

APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

TUN KHA AND OTHERS (APPELLANTS)

v.

THE KING (RESPONDENT).*

1947

Oct. 15.

Criminal Procedure Code, ss: 164, 364—Admissibility of confession.

Held: Where a confession has been recorded by a 2nd Class Magistrate who has not been empowered by the Government to record confessions, such confession is not admissible in evidence. The Magistrate cannot give oral evidence of the confession.

Nazir Ahmad v. The King-Emperor, (1936) L.R. 63 I A. 372 : *The King v. Saw Min*, A.I.R. (1939) Ran. 219, followed.

Po Dwe and others v. The Emperor, A.I.R. (1934) Ran. 78, deemed to be overruled by the Privy Council.

THEIN MAUNG, J.—I shall deal in this judgment with Criminal Appeals Nos. 1500, 1501, 1502, 1503 and 1520 of 1947 and Criminal Revision No. 234A of 1947, as all of them have arisen out of one and the same trial.

Tun Kha, Aung Kyin, Hla Maung, Maung Than and Ma Aye, the appellants in the said appeals, and Kyaw Sein, the respondent in the said revision case, have been convicted of an offence under section 395 of the Penal Code, and each one of them, except Ma Aye, has been sentenced to five years' rigorous imprisonment, whereas Ma Aye has been sentenced, under the same section, to three years' rigorous imprisonment only.

All of them, except Ma Aye, made confessions before U Aung Mo, Township Magistrate, Padaung (P.W. 15) on one and the same day; and all of them, except Maung Than and Ma Aye, have pleaded guilty.

* Criminal Appeals Nos. 1500—1503 and 1520 of 1947; Criminal Revision No. 234A of 1947 from the order of 3rd Special Judge of Prome, dated the 30th June 1947, passed in Criminal Regular Trial No. 21 of 1947.

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Moreover, all of them, except Ma Aye, have produced articles which have subsequently been identified at identification parades by their respective owners as properties which were taken away by the dacoits.

According to Maung Htwe, S.I.P. (P.W. 5), the appellant Tun Kha produced a Japanese rifle, 21 live Japanese cartridges, 2 misfired cartridges, 24 rifle cartridges and several pieces of clothes in the presence of witnesses on the 27th April, 1947, *i.e.* within five days after the dacoity; and his evidence is supported by the evidence of Maung Pu and ten-house *gaung* Thein Aung, who attested the search lists (Exhibits B, C and D). Tun Kha, who has now retracted his confession on the ground that he was beaten by three or four policemen to make him confess, does not know the men who beat him. He has alleged in his evidence on oath that the police officer and Thein Aung "searched themselves and brought the rifle." However, he did not cross-examine Thein Aung and Maung Pu at all, and he did not cross-examine Maung Htwe with a view to substantiation of the said allegation. Some of the clothes produced by him like the cotton blankets, exhibits 2 and 3, and the woollen blanket, exhibit 6, have been identified at an identification parade by Maung Mya and his sister Ma Than (P.Ws. 1 and 2) as their properties. However, he did not cross-examine Maung Mya at all and he cross-examined Ma Than just to find out if she identified them in the presence of elders conducting the identification parade. She told him that she did so in their presence, and ten-house *gaung* Maung Thai (P.W. 12), who supervised at the identification parade and gave evidence of its having been conducted properly, was not cross-examined by him at all.

He merely called witnesses to prove that on the night of the occurrence he was at his house with them as his sister-in-law Ma Hla Saing fell from the house. Ma Hla Saing (D.W. 13) herself does not remember the date on which she fell from the house. However, the other witnesses, namely, Hla Maung, Ma Hla Mai, Maung Toe Shin and U Hla Pe (D.Ws. 11, 12, 13 and 14) agree that he was arrested by the police on the following day. Now, according to U Than Pe, P.S.I. (P.W. 17), he was arrested on the 6th April 1947, *i.e.* on the fourth day after the dacoity. So if Ma Hla Saing fell down from the house at all, it must have been on the 25th April 1947, and not on the 22nd April 1947, which is the date on which the dacoity was committed.

It will thus be seen that he, Tun Kha, must be convicted even if his own confession and the confessions of his co-accused must be left out of consideration on the ground that they are not admissible in evidence.

As for the appellants, Hla Maung, Aung Kyin and Maung Than, who have not only made confessions, but also pleaded guilty, their appeals need be considered under section 412 of the Code of Criminal Procedure only as to the extent or the legality of their sentences. The same remarks apply to the case of the respondent Kyaw Sein who has "declined to submit appeal against the conviction and sentence passed upon him." They do not deny having taken part in the commission of the dacoity, but they plead that they were compelled to do so by Tun Kha and Ma Aye, who were then armed with a rifle and a hand grenade respectively. Only one of them, namely, Hla Maung, has chosen to give evidence on oath to that effect, and he has stated, under cross-examination by counsel for Tun Kha and Ma Aye, that he did not know them before. It is difficult to believe that Ma Aye and Tun Kha would

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have compelled a man, whom they did not know before, to join them in committing a dacoity. Besides, Hla Maung and his companions appear to have had ample opportunity to leave Tun Kha and Ma Aye on the way as he himself has stated "Ma Aye let us from the front when going to the place where we were to commit dacoity. Before we set out on mission Ma Aye, Aung Kyin, Maung Than and I remained in a *kaing* jungle while Tun Kha went to fetch the rifle * * * * Tun Kha left at about dusk and returned about two hours later. Kyaw Sein was also with us in the *kaing* jungle." It further appears from the above extract from his evidence that Ma Aye alone was with Hla Maung and his companions who were altogether four in number and that they could easily have overpowered her if they wanted to. His companions, namely, Aung Kyin, Maung Than and Kyaw Sein have not given evidence on oath in support of their case that they had to join in the dacoity under compulsion. It is true that they have made statements about it in their confessions to U Aung Moe but these confessions were made on one and the same day after they had been in custody together for several days. Besides they are now contending that these confessions should not be admitted in evidence. Under these circumstances I am of the opinion that they have failed to prove that they did not join in the dacoity voluntarily and that they have failed to establish extenuating circumstances for interference with the sentences which have been passed on them.

To turn now to Ma Aye's appeal which stands on a different footing altogether. She was arrested only on the 9th May, 1947, probably on account of her having been incriminated by the other appellants and the respondent Kyaw Sein in their confessions; and she has been convicted on the strength of those confessions

and the evidence of Tun Kyaing (P.W. 16), who was examined by U Than Pe, P.S.I., five days after her arrest. Now it has been laid down in *Ahphut and others v. The King* (1) that the confession of a co-accused can only be treated as lending assurance to other evidence against the co-accused and that it cannot be relied upon as the main evidence; and the fact that these are the confessions of five co-accused against her does not make any difference inasmuch as the confession of one co-accused cannot sufficiently support the confession of another co-accused as against her. (Cf. *Takanah v. The Emperor*, 10 C.W.N. 16.) The confessions can just lend assurance to the evidence of Tun Kyaing; and Tun Kyaing's evidence is not very helpful. He merely says that on the night of dacoity at about lamp lighting time as he was returning from Taungbwe village he saw Ma Aye and five men between *pongyi kyaung* at Seik-te and Thanbandin village. Now his village, according to him, is about two hours' journey from Yewin where the dacoity was committed. He did not see any weapon with Ma Aye and her companions and he cannot say whether Tun Kha was among her companions although he has known Tun Kha for many years. Even if he did see Ma Aye with five men it was at a great distance from Yewin and it was about lamp lighting time although, according to Hla Maung, he and his companions set out with Ma Aye and Tun Kha at about 8 p.m. only. Besides Tun Kyaing has admitted that he smoked opium although he has added at the same time that he brought the opium from Ma Aye and that he smoked it when he was ill. He has also admitted that he was examined by the police "for this case." Under these circumstances

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I am of the opinion that the prosecution has failed to prove its case against Ma Aye and that she is entitled to an acquittal.

For the above reasons I dismiss the appeals of Tun Kha, Aung Kyin, Hla Maung and Maung Than and I refuse to take any action in the Criminal Revision in favour of Kyaw Sein. However, I set aside the conviction and sentence of Ma Aye and acquit her. She shall be released so far as this case is concerned.

I have been able to decide all the above cases without coming to a definite decision as to whether the confessions made before U Aung Moe were admissible or not, as it will not make any difference (1) in favour of Tun Kha, Aung Kyin, Hla Maung, Maung Than and Kyaw Sein even though their confessions are left out of consideration altogether, and (2) against Ma Aye even if all the confessions be regarded as admissible evidence against her. However, it will not be proper for me to leave the question as to the admissibility in evidence of these confessions open.

U Aung Moe has admitted that he is only a 2nd Class Magistrate and that he has not yet been empowered by Government to record confessions. So the questions for consideration are (1) whether a confession which has been recorded by a 2nd Class Magistrate who has not been empowered by Government to record confessions is admissible in evidence, and (2) whether in the case of the record of the confession itself being inadmissible in evidence the Magistrate can give oral evidence of the confession.

I am of the opinion that both questions must be answered in the negative in view of the ruling in *Nazir Ahmad v. The King-Emperor* (1). That was a

(1) (1936) L.R. 63 I.A. 372.

case in which the Magistrate, who was empowered to record confessions, did not make any attempt to comply with the requirements of sections 164 and 364 of the Code of Criminal Procedure in recording the confession, and their Lordships held that the Magistrate's evidence of the alleged confession was inadmissible. Their Lordships observed in the course of their judgment :

“On the matter of construction ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of s. 164 is to allow evidence to be put in a form in which it can prove itself under ss. 74 and 80 of the Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by ss. 164 and 364 would be of such trifling value as to be almost idle. Any magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said, or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of s. 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case.

As a matter of good sense, the position of accused persons and the position of the magistracy are both to be considered. An examination of the Code shows how carefully and precisely defined is the procedure regulating what may be asked of, or done in the matter of examination of, accused persons, and as to how the results are to be recorded and what use is to be made of such records. * * * * * So with regard to the magistracy: it is for obvious reasons most undesirable that magistrates and judges should be in the position of witnesses in so far as it can be avoided. Sometimes it

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cannot be avoided, as under s. 533; but where matter can be made of record and therefore admissible as such there are the strongest reasons of policy for supposing that the Legislature designed that it should be made available in that form and no other. In their Lordships' view, it would be particularly unfortunate if magistrates were asked at all generally to act rather as police-officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police-officers under s. 162 of the Code; and to be at the same time freed, notwithstanding their position as magistrates, from any obligation to make records under s. 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses, and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. Their Lordships are, however, clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

This ruling has been followed by this Court in *The King v. Saw Min* (1), where it was held :

"If a Magistrate has made no attempt to comply with the requirements of ss. 164 and 364 in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under s. 533."

It is true that the present case is not one in which the learned Magistrate himself has failed to comply with the requirements of sections 164 and 364 of the Code of Criminal Procedure. It is a case in which a Magistrate, who is not empowered to record confessions, has recorded confessions, making every attempt to comply with the requirements of the said sections. However, the fact that he has not been so

(1) A.I.R. (1939) Ran. 219.

empowered cuts at the very root of the proceedings. It is not a case of mere irregularity in recording confessions. It is a case of their having been recorded without any power to do so. It is similar to the case of a magistrate having acted without jurisdiction and the entire proceeding must be regarded as a nullity. Otherwise in the words of their Lordships of the Privy Council "all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle", "any magistrate of any rank could depose to a confession made by an accused", and magistrates would "be relegated to the position of ordinary citizens as witnesses."

The learned Special Judge has admitted the confessions and the oral evidence of the magistrate who recorded them, on the authority of *Po Dwe and others v. The Emperor* (1) but this ruling must be deemed to have been overruled by *Nazir Ahmad v. The King-Emperor* (2 *supra*) and it has been expressly dissented from in *The King v. Saw Min* (3 *supra*).

The other authority which has been relied upon by the learned Special Judge is *Emperor v. Dhanka Amra* (4) which related to a confession recorded by a magistrate in a native state. This ruling however is distinguishable inasmuch as the confessions in the present case have been recorded by a mere 2nd Class Magistrate in Burma who cannot record confessions under section 164 of the Code of Criminal Procedure.

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(1) A.I.R. (1934) Ran. 78.

(3) A.I.R. (1939) Ran. 219.

(2) (1936) L.R. 63 I.A. 372.

(4) (1914) 16 Bom. L.R. 261.