**Swai and others v Republic**

**Division:** High Court of Tanzania at Mwanza

**Date of judgment:** 22 October 1973

**Case Number:** 270/1973 (106/74)

**Before:** Mfalila Ag J

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*[1] Evidence – Confession – Co-accused – Whether evidence against co-accused – Evidence Act, s.* 33

(*T.*)*.*

*[2] Evidence – Confession – Retracted confession – Procedure to be followed – Whether corroboration*

*necessary.*

*[3] Evidence – Confession – Whether extra-judicial statement amounts to confession.*

*[4] Evidence – Extra judicial statement – Admissibility of, as against co-accused, where statement does*

*not amount to confession – Evidence against maker only – Evidence Act, s.* 33 (*T.*)*.*

**JUDGMENT**

**Mfalila Ag J:** The appellants Samwel Mfunya, Sebastian Swai and Vincent Kitumbo were jointly charged along with two other persons namely Bernedicto Bernado who did not appeal and William Boniface who was acquitted, with stealing goods in transit contrary to ss. 269 (*c*) and 265 of the Penal Code, for which they were convicted and sentenced to seven years imprisonment. They were jointly charged and their appeals were consolidated. They all appealed against convictions and sentences. Considering the complexities involved in this appeal, the full facts as revealed by the evidence at the trial will be restated. On 15 August 1972 at about 10 p.m., a police party with dogs was on patrol duty in the Isevya Suburb of Tabora township. In the course of this patrol and as the party entered Boma Road past the railway station, they saw a bus parked off the road under mango trees. This bus aroused the suspicions of the members of the police patrol party, they therefore approached it and saw a man in it – one Hamisi Juma, who was present and identified in court but did not give evidence. The significance of this will become apparent presently. In any event, on being questioned, Hamisi admitted being the driver of the bus, but said that it had broken down and that he had sent the passengers into town to seek assistance. The police officers were still suspicious, one of them tried to drive the bus and it was found to be in good working condition. This apparently terrified the driver, but he was allowed to go after the particulars of his bus were taken and ordered to report the following morning at the police station. After the departure of the driver, the police party combed the surrounding area around the railway yard which is fenced. In the course of this search, seven cartons and two bales of cloth were discovered. The immediate suspicion was that these goods must have been stolen from the railway premises. It was therefore decided to lie in ambush and await whoever would come to collect them. Indeed as expected after half an hour or so a group of five people emerged and walking towards the cartons, they prepared to take them away. The police dogs were then released, they chased these people, but managed to arrest only one of them – the first accused Samwel Mfunya. He was closely questioned and pleaded that he and his companions had merely been employed by one Sebastian Swai the third accused, apparently to break and take out goods from a railway wagon. He led them to a railway wagon in question and as surely, they found it had been broken and cartons similar to those impounded earlier on were in it. He also led them to another place where a wire cutter, two other cartons and bales of cloth were discovered. All these were seized and taken to the police station along with the first accused. Early the following morning, he led the police party to a house in Rufita Street where he said, his other companions lived. In this house the second and fourth accused persons were found and arrested. Subsequently the third and fifth accused were also picked up. A few days later, the second accused, the fourth accused and first accused were taken before a Primary Court Magistrate – who recorded their extra-judicial statements and, during the trial, these statements were treated as confessions. I will revert to these statements later in the course of this judgment but suffice it to say at the moment that they all amounted to the same thing namely that these accused persons were innocent hirelings of the third accused Swai. They all said that they did not know at the time that they were dealing with stolen goods. Nevertheless they were all subsequently charged with this offence. On these facts, the case against the first accused consisted of direct evidence, namely of his arrest at the scene of crime, his statements to police patrol party which led to the discovery of other goods, and his retracted extra-judicial statement to the magistrate. On this evidence, he was convicted and sentenced to seven years’ imprisonment. The case against the third accused consisted mainly in the extra-judicial statements implicating him, made by his co-accused, who alleged that he was the brain behind the whole scheme and that they themselves were merely his tools. The trial magistrate found support for these statements in the fact that the third accused who was a Yard Foreman at Tabora railway station was on duty at the time when the wagon in question GG.61771 arrived at the station, and as the officer responsible for marshalling the wagon, he arranged for this particular wagon to be marked “sick” but that instead of placing it on the “sick line” as was normal procedure, he “misplaced” it and left it near the fence where it was easily accessible to intruders from without. The magistrate found, to use his own words: “This hypothesis tallies very squarely with the confession of first, second and fourth accused that it was Swai, third accused, the Yard Foreman, who master-brained the organization, led the accused to the wagon and by use of a big wire cutter unlocked the seal of the wagon. The wire cutter was found by the Police on the scene of crime and has been tendered as exhibit. My personal view of the position of the case is that an intrigue of arrangement was made to stop the wagon bound for Isaka from proceeding thereto and to marshal the same to a strategic position where it could easily be accessible from outside the yard. I have no