

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

In the matter of an Application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

1. Rangasamy Kanaganayagam alias Kajan Mama.
5th Lane, Punochchimunei,
Nawakkuda,
Kanthankudi East Batticaloa,

(presently at Batticaloa Prison,
Batticaloa)

1st Accused -Petitioner.

C.A.(PHC)APN No. 13/2019
H.C. Batticaloa No.HCB3057/2017

Vs.

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

Complainant-Respondent

2. Edwin Silva Krishana Nandarajah alias Pradeep Master.
(presently at Batticaloa Prison,
Batticaloa)

3. Sivanepathurei Chandrakanthan alias Pillaiyan (presently at Batticaloa Prison, Batticaloa)
4. Mihira Lebbe Kaleel alias Suresh alias Manjula alias Salam. (presently at Batticaloa Prison, Batticaloa)
5. Ariyanayagam Dharmanayagam alias Olapatti Kumar. (Trial proceeding without him)
6. Gunasinghe Arachchige Tharindu Madushanka alias Vinoth (presently at Batticaloa Prison, Batticaloa)

2nd to 6th Accused-Respondents.

BEFORE : **ACHALA WENGAPPULI, J.**
DEVIKA ABEYRATNE, J.

COUNSEL : Anil Silva P.C. with Rasika Balasuriya, Ajith Siriwardane and U. Abdul Najeem for the Accused-Petitioners.
Madhawa Tennakoon S.S.C. for the Complainant-Respondent.

ARGUED ON : 13.02.2020, 19.02.2020, 27.02.2020, 02.03.2020,
02.07.2020, 26.8.2020, & 27.08.2020.

WRITTEN SUBMISSIONS

TENDERED ON : 19.10.2020 (by the Accused- Petitioners)

DECIDED ON : 16.11.2020

ACHALA WENGAPPULI, J.

The 1st and 2nd accused-petitioners (hereinafter referred to as the 1st and 2nd Petitioners respectively), by their separate applications, have invoked the revisionary jurisdiction of this Court conferred under Article 138 of the Constitution, in seeking to set aside an order made by the High Court of *Batticaloa* on 09.01.2019 in case No. HCB 3057/2017, where they were indicted along with several others for the murder of former Parliamentarian *Joseph Pararajasingham* on 25.12.2005.

By the said impugned order, the High Court had decided to admit the confessionary statements of the two Petitioners, made to the learned Magistrate on 04.11.2015 when they were produced before his Court on that day, in case No. B/1357/05, and recorded under the provisions of Section 127 of the Code of Criminal Procedure Act No. 15 of 1979.

With their individual petitions addressed to this Court, the Petitioners collectively allege that the said order of the trial Court, in admitting their confessionary statements, had arrived at an erroneous finding that they were made voluntarily, on the following grounds;

- i. the said order is contrary to law and against the weight of evidence adduced at the *voir dire* inquiry,
- ii. the trial Court misdirected itself in its failure to appreciate the circumstances relating to the detention of the Petitioners and other conditions that existed prior to their production before the Magistrate of *Batticaloa*,
- iii. the trial Court misdirected itself in its failure to appreciate the voluntariness of the statements were impugned not on the

basis of that the Petitioners were subjected to physical harm but on the basis they relied on that the statements were made as a result of inducement and promise,

- iv. the trial Court misdirected itself in its failure to appreciate the Petitioners were not separated from the overpowering influence of the CID officers during the period in which they were kept at the corridor opposite the Chambers of the Magistrate for reflection,
- v. the trial Court misdirected itself in its failure to give adequate consideration in determining the voluntariness of the confessions made by the Petitioners with regard to the cautionary statement made by the learned Magistrate to the effect that their statements could be used in their favour, when the law does not envisage such a position,
- vi. the trial Court misdirected itself in its failure to appreciate the perfunctory questioning of the Petitioners by the Magistrate was not sufficient to test whether their statements were made voluntary or not,
- vii. the trial Court misdirected itself in its failure to appreciate that when a Magistrate is required to record a confession, he should scrupulously follow the provisions stipulated in the Code of Criminal Procedure Act No. 15 of 1979 relating to the recording of confessions and the failure to do so results in the recording of such confessions contrary to law,
- viii. the trial Court misdirected itself in its failure to appreciate the position that when all the circumstances of this case are taken

- into consideration it appears that the confessions were made as a result of an inducement and promise,
- ix. the trial Court misdirected itself in the applicable burden of proof in *voir dire* inquiries and the binding precedents of the superior Courts, resulting in a miscarriage of justice,
 - x. the trial Court had erred in law when it, without any reason, rejected the evidence that are favourable to the Petitioners and thereby a miscarriage of justice has occurred,
 - xi. the trial Court misdirected itself when it had drawn inferences from the evidence presented as well as when it came to conclusions not based on evidence and thereby denied a fair trial to the Petitioners, as guaranteed and protected by the Constitution.

At the hearing of this application, learned President's Counsel who appeared for the two Petitioners, referred to the evidence presented by them during the *voir dire* inquiry held before the High Court of Batticaloa as indicated in their petitions.

Since the two Petitioners seek identical relief based on identical legal principles and also on almost identical facts, this Court decided to pronounce a common judgment on the two applications.

