

# CALCUTTA HIGH COURT

The Queen

Vs

Hurribole Chunder Ghose

(Richard Garth, C.J. Pontifex, J.)

10.04.1876

## JUDGMENT

### **Richard Garth, C.J.**

1. In this case, the prisoner Hurribole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using certain forged documents, and sentenced to ten years' transportation. At the trial before Macpherson, J., it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

2. Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a police officer, and therefore not admissible, by reason of the 25th section of the Evidence Act (I of 1872). In answer to this objection, it was urged on the part of the prosecution, 1st, that Mr. Lambert was not a "police officer" within the meaning of the section; 2nd, that, if he were, the statement was made to him as a Magistrate, and not as a police officer; and that the 26th section was intended to qualify the 25th, so as to make a statement even to a police officer admissible, if made in the presence of a Magistrate. The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under Section 26 of the Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

3. It was urged by Mr. Jackson, for the prisoner, that the terms of Section 25 are imperative; that a confession made to a police officer, under any circumstances, is not admissible in evidence against him, and that the 26th section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody, to any person other than a police officer, shall be

admissible, unless made in the presence of a Magistrate. I am of opinion that this is the true meaning of the 25th section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

4. But then comes the question whether Mr. Lambert was a police officer within the meaning of Section 25. It was argued, and with some force, that the term " police officer" did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Beng. Act IV of 1866) "members of the Police Force;" and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police Force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

5. There is no doubt that, looking at the various sections of Beng. Act IV of 1866, the Deputy Commissioner of Police is not a member of the Police Force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "police officer," as used in that Act, has generally the same meaning as a member of the Police Force in the Act of 1866; but, in construing the 25th section of the Evidence Act of 1872, I consider that the term "police officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words "police officers," quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

6. I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

7. But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings? The 167th section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, fi it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to

justify, a conviction, was the Court below, before which the case was originally tried; and, upon this assumption, my learned colleague and I consulted MACPHBRSON, J., who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

8. Mr. Jackson, however, desired to be heard upon the effect of Section 167, and he had urged upon us,--first, that the section does not apply at all to criminal cases, and, secondly, that, if it does, the Court to determine whether the conviction ought to stand, is not the Court which tried the case, but the Court before whom the point of the admissibility of the evidence was argued. Mr. Jackson insisted that the word "decision" used in Section 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the Legislature that a case triable by a jury, and of the facts of which a jury alone are the proper judges, should be virtually re-tried by any Court not consisting of a jury; and in aid of his argument, he cited the case of *Reg. v. Navroji Dadabhai*

9. I am unable, however, to discover any sufficient reason why the 167th section of the Evidence Act should not apply to criminal as well as civil cases. It is perfectly true that the word "decision" is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance, where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

10. I am of opinion therefore that Section 167 does apply to criminal cases, but, upon consideration, I think that the Court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the Court of Review, and not the Court below. The point is certainly "raised," properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

11. Apart, however, from Section 167 of the Evidence Act, I think that, under Section 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we

ought to allow the conviction to stand. In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained information from the Judge as to what particular portion of the evidence applied to the prisoner Hurribole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

Pontifex, J.

12. I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have admitted at the trial. Without going so far as to say that Section 25 of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by police immediately under his control, to divest himself of his character of a police officer. I also agree that, under Clause 26 of the Letters Patent, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to Section 167 of the Evidence Act.

13. I agree that such last mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to consider the sufficiency or insufficiency of the evidence in relation to the verdict. (The counsel for the prisoner then went through the evidence to show that it was insufficient, apart from the confession, to justify the conviction being upheld. A certificate by a majority of the jury who tried the case, to the effect that if the confession had not been in evidence they would have given a verdict of acquittal, was tendered, but was rejected by the Court. The Court took time to consider their judgment, and eventually upheld the conviction on the evidence).

Cases Referred.

19 Bom. H.C.R. 358