doubt that these circumstances show that overall scheme was master-minded by a person very conversant with the marshalling arrangement of the railway wagons and the circumstances thereto and in the circumstances this could be nobody else but the accused-the Yard Foreman. These circumstances in my opinion suffice as an independent evidence to corroborate the accused’s confessions that the third accused Swai was the brain behind this dishonourable scheme and that he actually participated in the breakage of the wagon in question and theft of the goods therefrom.” As indicated the magistrate convicted the third accused and sentenced him to seven years’ imprisonment. Lastly, the case against the fourth accused consisted of his retracted extra-judicial statement. Although he retracted his statement, the trial magistrate after adverting to the law and the relevant authorities on retracted confessions, accepted it, holding that it was sufficiently corroborated because, again to quote his exact words: “The statements of the accused are so packed with such details of what happened before and after the alleged theft that such detailed statements could not have been a mere invention of the police which they dictated to the accused unless the police also participated in the whole transaction which is inconceivable. Those are my reasons for accepting the confessions. A retracted confession as this must be (or needs to be) corroborated. The first accused was actually seen by PW.1 and PW.2 and was caught by the police dogs at the scene of crime. It’s PW.1 who made a confession to the police that led to the discovery of the other two cartons and two bales of the goods (part of Exhibits). PW.1 and PW.2 said they saw five people and although they did not clearly recognize the faces of the other three the rest of the circumstances of the story shows that they could not have been any others but the accused’s inclusive particularly of second and fourth accused who have made the confessions.” The magistrate concluded by finding the fourth accused guilty, convicted him and sentenced him as indicated earlier to seven year’s imprisonment. I have quoted parts of the magistrate’s judgment in view of the complaints levelled against it in the memoranda of appeal particularly by Mr. Hindocha for the third accused. Mr. Hindocha submitted on behalf of his client that the magistrate’s judgment contains a number of misdirections and non-directions which vitiate his client’s conviction. After going through the record of trial and magistrate’s judgment, it became abundantly clear that the magistrate’s judgment indeed contains misdirections and non-directions; it is therefore the duty of this court to determine whether these misdirections and non-directions occasioned miscarriage of justice, before the appellants’ convictions can be allowed to stand. Mr. Hindocha’s complaints centred mainly around the magistrate’s use against his client of the extra-judicial statements made by the other accused persons. He submitted that the magistrate erred in law in treating the confessions of the other accused persons as evidence within the meaning of the Evidence Act 1967 rather than as a mere element in the consideration of the other evidence in the case and that consequently he failed to direct himself properly on the evidential value of the said confessions as against his client. In law these confessions had practically no evidential value against a co-accused and that therefore the magistrate erred in treating them on the same basis as accomplice evidence. He submitted further that the magistrate failed to appreciate that the confessions could not in law form the basis of the prosecution case and that if there was no substantial evidence of an independent nature against his client, they could not be used to sustain his conviction. For these reasons, he went on, the magistrate adopted a wrong approach in treating the said confessions as substantive evidence against the third accused and then looking for corroborative evidence in support thereof. He relied for this proposition on the case of *Gopa v. R*. (1953), 20 E.A.C.A. 318 as well as the commentaries on s. 30 of the Indian Evidence Act which was in use in this country until 1967. S. 30 of the Indian Act is the equivalent of our s. 33 in the Evidence Act 1967. Mr. Hindocha’s last submission was in connection with the magistrate’s finding that these confessions were corroborated. He said that the magistrate misdirected himself in finding as he did that the mere fact that the third accused, who was a Yard Foreman at the relevant time and responsible for marshalling railway wagons, detained for repairs the wagon containing the stolen goods, and instead of placing it on the “sick line” “misplaced” it in the railway yard at a place from where it could easily be accessible to intruders from outside the said yard, constituted independent corroboration of the confessions. The first and fourth accused persons merely reiterated their denials of having taken part in this offence and repeated that they were forced into making the extra-judicial statements which were produced and used in evidence against them. Before proceeding further, I think I ought to mention in fairness to the trial magistrate that this was a highly complex case involving complex issues of law. In addition to the fact that the accused were not defended by counsel, the already difficult task of the magistrate was confounded by poor investigation and prosecution of the case. The pitfalls and errors into which he fell ought to be viewed against these problems. To simplify the position, I will accept at the present stage as did the trial court and both counsel in this appeal, that the extra-judicial statements made by the first and fourth accused amounted to confessions within the meaning of s. 33 (1) of the Evidence Act, for although he did not say so in so many words, the trial magistrate must have acted under this section in using these statements against the third accused. Hence Mr. Hindocha’s complaints that these statements are not evidence within the meaning of s. 33 of the Evidence Act and that therefore the magistrate was wrong in treating them as such and then looking for