The case presented by the Petitioners was, since their arrest on 04.10.2015, they were kept in detention under Detention Orders in the fourth floor of the CID headquarters. They were periodically produced before the Colombo Magistrate's Court under case No. B 39532. They were

not given access to legal advice. The 1st Petitioner was given medical attention due to a complaint of chest pain, and was admitted to the National Hospital. After his treatments, he was brought back to CID on 31.10.2015. During their period of detention, they were constantly interrogated by the CID officers over the death of the former Parliamentarian.

The 1st Petitioner was shown a detention order and told that he could be kept at the 4th floor for a prolonged period in terms of the said detention order.

The CID officers, having told them that they could be kept in detention indefinitely, conveyed them the proposition that if they make statements to the Magistrate on the lines the officers indicate, in return, it would facilitate their being released by Court. They also informed each of the Petitioners privately that the other had already agreed to the said proposed course of action. The Petitioners, entertaining the hope of being released early from their detention, have agreed to make statements.

The Petitioners were then taken to *Batticaloa* by the CID officers in their vehicle on 04.11.2015. They left *Colombo* at about 1.30 a.m. and were told not to speak to each other. Having reached *Batticaloa* by midday, the Petitioners were produced before the Magistrate by the CID at about 2.00 p.m. on that day. The Magistrate asked a few questions and told them that "*if they make any statement, it could be used against them or in their favour*" (emphasis original) and were asked to think it over. The CID officers, who were waiting in the corridor until that point of time, had told the

Petitioners that "*if they did not make statements as suggested by the CID officers they would be taken back to Colombo.*"

After a short interval, the 2nd Petitioner was called into the Chambers and after his statement was recorded, he was handed over to the custody of prison officers and detained in the passage. Then the 1st Petitioner was called in and he too made a statement.

After their statements were recorded the Petitioners were shifted to open Court, where the CID officers enquired them what happened. The Petitioners have queried the CID officers as to the reason for their remanding. The reply was, once the confessions made by the Petitioners were perused by the senior officers of the CID, they would be released.

After some time, the Petitioners were taken to a room in the upstairs where they were asked by the prison officers and stenographers to read their statements from the computer screen and correct any mistakes before they were printed. The 2nd Petitioner did some corrections and signed it. Since the 1st Petitioner could not read or write, the 2nd Petitioner had read the statement for him and made corrections. He too had signed his statement. The Petitioners allege that the Magistrate did not read them the statements and they did not sign those statement in his presence.

On an earlier occasion, the CID had arrested the 2nd Petitioner, and was released as undertaken by the investigators, after producing him before a Magistrate at his bungalow at *Addalaichchenai* in midnight.

The trial Court, in its impugned order in accepting the statements as voluntarily made ones, had decided in favour of the prosecution on four primary considerations.

- a. the trial Court had ruled that caution given by the Magistrate to the Petitioners that if they make a statement it could be used in their favour made them to proceed with making statements could not be accepted since the two Petitioners have indicated their willingness to make statements after one week from their arrest and were produced before the Magistrate's Court upon completion of the investigations.
- b. It had also rejected the Petitioners' claim that they were reminded of their undertaking by the CID officers when they were sent out from the Chambers and kept with the prison officers before their statements were recorded, on the basis that, having had the opportunity of stating so to the Magistrate, the Petitioners have failed to make that complaint.
- c. the trial Court similarly rejected the contention by the Petitioners that their statements were not readout to them by the Magistrate but by the stenographer at an upstairs room of the Court building by concluding that this assertion itself indicates that they in fact had an opportunity to read their statements and had the opportunity to act independently in the absence of any CID

officers, as evident from the fact that they made corrections to the recorded version of their statements.

- d. The trial Court also rejected the evidence placed before it by the Petitioners to the effect that they have conveyed their concerns over the remanding order by a letter addressed to Court, forwarded through the Prison authorities, by summoning the relevant officers, on the basis of their partiality towards the Petitioners.

It appears from the above, the core of the Petitioner's complaint against the order of the trial Court is that it had wrongly concluded their confessionary statements, recorded by the *Batticaloa* Magistrate, were made voluntarily, when in fact they were induced to make them upon promise of release and also were influenced with the cumulative effect of the circumstances that had prevailed during the time period prior to their production before the Court.

In view of the above grounds, it is important that this Court undertakes an examination of the applicable legal principles on this particular area, based on the applicable statutory legal provisions and judicial pronouncements in interpreting them, particularly in relation to the question of the burden of proof of each party.

Of the 11 counts in the indictment, all of them are in relation to offences committed under the Prevention of Terrorism (Temporary Provisions) Act No. 78 of 1979 (hereinafter referred to as the Act) as

amended, except for the 2nd count, which had been presented under Section 140 of the Penal Code.

The third and fourth items of productions that are listed on the indictment relates to the statements made by the 1st and 2nd Petitioners to the Magistrate.

During the trial against the Petitioners and their co-accused, when the prosecution made an application seeking the permission of the trial Court to produce and mark these two statements against the Petitioners, they objected for its admissions compelling the Court to conduct a *voir dire* inquiry upon which the impugned order was made, in allowing the application of the prosecution.

Section 16(1) of the said Act states;

"Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether,

- (a) it amounts to a confession or not;*
- (b) made orally or reduced to writing;*
- (c) such person was or was not in custody or presence of a police officer*
- (d) made in the course of an investigation or not;*
- (e) it was or was not wholly or partly in answer to any question*

may be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance:"

Since the sub section 2 of that section states;

"the burden of proving that any statement referred to in subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant".

