

P.C. →
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Judgment
: 9, 1965

IN THE PRIVY COUNCIL

No. 9 of 1963

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON
RECEIVED
- 2 FEB 1966
21, BEDFORD SQUARE
LONDON, W.C.1.

B E T W E E N:

SUNGARAPULLE THAMBIAH Appellant

- and -

THE QUEEN Respondent

50968

C A S E FOR THE APPELLANT

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- 10 1. This is an appeal from the Judgment and Order of the Supreme Court dated the 29th May 1961 in so far as it affirmed the order of the District Court of Colombo dated the 30th June 1961 convicting the Appellant of the offence of abetting another in fraudulently using as a genuine document a forged cheque and sentencing him to two years rigorous imprisonment. p.126,1.7
p.122,1.1
- 20 2. The principal issues of this appeal are whether :-
- (a) the learned trial judge illegally admitted as evidence an alleged confession by the Appellant to a Police Officer in contravention of section 25(1) of the Evidence Ordinance (Chap.11 Vol.1 of the Legislative Enactments 1938 Ed.);
- 30 (b) in any event, the whole of the Appellant's statement or statements to the Police from which the confessional admissions were taken were not proved at the trial and should have been so proved;
- (c) even if the alleged statements of the

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Appellant do not amount to confessions within the meaning of the Evidence Ordinance, they were inadmissible in view of the prohibition in section 123(3) of the Criminal Procedure Code (Chap.16 Vol.1 of the Legislative Enactments 1938 Ed.); and

- (d) the Appellant having been acquitted of a charge of conspiracy, there was any evidence that he abetted another accused in dishonestly and fraudulently using as a genuine document the forged cheque (P2). 10

3. Section 25(1) of the Evidence Ordinance is as follows :-

- (1) No confession made to a police officer shall be proved as against a person accused of any offence.

Section 122 of the Criminal Procedure Code is as follows :- 20

- (1) Any police officer or inquirer making an inquiry under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined, but no oath or affirmation shall be administered to any such person, nor shall the statement be signed by such person. If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book. 30
- (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. 40
- (3) No statement made by any person to a

10 police officer or an inquirer in the
 course of any investigation under this
 Chapter shall be used otherwise than
 to prove that a witness made a
 different statement at a different
 time, or to refresh the memory of the
 person recording it. But any criminal
 court may send for the statements
 recorded in a case under inquiry or
 trial in such court and may use such
 statements or information, not as
 evidence in the case, but to aid it
 in such inquiry or trial.

20 (4) Neither the accused nor his agents
 shall be entitled to call for such
 statements, nor shall he or they be
 entitled to see them merely because
 they are referred to by the court;
 but if they are used by the police
 officer or inquirer who made them to
 refresh his memory, or if the court
 uses them for the purpose of contra-
 dicting such police officer or
 inquirer the provisions of the
 Evidence Ordinance, section 161 or
 section 145, as the case may be,
 shall apply.

30 Nothing in this subsection shall
 be deemed to apply to any statement fall-
 ing within the provisions of section
 32(1) of the Evidence Ordinance, or
 to prevent such statement being used
 as evidence in a charge under section
 180 of the Penal Code.

40 4. The Appellant was tried before the District
 Court of Colombo on an indictment in which the
 Appellant was charged along with four other
 accused persons with several offences connected
 with two forged cheques. All five accused were
 charged with conspiracy to use as genuine the
 two forged cheques. The Appellant was charged,
 as second accused, :-

p.1,1.26

(a) in count 4 with abetting the 1st
 accused, named Appuhamy, in dishonestly
 or fraudulently using a forged cheque
 (Exhibit P1) as a genuine document, an

p.2,1.31

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|--------------------------|--|----|
| <u>Record</u> | offence punishable under Section 459 of the Ceylon Penal Code: | |
| p.2,1.40 | (b) in count 5 with having fraudulently signed on the reverse side of the forged cheque P1: | |
| p.3,1.5 | (c) in count 6 along with two other accused persons of voluntarily assisting in disposing of the forged cheque P1: | |
| p.3,1.25 | (d) in count 8 with abetting Appuhamy, the 1st accused, in dishonestly and fraudulently using as a genuine document a forged cheque, Exhibit P2 dated 30th September 1958: and | 10 |
| p.4,1.1 | (e) in count 10 along with three other accused persons with voluntarily assisting in disposing of the cheque P2. | |
| p.97,1.4 | 5. At the conclusion of the trial the Appellant was acquitted of conspiracy and of the charges on counts 5, 6 and 10. The Appellant was convicted of abetting the 1st accused in using the two forged cheques P1 and P2 as genuine documents and was sentenced to 2 years rigorous imprisonment on each count, the sentences to run concurrently. | 20 |
| p.126,1.7 | 6. The Appellant appealed to the Supreme Court and by its judgment and order dated the 29th May 1961 the Supreme Court set aside the conviction and sentence against the Petitioner on count 4, that is the charge of abetment in regard to the cheque P1, but affirmed the conviction and sentence against him on count 8, that is the charge of abetting the 1st accused in uttering the forged cheque P2. | 30 |
| | 7. The undisputed facts relevant to count 8 may be summarised as follows :- | |
| p.38,1.47 - p.39,1.28 | (a) The 1st accused, Arnolis Appuhamy, was introduced to the Appellant by Cyril Albert Perera, an important witness for the prosecution, who | 40 |

