IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:
CA/HCC/147/19

Hon. Attorney General,
Attorney General Department,
Colombo 12.

High Court of Hambantota
Case No: HC/22/2001

Vs.

1. Godagama Kangkanamage Thilak Also known as Hiwwa
2. Jayasekara Vidanapathirana Piyadasa Also known as Kadira
3. Wanniaarachchi Kangkanamlage Also known as Sripala
4. Vilpita Rathnayakage Piyasena

Accused

(*In the High Court 22/2001)*

AND BETWEEN

Jayasekara Vidanapathirana Piyadasa Also known as Kadira

Accused – Appellant

Vs.

Hon. Attorney General,
Attorney General Department,
Colombo 12.

Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Delan De Silva for the Accused-Appellant.

Azard Navavi, S.D.S.G for the Respondent.

Argued on : 23.07.2024

Decided on : 27.08.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 24thMay 2019 of the High Court of Hambantota.

The accused appellant with three others were indicted under Section 296 of the Penal code, for committing the murder of Allewela Pahalage Wimal Weerasinghe on or about11th March 1982.

The first accused had died before the trial and the third and the fourth had been acquitted by the trial judge, but the accused-appellant had been convicted for the charge in the indictment. The instant appeal is filed against the said conviction and sentence.

The main grounds of appeal raised by the accused-appellant were,

1. The learned trial judge had wrongfully considered the confession made by the appellant to the magistrate,
2. The learned trial judge failed to consider the medical evidence being contrary to the matters in the confession,
3. The confession has wrongfully implicated the appellant and the trial judge had failed to consider the same.

The prosecution has based its case mainly on the confession recorded by the magistrate and the medical evidence and the evidence of the deceased mother and PW-03. The appellant had made a statement from the dock.

It is noteworthy to state that the incident had taken place in 1982, but the case for the prosecution had started after 27 years from the date of offence. The time period from the date of the offence to the first trial date is shocking but yet true, nevertheless the story of the prosecution unfolds as below,

The deceased mother, namely Leelawathi, had given evidence on oath and had stated in the High court that the deceased had been about 16/17 years at the time of the offence and was the eldest of the 5 children she has had. The deceased had gone missing on a date that she cannot remember and having waited for a few days, she had lodged a complaint to the police. After a few days, the police had taken her to Madhunagala forest, where she has seen decapitated body parts, which had been beyond recognition but she had identified a piece of cloth to have belonged to her deceased son, by the stitches she is supposed to have made on it, just before the disappearance. Police also has shown her a bottle which they believed had contained a poisonous substance. This witness had been cross examined lengthily but she had stood the test of cross-examination well.

Thereafter, the prosecution had led the evidence of PW-02, namely Sirisena, who is supposed to have given the information to the police on seeing scattered body parts of a human being in the Madhunagala forest, when he took his cattle to graze.

Next, the prosecution had led the evidence of the learned magistrate who had recorded a statement under section 127 of the Criminal Procedure Code on 09/04/1982. The learned magistrate had been retired at the time he had given evidence and he had done so after 28 years since retiring. According to his evidence, the accused-appellant was produced to his chamber by the police on 08/04/1982 and the accused-appellant had expressed his desire to make a confession. According to his evidence, he had explained verbally the legal implications of a confession and had ordered the prison authorities to keep him in a separate room until the next date for him to reconsider the decision to make a confession. As the next date had been a Saturday and as he had not been able to get the assistance of a stenographer, the learned magistrate himself had proceeded to write it in his own handwriting. Before doing so he had proceeded to question the appellant whether he was under any promise, threat or inducement. All those questioning had been recorded in his own hand writing before the commencement of the confession. As the answers had been in the negative, he had proceeded to write down the entire confession in his own handwriting. The witness had been extensively cross examined as to the propriety and the legality of the confession but he had stood the test of cross-examination satisfactorily. The position of the defence had been that the appellant never made a confession. At the end of the confession, the learned magistrate has recorded the affirmation that the appellant made the confession voluntarily and it was recorded rightly and correctly. After concluding the evidence of the learned magistrate, the learned trial judge had heard the submissions of both parties and had proceeded to admit the confession in evidence.

But before admitting the confession in evidence, an inquiry has been held to ascertain the voluntariness of the confession, as the defense had objected to the marking of the confession in evidence. During the inquiry for the voluntariness of the confession, the Magistrate had been lengthily cross examined but he had stood the test of cross-examination well, as stated above.