The Petitioners gave evidence during the said *voir dire* inquiry under oath and had called several witnesses on their behalf who testified to certain events that had taken place in relation to their detention at the Batticaloa prisons. In doing so, the Petitioners have sought to rely on the provisions of Section 24 of the Evidence Ordinance, in their quest to have their confessions being considered as irrelevant items of evidence, in the criminal proceedings against them.

Section 24 of the Evidence Ordinance states as follows;

"A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement threat, or promise is sufficient in the opinion of the Court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

This particular section of the Evidence Ordinance had received judicial interpretation on numerous occasions as the law reports and the authoritative texts indicate, but this Court will focus its attention primarily on the aspect of the nature of the evidentiary burden that had placed on the person who asserts the fact that the confessionary statement is irrelevant, due to the disqualifications that are enumerated in the said section, as well as on the prosecution, on proving the relevance of the confessionary statement by satisfying Court as to its admissibility under a provision of the Evidence Ordinance.

It had been stated by the Court of Criminal Appeal in the judgment of *The Queen v Kalimuttu* 69 NLR 349 that the burden lay on the prosecution to prove beyond reasonable doubt that a confession had been voluntarily made.

The Courts have thus placed the initial burden of proving the confessionary statement is relevant to the criminal proceedings initiated against the maker of the said confession, on the basis that it had been made voluntarily, clearly on the prosecution.

In *The King v Weerasamy et al* 43 NLR 152, it had been held that;

"... the Crown must establish the relevancy of these confessions by leading some evidence to show that they were made voluntarily. I think that section 104 of the Evidence Act puts that burden upon the Crown."

Having imposed the initial burden on the prosecution to prove the question of fact that the confession had been made by its maker voluntarily, in view of Section 24 of the Evidence Ordinance, the Court

have also considered the evidentiary burden on the accused person, if he asserts that it had not been made voluntarily and laid down the applicable principles in relation to that evidentiary burden.

In the judgment of *The King v Weerasamy et al* (supra) the Court stated;

"If the Crown establishes a prima facie case on that point, I shall hear any evidence the prisoners may wish to adduce and any submissions their Counsel may desire to make in regard to that matter."

The judgment of *King v. Ranhamy* 42 NLR.221, also had considered the expected course of action that should be adopted by an accused, in challenging the admissibility of a confessionary statement, as it states;

*"... when Crown Counsel moves to prove this confession under section 24 of the Evidence Act, the prisoner is entitled to give evidence to enable the Court to decide the question whether the statement was made voluntarily or in consequence of some inducement, threat or promise. ... This view is in conformity with the decision given by the Court of Criminal Appeal in England in the case of *Rex v. William Charles Codill* 27 C. A. R. p. 191, to the effect that when a dispute arises as to the admissibility of a statement by the prisoner, it is proper to allow the prisoner himself to be called as a witness if the justice of the case makes it desirable that this should be done on the issue of admissibility. If the Court, after hearing the prisoner, holds that the statement is*

admissible, Counsel may again call the prisoner to go into the circumstances before the jury with a view to determining the value of the statement in fact."

It is clear from the precedents cited above, our Courts too, following the practice of the English Courts, had adopted the procedure of *voir dire*, where "*it is proper to allow the prisoner himself to be called as a witness if the justice of the case makes it desirable that this should be done on the issue of admissibility*". It was emphasised that the accused could offer evidence to the consideration of Court, in order to determine the admissibility of a confession against him.

Section 24 of the Evidence Ordinance made confessions irrelevant in criminal proceedings against its maker, if it "*appears to the Court to have been caused by any inducement, threat, or promise*" in addition to several other factors contained within the said section.

Whilst placing a heavier burden of proving the admissibility of a confession on the prosecution at beyond reasonable doubt, the Courts have on the other hand ruled that such a confession is irrelevant, if it "*appears to Court*" from the evidence placed before it during a *voir dire* by an accused that its making had "*been caused by any inducement, threat, or promise*".

In *Vivekanandan & Another v Selvaratnam* 79(I) NLR 337, in a prosecution of offences committed under Customs Ordinance and Import and Export Control Act No. 1 of 1969, based on a confession obtained extra judicially, the then Supreme Court has, in relation to the word "*appears*" in Section 24 of the Evidence Ordinance, laid down the level of the

evidentiary burden on a person who asserts the confession is irrelevant under the basis that it had been obtained involuntarily as;

"... the Legislature has decidedly used the word " appears " to guarantee to accused persons in criminal proceedings, absolute fairness. Thus section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the Court after a proper examination and a careful analysis of the evidence and the circumstances of the given case, comes to the view that there appears to have been a threat, inducement or promise offered, though this is not strictly proved, then the Court must refuse to receive in evidence the confession. I should venture to think that a strong possibility that the confession was made under the stimulus of an inducement, threat or promise, would be sufficient to attract the exclusionary provision of section 24 of the Evidence Ordinance."

In relation to the instant matters that are before this Court, in addition to the Judge made requirement for an accused to offer evidence, Section 16(2) of the Act had placed an evidentiary burden on an accused as it states "*the burden of proving that any statement referred to in subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant*". Thus, in this instance, it was for the Petitioners to make it "*appears to the Court to have been caused by any inducement, threat, or promise*" in addition to several other factors contained within the Section 24.

Learned Senior State Counsel made strenuous submissions, inviting this Court to take a “*fresh look*” at the provisions containing procedural and legal restrictions to the admissibility of confessions made under the Prevention of Terrorism Act, since the Legislature by incorporation of special provisions to that Act, and thereby overriding certain safeguards that had already been placed over the years by the Courts and are traditionally afforded to an accused who made a confessionary statement, in relation to offences under the general criminal law, made an exception in enacting the said Act.

