IN THE COURT OF APPEAL OF THE DEMOCRETIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0194/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Moneragala Case No:

HC/10/2013

Sundaralingam Kedeeshwaran

ACCUSED

AND NOW BETWEEN

Sundaralingam Kedeeshwaran

ACCUSED-APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Amila Palliyage with Savani Udugampola, for Accused Appellant
	: Harippriya Jayasundara, P.C., ASG for the Respondent
Argued on	: 23-03-2022
Written Submissions	: 07-07-2021 (By the Accused-Appellant)
	: 11-08-2021 (By the Respondent)
Decided on	: 25-05-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred as to the appellant) was arrested on suspicion of being a member of a terrorist organization by the police officers attached to the Vinayagakulam police post within the police area of Thirukkovil on 18-03-2009.

At the time of his arrest, he was travelling in a bus plying from Akkaripaththu to Pothuvil. He had no identity card and only had in his possession a packet of biscuits and Rs. 340/- in cash.

Since his arrest, he has been in detention under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended (hereinafter referred to as PTA). At the time relevant to his case, he has been in detention at the Boossa detention Centre, run by the Terrorism Investigation Division of the police.

On the basis that the appellant made a confession under Section 16 of the PTA to PW-05 an Assistant Superintendent of Police who was entitled to record such a statement, he was indicted before the High Court of Monaragala.

The charges laid down against the appellant are as follows:

1. Causing the death of Sub-Inspector of Police, Howpe Gamage Lionel along with some others unknown to the prosecution at Sirinanadapura Thanamalvila on 21-01-2008, an offence in terms of Section 2 (1) (a) of the PTA read with Section 32 of the Penal Code, punishable in terms of Section 2(2)(1) of the said PTA.
2. At the same time and at the same transaction causing the death of Police Constable 42742, Herath Mudiyansalyage Gunasekara and thereby committing an offence punishable as mentioned above.
3. At the same time and at the same transaction causing the death of Police Constable 42759, Sagara Sandaruwan Kodithuwakku and thereby committing an offence punishable as mentioned above.

At the trial against the appellant, it was the PW-05, Assistant Superintendent of Police Jagath Nishantha Weerathunga who has been called to give evidence first against the appellant. According to his evidence, he was in charge of the administrative functions of the Terrorism Investigation Division Boossa unit and had his own office within the detention Centre.

It has been his evidence that on 04-08-2011, the appellant was produced before him by police constable 70754 Bandara at 19.25 hours. Upon inquiry through another police officer called Rasik as the appellant was unable to communicate in Sinhala, he has been informed by the appellant that he wants to make a confession with regards to his activities in the Liberation Tigers of Tamil Eelam (LTTE) Terrorist Movement. It was his evidence that he identified himself to the appellant and explained the relevant legal provisions and that any statement made by him can be used as evidence against him and also gave the written

copies of the relevant laws and instructed him to think further, and if he still wishes to make a statement to inform him.

According to him, the proceedings before him have been typewritten by WPC 5473 Kanthi. He has also directed the officer in charge of the unit to produce the appellant before a doctor. It was his evidence that the appellant was produced before him again on 10-08-2011 at his own request.

On that day too, PW-05 has engaged the services of the Sub Inspector of Police Rasik as an interpreter and has again explained the relevant laws and the consequences of making a statement to him and he has also directed the appellant to be produced before a doctor in order to determine whether he is in a fit position to make a statement. As before, WPC 5473 Kanthi has been engaged in typewriting the proceedings.

After completing the formalities, the appellant has commenced his statement at 10.05 a.m. and concluded it at 11.25 a.m. According to PW-05, he has asked the appellant whether he can write what he has to say and handed over to him, but it has been informed by the appellant that he cannot read or write the Tamil language. Accordingly, the statement given in Tamil by the appellant has been translated into Sinhala language by the earlier mentioned Sub Inspector Rasik and typewritten by WPC Kanthi.

When the relevant statement was sought to be marked as P-01 at the trial, the learned Counsel who represented the appellant has objected for it being marked as evidence on the basis that it was not a statement made voluntarily, and therefore, unacceptable as evidence at the trial. Because of this objection, the learned High Court Judge has proceeded to hold a *voir dire* inquiry. At the conclusion of the inquiry, it has been held that the alleged statement made by the appellant was a statement made voluntarily without any threat or inducement and therefore acceptable as evidence against the appellant. The learned High Court Judge has rejected the objection raised on behalf of the appellant.

