

Present : **Wijeyewardene J.**

THE KING v. FRANCISCU APPUHAMY

68—*M. C. Chilaw, 12,594.*

Statement made to a Magistrate under section 134 of the Criminal Procedure Code—Confession inadmissible on ground of improper inducement, threat or force—Degree of proof—Evidence Ordinance, s. 24.

A confession made to a Magistrate under section 134 of the Criminal Procedure Code is inadmissible where it is made under circumstances which render it irrelevant under section 24 of the Evidence Ordinance.

It is not necessary for a Court to be furnished with positive proof of the high standard contemplated by section 3 of the Evidence Ordinance before it rejects as irrelevant under section 24 of that Ordinance the confession on the ground of an improper inducement, threat or force.

The inquiry contemplated by section 134 of the Criminal Procedure Code is the preliminary inquiry for which provision is made by section 155 of the Criminal Procedure Code.

The King v. Ranhamy (42 N.L.R. 221) followed.

Section 134 of the Criminal Procedure Code has not been impliedly repealed by section 8 of Ordinance No. 13 of 1938 (sections 155-165 of the Criminal Procedure Code).

THE accused in this case was charged with murder before Wijeyewardene J. and a Jury at the third Western Circuit.

A. H. C. de Silva (with him *S. R. Wijayatilake*), for the accused.

F. C. Loos, C.C., for the Crown.

Cur adv. vult.

October 13, 1941. **WIJEYWARDENE J.**—

The accused was charged with the murder of one Agostinu Appuhamy on April 16, 1940. As the only evidence against the accused was a confession made by him to the Magistrate under section 134 of the Criminal Procedure Code, I had to decide on the admissibility of that confession before the Crown Counsel opened his case. On an application made by the Counsel for the defence, I directed the Jury to retire and called upon the Counsel for the defence to lead his evidence. The only witness called by him was the accused, while the prosecution called four witnesses—Baron, the village headman; Simon Perera, a police constable; an Assistant Superintendent of Police; and the Magistrate who recorded the confession.

The accused's evidence was to the following effect:—He was arrested on April 24 about 2 p.m. by Simon Perera and Baron at Danvilla estate and taken to the headman's house at Kumarakatuwa. He was removed from the headman's house about 2 a.m. on the 25th and was taken to the Chilaw Police Station about 9 miles away. He was brought back to the headman's house the same day about noon. He was then taken to the Danvilla estate for a few hours and brought back to the headman's house from where he was removed to the Chilaw Police Station on the 27th morning. He was ultimately produced before the Magistrate at 4.40 p.m. on the 27th, and he made his confession to the Magistrate forty-five minutes later. He was assaulted both at the headman's house and at the Police Station. He added, that at the headman's house, "they (Baron

and Simon Perera) ran needles into (his) finger nails. That was done by the constable while the headman was holding (his) hands. They also put some chilly powder into (his) nostrils. That was done by the headman”.

The accused stated further that the confession he made was false but he made it because he “had no way of escape from the police” and that the confession made by him “was dictated by the constable”. He explained that, at the request of Simon Perera, he did not tell the Magistrate about the treatment he received at the hands of Baron and Simon Perera, as Simon Perera promised to get him a “pardon”. He added that he feared the “consequences that might happen if (he) went against Simon Perera”.

The accused was unable to state with precision the time he was arrested or the hours he spent at the headman’s house, on the estate and at the Police Station after his arrest. He was quite definite however that he was arrested sometime in the afternoon of April 24.

According to the confession, the accused went with two persons called Sandanam and John to the hut of the deceased and with their help killed the deceased. Sandanam and John were arrested after the confession was made, but were discharged some weeks after, as the confession of the accused could not be used against them and there was no other evidence against them.

The confession starts by supplying the motive for the accused killing the deceased. The accused says that the deceased was on terms of intimacy with his wife. He then gives a reason for Sandanam and John taking part in the attack on the deceased. He suggests that Sandanam and John were displeased with the deceased in connection with a letter alleged to have been handed by the deceased to the accused and delivered by him to the Superintendent of Nelunkulia estate, a few days before the murder. The accused then proceeds to describe the murder and the part played by him and Sandanam and John.

The headman giving evidence before me referred vaguely to a rumour he heard in the village, about two days before the murder, that the deceased was friendly with the accused’s “pavula” and “pavul”, and said that he mentioned about this to the police before the accused was arrested. The words “pavula” and “pavul” were naturally interpreted by the Interpreter as “wife” in the context in which the word was used. It was very noticeable, when the headman was giving evidence, that he avoided using the name of the accused’s wife and persisted in using the word “pavula” and sometimes the word “pavul”. This became rather suspicious in view of the fact that the evidence for the prosecution in the Magistrate’s Court negatived the probability of such an intimacy between the accused and the deceased’s wife and this made me question the headman in detail as to what he meant by “pavula” and “pavul”. He then came with the explanation that he meant “family” by the word “pavula” and all that he heard was that that there was a friendship between the families of the accused and the deceased and that there was no talk in the village that the deceased was on terms of intimacy with the accused’s wife. I have no doubt, that the alleged intimacy between the deceased’s wife and the accused mentioned in the confession was the

invention of some policeman who knew that in criminal cases the Courts usually look for a motive for the crime, and that the headman was not unwilling to lend his support to the policeman, but thought it wise to secure a means of escape by using the ambiguous word *pavula* and *pavul*, in the event of his being confronted with the evidence led in the Magistrate's Court. Why did the accused relate the story about an intimacy in his confession when no such intimacy existed? Why was he anxious to provide a non-existent motive for the crime alleged to have been committed by him? Was it a voluntary act on his part? Was it not rather the statement of a man acting under the influence of some one in authority?

The reference to the letter itself is very suspicious. The constable Simon Perera had recorded in his diary some information he received on April 20 at the headman's house regarding a letter alleged to have been taken by the accused to the "conductor" of Nelunkulia who, it is admitted, calls himself the Superintendent of Nelunkulia. We then come to the confession made on the 27th when this letter is made to serve the purpose of supplying a motive for Sandanam and John attacking the deceased. Strangely enough, the evidence in the Magistrate's Court on behalf of the Crown shows that the story about the letter was a myth. Why did the accused invent the story about a letter? What was his anxiety to substantiate in this manner a charge against Sandanam and John whom the police suspected, when according to the police, he was making this confession, merely because he was impelled by strong feelings of remorse and penitence?

There is one other fact which appears to me to show that the confession was not a voluntary statement. The accused has maintained always that he was arrested on the 24th. The police denied that the arrest was on the 24th but admitted in the course of the proceedings, that the accused was arrested in the evening of the 25th. The accused was produced before the Magistrate, as stated earlier by me, on the 27th at about 4.40 p.m., nearly 48 hours after his arrest. It must have been well within the knowledge of every policeman interested in the case, that, in detaining the accused in custody for that period without producing him before the Magistrate, they were acting in direct violation of the provisions of section 37 of the Criminal Procedure Code. Now in reply to a question put by the Magistrate before recording his confession the accused stated:—"I was arrested at 6 p.m. on April 26, 1940, at Danvilla estate by constable Simon Perera. I was taken to the Police Station later". The police have admitted, as stated before, that the accused was arrested on the 25th evening, kept in the headman's house that night and taken to Chilaw Police Station on the 26th at 4 p.m. Why did the accused tell the Magistrate that he was arrested at 6 p.m. on the 26th and taken to the Police Station, Chilaw? That was not the truth and that was not the case of the accused. This fact suggests to my mind that the accused was induced to make that statement to the Magistrate in order to prevent the Magistrate from discovering that the police had disregarded the provisions of section 37 of the Criminal Procedure Code.

It is admitted by the witnesses for the Crown, that the accused denied all knowledge of the murder when questioned by the headman on April 17,

and on one or two subsequent occasions when questioned by the police. It is in evidence that the accused was working on his estate at the time of his arrest. The Crown wanted it to be believed that when the constable and the headman went on April 25, and the constable told the accused that he was suspected, the accused stepped forward and made a long statement confessing his guilt, supplying a false motive for his offence and a false motive for the other suspects joining in the offence. And yet a few days after making his confession to the Magistrate, the accused retracted it. It is, to say the least, very extraordinary that the accused should have been suddenly seized with remorse about nine days after the murder and after a number of denials by him on previous occasions, and then make a confession of this nature and thus provide the police with the only evidence to bring home to him the guilt of the crime at a time when the police were experiencing the greatest difficulty in finding out who committed the murder. It is not less extraordinary that this feeling of remorse should have deserted him with equal suddenness, a few days after the non-summary proceedings were started against him in the Magistrate's Court.

Neither Baron nor Simon Perera who were called as witnesses impressed me favourably. They, no doubt, denied that they ill-treated the accused or induced him in any way to make the confession. Of course, in a matter of this nature the headman or the constable would not have been unprepared to make such a denial even if they had behaved in the manner stated by the accused.

I do not think it necessary to refer in detail to the unsatisfactory nature of the evidence called by the Crown. I am not satisfied at all with the explanation given by Baron and Simon Perera for not taking the accused to the Police Station on the 25th instead of detaining him in the headman's house.

It is also unfortunate that the Assistant Superintendent of Police did not produce the accused before the Magistrate on the 26th but allowed the accused to remain at the Police Station till the 27th. The Assistant Superintendent of Police explained that he acted in that way in order to give the accused time to consider whether he should make that confession. I think that the Assistant Superintendent of Police would have acted more prudently if he produced the accused before the Magistrate within the time mentioned in section 37 of the Criminal Procedure Code and let the Magistrate decide as to the voluntary nature of the confession going to be made to him.

In recording the confession the Magistrate has followed the rules laid down by the Legal Secretary for the guidance of Magistrates. I think the Magistrate should have allowed a much longer interval than forty-five minutes to elapse before he recorded the confession. It would have been better if the Magistrate did not permit himself to be unduly fettered by the rules mentioned by me and put questions besides those set out in the rules and made a greater endeavour to elicit facts sufficient to enable him to form a correct judgment as to the voluntary nature of the confession the accused proposed to make.

It is not necessary for a Court to insist on the high standard of proof contemplated by section 3 of the Evidence Ordinance before it rejects

as irrelevant under section 24 of the Evidence Ordinance, a confession on the ground of an improper inducement, threat or force. The use of the word "appears" in section 24 indicates a much lower standard of proof in a matter of this nature.

On a careful consideration of the evidence led before me and a close study of the confession itself, I ruled that the confession was inadmissible, as it appeared to me, for the reasons given by me, to have been made under circumstances which made it irrelevant under the provisions of section 24 of the Evidence Ordinance. I would refer briefly to certain other points taken by the Counsel for the accused against the admissibility of the confession. The Magistrate had recorded the statements of two witnesses some days before the accused appeared before him and made his confession. On those facts, the Counsel for the accused argued that the confession could not have been recorded by the Magistrate under section 134 of the Criminal Procedure Code which provided for such a record to be made only before the commencement of an inquiry or trial. I find that this identical question has been discussed in (*The King v. Ranhamy*¹) where it was held that the inquiry contemplated in section 134 was not any inquiry but the preliminary inquiry referred to in section 155 of the Criminal Procedure Code. If I may say so with respect, I am in entire agreement with the view expressed by Soertsz J. in that case and I hold that it was competent for the Magistrate to record the confession at the time he did.

A further point taken by the accused's Counsel was that section 134 of the Criminal Procedure Code had been impliedly abrogated by section 8 of Ordinance No. 13 of 1938. Before that enactment, an accused person who was brought before the Magistrate in non-summary proceedings was informed of the nature of the offence of which he was accused and the Magistrate was then empowered to record any statement made by the accused. The Code also provided for the use of such a statement against the accused at the trial. As a result of section 8 of Ordinance No. 13 of 1938, any statement made by the accused on the charge being read to him at the commencement of the inquiry would not, now, be recorded by the Magistrate nor would such statement be used in evidence against the accused. According to the new procedure, the only statement of the accused in answer to the charge that would be recorded by the Magistrate would be the statement, if any, made by him after the close of the case for the prosecution. The Counsel for the accused submitted that the change in the procedure showed that the Legislature discountenanced a Court acting on a statement made by an accused person immediately at the commencement of the preliminary inquiry and that therefore it could not have been the intention of the Legislature that a Court should act on a statement made to a Magistrate especially where the accused comes from police custody, even before the commencement of the inquiry. While it may be conceded that there is some force in the observation of the learned Counsel, I am unable to hold that section 134 of the Criminal Procedure Code has been impliedly repealed by section 8 of Ordinance No. 13 of 1938.

Objection upheld.