

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA.**

In the matter of an Application for Revision in terms of Article 140 of the Constitution to revise the order made by the Provincial High Court of Colombo.

Republic of Sri Lanka.

Vs.

C.A Application No: **PHC / APN / 174 /17**

H.C Colombo Case No: **6233 /2012**

Selvarasa Kirubakaran of Pulloly East, Point Pedro,

Presently in the New Magazine,

Remand Prison,

Colombo 08.

**Accused**

**AND NOW BETWEEN**

Selvarasa Kirubakaran of Pulloly East, Point Pedro,

Presently in the New Magazine,

Remand Prison,

Colombo 08.

**Accused – Petitioner**

**Vs.**

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

**Respondent.**

Before – Menaka Wijesundera J.

Neil Iddawala J.

Counsel – K.S. Ratnavel for the

Accused – Petitioner

L. Karunanayake DSG for

the Respondent.

Argued On – 02.11.2021

Decided On – 02.12.2021

**MENAKA WIJESUNDERA J.**

The instant application for revision has been filed to set aside the order dated 28.5.2017 of the learned High Court Judge of Colombo.

The said order had been pronounced against the accused petitioner (hereinafter referred to as the petitioner) in a voir dire inquiry held to ascertain the voluntariness of the confession alleged to have been made by the petitioner.

The petitioner was indicted for aiding and abetting to murder the former army commander General Sarath Fonseka. The prosecution had attempted to mark a confession made by the petitioner to witness NimalRatnayake at the time of giving evidence Superintendent of Policethen Assistant Superintendant of Police (hereinafter referred to as ASP). The defense had objected by challenging the voluntariness of the confession, hence an inquiry had been held and the above mentioned order had been pronounced.

In the instant application the petitioner along with two others were indicted under the provisions of the Emergency regulation and the petitioner had been detained and inquired in to under the said provisions coupled with the provisions of the Prevention of Terrorism Act. Hence the alleged confession had been recorded in terms of **section 16 (1)** of the said act, and the said section had stipulated very clearly that a statement made to a police officer above the rank of an Assistant Superintendent of Police is admissible if it does not contravene the provisions of section 24 of the Evidence Ordinance which reads as

**“A confession by an accused person is irrelevant in a criminal proceeding if the confession appears to the Court to have been caused by any inducement threat or promise .....**”

In analyzing the above section in many of our decided cases it has been held that the word **appears** had been used to ensure the rights of the accused because it had been stated that what the Court in a situation of this nature has to decide is whether it **appears** to Court that there was a threat or inducement, and the word **appears** is indicative of a lesser degree of proof and not the proof meant in section 3 of the Evidence Ordinance. Thus what the legal luminaries have decided is that section 24 does not envisage a positive or definite proof to reject a confession.

This has been very well analyzed in the case of **Vivekanandan vs. Selvaratnum** 79NLR 344 by **Malcom Perera J** and adopted in the case of **Maridasa vs. The sate** 1995 1 Sri L.R.96.

Therefore it is very clear that the accused has a lesser degree of a burden than the prosecution.

But in the instant application the confession has been recorded in terms of section 16 (1) of the Prevention of Terrorism Act which states in subsection 2 that,

***“The burden of proving that any statement referred to in subsection 1 is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.”***

In analyzing the above mentioned section it has been held in the case of **Maridasa vs. The sate** 1995 1 Sri L.R.96 mentioned above that ***“...when a Court is called upon to decide the voluntariness recorded under section 16 of the Prevention of Terrorism Act it is of utmost importance to examine and evaluate the evidence to give to the accused utmost fairness”***

In the instant matter the petitioner had been indicted under section 2(1) (a) and 3(b) of the Prevention of Terrorism Act, and the prosecution alleges that the petitioner made a confession to Assistant Superintendent of Police (hereinafter referred to as ASP), and

when the prosecution tried to mark the same in evidence the petitioner objected and a voir dire inquiry was held in order to ascertain the voluntariness of the same.

The main contention of the petitioner was that the petitioner was tortured and inhumanly treated before obtaining the confession and thus it was not at all voluntary and apart from that the typist who recorded the confession was dictated by the ASP NimalRatnayake and not by the petitioner or the translator.

The contention of the respondents is that the presence of a translator was not required because the ASP who recorded the confession was very fluent in the Tamil language, and the ASP in fact translated few portions of the evidence when the translator in Court erred. In the evidence of the ASP in cross examination it had transpired that the ASP had to sit for a Tamil proficiency test before being promoted to the rank of SP and ASP, furthermore he had stated in evidence that he used the Tamil dictionary and the English dictionary when translating the confession. It is also to be noted that when cross examining the ASP, the counsel for the petitioner had suggested to the ASP that he was not present at the time of the translation, if that is so, the position he had taken up before this Court is contradictory because what he stated was that the ASP translating the confession was not legal because it may have caused undue concern to the petitioner.

The learned High Court Judge also has observed in his order that the petitioner had not cross examined the ASP and suggested to him that he had no knowledge of the Tamil language and what was recorded as the confession was in fact dictated by the ASP himself. Therefore the submissions of the petitioner is contrary to his position at the inquiry. The learned High Court Judge has further averred that the petitioner had initialed every page of the confession along with the ASP and the stenographer,

The petitioner further alleged in Court that he was transported in a three wheeler to the TID from the Criminal Investigations Department (hereinafter referred to as the CID), but

the respondents responded and stated that the distance from the TID to the CID is very minimal and in fact the three wheeler used was one belonging to the CID.

The petitioner alleged further that the confession was recorded over a span of nearly six days which may cause a great deal of distress to the petitioner, but the respondents responded in saying that the length of six days was in favor of the petitioner because it gave him time to decide otherwise if he changed his mind. But this Court notes that on each day the confession was recorded the ASP had looked in to the welfare of the petitioner and he had noted that it was satisfactory which had not been cross examined by the petitioner at the inquiry.

Anyhow having the above mentioned legal definitions and the submissions of both parties what has to be decided here is whether the learned High Court Judge has erred in deciding that the above mentioned confession was made voluntarily or not.

The position taken up by the petitioner at the inquiry is that he never made the statement and in fact what he made was a statement to an officer named Subair and no other. But it is observed that the ASP was not cross examined on this, furthermore the evidence given by the ASP is uncontradicted and consistent.

The fact that whether the ASP to whom the confession was made to was able to translate the same this Court has to consider very seriously. On considering the evidence of the ASP at the inquiry it is very clear that he had sat for two examinations to obtain proficiency in the Tamil language held by the police department in order to obtain his promotions to the rank of SP. Furthermore he had used the Tamil and the English dictionaries to help him to translate the confession.

But the question is whether it caused any distress to the petitioner at the time of the recording and was not voluntary as envisaged by section 24 of the Evidence Ordinance.

The ASP himself had admitting in examination in chief that he was not very confident in the Tamil language and had to refer the dictionary sometimes and, the ASP himself translating the confession raises a doubt as to whether the statement of the petitioner was translated in verbatim to the typist or not, and to the petitioner it may have been a daunting experience when the ASP himself was translating in view of his official position. Therefore although the Counsel appearing for the petitioner had taken contrary defenses at the inquiry it is the duty of this Court to assure absolute fairness to the petitioner as stipulated by section 24 of Evidence Ordinance. At this point this Court refers to a judgment by Former **Chief Justice Sarath Silva** where it has been stated how a Judge should act when considering the voluntariness of a confession, in the judgment of **Nuwan De Siva vs. The Attorney General 2005 1 Sri L.R. at 146**“..the judge should approach it, much as would a jury, were it for them. In other words he should understand the principle and the spirit behind it and apply common sense, and would add, that he should remind himself that voluntary in ordinary parlance means “of one’s own free will.”

Therefore this Court is of the view that since the recording of the confession expanded to nearly six days, the most prudent thing the ASP could have done is to obtain the services of a translator on at least on one or two days. Therefore the ASP translating the entirety of the confession on six long days causes doubt as with regard to the voluntariness of the same. Therefore it is the wellconsidered view of this Court that the confession recorded in the instant case is in contravention of the provisions of section 24 of the Evidence Ordinance.

Hence this Court sets aside the order dated 28.05.17 of the learned High Court Judge of Colombo and allows the instant application for revision.

**Judge of the Court Of Appeal.**

**I agree.**

**Judge of the Court of Appeal.**