The learned High Court Judge has pronounced his order with regard to the *voir dire* inquiry on 31-03-2015. Accordingly, the trial has proceeded to its conclusion and based on the confessional statement alleged to have been made by the appellant, he was convicted as charged by the learned High Court Judge by his conviction dated 15-06-2017, and sentenced to life imprisonment.

Being aggrieved by the said conviction and the sentence, the appellant filed this appeal.

At the hearing of the appeal, the learned Counsel for the appellant raised the following grounds of appeal for the consideration of the Court based on the acceptance of the alleged confessional statement by the learned High Court Judge as evidence at the trial:

1. The learned High Court Judge failed to consider that the confession was two years, four months and twenty-three days after the arrest.
2. The interpreter who is alleged to have translated the confession was not a competent person to do such a translation and there is a doubt whether the alleged confession has been translated correctly.
3. The learned High Court Judge failed to properly evaluate the medical evidence and failed to consider the observations made by the trial judge in regard to the visible scars on the body of the appellant.
4. The prosecution failed to create any nexus between the incidents stipulated in the indictment and with the alleged confessional part of the statement.

It was the contention of the learned Counsel for the appellant that he is only challenging the alleged confession by the appellant as there was no other evidence whatsoever against him led at the trial. As the grounds of appeal are grounds based on the confession relied on by the prosecution at the trial against the appellant, it was decided to consider whether the acceptance of the confession as evidence by the learned High Court Judge of Monaragala was a decision correctly made, or whether there was no basis for the High Court Judge

to decide as such at the *voir dire* inquiry, before considering any other evidence led at the trial or the final judgment for that matter.

It was so decided because if this Court finds that the alleged confession has no validity before the law, considering the other evidence and the final judgement would be of no use, as the appeal of the appellant shall succeed on that basis alone.

At the *voir dire* inquiry, the prosecution has led the evidence of the following witnesses.

(a) Earlier mentioned PW-05, who was the Assistant Superintendent of Police (ASP) before whom the alleged confession has been made.
(b) PW-08, Sub Inspector of Police Razik, who is alleged to have interpreted the confession,
(c) WPC Kanthi (PW-09), who assisted the recording of the confession by typewriting it.
(d) PW-06 police constable 33489 Galappaththi, who has produced the appellant before the ASP on 10-08-2011.
(e) PW-23, the Judicial Medical Officer before whom the appellant has been produced on 04-08-2011 and 10-08-2011.

The prosecution has marked the documents X1, X2, and X3 in order to establish that the relevant laws were explained and shown to the appellant. Interestingly, I find that the prosecution has not led the evidence of the officer to whom the appellant has expressed his wish to make a statement to a higher officer on 04-08-2011, which in my view was essential to establish that it was the appellant who initiated the making of a confession.

The appellant has given evidence at the inquiry. It has been his evidence that he is unaware of his date of birth or about his parents and any brothers or sisters. It has been stated that from the time he can remember he has been working at a cattle farm and while working there he was recruited by the LTTE as a child soldier. After his arrest on 18-03-2009 by the Thirukkovil police he has been

taken to the Boossa Detention Centre and had been there until the alleged confession was recorded. He has admitted that during his stay at the detention Centre the Magistrate used to visit the Centre. However, it was his position that the Magistrate never questioned him or the detainees were never allowed to speak to the Magistrate. Although the officers from the International Commission of the Red Cross (ICRC) used to visit them, it was his position that since the officers of the Centre were always present during such visits, he could not speak to them freely.

Further, he has stated that he was severely assaulted and forced to sign the documents marked X1, X2, and X3 and three days before the alleged confession too, he was assaulted. In the proceedings before the High Court at page 370 of the appeal brief the learned High Court Judge has made the following observations with regard to the visible previous injury marks on the body of the appellant.

> "ඔහුගේ පිටෙහි වම් පැත්තේ තද කලු පාටින් ඉරක් ආකාරයට පැරණි තුවාල කැළලි 04 ක් ඇති බව නිරක්ෂණය කරමි. එය සටහන් තබමි. ඔහුගේ වම් කකුලේ සහ දකුණු කකුල් වල කලවා පිටුපස ඉහළ කොටසේ ඉරක් ආකාරයට කැළලි ඇති බවට නිරක්ෂණය කරමි. දකුණු කකුලේ එක ඉරකුත්, වම් කකුලේ පහල කැළල් 02 ක් ඇති බවට නිරක්ෂණය කරමි."

It was the position of the appellant that the injuries were there when he was taken before the JMO by the officers of the detention Centre and the JMO failed to examine his body.

He has been subjected to cross examination at length by the prosecution and has maintained the same position that he was assaulted and made to sign the confession.

In his order dated 31-03-2015, the learned High Court Judge has found that the evidence of PW-05 has no contradictions and was consistent. Further, the evidence of the witnesses who assisted PW-05 in recording the alleged confession

is consistent with the evidence of PW-05. He has found that the alleged translation of the confession by PW-08 was correctly done and has no reason to doubt his ability to translate. The learned High Court Judge has concluded that by admitting that the translation was correctly done and placing his signature in the confession the appellant has also admitted that it was correctly translated.

The learned High Court Judge has observed that the failure by the appellant to suggest that he was severely assaulted and forced to sign this confession when the relevant witnesses gave evidence amount to an afterthought by the appellant. It was his position that the JMO has correctly observed that the appellant had no visible recent injuries.

Although the learned High Court Judge has commented that old scars were visible on the body of the appellant, he has not commented any further on those scars, but it appears that the learned the High Court Judge has gone on the basis that the scars observed were not due to injuries inflicted at the time relevant to the recording of the alleged confession.

After considering the evidence, the learned High Court Judge has commented in the following manner in his order;

“මෙම පරීක්ෂණයේ දී ඉදිරිපත් වූ සාක්ෂි සියල්ල පොදුවේ සැකිල්ලට ගැනීමේදී මෙම විත්තිකරු, ත්‍රස්තවාදී විමශර්නය අංශයේ සිටින කාලයේදී හෝ විශේෂයෙන් ප්‍රකාශය දුන් දින වකවානු වල කිසිදු ආකාරයක පහරදීමකට ලක් වී නැති බව ප්‍රබල සාක්ෂි ඇත. ප්‍රකාශය සටහන් කර ගැනිමත්, සහකාර පොලිස් අධිකාරී ඇතුළු අනෙකුත් නිලධාරින් විසින් විත්තිකරුට එවැනි ප්‍රකාශයක ඇති නීතිමය බලපෑම පහදාදීමත්, සහ සිතා බැලීමට කලයක් ලබා දීම තුළින් මෙම විත්තිකරුට ප්‍රකාශයක් කිරීම තම ස්වකැමැත්තෙන්ම කිරීමට අවශ්‍ය වාතාවරණය සහ අවස්ථා සලසා දී ඇත. වෛද්‍යවරයෙකුට අවස්ථා දෙකක දී යොමු කර පරීක්ෂා කිරීම තුළින් ද මෙම විත්තිකරු මනා මානසික මෙන්ම සෞඛ්‍ය තත්ත්වයකින් සිටින බවට කරුණු තහවුරු වී ඇත. විත්තිකරුත් පහරදීමක් කර ඇති බවට ගෙන ඇති සථාවරය කිසිසේත්ම තාත්වික හා පළිගත නොහැකි බවට ඉහත විශ්ලේෂණය අනුව පෙනී යයි.”

After coming to the above final conclusion, the learned High Court Judge has decided to accept the alleged confessional statement made by the appellant on 10-08-2011, sought to be marked as 'P-01', as evidence at the trial against him, which was the basis of the conviction of the appellant.

Consideration of the Grounds of Appeal

Subjected to the exceptions as provided by the Evidence Ordinance, no confession made to a police officer shall be proved against a person accused of any offence. (Section 25(1) of the Evidence Ordinance)

However, PTA provides for the receiving of such a confessional statement as evidence at a trial against the maker of such a statement. In terms of section 16 of the PTA such a statement made by a suspect while in police custody, to a person who holds a rank of an Assistant Superintendent of Police or above, can be accepted as evidence against such person or any other person charged jointly, if the statement is not irrelevant in terms of section 24 of the Evidence Ordinance.

Section 16 of the PTA reads as follows;

1) **Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether –**
    a) **It amounts to a confession or not;**
    b) **Made orally or reduced to writing;**
    c) **Such a person was or was not in custody or presence of a police officer;**
    d) **Made in the course of an investigation or note;**
    e) **It was or was not wholly or partly in answer to any question,**

May be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance:

Provided, however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.

2) **The burden of proving that any statement referred to in the subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.**
3) **Any statement admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if, and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1).**

Section 16 of the PTA states that such a statement can only be proved against a person only if it is not irrelevant in terms of section 24 of the Evidence Ordinance. For matters of clarity section 24 is reproduced below.