corroborative evidence. He said that according to the commentaries on s. 30 of the Indian Evidence Act, and the proposition in *Gopa’s* case, the confessions under s. 33 cannot be treated as evidence against a co-accused. In *Gopa’s* case, the Court of Appeal dealt with this same problem at length and quoted extensively from Sarkar particularly a passage appearing at p. 289 which states: “It is a fallacy to say that the confession of co-accused can be dealt with on the same basis as the evidence of an accomplice. The ordinary way of dealing with accomplice evidence is to treat the evidence of an accomplice as the foundation of the prosecution story, and then to see how far there is corroboration of matters which affect the accused and tend to show that the evidence is true against him. But we cannot take the confession of a co-accused as the basis of the prosecution case. It is not given on oath and there is no right of cross-examination.” After discussing the other authorities on the point, the appeal judges held at p. 322: “Returning now to the submission by the appellant’s counsel, that the trial judge misdirected himself in treating the confession as the basis of the evidence against a co-accused and then looking for corroboration, we are abundantly satisfied from the authorities cited above that the approach is the wrong one and that a confession can only be used as lending assurance for other evidence against the co-accused, evidence which only falls short by a very narrow margin of the standard of proof necessary for a conviction.” *Gopa’s* case decided twenty years ago was an appeal from the decision of this court regarding the use of confessions against co-accused under s. 30 of the Indian Evidence Act then in force in this country. This interpretation of s. 30 agreed with the commentaries by various authors on that section, including *Woodroffe’s Law of Evidence Applicable to British India*, 9th Edn. The author states at p. 312: “The law which prevailed before the passing of this Act required a conviction to be based on evidence, excluding from that term statements of the character mentioned in this section (Section 30). And in so far as a statement by a witness only is ‘evidence’ according to the definition given of that term when used in this Act, a confession by an accused person affecting himself and his co-accused is not ‘evidence’ in that special sense. . . . The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration of all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence. For even when regarded as evidence and taken at its highest value, it is of too weak a character to found a conviction upon it alone and hence corroboration should be required in all cases. If instead of being the statement of a fellow-prisoner, it had been evidence given on oath and on examination as a witness, it would not have been anything other than the evidence of an accomplice, which in general, requires corroboration before being acted upon, and if the testimony of an accomplice before the Court under the sanction of an oath and a process of careful examination and capable of being tested by cross-examination, is yet by its nature such that, as against an accused, it must be received with caution, still more so must be the confession of a fellow-prisoner, which is only the bare statement of an accomplice limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril into which it brings the speaker and which it is generally fashioned to lessen.” I think this is an appropriate stage for me to set out in full s. 33 of the Evidence Act 1967: 33 (1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other persons. (2) In this section “offence” includes the abetment of or attempt to commit the offence. Apart from inconsequential variations, the section is identical to s. 30 of the Indian Evidence Act. The controversy surrounding s. 33 as was ably demonstrated by Mr. Hindocha can be split into two main parts. The first part is whether the confessions admitted under that section can properly be regarded as evidence under s. 3 of the Act. The second part is the meaning to be given to the phrase “may take into consideration” as used in the section. With regard to the first part, Mr. Hindocha submitted as indicated earlier that confessions under s. 33 are not evidence within the meaning of the Evidence Act 1967, that they merely form an element in consideration of other evidence in the case. In this he appears to be well supported by the commentaries on the Indian Evidence Act as in Woodroffe quoted earlier in this judgment when the author states at p. 312: “And in so far as a statement by a *witness only* is ‘evidence’ according to the definition given of that term when used in this Act, a confession by an accused person affecting himself and his co-accused is not evidence in that special sense.” This of course is a commentary under s. 30 of the Indian Act which defines “evidence” under s. 3 as follows: “3. ‘Evidence’ means and includes: 1 . A ll statements which the Court permits or requires to be made before it by *witnesses* in relation to matters of fact under inquiry: such statements are called oral evidence. 2 . A ll documents produced for the inspection of the Court: such documents are called documentary evidence.” The question therefore is whether, if Mr. Hindocha’s submission is correct in law, the commentaries in Woodroffe would be applicable to the confessions under s. 3 of our Evidence Act which defines evidence as follows: “3(1) In this Act the following words and expressions are used in the following sense unless a contrary intention appears from the context: ‘evidence’ denotes the means by which an alleged matter of fact, the truth which is submitted to investigation is proved or disproved, and without prejudice to the foregoing generality, includes statements by accused persons, admissions and observations by the Court in its judicial capacity. ‘Documentary evidence’ means all documents produced as evidence before the Court. ‘Oral evidence’ means all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry.” There is therefore I think a marked difference in scope between what is “evidence” under the Indian Act and under the Tanzanian Act. Whereas under the Indian Act the term “evidence” is limited only to statements which the court permits or requires to be made before it *by witnesses*; under the Tanzanian Act, “evidence” includes statements by accused persons, admissions and observations by the court. This definition is wide enough to include statements by accused persons in the form of confessions and proved for use in the circumstances provided for under s. 33 of the Act. If the confessions were reduced to writing, then on being proved in court and admitted, they are documentary evidence as defined by that Act. The result of this therefore is that although in general the commentaries on the Indian Act are of great persuasive value when interpreting the Evidence Act 1967 which is modelled on it, this will very much depend on whether the particular provision in the Tanzanian Act bears any material variation from its Indian counterpart. I think s. 3 of the Tanzanian Act bears such material differences and variations sufficient to render the commentaries on s. 3 of the Indian Act inapplicable to it. Therefore, unlike the Indian Act, the confessions of an accused, proved and admitted for use in the circumstances provided in s. 33 of the Tanzanian Evidence Act can be treated as evidence within the meaning of s. 3 of that Act, and that therefore the magistrate was right in treating them as such. I will now turn to the second part regarding the meaning and significance to be given to the phrase “may take into consideration” used in s. 33 of the Evidence Act. Mr. Hindocha submitted, and again he is well supported by the existing authorities under s. 30 of the Indian Evidence Act, that the magistrate erred in treating the confessions as substantive evidence and then looking for corroborative evidence in support thereof because at best these confessions could only be used to lend assurance to other substantial independent evidence. If my understanding of this submission and the authorities which were cited is correct, it appears to say no more than this, that the confessions which are proved and admitted for the purposes of s. 33, are not evidence and therefore cannot be corroborated as to their truth, but they can only be used to support or in the words of commentators “to lend assurance to other evidence”. In other words, while they can be used to support and establish the truth of other evidence, their own truth cannot be supported and shown by other evidence. Quite a feat in mental gymnastics, but I think that this view is largely a product of the meaning attached to “evidence” in the Indian Act from which confessions proved and admitted for use under s. 30 are excluded. Woodroffe has an exceedingly illuminating paragraph on the meaning to be attached to the phrase, at p. 312 he states: “By this section, (i.e. s. 30), the legislature has only bestowed a discretion upon the court to take into consideration such confession. While under S. 21 admissions (which include confessions) are relevant and may be used against the person making them, the present section merely provides that the court may take them into consideration against other persons; and this distinction is significant and shows that under this section the court can only treat a confession as lending assurance to other evidence against a co-accused.” What the author has done here is to interpret s. 30 which deals with confessions, by comparing its wording with s. 21 which deals with admissions, which according to him include confessions. S. 21 is the equivalent of s. 23 in the Tanzanian Act. But I think that this comparison is misleading. In the first place as the courts have recognized over the years, there is a real distinction between admissions and confessions, and this distinction is, in the words of the Court of Appeal in *Gopa’s* case, not a technical refinement. Their Lordships stated at p. 320 quoting an American jurist: “This distinction between a confession and an admission as applied to criminal law, is not a technical refinement but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgement of guilt on the part of the accused and by the very force of the definition, excludes an admission, which of itself as applied in Criminal law, is a statement by the accused, direct or implied of facts pertinent to the issue and tending in connection with proof of other facts to prove his guilt, but of itself insufficient to authorise a conviction.” In the second place s. 21 (or our s. 23) provides for the use of admissions against their makers whereas s. 30 (or our s. 33) provides for the use of confessions against persons other than their makers. In the circumstances the wording of one section cannot be used to interpret, by way of comparison, the wording of the other, dealing as they are not only with different situations, but with different objects. It is clear then that the view on confessions admitted for use in the circumstances provided under s. 30 of the Indian Evidence Act that they can do no more than lend assurance to other evidence, was developed under the influence of three factors all of which are peculiar to that Act. The first factor was the view that these confessions are not evidence with the meaning of s. 3 of that Act and that consequently they can neither standalone nor be supported by other evidence, they can only be used in support of other evidence. The second factor was the false comparison that was made by the text writers between admissions under s. 21 and confessions under s. 30. The third and last factor was what is clearly a manifestation of dislike for this section by those who had to administer it in India, who regarded it as anything from dangerous to extraordinary. My task therefore is to interpret the phrase “May take into consideration” in s. 33 of our Evidence Act free from these Indian influences, the aim being to arrive at an interpretation which will ensure a just decision, just, in the sense that the section is neither a loop-hole through which the guilty escape nor a snare for the innocent. I have already held that the confessions of an accused proved and admitted under s. 33 are evidence within the meaning of s. 3 of the Act. The only question is the extent to which this kind of evidence can be used against a co-accused. Since, as I have ruled such confessions are evidence, certain results immediately follow. The first is that they can stand on their own. The second is that they can support other evidence, and the third is that they can themselves be supported by other evidence in other words to lend them more assurance. It follows that they can be used to the same extent as other evidence subject of course to any exclusionary rules that may be applicable and to such additional requirements as corroboration. There are of course pronouncements scattered in the authorities to the effect that such evidence is in any case weaker and on a lower scale than accomplice evidence because the latter is made under oath and the former is not. The passage from Woodroffe quoted earlier, puts the position extremely well: “. . . If instead of being the statement of a fellow prisoner it had been evidence given on oath and on cross-examination as a witness, it would not have been anything other than the evidence of an accomplice, which, in general, requires corroboration in order to its acceptance; and if the testimony of an accomplice given before the Court under sanction of an oath and a process of careful examination, and capable of being tested by cross-examination, is yet by its nature, such that, as against an accused, it must be received with caution, still more so must be the confession of a fellow prisoner which is only the bare statement of an accomplice, limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril into which it brings the speaker and which it is generally fashioned to lessen.” With respect, this passage assumes a number of things to be true, but on closer examination appear doubtful. Is it necessarily true for instance that the sanction of an oath is a more effective guarantee of truth than the peril to which a confessing prisoner subjects himself? To me the peril which one faces by confessing to a crime is more real than the imaginary sanction of an oath. Witnesses lie in various courts every day and yet prosecutions for perjury are only known by their absence. For my part therefore, self-incrimination is a greater guarantee of truth than an oath, and that barring malice, a confession by an accused fully implicating himself and also his co-accused has a greater guarantee of truth than the evidence of an accomplice who faces no real prospect of penalties himself and in fact may be under a promise of pardon. Examination or cross-examination however careful, cannot extract the truth from a witness determined to tell falsehoods against others to save his own skin. I would therefore say that the requirements to be applied to extra-judicial statements, whether retracted or not sought to be used against accused persons other than their makers under s. 33 of the Evidence Act, are first to determine and make a finding whether such a statement amounts to a confession, secondly the extra-judicial statement must be proved in court, and thirdly it must be corroborated in material particulars unless the court is otherwise satisfied as to its truth. Once the statement is found to possess these requirements, it can be used as evidence, that is to say in the words of the section itself, the court may take it into consideration as evidence against the other accused person implicated in it in considering the guilt or otherwise of such other accused person. If the court is satisfied after hearing all the evidence that the confession is as true to such other accused as it is to its maker, then I can see no reasons for the court to refrain from convicting such other accused. But the court must find and accept its truth. I will therefore conclude this part of the judgment by stating that in a proper case, a court of law can act and convict solely under the evidence proved and admitted under s. 33 of the Evidence Act. Consequently in this case, I will only quarrel with the findings of the resident magistrate if the extra-judicial statements which were made by the first and fourth accused persons do not possess the requirements laid down in this judgment. Earlier in this judgment I said that the evidence against the third accused consisted wholly of the extra-judicial statements, implicating him, made by his co-accused, namely the first, second and fourth accused. Therefore the first question to be determined is whether these statements or any of them amount to confessions so as to consider them against the third accused under s. 33 of the Evidence Act. The rule of course is that to render the statement of one person jointly tried with another for the same offence, liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged. Woodroffe puts it succinctly at p. 310: “Before a confession of a person jointly charged and tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person *substantially to the same extent* as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried.” The same rule was approved and applied by the Court of Appeal in *Kyabanamaizi v. R*., [1962] E.A. 309. Forbes, V.-P. as he then was stated at p. 315 quoting *Sarkar on Evidence*: “It is abundantly clear from the relevant cases on the point that in order that the statement of an accused may be taken into consideration against his co-accused tried jointly for the same offence, it must implicate himself substantially to the same extent as others, and must expose himself to the same risk along with the fellow prisoners, otherwise the confession cannot be taken into consideration under this section. If the statement implicates him as fully as the others, or in a greater degree, it is then only that it can afford a sort of safeguard for truth. If the statement criminates the maker partially or in a lesser degree, or throws the main burden of the blame on others, it cannot be used against his co-accused. Statements however criminating made in self-exculpation or in mitigation of guilt, are self-serving statements and are not admissible. A statement falling short of actual admission of guilt would be a mere inculpatory admission and not a confession at all within the meaning of Section 30. All that the section requires is that it must be a ‘confession’ and that the statement of the confessing person must implicate himself substantially to the same extent as it implicates the others. “It appears that the real test is not whether the confessing accused ascribes to himself a major or minimum part in the crime, but whether when implicating his co-accused he gives a full and true account of the crime and unreservedly confesses his own share of the guilt, i.e. implicates himself as fully substantially as his co-accused. It may be that the part assigned to him was not a leading or major one, but in any case there must be a confession to the fullest extent of whatever part he took in the commission of the crime. It is in this sense that the confession must ‘affect them both equally’. It is only a statement of this kind that can be said to implicate the confessing accused ‘substantially to the same extent’ as it implicates the others. When there is no full and complete confession of his own guilt and the part taken by him in the crime, but an embroidered story spun out with the object of clearing himself or reducing his own guilt at the expense of others, it is nothing but an explanation of an exculpatory nature or a self-serving statement.” How then does each statement in this case measure up to these tests? The first accused stated in his statement before the magistrate that he was employed by the third accused to carry these goods, that he was at the time not worried because he believed the goods lawfully belonged to the third accused. Similarly the second accused stated that he was hired by the third accused to carry these goods, that he believed the representations of the third accused that the goods were his. In fact, he went on, he had turned down an earlier offer by the third accused because he suspected then that the transaction was illegal. The fourth accused made a similar allegation that he was an innocent hired hand of the third accused to whom he genuinely believed the goods lawfully belonged. Now, can these extra-judicial statements be said to be full confessions of the guilt of each of their makers, in other words do they implicate each maker of them as fully and substantially to the same extent as the third accused? I think not. The whole burden of guilt in each of these statements is off-loaded from the maker onto the third accused. For they are all saying, “we are innocent because we did not know at the time that the third accused was involved in some criminal activities”. These statements cannot therefore pass the test laid down by the Court of Appeal in the *Ezera* case quoted above, because they do not contain the full confession of the guilt of each of their makers, they are designed to clear the makers at the expense of their co-accused, they are therefore nothing but explanations of an exculpatory nature or self-serving statements, thereby robbing them of all guarantee of truth. They are for this reason not confessions within the meaning of s. 33 of the Evidence Act 1967 and that therefore the resident magistrate erred in using them against the third accused. He could only use them against their makers. For, as the Court of Appeal stated in *Anyangu v. R*., [1968] E.A. 239 at p. 240: “A statement which does not amount to a confession is only evidence against the maker.” The second error with regard to the case against the third accused was that these statements were not proved in court as required by s. 33 of the Act. For, although this section allows a confession to be used against another accused, it yet requires that such confession should be “proved” as against the accused to whose prejudice it is to be used. As Woodroffe puts it at p. 312: “When a confession is used for the purpose of this section, the person to be affected by it has a right to demand that it be strictly proved and shown to have been in all essential respects, taken and recorded as prescribed by law. . . . What is contemplated is a formal proof by the prosecution of a confession previously made.” The record of the lower court does not show that this additional requirement as to proof was complied with. The magistrate who allegedly recorded these statements was allowed to tender them above the makers’ protests. Having removed the statements as against the third accused, is there any other evidence to support his conviction? There is none. The magistrate’s hypothesis, regarding the “misplacement” of the “sick” wagon was wholly based on the contents of these extra-judicial statements. Remove the statements and the hypothesis crumbles. There was therefore in law no evidence presented against the third accused during his trial in the lower court, and I have no alternative in the circumstances but to allow his appeal. I will now turn to the first accused Samwel Mfunya. His appeal against conviction has no merit, for he was caught red-handed by police dogs at the scene of crime. The trial magistrate accepted the prosecution case and rejected his version, and for my part, rightly so. His appeal against conviction is dismissed. With regard to sentence, the magistrate imposed the maximum, i.e. seven years’ imprisonment, but I cannot see how anyone can complain against such a sentence for an offence of stealing property belonging to a public corporation worth over Shs. 15,000/-. The Railways Corporation was the special owner of these goods as defined under s. 258 of the Penal Code. The minimum sentence for this offence under s. 5 (*d*) of the Minimum Sentences Act 1972 is five years, and although all the stolen property was recovered, this does not reduce the seriousness of the original scheme. Therefore, although perhaps I would not myself have imposed such a sentence, this cannot be a reason for intervention, as a sentence of seven years under these circumstances cannot be regarded as manifestly excessive to justify the intervention by this court. There are cases, and I think this is one of them, which deserve the imposition of maximum penalties under the law, if only to instil into the minds of these thieves that the courts will always treat with unusual seriousness offences against public property. After all public property is the cornerstone of our society. I have therefore nothing but commendation for the trial magistrate in this case for treating offences against public property with the seriousness that they deserve. In the result, the appeal against sentence is also dismissed and the sentence which requires the confirmation of this court is hereby confirmed. And lastly the fourth accused, Vincent Kitumbo. As I stated at the beginning of this judgment, the case against him consisted of a retracted extra-judicial statement which he made to a primary court magistrate. In this statement he admitted being part of the group which raided the railway wagon, but he said that he had simply been hired by the third accused at the rate of Shs. 150/- per trip and that the third accused had specifically sent for him from Kigoma. He went on to state that he did not know at the time that they were handling stolen property. During his trial, he retracted this statement saying that he was beaten into making it and that in fact it was dictated to him by police officers. According to his evidence in court, he was simply arrested by police on the morning of 16 August 1972. The trial magistrate directed his mind to the law regarding retracted confessions and following the decision of the Court of Appeal in *Tuwamoi v. Uganda*, [1967] E.A. 84, the magistrate held in effect that a retracted confession must be corroborated in material particulars by independent evidence, before it can be acted upon. He found that the fourth accused’s statement had been so corroborated and convicted him on it. I think I should say a word or two about the law governing retracted confessions as adverted to by the magistrate. He certainly cannot be faulted for holding as he did that a retracted confession must be corroborated, for he was bound by the decision of this court in the case he quoted *R. v. Melanyi* (1971), H.C.D. 398 in which Kwikima, Ag. J. stated *inter alia*: “It is trite law, and authorities abound on this point, that an admission or confession which has been retracted cannot support a conviction unless it is corroborated by other evidence.” In stating this, his Lordship said that he was following among other authorities, the Court of Appeal decision in *Tuwamoi v. Uganda*, [1967] E.A. 84. But, I think, with respect, that this is exactly what the learned Appeal judges did not say in the *Tuwamoi* case. As it is clear from the facts of that case, the court was grappling with the problem whether in practice there should be a distinction in the treatment between retracted and repudiated confessions, because earlier judgments of that court notably *R. v. Labasha* (1936), (3) E.A.C.A. 48 and later *Gathungu v. R*. (1953), 20 E.A.C.A. 294, had ruled that there is in fact such a distinction in that a retracted confession must be corroborated whereas a repudiated confession need not. In resolving this problem, the court traced the history of the rule governing retracted confessions. Their Lordships found that the first reported East African case on the point was *R. v. Mutwiwa* (1935), 2 E.A.C.A. 66, in which it was held: “It is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.” This restricted view was expanded in later cases starting with *R. v. Keisheimeiza* (1940), 7 E.A.C.A. 67 in which the same court held that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. Whitley, C.J. continued: “We agree that in ordinary cases as a general rule when a confession is definitely and categorically retracted, it is unsafe for the Court to act upon it without corroboration, but if after enquiring into all the material points and surrounding circumstances the Court is fully satisfied that the confession cannot but be true there is no reason in law why the Court should not act upon it.” And ending with *Kamau v. R*, [1965] E.A. 501 where the court stated at p. 505: “As we have earlier said, the other material evidence against the appellant was her own cautioned statement, which she retracted at the trial. In relation to this, the learned judge directed the assessors that it is dangerous to rely upon a retracted confession in the absence of corroboration, but that they might do so if fully satisfied that the confession must be true. . . . We think that the learned judge’s direction regarding retracted confessions was correct.” After considering this case, the court then summarised the present rule as follows at p. 89: “The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true.” This then is the extent to which the original restricted rule in the *Mutwiwa* case had been expanded between 1940 in the *Keisheimeiza* case and 1967 in the *Tuwamoi* case. Having traced the history of the rule regarding retracted confessions thus far, the court then commented on the *Labasha* case which had made a distinction in the treatment to be accorded between retracted and repudiated confessions and held at p. 90: “There are two matters of special significance in this judgment (i.e. *Labasha* judgment). The first point is that when this judgment was delivered the law as to a retracted statement was still that as set out in the *Mutwiwa* case, that is that a retracted statement should be corroborated by other material evidence before a conviction could safely be founded on it. This judgment was delivered in 1936 before later judgments of this Court made it clear that a Court can found a conviction on such a statement even if there is no corroboration provided that the Court is fully satisfied in all the circumstances of the case that the confession must be true. We doubt very much whether this Court would have made the distinction between a retracted and a repudiated confession if the rule of practice had been then so widely stated.” And with this the court effectively overruled its earlier decisions in the *Labasha* and *Gathungu* cases. I would therefore say that the rule regarding retracted confessions as originally laid down in the *Mutwiwa* case has over the years been expanded and that the position now is that as laid in the *Tuwamoi* case, the extension being that while mindful of the danger of acting on a retracted confession which has not been corroborated, a trial court can now act on such a retracted confession in the absence of corroboration provided that the court is otherwise fully satisfied in the circumstances of the