Under Section 80 of the Evidence Ordinance, whenever any document is produced before any court purporting to be recorded during any judicial proceeding such as a confession or a statement by any prisoner or accused has been taken down and signed by any judge or magistrate, the courts shall presume that the document is genuine and that such evidence, statement or confession was duly taken.

Hence section 80(3) of the Evidence ordinance has stated that a confession duly recorded by a magistrate can be presumed to be genuine and duly taken. Therefore, the question arises whether the term "duly taken" means that a confession recorded by a magistrate, whether a court can accept, without going into the voluntariness of the confession.

In all the decided cases relating to confessions recorded by learned magistrates, when such confessions have been admitted in evidence, provisions of Section 24 of the evidence ordinance have been adhered to. Therefore, it is the opinion of this court that even if the magistrate has recorded a confession, it is best for every court to go into the voluntariness of the confession before admitting it in evidence.

The main ground of appeal taken by the counsel for the appellant was the admissibility of the confession made by the accused-appellant to the magistrate.

Under section 127 of the Code of Criminal Procedure Code (CPC) a magistrate can record any statement or confession made to him and if it is a confession, the procedure has been described under section 127 (3) of the code, where it has been stated very clearly that "a magistrate shall not record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was voluntary."

Hence the basic principle behind a confession is that it has to be voluntarily made without any threat or inducement.

In the case of **Nuwan De Silva V Attorney General** 2005 1 SLR 146, a five bench judgment by their Lordships in the Supreme Court, where S.N. Silva CJ has held with the others agreeing to the steps to be followed before admitting a confession made to a Magistrate being admitted in evidence.

It has held that "section 127 of the CPC empowers the Magistrate to record any statement made to him before the commencement of any inquiry or trial, section 127 (3)especially deals with the recording of a statement, being a confession. **It requires the Magistrate not to record any such statement unless upon questioning the person making it that he has reason to believe that it was made voluntarily".**

Therefore, it is very clear that their Lordships have held that even if the confession is made to a Magistrate the voluntariness of the confession has to be gone in to before admitting in evidence.

Therefore section 80(3) of the Evidence Ordinance only stipulates the genuineness of the document and not the voluntariness of the document.

The Law of Evidenceby E.R.S.R Coomaraswamy Volume 2, book 1, page 136, has analysed the scope and basis of Sectoin 80 and goes on to compare section 79 and 80 of the Evidence Ordinance and goes on to say that "section 80 does not render admissible any particular type of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in judicial proceedings or in accordance with the law. It presumes that all acts done in respect of the document were rightly and legally done". It has gone onto site **Queen v Wittie** 63 N.L.R 121, where Sansoni J has said, "The presumption is that all necessary formalities purporting to have been performed have in fact been performed", and it goes on to site **R v Gnanaseeha Thero** (1968) 63 N.L.R 154 at 158, where it has said that there in presumption that a confessional statement was spontaneously and voluntarily done."

Therefore, section 80 of the Evidence Ordinance does not take away the fact that the voluntariness of the confession should be gone into. Therefore, it is the opinion of this court that when a magistrate records a confession the voluntariness of the statement has to be gone into.

Hence as per the voluntariness of the confession also the above mentioned case law is important and it has further held as below that "section 24 provides that a confession made by an accused person is irrelevant in criminal proceedings if it appears to Court to have been caused by any inducement threat or promise having reference to the charge against the accused person proceeding from any person in authority,or from any other person in the presence of the person in authority and which is sufficient in the opinion of Court to give the accused person grounds of supposing that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him."

The case law further says, "That this exception which renders a confession irrelevant in criminal proceedings is based on English law and Coomaraswamy has noted that Section 24 is similar to Article 22 of the Stephen's Digest (the

Law of Evidence E.R.S.R Coomaraswamy Vol. 1, Pg 404). In English law, the exception is stated in the often quoted Dictum of Lord Summer in **Ibrahim v R** CM 5256, which reads as follows,… no statement by an accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it had not been obtained from him either by fear of prejudice or hope or advantage exercised or held out by a person in authority. Following on the lines of the position in English law, it has been constantly held by our courts that it is the burden of the prosecution to establish beyond reasonable doubt that the confession is not rendered irrelevant by any inducement, threat or promise as stated in Section 24. If it appears to a court that any of the vitiating factors of Section 24 appears to have caused the accused to make a statement, the court should rule that the statement is irrelevant. E.H.T Gunasekara J, in the case of **Queen v Cecilin**, observed that the provisions of the Criminal Procedure Code referred to above and of Section 24 should be read together. On this basis he stated as follows: "In my Opinion a confession is made voluntarily if it made is circumstances that do not render it inadmissible by reason of the provisions of Section 24 of the Evidence Ordinance.""