> **24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceedings from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making if he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.**

In this action, the prosecution has called several witnesses in order to establish that the alleged confession was made voluntarily without any inducement, threat or promise as referred before.

In terms of section 16(2) of the PTA, the burden of proving any statement made under the PTA is irrelevant in terms of section 24 of the Evidence Ordinance is with the person asserting it to be irrelevant.

However, this provision has been subjected to consistent interpretation by our Superior Courts. It has been held that if it is the view of the Court that the statement sought to be marked as evidence appears to have been made under threat, inducement, or promise, though it is not strictly proved, the Court must refuse to accept that as evidence and the burden expected from an accused person by section 16(2) of the PTA is a very light burden.

In the case of **Mahadevan Yogakanthan Vs. Republic of Sri Lanka, C.A. Appeal 41/2010 decided on 12-06-2012,** Ranjith Silva, J. held as follows;

> *"According to this section it appears that the burden of proving that it was not voluntarily rest on the accused-appellant. But what is important is the language the legislature has used in Section 24 of the Evidence Ordnance. It states that 'when it appears to Courts' to guarantee the accused person in criminal proceedings absolute fairness. Thus, Section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the court after proper examination and a careful analysis of the evidence and the circumstances of a given case, holds to the view that there appears to have been a threat, inducement or promise, though this is no strictly proved, the Court must refuse to receive in evidence the confession. In other words, the burden appears to be, the burden cast by the subsection 2 of (16) of the Prevention of Terrorism Act is a very light burden because there is not much that the accused has to prove. From the given circumstances of the case sometimes a court of law may be able to decide whether it appears that the confession was not voluntarily."*

S Vivekanadan and Another Vs. S Selvaratnam 79 (1) NLR 337 was a case decided before the provisions of the PTA came into operation as to the acceptability of a confession. It was held:

"Section 24 of the Evidence Ordinance does not require positive proof of improper inducement, threat, or promise to justify rejection of confession. If the court after a proper examination and careful analysis of the evidence and the circumstances of the given case comes to the view that there appears to have been a threat, inducement, or promise offered, though this is not strictly proved, then the court must refuse to receive in evidence the confession. The burden is on the prosecution to prove that the confession is voluntary and there is no burden of proof on the accused to prove the inducement, threat or promise."

Per Malcolm Perera, J.

> *"At the outset, the Court must determine the meaning of the word appears. I think what the Court has to decide is not whether it has been proved that there is a threat, inducement, or promise, but whether it appears to Court that such threat, inducement or promise, was present. I am inclined to the view that the word "appears" indicates a lesser degree of probability than it would have been, if the word "proof" as defined in section 03 of the Evidence Ordinance has appeared in section 24."*

In the case of **Pyarelal Vs. State of Rajasthan (1963) S.C. 1094,** the Supreme Court of India stated that the crucial word is the word appears, and that the appropriate meaning of it 'seems'. It imports the idea of a lesser degree of proof of the fact of the presence of inducement, threat or promise.

In the appeal under consideration, admittedly, the appellant is a person who is unable to read or write his own mother tongue. Under the circumstance, it was of paramount importance for the prosecution to establish that the alleged statement made by the appellant was correctly recorded as it was the basis for any prosecution against the maker. According to the evidence it has been the PW-08 who was also a Sub Inspector of Police who has translated what was said by the appellant for the typist to typewrite the same. PW-08 was not a qualified

translator/interpreter of the Tamil language to Sinhala language, but a person who can speak, read and understand the Tamil language being a person educated in Tamil and passed his GCE (OL) examination with a credit passes according to him. It is my view that it is essential to eliminate any doubts as to whether the statement made was recorded correctly, since it is that statement that will be used against a person where he can be found guilty based on that statement itself in terms of the provisions of the PTA. I am unable to find any justification as to why the police could not obtain the services of a qualified translator/ interpreter on this occasion in view of the fact that the appellant was a person who could not read or write his own mother language, leave aside the Sinhala language to which the alleged confession has been translated. I am of the view that it is essential to record any confession recorded under PTA in the language it was made, rather than translating it to a language alien to the maker of the alleged statement in view of the requirements of section 24 of the Evidence Ordinance.

I am in no position to agree with the view of the learned High Court Judge that the prosecution has proved that the statement has been correctly recorded in view of the above infirmities of the procedure adopted by the ASP in recording the alleged confession.