case that the confession must be true. I think that this extension was a necessary corollary to the opinion of the court in the *Keisheimeiza* case that the danger of acting upon a retracted confession in the absence of corroboration must depend to some extent upon the manner in which the retraction is made. In the circumstances, I am compelled to say with respect that the view laid down by Kwikima, Ag. J. in the *Melanyi* case would take us forty years backwards. I will now consider the evidence on which this appellant, the fourth accused, was convicted. He was convicted on his own statement which he retracted. I think it can be said without prejudice that other things being present, the magistrate’s view on the statement was correct, as well as his founding the conviction on it. But there are certain unsatisfactory features regarding the way this statement was admitted in evidence that has made me extremely uneasy as to whether this conviction should be upheld. State Attorney quite understandably informed the court that he was not in a position to support the conviction of the fourth accused considering the improper manner in which his statement was admitted. I share these views. As soon as the appellant indicated his retraction of this statement, the court was faced immediately with the problem of resolving the voluntary nature of the statement, for the appellant alleged that he was beaten into making it. The court should have heard evidence on the point and then decided on this evidence whether the statement was voluntary. This retracted statement was admissible in evidence only after a specific finding by the court that it was voluntarily made. This however did not happen. All that there is on the point is a remark in the judgment to the following effect: “The magistrate who took the statements of confessions, Stephen Maganga, appeared to me in Court as a steadfast witness who withstood the cross-examination of the accused without losing slightly his stability in the grip of his testimony. I found that he is a credible witness. On his evidence I find as a fact therefore that the accused were explained their rights before they gave the statements. . . . I find therefore that the confessions were voluntary and if there had been any coercive influence by the police, such influence had been cleared at the time the accused gave the statements in the cool atmosphere of the magistrate’s chambers.” With respect, this part of the judgment contains a number of misdirections bearing directly on the admissibility of this statement. In the first place, the fact that the magistrate who recorded the statement appeared in court to be “a steadfast witness who withstood the cross-examination of the accused without losing slightly his stability in the grip of his testimony”, was irrelevant, as was the point whether the accused were explained their rights, to the central issue whether these statements were voluntary, because the conduct of the magistrate was not in issue. It was the conduct of the police which was in issue, therefore it is they who should have been tested to see whether, in the magistrate’s own words, “they would also have appeared to the court as steadfast witnesses who withstood the cross-examination of the accused without losing slightly their stability in the grip of their testimony”. In the second place I think there is a serious flaw in the argument that even if there had been prior coercion such had been removed at the time of making the statements “in the cool atmosphere of the magistrate’s chamber”. This reasoning is false first because it is not supported by any evidence apart from the “coolness of the magistrate’s chambers”, and secondly it actually begs the question. If the appellant and his friends had been coerced into going to the magistrate to make the statements, then to my mind if “the cool atmosphere of the magistrate’s chambers” had indeed removed this fear, they would have refused to make the statements before the magistrate telling him that they were not free agents. The appellant was saying that he was still under fear when he made the statement. It was up to the prosecution to disprove this. The trial magistrate should have followed the useful guidelines put forth by Rudd, Ag. J. in an appeal decided by the High Court of Kenya, *Onyango Otolito v. R*., [1959] E.A. 986, where the Acting Chief Justice was dealing with the admissibility of retracted confessions. The Acting Chief Justice stated at p. 988 (with suitable variations): “. . . Nor does he [i.e. the trial magistrate] appear to have considered whether the alleged confessions [to the magistrate] were voluntary. As it had been suggested to the magistrate, who gave evidence, that the witnesses had been threatened and beaten with a view to extracting a confession, the Court was clearly put on its inquiry as to whether or not the alleged confessions were voluntary. Consequently before calling any such confession to be tendered in evidence, the Court should have asked the appellant whether he admitted that the statement which he is alleged to have made to the magistrate was made voluntarily and if the appellant had denied that it was made voluntarily should have proceeded to hold a trial within a trial for the purpose of determining its voluntary nature or otherwise. . . .” This is the proper procedure which should have been followed before these statements or any of them were admitted in evidence and used against the appellant Vincent Kitumbo. Failure to determine the voluntary nature of the appellant’s statement as indicated was a defect which certainly vitiated his conviction, nevertheless considering the evidence available, this would have been a proper case to order a retrial, but since the appellant to date has been in prison for more than a year, such an order would create unnecessary hardship. I will therefore reluctantly refrain from so ordering. In the result the appeal of the fourth accused Vincent Kitumbo is allowed, his conviction quashed, the sentence against him set aside with the order for his immediate release unless otherwise lawfully held. *Order accordingly.*

For the first appellant: *KK Hindocha*

For the respondent: *P Ntabaye* (State Attorney)