Further downwards the judgement has lengthily analysed Section 24 and the responsibility on the magistrate to question the accused with regards to the voluntariness of his to make the confession. Finally, his lordship S.N. Silva has held that, "**Although the question is for the judge, he should approach it much as a jury would, were it for them. In other words, he should understand the principle and the spirit behind it, and apply his common sense, and we would add, he should remind himself that voluntary in ordinary parlance means "of one's own free will"".**

Hence as per the above judgment even if the confession has been recorded by a Magistrate it has to be gone in to with regard to the voluntariness of the confession before it is admitted in evidence.

In the instant matter, the learned magistrate has questioned the accused very lengthily with regard to his voluntariness to make the confession and whether there was a person in authority who was trying to influence him to make the confession. Further, the appellant was taken away from police custody and remanded, and the learned Magistrate had given him one day to think it over and come back to court and make the confession. Therefore, even if there was inducement or threat from the police, while he was in the police custody, there would be no threat, when the appellant came from remand and made the statement.

Thereafter, the magistrate has been careful enough to write down in his own writing, as there was no stenographer available. He had also taken steps to

initial on the side, where certain additions and alterations have been made during the recording. Thereafter, at the end of the confession, he had got the accused to sign and the learned magistrate himself has endorsed, according to the provisions of the Criminal Procedure Code, that it had been made voluntarily.

All this has been very meticulously considered by the learned trial judge, therefore the contention of the learned counsel for the accused-appellant, that the confession is wrongly admitted in evidence is without any merit.

According to the contents of the confession, the accused-appellant had been in the company of the deceased and the first accused on the date of the incident, the time had been very late in the night and during this meeting they had consumed liquor. During the meeting the deceased by the first accused not to shout and the accused-appellant, along with another unknown person had assaulted the deceased. Thereafter the second accused had cut the deceased and had separated his neck from the body. This he says has been done on the instructions of the first accused. But the learned Trial judge had been careful not to use this statement against the first accused.

Therefore, according to the above mentioned confession, the culpability of the accused-appellant had been very clearly adduced. Thereafter, the learned trial judge in his judgement has considered to see whether the above mentioned portion of the confession has been corroborated by any other evidence, and he has come to the conclusion that the evidence of the deceased mother, who had found the parts of the deceased body being scattered all over in the jungle, which were found by a person who has gone to tie his cattle to graze in the jungle (PW-03).

According to the confession of the second accused-appellant, before the neck of the deceased had been separated from the body, the first accused had made him drink poison from a bottle, according to the evidence of PW-01, PW-03 and the police, there had been a small bottle found near the scattered body. This particular body had been found on 11th of March, 1982, and the mother of the deceased had complained to the police with regard to the disappearance of the son a few days prior to the 11th of March 1982.

Although the learned counsel for the has stated that the post mortem evidence had been contrary to the contents of the confession, the learned JMO, who gave evidence on the report of Professor Niriella has stated in evidence that although the cause of death could not be specifically stated due to the decomposed body, the JMO has said that death could have occurred in the way it has been described in the confession. Therefore, we see no disparity in the evidence of the JMO and the evidence given in confession.

The next ground of appeal is that the accused had been improperly implicated in the confession and the trial judge has accepted it without proper analysis.

This we observe to be wholly incorrect because the accused-appellant hadbeen very clearly implicated in the confession and it had been corroborated by the circumstantial evidence played by PW-01, PW-03, police and the doctor. all these portions of evidence have been meticulously analysed by the trial judge. This is very clear by Paragraph 2 in page 16 of the judgement, where he had said that the accused-appellant, along with the dead first accused and two others, unknown to the prosecution, had committed this offence on a pre-arranged plan. The murderous intention of the accused-appellant is clearly displayed by the description of the accused-appellant of the incident. In light of the evidence placed by the prosecution, the accused-appellant had made statement from the dock, in which he has not denied the fact that he made a confession to the magistrate, but has gone on to state that he had been tortured by the police while in remand custody. But the learned trial judge had observed that at the time he had been produced to make a confession, he had not stated anything with regard to the torture he had to undergo in the hands of the police. Therefore, he has rejected the dock statement and had concluded that since the confession had been admitted in evidence, which has explained the culpability of the accused-appellant and those factors had been circumstantially corroborated by PW-01, PW-03, police and the doctor.

Therefore, we find the conclusion of the trial judge is factually and legally correct. As such, we find that the conviction and sentence entered by the Trial Judge is hereby affirmed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal