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How this affected the question of negligence was not gone into in the court below. It was touched on in this court. In my opinion, it does not affect the learned judge's findings as to negligence at all. This rule 4 (2) must be read with rule 4 (1), and is supplementary to it. Ferries are only intended for five-and-a-half tons. The ferrymen are not empowered (as is the Director) to permit heavier loads. What they are empowered to do is to refuse to take a load if, in their opinion, it is too heavy. If a dispute arises as to whether or not a load is too heavy, this rule enables the ferryman to have legally the last word and to refuse. It does not do more than that.

The case in the court below proceeded on the basis that the gross weight of the laden lorry was too much for the ferry, and the dispute was as to the liability. The exact gross weight did not appear. In the arbitration proceedings, it was said (by the company) that the kerosene weighed about five tons. The unladen weight of the lorry is nowhere mentioned. But if the load was too much for the ferry, it matters nothing by how much it was too much.

In my opinion, the appeal should be allowed and the decision, making the appellant liable for half the loss, should be set aside and the company made liable for the whole loss to be assessed by the master as directed by the court below.

[COURT OF APPEAL]

Freetown
Nov. 16, 1962

Ames Ag.P., Dove-Edwin J.A., R. B. Marke P.J.

DIVIN KOROMA, FODAY BANGURAH AND THOMAS FILLIE *v.* REGINA

[Criminal Appeals 21, 22, 23/62]

Criminal Law—Murder—Trial—Evidence—Incriminating statement which also denies guilt—Evidence consistent with guilt and with innocence.

Appellants were convicted of a murder which took place on October 17, 1961. On October 18, third appellant made a statement to the police which was not incriminating. On October 25, he made another statement to the police in which he started by incriminating himself but ended by denying that he had participated in the murder. ("... it is true that I am a member of the human baboon society but the day of the incident I was not among them and that day I was in the bush cutting sticks. ...") At the trial, there was some additional evidence but it was as consistent with the innocence of third appellant as with his guilt. He did not give evidence at the trial, but made a statement from the dock denying his guilt.

Held, allowing the appeal of third appellant, that where a defendant is convicted on the basis of a statement in which he both incriminates himself and denies his guilt, the conviction should not be allowed to stand.

The appeals of first and second appellants were dismissed.

Aaron Cole for the first and second appellants.
W. S. Marcus Jones for the third appellant.
Nicholas E. Browne-Marke (Acting Solicitor-General) for the respondent.

AMES AG.P. These appeals are from convictions for a terrible murder by members of a secret society. In statements to the police, one of the appellants said it was "a society called Kandubay"; another called it "a cannibal society"; and another, "the human baboon society." The killer, or killers, makes himself or "ourselves ready in the bush in a baboon form." In this instance the victim was a small girl, snatched from the back of her aunt, to whom she had been given for upbringing.

The conviction of the first and second appellants rests on unequivocal confessions, and in the case of the second appellant identification by the aunt.

The case, as it affects the third appellant, is different. The murder was on October 17 of last year. On the 18th he made a statement to the police, which went into much detail but which did not incriminate him. On the 25th he made another statement to the police (how and why does not appear: he had still not been charged). This statement starts off by incriminating him but ends by denying participation in the murder (". . . it is true that I am a member of the human baboon society but the day of the incident I was not among them and that day I was in the bush cutting sticks. . .")—which is what he had said in his statement of the 18th.

This statement is not an unequivocal confession of guilt. It was necessary for the prosecution to adduce additional evidence to indicate that the incriminating part was the truth. There was some additional evidence but it was as consistent with innocence as with guilt. The third appellant did not give evidence (none of them did): he made a statement from the dock (as did the second appellant; the first appellant remained silent) in which he denied guilt.

He was convicted because of the incriminating part of this statement, and, in our opinion, it would be unsafe, to say the least, to allow the conviction to stand.

We notice that this statement was made starting at about 4.50 a.m. We realise that at times statements have to be taken from accused persons at night, such as persons arrested and taken into custody at night. But this was not such a case. This man had already made a statement on the 18th. Whether he was in custody or not from the 18th to the 25th does not appear; and it ought to have appeared; it was a very relevant detail. But whichever it was, he was not making a statement upon being arrested, or upon being charged. So why he should have been asked to make another statement at 4.50 a.m. has not been explained; and it is disturbing that it should be so.

The appeal of this appellant is allowed, but that of the other two is dismissed.