I am well aware of the judgment in **The King Vs. Karaly Muttiah (1940) 41 NLR 172,** where it was held that a confession made in Tamil to a Superintendent of Prisons who claims to have a knowledge of that language but recorded in English and read over by the superintendent in Tamil does not offend any provisions of law in that itself. It was held that such a statement must be considered carefully before holding a statement made in such circumstances to be admissible.

However, it is my considered view that the views expressed by Mosely, J. in **Karaly Muttiah (supra)** is no longer relevant in the present-day context. The above was a case decided in the year 1940 when the laws like where a mere

statement while in police detention can be evidence against the maker and even against anyone else, in terms of section16 of the PTA was nonexistent. I am of the view that it was essential for the prosecution to eliminate the doubt whether the statement was translated by a competent translator and recorded correctly, which in my view the prosecution has failed to establish.

Another matter that needed the consideration of the learned High Court Judge was whether it appears that there had been a threat, inducement or promise towards the appellant in making the alleged confession. The position of the appellant was that he never made a confession, but was asked to sign some documents under duress. However, the learned High Court Judge has rejected that contention on the basis that the evidence led by the prosecution in that regard has established that there was no such duress but it was a voluntary act of the appellant. He has also accepted the evidence of the JMO who examined the appellant on 04-08-2011 and on 11-04-2011 deciding that there was no need for the JMO to comment on any old scars or marks on the body of the appellant in her report as she has looked only for recent injuries.

It is not unusual in a case of this nature for not to have contradictions and omissions in the evidence of the prosecution witnesses as they are official witnesses. What is necessary in such a scenario is to look at the evidence as a whole and come to a finding as to the trustworthiness of the evidence. In this regard, I find that the evidence of the JMO was highly unsatisfactory. The JMO should have known very well the purpose of the appellant being produced before her for a report, when produced under the custody of the officials of the detention Centre. Under the circumstances, it was the duty of the JMO to conduct a proper examination of the appellant and report not only the recent injuries, but any possible evidence of previous injuries as well, in order to enable the Court to decide whether the appellant had to face any threat or intimidation for him to make a confession to implicate himself in a crime.

The learned High Court Judge had himself has observed telltale marks on the body of the appellant which clearly supports his evidence that he was subjected to torture. However, I find it unacceptable the learned High Court Judge's view that the JMO was justified in not looking for old marks but for new recent injuries. I am in no position to agree with the learned High Court Judge's failure to comment on his own observations in his order. Had he looked at the evidence in its totality, there was sufficient basis to conclude that the alleged confession of the appellant would not have been a voluntary act of the appellant.

At this juncture, I would also like to comment that Sri Lanka has an adversarial system of justice as against the inquisitorial system of justice. Under the adversarial system, a judge is cast in the role of an impartial umpire, ruling the case as presented by the parties and not descending into the area of combat. However, this does not mean that a judge has to be a silent spectator. A judge has all the right to intervene and question a witness in order to clarify matters and to avert a miscarriage of justice. **(See- Bandaranayake Vs. Premadasa (1978-79) 2 SLR 369)**

In the instant case, I find that the learned High Court Judge, at several instances (see- page 143, 164, and 188 of the appeal brief) has assumed the role of the prosecutor in what appears to be an attempt to fill the gaps of the prosecution case. I find this as an unhealthy practice which amounts to a denial of a fair trial, which a judge should avoid at all times.

For the aforementioned reasons, I am in no position to agree with the contention of the learned ASG that the learned High Court Judge was correct in his admission of the alleged confession as a confession made voluntarily without any threat, inducement or promise.

I am of the view that if considered in its correct perspective, the alleged confession clearly appears to be a confession, not made voluntarily in terms of section 24 of the Evidence Ordinance. Hence, not acceptable as evidence against the appellant.

Accordingly, I set aside the *voir dire* inquiry order dated 31-03-2015 in relation to the alleged confession by the appellant, as it cannot be allowed to stand and reject the acceptance of the statement as evidence.

The only evidence the prosecution relied on against appellant in order to prove the charges preferred against him was the alleged confession marked 'P-01' at the trial. In view of the rejection of the same, I find no basis to allow the conviction of the appellant to stand either.

Therefore, I set aside the conviction and the sentence dated 15-06-2017 by the learned High Court Judge of Monaragala and acquit the appellant of the charges preferred against him.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal