

## APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

KHAW TAW AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).\*

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AP. 2.

*Evidence Act, ss. 30, 133—Confession of a co-accused—Meaning of the word  
“may be taken into consideration.”*

*Held*: That confession of a co-accused is not specific evidence in the sense that conviction on that confession alone cannot stand.

If there is other relevant evidence tending to prove the guilt of the accused the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it.

If there is no other evidence or if the other evidence is insufficient to establish a *prima facie* case against the accused the confession of the co-accused must be excluded altogether and cannot be taken into consideration.

The confession of a co-accused cannot be added to supplement evidence otherwise insufficient and in no case can it be used to fill gaps in the prosecution evidence.

The confession of a co-accused is therefore not on the same footing as the testimony of an approver which is substantial evidence and on which alone conviction can be made under s. 133 of the Evidence Act.

*Emperor v. Lalil Mohan Chuckerbutty and others*, I.I.R. 38 Cal. 559 at p. 587; *Maung Mya and another v. The King*, (1938) R.L.R. 30, followed.

Under Special Judges (Third Amendment) Act (Burma Act LXVII of 1947) s. 5 (3) a Special Judge can act on the evidence recorded by his predecessor or predecessors.

*P. N. Ghosh* for the appellants.

*U Tin Maung* (Government Advocate) for the respondent.

U SAN MAUNG, J.—On the 28th of June, 1946, corresponding to the 14th *Lazok* of *Nayon*, 1308 B.E., a motor launch named “Myinetazin” owned by

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\* Criminal Appeal No. 184 of 1948  
Criminal Reference No. 12 of 1948; appeal from the order of the 3rd Special Judge of Insein, dated the 18th February 1948, passed in Criminal Regular Trial No. 135 of 1947.

Maung Tun Maung (P.W. 2) of Kemmendine, Rangoon, was engaged by an Arakanese by the name of Shwe Tha Aung for a special trip to Phagu near Dabein for the purpose of loading certain goods which were to have been brought inside 20 or 25 gunny bags. The nature of the goods was not by that time known to Maung Tun Maung, but, as it subsequently transpired, they were draperies from illicit sources. Shwe Tha Aung had three Arakanese as his companions. They were unknown to Maung Tun Maung, but it can no longer be in dispute that these unknown companions were Maung Than husband of Ma Aye Yi (P.W. 26), Shwe Tha Aung partner of Maung Than, Hla Baw Tau the uncle of Maung Than and Maung Gyi (P.W. 27), and Tha Gywe a friend of Maung Gyi. One other passenger was the accused Shwe Thein, who was to have acted as a broker at the transaction. The crew of the motor launch consisted of Maung Aye Maung (P.W. 1), the assistant of Sein Tun Pe who was the driver of the engine, the serang Tun Aye and his assistant Maung Kha. There were also in the launch Chit Pan and Aye Maung, who were the friends and companions of the owner Maung Tun Maung (P.W. 2). The launch with its 12 passengers aboard arrived at about 3 p.m. at a spot about two miles south of Ma-U village. There it stopped while the accused Shwe Thein and one of the Arakanese went to arrange for meals. At about 5 p.m. these two came back to the launch and took away with them Sein Tun Pe, Aye Maung, Chit Pan, Aye Maung (P.W. 1), Tun Maung (P.W. 2) and the other Arakanese to the house of Daw Shwe Sein (P.W. 3) where they were fed. At about 7 p.m. Aye Maung (P.W. 1), Chit Pan and one Arakanese came back to the launch and ordered the launch to proceed to Ma-U village. This was done and, on arrival there, Maung Kha, Tun Aye and the

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other Arakanese who had not had their meals were taken away. The launch was left in charge of Tun Maung and Aye Maung (P.Ws. 2 and 1), Aye Maung, Chit Pan and Sein Tun Pe, while the four Arakanese traders went with Maung Kha, Tun Aye and Shwe Thein into Ma-U village taking with them the gunny bags as well as the valuable properties belonging to them. At about 4 a.m. Aye Maung (P.W. 1) was awakened by Sein Tun Pe and told that the launch was ordered to be shifted back to its original position two miles south of Ma-U village for the purpose of loading goods. This was accordingly done, and when the launch arrived near the original position someone from the bank flashed a torch and ordered the launch to be brought into a small creek. No sooner had this been done than several shots were fired from the direction of the men with the torch. Aye Maung (P.W. 1) jumped into the water and Maung Tun Maung (P.W. 2) did likewise. Tun Maung swam away and hid himself among the bushes in the stream. Aye Maung (P.W. 1), however, foolishly obeyed the command which was to the effect that the five men from the launch must come up the bank. This command was also obeyed by Chit Pan and the other Aye Maung. No sooner had they clambered up the bank than the firing began again. Aye Maung (P.W. 1) again jumped into the water and swam to the opposite bank. The other Aye Maung was shot. The fate of Chit Pan and Sein Tun E—who apparently did not go up from the launch—was only known the next morning when they were found dead on the bank near the launch with *dah-cut* wounds. Aye Maung (P.W. 1) went to Daw Shwe Sein's (P.W. 3) house at sunrise and thence to the headman Maung Way (P.W. 21), to whom he made a brief report of the night's occurrence. The headman proceeded to the scene of crime and there

saw the dead bodies of Aye Maung, Chit Pan and Sein Tun E as already mentioned above. He then sent a report, Exhibit J, to Dabein police station, and the next day the launch and the three dead persons were taken to Dabein whence the dead bodies were sent to Hlegu hospital where the post-mortem examination was held by Dr. Dayal Singh (P.W. 23), whose findings are conclusive on the point that the death of Aye Maung was due to the gun-shot wounds received by him and that the deaths of Sein Tun Pe and Chit Pan were due to the incised wounds, of which there were several on each of them. After due investigation the case was sent up by the Dabein police against the appellants Khaw Taw and Tun Kyaing and three other accused Shwe Thein, Sein Aung and Nauk Chi for dacoity with murder, punishable under section 396 of the Penal Code, and as against Ba Kaing, Ba Au and Tin Maung under section 412 and/or 414 of the Penal Code for receiving and/or assisting in the disposal of dacoited properties. Nauk Chi, Ba Kaing, Ba Au and Tin Maung were discharged by the Special Judge, Insein (U Tha Mya), who first dealt with the case. The same Judge framed charges under section 396 of the Penal Code against Khaw Taw, Shwe Thein, Sein Aung and Tun Kyaing after examining the discharged accused Ba Kaing, Ba Au and Tin Maung as witnesses for the prosecution. After some of the witnesses for the defence were examined he submitted the case to the Sessions Judge, Insein, for the purpose of transferring the same to another Special Judge in view of certain observations of the then Chief Justice in Criminal Appeal No. 1461 of 1947. The case was then transferred to U Hla Nyun, Special Judge, Taikkyi, sitting at Insein. Unfortunately U Hla Nyun was not able to dispose of it before his transfer from Insein District and hence the case finally came to the file of

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U Thein Pe, 3rd Special Judge, Insein, who convicted the appellants Khaw Taw and Tun Kyaing and the accused Shwe Thein and Sein Aung of offences punishable under section 396 of the Penal Code. Shwe Thein and Sein Aung, who were only sentenced to transportation for life, have not appealed against the convictions and sentences and the present appeal was filed by Khaw Taw and Tun Kyaing who were sentenced by the trial Judge to the extreme penalty provided by the law.

The case against the appellants rests mainly upon the confessions, Exhibits W and X, of their co-accused Shwe Thein and Sein Aung and the fact that on the 31st July 1946, about a month after the dacoity took place, they and the accused Sein Aung sold a set of gold studs (Exhibit 53) belonging to Maung Than to the discharged accused Maung Tin Maung (P.W. 34) at Tada-U in Mandalay District. Besides, there is circumstantial evidence which goes to indicate that they knew or had reason to believe that the gold studs which they had sold were obtained by dacoity. As against the appellant Khaw Taw, there is also the fact that the umbrella (Exhibit 12) which was found in his possession at the time he was arrested at Daik-U on the 10th August 1946 was identified to be Maung Than's property.

Now, the confession, Exhibit W, given by Shwe Thein at Hlegu before U Hla (P.W. 25) though subsequently retracted, must be considered to be both voluntary and substantially true in so far as the confessor's own part in the crime is concerned. No doubt, Shwe Thein tried to exculpate himself of the murder of Maung Than and other Arakanese traders, but the circumstances belied his words. According to him, on the day of occurrence, the motor launch carrying himself, the four Arakanese traders Maung Than, Shwe Tha

Aung, Hla Baw Thu and Tha Gywe and the crew of seven arrived at a spot near Ma-U at about 2 p.m. Thereafter, he and Maung Than went to the house of Ma Shwe Sein (P.W. 3) to prepare meals. When ready, he and Maung Than went to the launch in a canoe and brought everyone except two or three men to Ma-U to have their meals. Shwe Tha Aung and Tha Gywe remained behind with him while the rest of the persons returned to the launch which was then brought to Ma-U. Khaw Taw soon arrived to say that the draperies were ready for inspection. He and Sein Aung then went to the launch to call Maung Than, Hla Baw Thu and two of the crew. It was already dark then. Then, as Hla Baw Thu's feet were sore, he was left behind at Ma Aye's house while he, Sein Aung and the five men from Rangoon proceeded in the direction of Taingkali *chaung* where the sampan (apparently carrying the stolen goods) was said to be moored. However, before that *chaung* was reached Khaw Taw shouted out to them to stop and also asked him to come. He went and on arrival near Khaw Taw saw Tun Kyaing and Nauk Chi *alias* Nga Pein with him. He asked Khaw Taw the whereabouts of the sampan, whereupon Khaw Taw said that they were not there to sell goods but to rob the traders of their property. He protested, but in vain. He was even threatened with death, and Khaw Taw and his two companions were at that time armed with two rifles and two hand grenades. They took him to where the traders were. He and Sein Aung again protested saying that the traders had promised them Rs. 8,000 on their return, but Khaw Taw was adamant saying that he was in need of money for the purpose of compounding the buffalo robbery case. Khaw Taw then told Maung Than that they were there not to sell draperies but to commit robbery. Thereafter, he took away

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Shwe Tha Aung and Maung Than to a short distance and killed them by hammering them with an axe. Tun Kyaing and Nauk Chi remained guarding him, Sein Aung and the three men from Rangoon. Thereafter, the three men from Rangoon were tied with ropes with the assistance of himself and Sein Aung and were taken away by Khaw Taw, Tun Kyaing and Nauk Chi to be murdered likewise. When they eventually returned, Khaw Taw brought with him a diamond ring said to be from Shwe Tha Aung's hand. Khaw Taw then asked him for the purse said to be entrusted with him by Maung Than, and he therefore handed over the purse which Maung Than had in fact entrusted along with a bundle of diamonds. He did not give up the diamonds, but told a lie instead. Thereafter, they came back to Ma-U and Khaw Taw who counted the money, announced that there were Rs. 7,000 in all. Then, at the request of Khaw Taw, he and Sein Aung went to call Hla Baw Thu who came along with them. Hla Baw Thu was also bound with ropes and taken away by Khaw Taw and his two companions to be murdered. Thereafter, all the five of them had dinner at the house of Khaw Taw's wife, who was no other than his own sister. There, Khaw Taw gave him Rs. 1,500 and Rs. 1,000 to Sein Aung saying "Both of you will also have to abscond." At about 2 a.m. he and Sein Aung went to the launch as requested by Khaw Taw and Tun Kyaing and ordered the launch to proceed to the original stopping place near Taingkali for the purpose of loading goods. The launch proceeded there and was ambushed by Khaw Taw and his companions while he and Sein Aung stood and watched the proceedings from a *kazin* about a field plot away. Then Khaw Taw and his companions came back saying "All of them are now dead—we are now safe." So saying they all came back to Ma-U village

which was reached at about dawn. He and Sein Aung then went to Daik-U and thence to Mandalay while Khaw Taw and Tun Kyaing went in a separate group. He kept the shirt and the watch belonging to Maung Than, but disposed of the diamonds of the diamond bangles for Rs. 1,060. He also sold the diamond *nagats* through Ba Khaing of Daik-U in whose house he had put up. He was cheated of one pair of bangles by a man who promised to sell them for him. On his return from Mandalay, he was arrested by the police at Pegu at the instance of Ba Khaing's wife.

This confession of Shwe Thein is corroborated by that of Sein Aung, Exhibit X, which was recorded by the same Magistrate (P.W. 25) on the same day. It is further corroborated by the evidence of witnesses for the prosecution as to the fact that Maung Than and his three Arakanese companions were taken by Shwe Thein for the purpose of purchasing draperies from illicit sources, that large sums of money and jewellery were also taken away by these Arakanese, that the launch was attacked in the manner alleged, that Shwe Thein, Sein Aung, Khaw Taw and Tun Kyaing absconded from Ma-U soon after the crime, that Shwe Thein was in possession of Maung Than's shirt and watch, and that he had sold the diamonds from the bangles and the diamond *nagats* belonging to Maung Than. It is not necessary to recapitulate their evidence in detail as they have been carefully set out in the judgment of the learned trial Judge.

Although both Shwe Thein and Sein Aung tried to make out in their confessions that they were unwilling spectators at the murder of Maung Than and his companions by Khaw Taw, Tun Kyaing and Nauk Chi, the circumstances of the case make it clear that they must also be in the conspiracy to murder and to rob the Arakanese traders and that as the robbery was

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committed by five persons conjointly, it was a case of dacoity as defined in section 391 of the Penal Code. It is inconceivable that unless Shwe Thein and Sein Aung were in the conspiracy, they would be allowed to escape with their lives. Then again, if they were not in the conspiracy, they would have left the company of the robbers as soon as they could safely do so. Instead, they carried out the request made by Khaw Taw to bring Hla Baw Thu for the purpose of being murdered. This man was the one who remained behind at Ma-U because of his sore feet. Then again, they decoyed the motor launch to the place where it was ambushed by Khaw Taw and his companions by giving a false message to the effect that the launch was to be moved to the original position near Taingkali to be loaded with goods. Lastly, they absconded from Ma-U immediately after the crime.

What probably happened was that Shwe Thein, as brother-in-law of Khaw Taw, was assigned the role of *lathauk*, and that he successfully carried out the duty assigned to him by bringing Maung Than and his companions to Ma-U on the pretext that there was stolen drapery for sale and that when the robbery was successfully carried out, he was given the task of disposing the jewellery obtained from Maung Than. His contention that the purse containing the money and the bundle of diamonds (jewellery) was entrusted to him by Maung Than after the latter had had his dinner, is too improbable to be believed. Shwe Thein undoubtedly gave his confession in such a way as to greatly minimize the part played by him in the adventure and to explain away, as far as he could, all the incriminating circumstances appearing in evidence. Far from being the result of tuition on the part of the police, his confession seems his best effort at avoiding the death penalty which he thought was in store for

him. His contention that the confession was extorted from him by the police must be rejected as untrue. So must be the contention of Sein Aung in regard to his confession, Exhibit X.

Unfortunately for the prosecution, the confessions of Shwe Thein and Sein Aung cannot be used against the appellants in the same manner as evidence of approvers. Under section 30, of the Evidence Act, the confession of an accused can only be taken into consideration as against the co-accused and as to the meaning of the words "may take into consideration" occurring in this section the following observations of Jenkins C.J. in a Special Bench case of *Emperor v. Lalit Mohan Chuckerbutty and others* (1) seem apposite :

" This will be a convenient place at which to deal with the confessions.

Reliance has been principally placed on those of the accused Soilen Das and Sush Biswas, and these the prosecution would use not only against the persons making them, but also against the rest of the accused. The warrant for this is to be found in section 30 of the Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, 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 person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 relevant, and may be proved as against the person making them, all that section 30 provides is, that the Court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

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This observation was approved of by Mackney J. in *Maung Mya and another v. The King* (1) and we would have expected that, since the time *Maung Mya's* case was reported, Judges and Magistrates in Burma would have no difficulty in interpreting the meaning of the words "may take into consideration" appearing in section 30 of the Evidence Act. However, since it now appears that these Judges and Magistrates are still finding it difficult to interpret this section, we would summarize below the law on the subject as expounded and clarified in the various judicial decisions which we approve :

(1) The confession of a co-accused is not substantive evidence in the sense that a conviction on that alone can stand.

(2) If there is other relevant evidence tending to prove the guilt of the accused, the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it.

(3) If there is no other evidence, or if the other evidence in the case is insufficient to establish a *prima facie* case against the accused, the confession must be excluded altogether and cannot be taken into consideration.

(4) The confession cannot be added to supplement evidence otherwise insufficient, and in no case can it be used to fill gaps in the prosecution evidence.

The confession of a co-accused is therefore not on the same footing as the testimony of an approver which is substantive evidence in the sense that a conviction on that alone is legal, *vide* section 133, Evidence Act, and which can be used, when the other evidence in the case is insufficient to establish a *prima facie* case against the accused, to supplement the evidence otherwise insufficient.

Bearing these principles in mind, we must come to the conclusion that in this case the prosecution has not succeeded in establishing the offence punishable under section 396 of the Penal Code as against the appellants Khaw Taw and Tun Kyaing. No doubt the gold studs (Exhibit 59) which the two appellants and the accused Sein Aung sold to Maung Tin Maung (P.W. 34) at Tada-U about a month after the dacoity have been satisfactorily identified to belong to Maung Than. His wife Ma Aye Yi gave very cogent evidence in regard to them when she said "These belonged to my husband and he was using these with the shirt (Exhibit 34) when he left home. I do not know when he bought these, but each stud has the mark 'T' at the back. Both he and I made these marks after he had bought the same four or six months before he left home. We made these marks so that there might be no mistake when we pledged the same when we needed loans of money." At the identification of properties held on the 4th September 1946 under the supervision of U Hla (P.W. 25), Ma Aye Yi mentioned to the Magistrate, the special mark of identification alluded to by her in her evidence. (See Exhibit Q.) Therefore the learned trial Judge was quite justified in coming to the conclusion that the exhibit gold studs were property obtained by dacoity. The appellants of course denied having sold them to Maung Tin Maung (P.W. 34) but Maung Tin Maung from whose possession these studs were seized by the police is supported on the point by Maung Win (P.W. 31) and Maung Kyone (P.W. 32). The seller gave their names as Maung Aye, Maung Kyi and Tin Maung, *vide* the receipt, Exhibit Z-1. These were the fictitious names assumed by the two appellants and Sein Aung, Khaw Taw calling himself as Maung Aye and Tun Kyaing calling himself as Tin Maung. The

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evidence on record is therefore sufficient to establish as against the appellants the offence of dishonestly receiving stolen property knowing or having reason to believe the same to have been obtained by dacoity. The fact that the two appellants absconded from Ma-U soon after the dacoity was committed, that they were again in association with the confessors Shwe Thein and Sein Aung at Dabein when Shwe Thein put up at the house of Ba Khaing (P.W. 38) and his wife Ma Thar Nyunt (P.W. 39), and again at Amarapura, and the facts that Khaw Taw was the brother-in-law of Shwe Thein clearly indicate that, at the very least, the appellants Khaw Taw and Tun Kyaing knew perfectly well that Shwe Thein and Sein Aung were involved in the dacoity near Ma-U and that the exhibit gold studs were dacoited property. The fact that when the police went to seize these studs from Maung Tin Maung (P.W. 34), Shwe Thein accompanied the police is significant. Shwe Thein must also have been in the know as regards the place where the studs were sold by the appellants and Sein Aung. According to U Soe Min (P.W. 37), Sub-Inspector of Police, Dabein, it was Shwe Thein who took him to the house of Maung Tin Maung at Tada-U.

As against the appellant Khaw Taw there is a further piece of evidence implicating him of the offence under section 412 of the Penal Code. This relates to the finding in his possession of the umbrella (Exhibit 12) which has been identified to be that of Maung Than by Ma Aye Yi (P.W. 26) and Maung Gyi (P.W. 27). Although the identification of this property cannot be considered to be so satisfactory as that of the gold studs, there seems nothing to disbelieve the story of Ma Aye Yi and Maung Gyi that they could recognize the umbrella. The appellant Khaw Taw claimed the umbrella to be his and his wife Ma Kyin U

(D.W. 1) gave evidence to the effect that it was purchased by Khaw Taw at Rangoon at the Pagoda Bazaar. However, we are more inclined to believe Ma Aye Yi and Maung Gyi as there seems no reason why they should tell a lie in regard to this umbrella, which was insignificant in value. Ma Aye Yi (P.W. 26) in particular refused to say that the gold ear-rings set with white stones (Exhibit 7) were hers and these ear-rings must have far exceeded the umbrella in value.

For these reasons we consider that the appellants should have been convicted of the offence punishable under section 412 of the Penal Code.

It has been contended on behalf of the appellants that the order of the Special Judge (U Hla Nyun) contained in the Diary entry dated 14th November 1947 to the effect that since the Special Judge's (Third Amendment) Act, 1947 (Burma Act LXVII of 1947), had come into force he could make use of the evidence of witnesses Nos. 1, 4, 13, 14, 17, 19, 21, 22, 24, 27, 29, 30, 33 to 39 examined by his predecessor U Tha Mya was wrong and that U Hla Nyun should have recalled and examined these witnesses. This contention is untenable. U Hla Nyun as a successor of U Tha Mya was clearly entitled, under sub-section (3) of section 5 of the Special Judge's Act, 1946, as inserted by Burma Act LXVII of 1947, read with section 350 of the Criminal Procedure Code to act on the evidence partly recorded by his predecessor and partly recorded by himself. U Thein Pe who succeeded U Hla Nyun could also act on the evidence recorded by U Tha Mya and U Hla Nyun.

For these reasons we would set aside the convictions under section 396 of the Penal Code and the sentence of death passed on the appellant Khaw Taw and Tun Kyaing and direct that instead these appellants be convicted under section 412 of the Penal Code and

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sentenced to transportation for life. The maximum penalty provided by that section is clearly merited by them, when the circumstances of the whole case are taken into consideration.

U THEIN MAUNG, C.J.—I agree.