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was well known to the Appellant and his family and also to the 1st accused for many years.

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(b) On the 22nd September 1958, the Appellant accompanied the 1st accused to the Pettah branch of the Bank of Ceylon for the purpose of helping the latter to open a current account there. The Appellant obtained for the 1st accused a recommendation from a constituent of the Bank and also helped him to fill up the necessary forms for the purpose. The name of the 1st accused was entered in the forms as Gunadasa. There being some delay at the Pettah Branch, the 1st accused took no further steps at that Branch. On the next day the 1st accused opened an account in the Wellawatte branch of the Bank of Ceylon. The necessary initial deposit of Rs.1000/- was furnished by the Appellant who also arranged for the necessary recommendation. The Appellant introduced the 1st accused as P.V. Piyadasa to the person who gave the recommendation.

p.21,1.1-
p.22,1.13

p.26,1.12-
p.27,1.48

(c) The Appellant kept the cheque book issued to the 1st accused after 5 cheque leaves in the book had been signed by the 1st accused and countersigned by an official of the bank. The Appellant utilised the signed cheque leaves for drawing out money for his own purposes and, having overdrawn the account, deposited to its credit Rs.500/- on the 30th September 1958 and Rs.150/- on the 6th October 1958. The Bank receipts for these deposits were found by the police in his coat pocket on the 22nd October 1958 some seven days after the first accused had attempted to deposit cheque P2 to the credit of his account.

p.80,11.1-
43
p.27,11.25-
p.28,1.2

p.67,1.4

(d) The cheque dated 30th September 1958 for the sum of Rs.21,740/63 (Exhibit P2) was lost after it had been posted by the payee to its Bank on the 9th October 1958.

p.9,1.9
p.11,1.13

Record

p.33,l.10 -
p.34,l.15

This cheque found its way into the hands of the 1st accused who on the 14th October 1958 handed it in at the Wellawatte Branch of the Bank of Ceylon to be credited to his account.

p.33,l.48 -
p.34,l.12

- (e) The Bank discovering that the payee's name had been altered, wanted to question the 1st accused but failed to do so because he had suddenly left the Bank without waiting for the Bank receipt for the cheque.

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- (f) The Appellant assisted the Police in their efforts to trace the 1st accused. The evidence of Inspector Goonetilleke on this point is as follows :

p.66,l.13

"At that time I was still on the look out for this person called P.V. Piyadasa and I was making attempts to take him into custody. I detailed Police Sergeant Appuhamy to make inquiries in Pamankada and Wellawatte areas. On 18.10.58 at about midnight I ambushed along with the 2nd accused near the Sapphire Theatre to find P.V. Piyadasa but was not successful."

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8. The prosecution adduced evidence, in addition, of certain facts disputed by the Appellant. These facts may be briefly stated as follows :-

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p.39,l.3-27

- (a) Cyril Albert Perera stated that in August or September 1958 the Appellant had asked him to find an experienced baker to work for him and that he had introduced the 1st accused a few days later to the Appellant. The 1st accused had on that occasion given his name as Arnolis Appuhamy of Pamankada.

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p.66,11.36-48

- (b) Inspector Goonetilleke gave evidence to the effect that a letter dated the 20th September purported to be

- signed by one H.B. Mendis (P14) recommending the 1st accused as a fit person to open an account in Grindlay's Bank Ltd. was found in the house of the 1st accused. This letter was a forgery. Inspector Goonetilleke also stated that he found in the Appellant's house two letter heads (P15 and P16) on which the name H.B. Mendis had been written several times. He went on to say, after the objection of the Appellant had been overruled by Court, that the Appellant had admitted to him that the writing on P14, P15 and P16 were his.
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- Record
p.19,1.1-28
p.67,11.10-22
p.67,11.23-24
p.69,11.1-9
- (c) Nathanielsz, a clerk at Grindlay's Bank, stated that in August or September 1958, the Appellant came to the Bank and inquired about the procedure for opening an account in that Bank and that the Appellant was accompanied on that occasion by a man whom he could not identify.
- 20
- p.16,1.30-
p.17,1.13
- (d) Don Andreas in his evidence stated that the Appellant came to the hotel in which he was working and inquired for the 1st accused: "He (Petitioner) asked me whether Ralahamy who delivers bread had come there. I understood him to be the 1st accused"
- p.52,11.1-35
- (e) Dharamananda Rajah, a clerk at the Bank of Ceylon, Wellawatta, stated that the Appellant came to the Bank two days before the 1st accused opened his account and removed the forms necessary for opening an account. When the Appellant later came with the 1st accused the witness had inquired whether the 1st accused was the Appellant's man.
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- p.31,1.22-34
9. The Appellant gave evidence at the trial. According to him the first accused was introduced to him as Piyadasa by Cyril Albert Perera. It was as a favour to Cyril Albert Perera that the Appellant helped the 1st accused to open a bank account. The cheque book with the signed cheque leaves were kept by him by arrangement so that he might get back the Rs.1,000/- given by the
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- p.42,1.33-36 Appellant for the initial deposit and that having overdrawn the account he deposited Rs.500/- and Rs.150/- to the credit of that account. It was admitted by Cyril Albert Perera that he had been warned of the 1st accused's arrest. Sirisena, the prosecution witness who owned the hotel at which the prosecution witness Andreas, his uncle, worked as cashier, also admitted that he went from Wellawatte to Colombo Fort where Cyril Albert Perera worked to warn him of the 1st accused's arrest. It was also suggested by the Appellant that Cyril Albert Perera, who used to come to the Petitioner's house and play with his children, had introduced the two letter heads P15 and P16 into the drawer where they were found by the police on the night of the 23rd October 1958. 10
10. The learned trial judge allowed Inspector Goonetilleke to give oral evidence of an alleged confessional statement made to him by the Appellant and recorded by him in writing. The learned trial Judge's reasons for admitting the evidence were as follows :- 20
- p.68,1.28-43 "Even if the answer by this witness is to the effect that the 2nd Accused admitted that he wrote the signature H.B. Mendis on P14 having practised the same on the documents P15 and P16 as he has stated in the lower court, this evidence would not be a confession by the 2nd accused of having committed any of the offences with which he is being charged in the present case. Nor would it be an admission suggesting an inference of guilt to any of the charges with which he is charged in the present case. Therefore I allow the witness to answer the question put to him." 30
- The evidence of Inspector Goonetilleke, led by the prosecution, regarding the Appellant's statement concerning P14, P15 and P16 is as follows :- 40
- p.69,1.1-9 "Q. Did the 2nd accused tell you about the writing H.B. Mendis on P14?"

"A. He said he signed the name H.B. Mendis on P14.

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Q. What did the Second accused tell you about the writing H.B. Mendis on P15 and P16?

A. He said that he wrote H.B. Mendis on these documents.

Q. For what purpose?

10 A. He said he practised this signature on P15 and P16 and thereafter signed it on P14."

11. It transpired in Inspector Goonetilleke's cross-examination that the recorded statements of the Appellant~~s~~ were longer than the statement spoken by the witness and that it contained "explanations" which do not appear in the evidence of the Inspector.

20 The Inspector said that he asked the Appellant to come into his office on the 22nd October at 1.45 p.m. During that time he was treated as a suspect. The Inspector was acting in terms of Section 129(1) of the Criminal Procedure Code having obtained the permission of the Magistrate, but he did not at that time formally arrest the Appellant. It was at 3.55 p.m. on the 22nd October that the Appellant was made aware of the offences of which he was suspected. At least eight statements were taken from the Appellant. The Appellant had confessed to him to have written P14, P15 and P16 after he had been made aware that he was in custody on a charge of forgery.

p.71,l.14-
p.72,l.28

p.73,l.7-14

40 "I do not know whether I should use the word confessed. Immediately after my return to the office I put in on record. What he stated to me I recorded. When we were climbing the stairs he said so. He offered me the explanation for the two note heads. The forgery part of it came later. The documents were shown to him later. Even before P14 was shown to him he gave an explanation regarding P15

p.73,l.15

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and P16. After that I recorded his statement incorporating that."

p.84,l.11-
p.85,l.1

12. In cross-examination the Appellant said he did not see P14 until the night of the 22nd October. He did not offer to give an explanation to Mr. Goonetilleke. He said that two other documents were found in his chest of drawers along with P15 and P16. The Appellant's counsel then objected to the production of those documents on the grounds that they should have been produced in examination in chief, but the Judge allowed the documents to be marked 'X' and 'Y'. The Appellant admitted that the bodies of 'X' and 'Y' had been written by him.

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p.91,l.28-33

13. After the defence of the Appellant and that of the other accused had been closed, Counsel for the prosecution recalled Inspector Goonetilleke who said :-

"I recorded the statement of the 2nd accused S. Thambiah. At the time I recorded the statement I showed him P15 and P16 and subsequently P14. I produce the copy of his statement marked C. P14 is a typed letter. (Counsel states that X and Y have already been marked and he moves that these documents he proposes to mark be now marked as A and B.)

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I produce marked A and B dated 4.9.58 and 30.8.58 respectively both found in the possession of the 2nd accused."

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It is humbly submitted that this document was not legally proved and was not properly before the trial court.

p.112,l.40-
p.113,l.13.
p.118,l.30-34
p.120,l.50 -
p.121,l.8

14. In the course of his Judgment the learned trial judge did not deal with the question of admissibility. He reviewed the evidence in detail and referred inter alia in two places to the admissions by the Appellant that he had signed H.B. Mendis on the letter P14 having practised the signature on P15 and P16 and also to the Appellant's denial of these admissions.

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15. The Appellant appealed to the Supreme Court on the grounds inter alia that the trial judge erred in law in admitting a statement alleged to have been made by the Appellant to Inspector Goonetilleke although that statement amounted to a confession and was inadmissible; that the trial judge was wrong in the circumstances of the case in accepting the evidence of Inspector Goonetilleke of the statement alleged to have been made by the Appellant and drawing inferences from it; and further that there was no evidence that the Appellant aided and abetted the first accused to commit an offence in respect of P2. Record
p.123,1.40
p.124,1.6
16. The Judgment of the Supreme Court (H.N.G. Fernando J. and Thambiah J.) was as follows :-
- "We agree with the submission of learned counsel for the 2nd accused-appellant that the prosecution did not succeed in establishing that the 2nd accused had instigated the 1st accused to utter the cheque P1 or aid him to do so. In the circumstances the conviction and sentence against the 2nd accused on count four of the indictment has to be set aside, and we accordingly do so. The convictions of all the accused on the other counts and the sentence of two years' imprisonment passed against each of the three accused are affirmed." p.126,1.7
- 30 The Judgment contained no reference to the point taken with regard to the inadmissibility of the Appellant's statement.
17. On the 24th October 1961 the Appellant was granted Special Leave to appeal to Her Majesty in Council. p.128,1.10
18. It is respectfully submitted that the Appellant's alleged statement that he had signed P14 and practised the signature of H.B. Mendis on P15 and P16 constituted in all the circumstances a confession by the Appellant to a police officer and was wrongly admitted by the learned trial judge in contravention of Section 25(1) of the Evidence Ordinance; further that in any event

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the trial judge was at fault in admitting the said statements without the whole of the Appellant's alleged statements relating to the signing of P14, P15 and P16 being proved at the trial; that in any event the alleged statements of the Appellant relating to P14, P15 and P16 were inadmissible in view of the prohibition in Section 122(3) of the Criminal Procedure Code; and lastly that once the Appellant had been acquitted of the charge of conspiracy there was no evidence to connect the Appellant with the actions of the first accused on the 14th October 1958 in presenting the cheque P2.

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19. The Appellant humbly submits that this appeal should be allowed and the Appellant's conviction should be quashed for the following amongst other

R E A S O N S

- 1. BECAUSE the trial judge wrongly admitted as evidence an alleged confession to a police officer contrary to Section 25(1) of the Evidence Ordinance.
- 2. BECAUSE the trial judge admitted part of a statement alleged to have been made by the Appellant to the police without the whole statement being proved.
- 3. BECAUSE the trial judge wrongly admitted as evidence statements rendered inadmissible by Section 122(3) of the Criminal Procedure Code.
- 4. BECAUSE there was no evidence, once the Appellant had been acquitted of the charge of conspiracy, that he aided or abetted the first accused in the first accused's offence of presenting a forged cheque Exhibit P2.

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E.F.N. GRATIAEN

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DICK TAVERNE

No. 9 of 1963

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-v-

THE QUEEN

C A S E FOR THE APPELLANT

Lodged the *16th March* 1965.

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