The judgment *Vivekanandan & Another v Selvaratnam* (supra) was pronounced on 16.12.1977 and the Act was certified by the Hon. Speaker 20.07.1979. The reasoning of this judgment on the word “*appears*” in Section 24 of the Evidence Ordinance had been consistently adopted and followed since its determination by the Courts.

Bindra on his authoritative test on Interpretation of Statutes, 9th Ed, at p. 769 cites the case of *Melbourne Corporation v Parry* 31 CLR 174, where it had been held by Isaacs J that;

“... when Parliament is considering de novo that the law shall be on any given subject, and it finds in a previous Act words which have received by the judicial interpretation a well-settled meaning of effect, and introduces those words verbatim or without any appreciable difference, merely accommodating them to their new surroundings, they are generally presumed by a Court to have been adopted in the accepted sense.”

Adopting that principle to the instant matter, this Court is of the view that it is safe to presume that when the Parliament enacted the Prevention of Terrorism (Temporary Provisions) Act, it which had been certified on 20.07.1979, it was aware of the interpretation already provided by the judgment of *Vivekanandan & Another v Selvaratnam* (supra), to the word “*appears*” in Section 24 of the Evidence Ordinance, in making reference to that section in the Section 16(1) of the newly enacted Prevention of Terrorism Act and therefore intended to have the same meaning attached thereto, in relation to Section 16(1), as well.

On the other end of the spectrum, in *Mariadas v The State* (1995) 1 Sri L.R. 96, learned President’s Counsel for the Appellant invited this Court to make a pronouncement that “*when a Court is called upon to give a ruling regarding the voluntariness of a confession recorded under Section 16 of the Prevention of Terrorism (Temporary Provisions) Act it is of utmost importance to examine and evaluate the evidence so as to guarantee to the accused person in criminal proceedings absolute fairness*”, the Court indicated its reservation to the proposition as it stated thus;

“In our view it is not necessary to make any pronouncement with regard to the submission of the learned President's Counsel on this aspect. Since we are of the view that there is a grave doubt as to whether the document P1 which was produced as the confession made by the accused-appellant was in fact made by him especially in view of the fact that the officer who is alleged to have typed the statement has not been called as a witness.”

In the light of the above principles of law, this Court now proceeds to consider the submissions of the parties, in order to satisfy itself whether the trial Court was correct in admitting the confessionary statements made by the Petitioners by application of the relevant principles of law to the evidence that had been presented before it.

The contention advanced by the learned President's Counsel is not that the prosecution had failed to prove the voluntariness of the two confessions beyond reasonable doubt, but that the evidence presented by the Petitioners made it "*appear*" to the Court that their confessions made out of inducement, acting upon a promise of early release.

It was emphasised by the learned President's Counsel that the failure of the trial Court to consider the circumstances under which the Petitioners were produced before the Magistrate for the purpose of recording their confessions, coupled with the fact of the failure of the Magistrate to grant sufficient time for the Petitioners to ponder over their decision to make confessions had exacerbated the effect of the promise by the CID officers of an early release as a reward for making confessions on a prepared script, culminated with the fact that the Magistrate's caution that making a confession would be in their favour. It is contended by the Petitioners that the said erroneous caution had cemented their perception that making a confession ensures their early release.

These factors were important for the Petitioners especially in view of their challenge on the relevancy of the confession is not mounted on the

footing that they were tortured by CID but rather on the adaptation of subtler methods, in inducing them with a direct promise of an early release and creating circumstances that seemed to indicate that their release is a realistic probability if they comply with the CID direction and thereby luring the Petitioners to believe in their promise. Therefore, the Petitioners claim that the cumulative effect of these circumstances, as revealed from the evidence presented on their behalf had all escaped from attention of the trial Court, when it proceeded to consider the question whether it appears that the confessions were made upon inducement.

This contention brings in to consideration of the issue whether the circumstances under which the Petitioners were kept, produced before the Magistrate and allowed to reflect on the question whether to proceed with making statements are in fact relevant considerations, and if they are relevant, its' extent and effect.

When a person is produced before the Magistrate in Chambers as it is generally done, the superior Courts have expected such Magistrate to ascertain from the suspect or accused as to the circumstances under which he made such a decision, its reasons and thereafter grant reasonable time to reflect upon his decision, with the judicial cautioning, before proceeding to record such a statement.

Professor G.L. Peiris, in his book *Recent Trends in the Commonwealth Law of Evidence* had stated thus, in relation to this significant step in the proceedings, (at p. 96);

"... the realisation by the accused that he is in the presence of a judicial officer who has no connection with the police and that has nothing to fear and can speak freely. He should be asked specifically whether he has been assaulted or threatened to induce him to make a statement or been advised to make a statement or whether any promise or inducement has been made to him."

The Court of Criminal Appeal has observed the following, in relation to the area under consideration, in its judgment of *The Queen v Martin Singho* 66 NLR 390;

"Before we part with this judgment we wish to point out that the circumstances which lead up to an accused person's appearance before a Magistrate to make a confession are no less important than the circumstances surrounding the actual making of it. We say so, because it is often the practice to confine the inquiry at the trial to the circumstances surrounding the actual making of the confession and not to the circumstances which led up to an accused person's appearance before the Magistrate."

