detained by the Police. Mr. Gunasekera in support of his submission that the accused was not in Police custody at the time of the confession cited the case of *Dow v. Appuhamy*¹. In that case a Policeman had seen a servant in suspicious circumstances with a bottle of oil and so he took the servant to his master and the result was that the servant confessed to stealing this bottle of oil. The master

¹ (1899) 1 *Thambyah's Reports*, p. 72.

thereupon told the Police to deal with the servant according to law. The point now under consideration arose, and the Judge, on appeal, held that the servant was not in custody until the master had told the Police to deal with him according to law.

I should be unwilling to adopt that reasoning without further argument. But I cannot decide this case on that authority for the reason that there is no definite evidence as to when the accused was charged—whether before or after he was taken by the Police to the Assistant Government Agent. One has to remember the extracts I have read, especially that which states that the Government Agent took the papers and asked the Police to take steps in the matter; and also the Magistrate's remarks that the Government Agent put the Police on the track of the accused and he was produced before the Government Agent. I hold that the accused was in the custody of the Police when he made the confession (P 14) and that the confession was therefore not admissible in evidence against the accused under section 26.

Then it is argued for the Crown that assuming he was in custody, it was not a lawful custody. There is no evidence as to whether there was any warrant but it seems to me that whether it was a lawful or an unlawful arrest is not material to this issue.

The next point for decision is how does the admission of this evidence affect the conviction? Does it go to the root of the matter and make the conviction untenable, or can the conviction be allowed to stand under section 167 of the Evidence Act which reads:—

“The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.”

There was evidence of other facts which, if accepted, would, without the confession, have justified the Magistrate in convicting the accused. There is the letter P 3. This is in the handwriting of the accused written on January 11 to the President of the Village Tribunal. It reads as follows:—

“Sir, I beg to lay before your honour the following facts for your kind and sympathetic consideration, that the fines collected from last August were not yet remitted. I had these monies and I do not know what happened. I tried my level best to procure this amount by taking a loan on mortgaging my land, but it has not yet settled and postponing from day to day. I did not bring this to your notice so long thinking that I will be able to procure this amount and remit this. As I have no way of remitting this amount, I beg that you will be pleased to remit this amount on taking a necessary document from me. I am still not well to attend to work. Further, I beg of you to see to this and grant me redress. I am so sorry and shame to look at your face as I have done this act. I again tell you the fact that I do not know what

has happened to this money. All the time I was trying my best to earn this amount but to my misfortune all failed. Beg that you will help me at this juncture. I am, Sir, Your Obedient Servant."

The accused's explanation of that document was that the books had not been kept properly for some months. The Government Agent was expected in January and the accused alleged that on this day the President went to his house and told him that there would probably be a deficiency; that the Government Agent was coming, and asked whether he would write a letter saying that he was responsible for the deficiency. The accused says that he gave that letter to the President on the promise that he would be saved from trouble. He says that he wrote it at the dictation of the President.

Dealing with this letter, the Magistrate in his judgment says in effect that that letter alone coupled with the evidence of the President and of the accused would not have induced him to convict the accused, because, he says, evidence had been led that the President sometimes had custody of some of the fines that were levied in the Court. This is what the Magistrate says on that point :—

"the prosecution admits that the ultimate responsibility for the money was with the President, and in point of fact the amount has now been made good by him to the Government Agent. In view of that, if the evidence was that of the President and the accused alone it would have become necessary for me at least to give the accused the benefit of the doubt that would arise."

In the confession (P 14) the accused said :—

"I admit that I spent the money for medical expenses and for home requirements. I was constantly trying to make up the money I had spent After the President had signed all the papers I retained them instead of sending in the money."

I might mention here that the Magistrate, when he admitted that confession in evidence had not the advantage of the objection being put before him in the way it has been put before this Court. It was not put before him as inadmissible under section 26 of the Evidence Act. The Magistrate found that the confession was a voluntary one. If the objection had been raised under section 26 of the Evidence Ordinance he might have decided otherwise. I think the most cogent evidence that can be put before a Tribunal is an admission or a confession. The Magistrate takes that view for he says in effect that this confession, added to P 3, induced him to accept P 3. This is how he puts it :—

"The prosecution admits that the ultimate responsibility for the money was with the President and in point of fact the amount has now been made good by him to Government. In view of that, if the evidence was that of the President and the accused alone, it would have become necessary for me at least to give the accused the benefit of the doubt that would arise."

He goes further and says :—

"But when, as here, the letter P 3 is followed up by a confession within two days of it to another official against whom no such allegation

even can be cast to the Assistant Government Agent, and the retraction was made only 16 days later, I can come to no other conclusion than that the affidavit P 12 was an afterthought."

P 12 was an affidavit which the accused swore 16 days later, stating that he had written P 3 at the dictation and persuasion of the President.

I do not think (in view of the passage of the judgment I have just cited) that I can say that the Magistrate would have come to the same conclusion without the evidence of the confession.

Now what order should be made? Section 347 of the Criminal Procedure Code gives power to this Court to send the case back for trial or to commit it for trial. The Crown submits that if the Court holds that the conviction cannot stand because of the admission of this confession, the Court has authority to commit the case for trial or retrial on the ground that the Magistrate should not have tried the case. An authority for that proposition is *Silva v. Silva* where it was held that in a case of complexity or where difficult questions arose, the Magistrate should not assume jurisdiction, but commit for trial. I am not prepared to hold that the Magistrate was wrong in assuming jurisdiction.

I hold that the confession was made when the prisoner was in the custody of the Police and it is possible to say that had that been excluded the Magistrate would have come to the same conclusion.

The conviction is therefore quashed and the accused is discharged.

Conviction quashed.