In the Trial at Bar judgment of *The Queen v Gnanaseehathero & 21 Others* 73 NLR 154, it was emphasised the adoption of a proactive role by the Magistrate in probing the antecedent circumstances as the Court observed that;

"The circumstances of the detention in this case, the hours of interrogation, the duration of the questioning, the existence

of signed statements in the hands of the police, the nature of the custody and such other unusual features that preceded their production before the Magistrate are in our opinion factors that should have warned the Magistrate of the need to probe much further than being content with the normal questioning that would be adequate in a straightforward case. We find that in one instance, even where an accused said he thought it would be an advantage to make a statement to the Magistrate, he did not think it necessary to pursue the questioning to find out why the accused thought so. We feel that having regard to the factors enumerated above, the learned Magistrate should have made a more searching inquiry from every accused before he decided to record his statement."

Their Lordships of the Court of Criminal Appeal, in its judgment of *The Queen v Martin Singho* 66 NLR 390, in stating out the reasoning behind of its stressing of the importance of an undertaking of such an investigation, have observed;

"A statement recorded under section 134 of the Criminal Procedure Code does not become admissible in evidence merely because it is recorded by the Magistrate under that section. To be admitted as evidence it must be relevant under the Evidence Ordinance. A confession being a species of the genus admission, is relevant and may, under section 21 of the Evidence Ordinance, be proved against the person who

makes it, unless it is a confession which is barred by sections 24, 25 and 26 of that Ordinance. Under section 134 a Magistrate may record statements made not only by accused persons but by others. He may record statements which are confessions and statements which are not. But a condition precedent to the recording of a statement which is a confession is that upon questioning the person making it he must have reason to believe that it is made voluntarily. If he does not believe that it is voluntarily made, he is forbidden to record it. If he has reason to believe that it is voluntarily made, he is bound to record it and append the prescribed certificate.

In consideration of the circumstances under which the accused is produced before a Magistrate, in relation to recording a statement, Abrahams CJ considered that the fatigue of an accused is also as a relevant and contributory factor to the determination of the question of voluntariness of a confession, per *R v Ranhamy* (1937) 2 C.L.J. 104.

Having probed into the circumstances, and cautioned the maker of the consequences of making a confession, the Magistrate must then offer reasonable time for him to reflect upon his decision to make a statement.

In this context the Trial at Bar of *The Queen v Gnanaseehathero & 21 Others* (supra) it had been stated that;

"Another circumstance relating to action falling within the purview of the Magistrate which has a bearing on the

question of voluntariness is the nature of the opportunity afforded for reflection.

The evidence is that formal orders of remand were made by the Magistrate, after the accused were produced before him; they were then taken to the new Magazine Prison in charge of prison officials often under heavy armed escorts. It is doubtful whether this atmosphere would have conducted to any sober reflection on the lines of the admonition given by the Magistrate. It has been repeatedly laid down by the Courts of this country and elsewhere that where an opportunity is given for reflection the prisoner must be sent to a place not accessible to officers whose presence itself can exert influence on his mind" (emphasis added).

In the light of above considerations and precedents this Court now ventures to consider the evidence that had been placed before the trial Court, during the *voir dire* in relation to this particular aspect, which the learned President's Counsel allege as not considered by the trial Court at all.

The 1st Petitioner, in his evidence stated that he was asked to report to Batticaloa CID office on 04.10.2015 and when he arrived there was taken in a vehicle with the 2nd Petitioner to Colombo and kept in custody of the CID. They were questioned repeatedly and produced before a Court. During one such instance of interrogation, the CID informed him that they know the person who shot the Parliamentarian is now dead and if the 1st Petitioner says [to the Magistrate] what they want him to say, he could go home and end the suffering of his four young children. That evening the 1st

Petitioner had suffered a chest pain and was taken to Hospital. His pain continued for several days and again the 1st Petitioner was admitted to the Intensive Care Unit. The Doctors have told him that he had suffered a heart attack and advised him to be careful. The CID officers, who were in the Hospital with him have advised the 1st Petitioner to inform the medical staff that he has recovered and, once discharged from Hospital he can go home in just two days.

After his discharge from Hospital, the 1st Petitioner was again told by CID officers that he could be kept in detention indefinitely until he dies from his illness after showing him a letter but if the Petitioner is prepared to say what they want him to say he could go home. Then he asked them what is expected of him and has received instructions.

The 2nd Petitioner was produced before a senior officer of the CID who had advised him CID officers want to help him and if he is prepared to say what the officers want him to say, he could go home soon. The Petitioner was further advised one *Shanthan* had shot the deceased Parliamentarian and if he continues to maintain his denial, there is no chance of release. Before the 2nd Petitioner was taken to *Batticaloa* Courts he was warned that he could be jailed for 25 years for his relationship with the LTTE and whether he knew how many of them are still languishing in *Welikada* without any investigation.

On 04.11.2015, both Petitioners were taken to a vehicle at about 1.00 a.m. They were told not to speak to each other and asked to remind themselves as to what had already been told. The vehicle arrived at *Kaduruwela* and stopped for a while. The CID officers returned to the

vehicle having visited some place and drove on until they reached *Batticaloa*.

Both of them were taken to the Courts and produced to the Chamber of the Magistrate. They were asked whether they want to make statements. Since there was no reply, the Magistrate asked the CID officer *Siriwardhanato* leave his Chambers. They were cautioned by the Magistrate that the statement they make could be used either against them or in their favour. They were given an interval to consider whether they still want to make statements.

The two Petitioners were sent out of the Chambers and in the adjacent passage the CID officers were waiting for them. They asked whether they made statements and when the Petitioners indicated they did not, the officers have said if that is the case then they would take the Petitioners back to *Colombo*.

After some time, the 2nd Petitioner was called into the Chambers and in his absence, the 1st Petitioner was told by the CID officer that he need not worry to make the statement along the lines already mentioned and he will be released thereafter. The Petitioner agreed.

When he was called into the Chambers, the Magistrate asked him whether he want to say something about the murder of *Joseph Pararajasingham* and the 1st Petitioner narrated what he has been asked to narrate by the CID on the belief that would secure his release. After he made his statement, the 2nd Petitioner too was called in afterwards and told to sign on the statement by going upstairs. They were ordered 14 days in remand by the Magistrate. The 2nd Petitioner then asked the CID officer as

to why he was remanded. The reply was once his superiors satisfy of the contents of their statements, they would be produced before Court and until then to make adjustments for 14 days.

During cross-examination it was elicited that the 2nd Petitioner was afforded an opportunity to speak to his wife over the telephone and was aware that his wife was asked by the CID to be present in Courts on that day. During his period of detention at CID no one visited him although the 1st Petitioner was visited by his wife and her sister. The 2nd Petitioner could not recollect what he told the Magistrate or what the CID wanted him to say in statement. The 2nd Petitioner denied when he was suggested that he now comes out with a fabricated version of events.

Learned Magistrate who recorded the two confessions, stated in his evidence that two suspects were produced by the CID in case No. B/1357/05 at 2.00 p.m. to have their statements recorded. After the initial cautioning they were given one hour to reflect on their decision and since they re-confirmed their willingness, their statements were recorded in Chambers and remanded. When Petitioners were produced for the 2nd time, Magistrate was informed that in order to release themselves from the suspicion over their involvement with the "*incident*" they want to make statements. When the Petitioners denied any threat on them, the recording proceeded and their statements were subsequently certified with signatures.

During his cross-examination by the Petitioners, the Magistrate admitted having cautioned them of the consequences of making a confession by informing them that their statements could be used against

them as well as in their favour. The Magistrate was aware that the Petitioners were detained from 04.10.2015 to 04.11.2015 at the CID and were kept under Detention Orders. He further conceded the time to reflection was decided by him as one hour since there is no specific provision dictating otherwise. He candidly admitted that he was not aware that the Petitioners were up from 1.00 a.m., where they were before their production, the 1st Petitioner was discharged from Hospital a mere 3 days prior due to a heart ailment or whether they had lunch, before their production before him at 2.00 p.m.

PS 27697 *Siriwardhana* of CID is the investigating officer to the murder of *Joseph Pararajsingham* and the Petitioners were arrested on suspicion. Detention Orders for three-month period were obtained for their detention at the CID. They were produced before the Magistrate's Court of *Colombo* in case No. B/39592. The witness denied having influenced the Petitioners to make statements with the promise of release either by himself or through any other officer.

According to the witness, the reason for the production of the Petitioners to *Batticaloa* Courts, instead of *Colombo* was that the investigations have reached their conclusion and there was no further purpose of detaining them under the Detention Order, in spite of the fact that they could have been held until its expiration. The *Batticaloa* Court was informed this position by way of a further report dated 04.11.2015 and the CID moved that they be remanded.

On the evening of 03.11.2015, the Petitioners were produced before the *Colombo* JMO for examination and report. They left *Colombo* at about

2.00 a.m. after having milk tea. They had conducted an inspection in Welikanda area on their way to Batticaloa. They reached Batticaloa at about 11.00 a.m. The case was called on a motion and the further report was filed but the Petitioners were produced before the Magistrate after the Court adjourned for the day.

The witness followed the two Petitioners into the Chambers, but was asked to stay out. They waited in the corridor and the Petitioners were thereafter taken to the cell. He denied having spoken to any of the Petitioner after their production before the Magistrate.

During cross-examination, the witness admitted that the Petitioners were only verbally informed of their detention under Detention Orders and knew that the 1st Petitioner had a heart ailment and maintained a family of four children. He further admitted that the 1st Petitioner did not want his family informed of his illness.

He dined having told the Petitioners to make statements on the lines he suggested implicating one *Shanthan*. He further admitted that the Petitioners could have been produced before the Colombo Courts but it had been decided to produce them at *Batticaloa*.

However, the Prison officer *Nawaz*, who was on duty when the Petitioners were produced before the Magistrate said in his evidence that after they were sent out for reflection, the CID officers queried from them as to why they were sent back. He specifically said however, there was no act of threatening.

When the evidence placed before the trial Court is considered as a whole, against the backdrop of the reasons on which the trial Court

decided that the confessions were made voluntarily, it is noted by this Court that the trial Court had not considered some of the factors that are associated with the circumstances under which the Petitioners were produced before the Magistrate's Court and the adverse impact of those circumstances on their mind-set, which may have had a bearing in their decision making process in relation to proceed with the confessionary statements. Understandably this is the very area that had been addressed to by the learned President's Counsel, in support of the revision applications filed by the Petitioners.

Admittedly, the Magistrate had not probed into the circumstances under which the Petitioners were kept in detention, including the place of detention, the duration and the intensity of their interrogation, and also the circumstances they were under prior to production before him on that very day.

Clearly the Petitioners were after a long journey and were without proper sleep. They say they were deprived of food, a fact denied by the CID officers. Obviously they were in fatigue and under stress, which may have influenced and contributed to their ability to take an informed and considered decision.

Then, during the initial cautioning process it has been stated by the Magistrate that the statements made by the Petitioners could be used against them or in their favour. The caution was issued originally in Tamil, the language the Petitioners spoke, translated to Sinhala as “ඔබලා පටයන ඉකාගය ඔබලාට විරැද්ධව තෝ පසුව පරිජ්‍යායේදී භාවිත කළ හැකි බව පටයා...”). This indicates, despite the risk of supplying material against the Petitioners

for a future prosecution against them, there is a positive side also in the making of a confessionary statement to a Magistrate. The Petitioners claim that they were promised release from custody after making the statement on the lines as suggested by the CID. This claim strongly denied by the prosecution.

Importantly, it must be noted that when the 2nd Petitioner was produced before the Magistrate for the first time and during his questioning, the Magistrate asked him why he wants to make a confession. The reply was that he is a suspect in this matter and he needed to be free (translated as “මා ගැකකරුවෙකු ලෙස සිටින හේදින් මෙයින් මා තිදහස් විය යුතුයි”). The 1st Petitioner’s reply to the same question was that he feared his conscience (translated as “හරඳ යාක්ෂියට බියෙන්”)

After the allocated time for his reflection was over, the 2nd Petitioner was asked, in addition to several other questions put to him, for the 2nd time for a reason to make the confessionary statement. His reply was that he expected the suspicion over him to be ended (translated as “අදාළ ගැක සහිත කරුණ අවකානයක් විය යුතු නිය”). The immediate question by the Magistrate put to the Petitioner, following this answer was whether there was any inducement or threat for him to make this statement to which the Petitioner replied in the negative. No probing by the Magistrate as to how the Petitioner expected his suspicion to be over by making the statement.

In contrast, when the 1st Petitioner was produced before the Magistrate at 4.05 p.m., he was only asked fewer routine question except for two. One question was his reason to make his statement. His almost identical reply as his co-suspect was that he expected the suspicion over

him to be freed from the suspicion (translated as “ මෙම ප්‍රක්‍රියාවේදී ම සැකකරු ලෙස සිටින හේතුන මෙහින මා නිදහස් විය යුතු තිබා”)

Clearly these answers convey the message, the Petitioners were expecting they be cleared of the suspicion that had been hovering over them for past one month depriving their personal liberty. If it had been properly and sufficiently probed by the Magistrate, he could have satisfied whether that could be a disqualification spelt out in Section 24 of the Evidence Ordinance, as it states “*... inducement threat, or promise is sufficient in the opinion of the Court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*”

It is correct that this is a consideration under the purview of the trial Court in determining the admissibility of the confession. But the Magistrate who recorded the confession, too should be mindful of this disqualification and should have probed further into this opaque area in order to exclude any possibility of any threat, promise or inducement offered to the Petitioners luring them to make such confessions, before proceeding into recording that statement.

This Court is of the view that it is worth repeating the emphasis of this important step as stated by the Court of Criminal Appeal in *The Queen v Martin Singho* (supra) that;

Under section 134 a Magistrate may record statements made not only by accused persons but by others. He may record statements which are confessions and statements which are

not. But a condition precedent to the recording of a statement which is a confession is that upon questioning the person making it he must have reason to believe that it is made voluntarily. If he does not believe that it is voluntarily made, he is forbidden to record it. If he has reason to believe that it is voluntarily made, he is bound to record it and append the prescribed certificate."

The circumstances referred to above were somewhat identical with the factual position considered by the Trial at Bar in *The Queen v Gnanaseehathero & 21 Others* (supra) as the following quotation indicates;

"We find that in one instance, even where an accused said he thought it would be an advantage to make a statement to the Magistrate, he did not think it necessary to pursue the questioning to find out why the accused thought so. We feel that having regard to the factors enumerated above, the learned Magistrate should have made a more searching inquiry from every accused before he decided to record his statement."

It seemed that the Petitioner's assertion that there was only perfunctory questioning by the Magistrate is a legitimate complaint. How this failure of the Magistrate to probe into the reply of the Petitioners affects the impugned order of the trial Court is, since it is the duty of the trial Judge to determine whether the evidence presented by the Petitioners "*... appears to the Court to have been caused by any inducement, threat, or promise...*" and its failure in considering this important aspect of the

evidence presented on behalf of the Petitioners before it, tends to taint the validity of the order, made by it in its entirety, in admitting the confessionary statements.

Another similar important consideration that had escaped the attention of the trial Court, in making its impugned order, is the relatively limited time allocated for the Petitioners to reflect on their decision to make the confessions, upon the words of caution issued by the Magistrate. The Petitioners were produced before the Magistrate at 2.00 p.m. and after the initial cautioning they were handed over to Prison officers at 2.15 p.m. The 2nd Petitioner was produced for the 2nd time at 2.55 p.m. and verified whether he wants to proceed with the statement. The 1st Petitioner was taken in at 3.10 p.m. and allowed him to reflect by handing him over to Prisons at 3.20 p.m.

At 3.45, the 2nd Petitioner was called in and had his statement recorded. He concluded his statement at 4.00 p.m. and the 1st Petitioner was called in at 4.05 p.m. and his statement was recorded reaching its conclusion at 4.20 p.m.

This indicates the time gap allowed to the 1st Petitioner for his reflection from 3.20 p.m. to 4.05 p.m. which is about 45 minutes whereas the 1st Petitioner was allowed to reflect from 2.15. p.m. to 2.55 p.m., a 40-minute gap.

In addition to this relatively narrow time gap, another disturbing feature is revealed from the evidence. It is claimed by the Petitioners that when they were sent out after the initial caution by the Magistrate they

were reminded of making statements and warned if not they would be taken back to Colombo by the CID officers. Siriwardhana denies making that statement, although he admits he was in the vicinity when they came out of the Chambers. The Prison guard Nawaz supports the Petitioners claim that the CID officer had spoken to them after they were sent out from the Chambers.

It had already been referred to the judgment of *The Queen v Gnaniaseehathero & 21 Others* (supra) earlier on but at this juncture too needed to repeated, in order to emphasis one particular aspect the superior Court had stressed. That aspect is referred to in the said judgment as follows;

"The evidence is that formal orders of remand were made by the Magistrate, after the accused were produced before him; they were then taken to the new Magazine Prison in charge of prison officials often under heavy armed escorts. It is doubtful whether this atmosphere would have conducted to any sober reflection on the lines of the admonition given by the Magistrate. It has been repeatedly laid down by the Courts of this country and elsewhere that where an opportunity is given for reflection the prisoner must be sent to a place not accessible to officers whose presence itself can exert influence on his mind" (emphasis added).

The evidence presented by the Petitioners indicate that they were not given a reasonable opportunity to reflect upon their decision to make a confessional statement and were denied of an opportunity, where they

were provided with an atmosphere to conduct any sober reflection on the lines of caution administered by the Magistrate, a few minutes ago.

It was contended by the learned President's Counsel that the Magistrate could have remanded the Petitioners and allowed them at least a day, away from the influence of the CID officers, to reflect on their decision to confess.

This seemed a justifiable criticism on the time allocated for reflection since the CID, in its further report filed before the Magistrate stated that the investigations in relation to the two Petitioners have reached its conclusion and moved the Court to make an order remanding them. Thus, if the Magistrate was properly informed of the views expressed in *The Queen v Gnanaseehathero & 21 Others* (supra), he could have remanded the Petitioners, allowing them a reasonable time, free from the influence of the CID officers, for a session of an informed reflection and to indicate their respective positions at a subsequent point of time.

It is during this restricted and cramped time period, the Petitioners have reflected on their decision to confess and made up their minds to proceed with that option. Certainly when a Judicial officer, totally an independent person and without any perceived bias towards the prosecution, indicated that their confessions could be used against them as well as in their favour, it could have tilted the already agitated minds of the Petitioners in favour of the decision to proceed with making the confession as they were told.

The Petitioners had two options before them. If they decline to make confessions, they would be facing an uncertain future of continued incarceration for an indefinite period of time as they were warned by the CID, or, in the alternative, they could make a confession and reunite with their families as promised by the CID. When the Magistrate indicated their confessions could also be used in their favour, there exists a high probability of the Petitioners perceiving it as a confirmation of what the CID officers have already indicated to them and influenced their minds.

Learned Senior State Counsel, in seeking to counter any adverse effect created by the use of the word "*in favour*" by the Magistrate referred to his re-examination, where it was elicited from the Magistrate as to what he meant by "*in their favour*". He had certainly offered an explanation for the use of the words "*in favour*". But what is important in this regard is not what the Magistrate may have intended to communicate to the Petitioner, but what was actually perceived by the Petitioners from those set of words, upon hearing them from a judicial officer.

This Court is more inclined to agree with the learned President's Counsel in this particular issue and hold that the use of the word "*in favour*" could well have been resulted in influencing the minds of the Petitioners in favour of making confessions.

Learned President's Counsel, in highlighting another point, had referred to the evidence in relation of placing the certificate by the Magistrate on the basis there are conflicting claims as to how the certification was made. However, in *King v. Ranhamy* 42 NLR 221, it was decided that "*a Magistrate's certificate under section 134 is not decisive of the*

question whether or not confessions were voluntary. This certificate only vouches the fact that the confessions vis-a-vis the Magistrate were voluntary confessions".

The Court had also added "... but that does not preclude the existence of an earlier taint or some original sin".

Thus, in view of the above, this Court is of the considered view that the evidence presented by the Petitioners are sufficient to make it "appear" to the trial Court that the two confessions were not made voluntarily as the prosecution alleges and thereby satisfy the criterion laid down in Section 24 of the Evidence Ordinance to rule such confessions are irrelevant.

Coomaraswamy in his treatise on The Law of Evidence Vol. 1 (p. 414), states;

"It is not necessarily wrong for a Court of Criminal Appeal to reverse the decision of a trial judge who has held a trial within a trial on the admissibility of alleged confession, when the decision has turned on the credibility of witnesses whom the judge had the advantage of seeing and hearing and when he has believed the evidence of the prosecution witnesses and disbelieved the evidence of the accused" and "would not interfere ... unless satisfied that the judge had completely wrongly assessed the evidence or had failed to apply the correct principles".

This Court holds the view that the impugned order of the trial Court in admitting the confessions as voluntarily is tainted with the two disqualifications as mentioned by the learned author in the text and considers that itself satisfies the requirement of the existence of an

exceptional ground for this Court to act in revision, and to make a ruling in favour of the Petitioners by setting aside the said impugned order.

The applications of the Petitioners are accordingly allowed. No costs.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL