CALCUTTA HIGH COURT

Sheikh Amiruddin Ahmed Alias

Vs

Emperor

(Teunon and S Huda, JJ.)

30.07.1917

JUDGMENT

Teunon, J.

1. In this case the appellant before us has been convicted of dacoity and sentenced under Section 395, Indian Penal Code, to rigorous imprisonment for five years.

2. The trial was by Jury in the Court of the 2nd Additional Sessions Judge of Mymensing and what has been urged before us is that the trial has been vitiated by the erroneous admission of evidence and by serious misdirections in the learned Judge's charge.

3. It appears that on the night of the 24th of November 1916, at a village called Rajoi, a serious dacoity took place in the houses of two cousins Rajendra and Debendra Bhoumik. Prom the house of Debendra. cash, currency notes, ornaments and other articles to an aggregate value of over Rs. 9,000 and from Rajendra's house cash' and other property to the value of some Rs. 800 are said to have been removed.

4. In connection with this dacoity and with a dacoity that took place in village Baliapara about a month before, the appellant, it appears, came into touch with the Police on the 26th of November. On the 28th of that month two persons of the name of Zahir and Pirn, and on the 29th a third man named Maniruddin were arrested. Thereafter also on the 29th, the appellant was himself Arrested.

5. It is next said that all the four persons so arrested made confessions to certain Police Officers, and that the confessions so made led to certain discoveries.

6. On the following day, 30th November, all four were produced before a Deputy Magistrate to whom appellant made a confession and Zahir and Piru made statements. On the 3rd of

December, the Deputy Magistrate, who recorded the statements, next proceeded to verify the appellant's confession and in the course of these verifications proceedings, which continued to the 5th December, appellant, it is said, made additional statements.

7. Ultimately all four accused were placed on their trial, and all four have been convicted. We are, however, not concerned with Piru, Zahir and Maniruddin, whose cases are not before us.

8. I shall now deal with the objections that have been taken before us to the trial as conducted by the learned Judge.

9. The 1st objection or series of objections refers to the confession made by the appellant himself on the 30th November. It is urged in the 1st place that the Sessions Judge has not sufficiently placed before the Jury the circumstances which militate against the value of the confession, such as (a) the interval between arrest and the making of the confession, in other words, the period spent in Police custody, (6) facts indicating that the appellant had been led to believe that he would be made an approver, (c) the attempts made in portions of the confession to extenuate the appellant's own share in the crime and (d) the discrepancy between the sums or value stolen and the sums recovered. It has also been urged that the Judge should have excluded or directed the Jury to discard from their consideration the first portion of the confession in which the appellant speaks of the earlier dacoity at Balipara. In my judgment the Judge would have grievously erred had he excluded any portion of the confession, and the fact that he put the whole of the confession before the Jury detracts from the argument that he did not invite special attention to passages in which, for instance, he speaks of persuasion or of his rescue of a child from spoliation. Similarly the learned Judge has in fact dealt with the question of inducement. Thus, though it may be said with some reason that the Judge's treatment of the confession is to some extent one-sided, for instance in putting to the Jury such questions as these, "is not the production...material corroboration" ..."do they not afford sufficient corroboration", and in treating the use in the confession of English expressions (which is merely consistent with evidence previously obtained) as having the value of independent corroboration, yet such misdirections as there are in this connection would not in my opinion have been sufficient by themselves to necessitate a re-trial.

10. It is next urged that the Judge has erred in instructing the Jury to take into consideration as against the appellant the statements made by Zahir and Piru to the Magistrate on the 30th of November. He has throughout; spoken of these statements as "confessions", "confessional statements" or "confessions of a sort," but when we examine them we find that they are not self-incriminating statements. In speaking of them as confessions and in saying that they "should" be taken into consideration as against the appellant, the Judge, it is clear, must have misled the Jury.

11. In the third place it is contended that the so-called verification proceedings are illegal and that no evidence regarding them should have been admitted. This contention is based largely on the observations to be found in the judgments in the case of *Emperor v. Radhe Halwai*[1] but I do not understand that case or any other case to lay down that such proceedings are wholly illegal. They are undertaken, it would seem, with a view to testing the truth of a confession and to obtain evidence either corroborating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance, in ascertaining that the prisoner is familiar with, or wholly ignorant of, the localities of which he has spoken, or in furnishing clues to further enquiry, such proceedings may be useful. In connection with such proceedings the main concern of the Courts would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken, for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation, when not recorded in the manner provided in Section 164 of the Code of Criminal Procedure, are, in my opinion, inadmissible. If further authority for this proposition is required it is to be found in the cases of *Queen-Empress v. Bhairab Chunder Chuckerbutty*[2] (though I am not to be understood as agreeing in the distinction therein drawn between a statement and a confession); *Emperor v. Radhe Halwai 7 C.W.N. 220(Supra) and King-Emperor v. Rajani Kanto Koer*[3]

12. Lastly very serious objection has been properly taken to the manner in which the Sessions Judge has dealt with the confessions said to have been made by the appellant and the co accused to the Police in the course of the Police investigation. It is unnecessary and it would be all but impossible to enumerate in detail the errors committed by the learned Judge in this connection. He has admitted in evidence and placed before the Jury the whole history so to speak of the investigation. He has permitted the Police Officers and other witnesses, introducing inter alia much hearsay matter, to describe the steps and processes by which they obtained and worked up clues and finally succeeded, in the Judge's language, in tracking and trapping the culprit" and finally in "bagging" the accused on their trial.

13. The confessions having led, it is said, to discoveries, he has next admitted in evidence not merely so much as led directly to the discovery or related directly to the fact discovered but practically the whole of each such statement, including such matter as this, "Maniruddin named one Amiruddin (i.e. the appellant), while Zahir did not...Maniruddin and Zahir were confronted and Zahir when thus confronted had to admit that Amiruddin was also in the gang," and again, "Amiruddin asked to be confronted with Piru, Zahir and Maniruddin, to tell them to their faces what articles they each had got in their shares."

14. He has next in effect directed the Jury that the statements which he has thus erroneously

admitted could and should be used not merely against the maker but against his co-accused. In another respect also the Sessions Judge has dealt erroneously with this part of the case. He has expounded to the Jury the provisions of Sections 24 to 30 of the Evidence Act, and has next left it to the Jury to "scrutinize the confessions and the other evidence" in the light of that exposition. If in this portion of the charge he intended, as he apparently did, to leave it to the Jury to decide, whether the statements or confessions made to the Magistrate and how much of the confessions said to have been made to the Police Officers were admissible, he has clearly thrown upon the Jury the duty which the law lays on him. It is for the Judge to admit or exclude evidence in accordance with the law on that subject, and for the Jury to weigh and value the evidence admitted.

15. I have next to consider two criticisms which have been advanced in connection with this part of the case and do not appear to me to be well founded.

16. It is said that the Sessions Judge is wrong in his view that Section 27 of the Evidence Act applies to and qualifies Section 24 and Section 25, as well as Section 26. Whether as regards Section 24 the question strictly arises has not been made clear, inasmuch as it has not been shown to us that discoveries resulted or are said to have resulted from confessions other than confessions made to Police Officers, or when in the custody of Police Officers and not in the immediate presence of a Magistrate. If, however, the question does arise, in that case I am of opinion that Section 27 qualifies not only Section 26 and Section 25, but also Section 24. All three sections lay down general rules excluding confessions. It is, in my opinion, unnecessary to discuss the policy which has led to the enactment of these rules. It is sufficient to say that the same broad grounds or principles appear to underlie all three. In Section 27 follows an exception. The reason for making or providing this exception applies alike to each of the three preceding general rules. If the exception had been intended to apply only to Section 25 or only to Sections 26 and 25, we should have expected to find this intention expressly stated or to find the exception embodied in those two sections or in Section 26 alone. Further the position of Section 28, which is also in the nature of an exception to Section 24, supports this view. I, therefore, hold that when a confession as a whole is excluded, whether by reason of the provisions of Section 26 or of Section 25 or of Section 24, so much of the information given by the person making the confession, when accused and in custody, as distinctly relates to a relevant fact thereby discovered becomes admissible.

17. It has next been contended that when an accused himself produces the articles said to be discovered, any anterior statement made by him is inadmissible. I am unable to assent to this contention. On the contrary I agree with the view taken in *Queen-Empress v. Nana*[4] *and in Legal Remembrancer v. Chema Nashya*[5] that in such cases so much of the information as set the Police

in motion and led to the discovery" is admissible. Even so, that does not in the present case render admissible evidence to the effect that when a certain pot had been fished out, Amiruddin, when pouring out the ornaments, said: "I got these ornaments in my share in the Rajoi dacoity." That statement obviously led to the discovery.

18. In conclusion I have to point out to the Additional Sessions Judge that in his charge to the Jury he should avoid as far as may be the use of expressions which assume the guilt of the accused. I have already had occasion to deprecate his use of the interrogative method, and more particularly his addressing to the Jury questions couched in the form is not this" or does not that" and the like. Lastly, I cannot condemn too strongly his use of slang or colloquial phrases such as "tracking and trapping" or "bagging" culprits; more especially when applied to the persons then on their trial.

19. For the reasons given in our several judgments we agree that we have no alternative but to set aside the conviction and sentence in the present case and direct that the appellant be re-tried. The re-trial will be in the Court of the Sessions Judge.

Shamsul Huda, J.

20. In this case three important questions of law have been argued before us. The first question is whether Section 24 of the Evidence Act controls Section 27 or is controlled by it or, in other words, whether information given to a Police Officer by an accused person which may have led to a discovery within the meaning of Section 27 can be used as evidence in case such information is proved to have been obtained by any inducement, threat, or promise, such as under Section 24 would make a confession inadmissible. The question is res Integra so far as this Court is concerned, but there is an important decision of the Full Bench of the Allahabad High Court in *Queen-Empress v. Babu Lal*[6] in which the question whether Section 27 controls Section 25 of the Evidence Act was fully discussed and that decision has an important bearing on the decision of the present question; It was held by the majority of the Full Bench that Section 27 controlled Section 25, while the opposite view, viz., that it was a proviso to the next preceding section only was maintained in an equally exhaustive judgment by Mahmood, J. The reasons given for and against the view that Section 27 controls Section 25 also apply with equal force to the question whether that section likewise controls Section 24. Although at first sight it may appear somewhat anomalous that an accused person should be prejudiced by a statement made by him even against his own will, for it infringes one of the fundamental principles of law that an act done by a person against his own will is not his act, there is on the other hand the consideration that by whatever means obtained, the statement receives a guarantee of its authenticity by the corroboration which the discovery lends to it. The considerations for and against the admissibility of such statement

may be said to be equally balanced. If the policy of exclusion embodied in Sections 25 and 26 is based on the unreliability of Police Officers deposing to incriminating statements made by accused persons, by reason of their being specially interested in the detection of crime and by reason of the corrupt practices that prevailed in those days, the danger is largely removed by the confirmation afforded by the discovery.' If, on the other hand, the exclusion is based on a desire to remove all temptations in the way of Police Officers to obtain confessions by inducement, threat or torture the discovery' does not remove the danger. That both these considerations had their share in determining the provisions of Sections 25 and 26 cannot be doubted. The fact, however, that Sections 25, 26 and 27 existed in the Code of Criminal Procedure uncontrolled by any express provisions such as we now have in Section 24 of the Evidence Act, may suggest the inference that by transferring those three sections from the Code of Criminal Procedure to the Evidence Act, no change in the law was intended to be introduced. But this argument is clearly fallacious, as Section 24 laid down no new principle but embodied a well established principle regulating the admissibility of confessions, and even before it was formally enacted as a rule of law in this country the principle governed these provisions of the Criminal Procedure Code even before their transfer to the Evidence Act of 1872. It appears, however, that the general principle derived from the English law was even under that law modified, so as to negative its application to confessions leading to 'discovery' [Taylor's Law of Evidence, Section 824] I think, therefore, we ought to be guided by the decision of the majority of the Full Bench of the Allahabad High Court and hold that Section 24 does not control Section 27.

21. The next question for consideration is the extent to which information falling under Section 27 can be given in evidence. The section itself is clear on that point and no discussion seems necessary. It lays down that only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It is noticeable that the word used is not "statement" but "information", and this seems to suggest that even if a single statement contains more information than what is contemplated" in Section 24, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If, therefore, an accused person were to state to a Police Officer that he killed A with a knife and concealed the dead body at a particular place, all that is admissible is the information that he had concealed the dead body in that place, but the further information that he himself had killed A is not admissible under Section 27.

22. It was pointed out by Straight, J., in the case of Queen-Empress v. Babu Lal 6 A. 509 : A.W.N. (1884) 229 : 4 Ind. Dec. (N.S.) 155(Supra)(that "where a statement is being detailed by a constable as having been made by an accused in consequence of which he discovered a certain

fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding." This question was fully discussed by a Full Bench of the Bombay High Court in Queen-Empress v. Nana 14 B. 260 (F.B.) : 7 Ind. Dec. (N.S.) 632(Supra). In the present case it is clear that the investigating Police Officer was allowed to disclose in his evidence a great deal more than is contemplated by Section 27.

23. The last question for consideration is the propriety of the procedure adopted by the Deputy Magistrate Maulvi Abu Ali Chowdhury for the purpose of verifying the confession of the accused Amiruddin. It appears that after recording the confession of the accused in the regular manner this officer took the accused with him to various places referred to in the confession for purposes of verification, and in the course of such verification Amiruddin seems to have supplemented his former recorded confession by other statements of an incriminating nature, and the learned Deputy Magistrate was allowed at the trial to depose to these other statements of Amiruddin though they were never recorded at any time under Section 164 of the Criminal Procedure Code. I am clearly of opinion that these additional statements could not be used as evidence against the accused. As authorities for this view, I may refer to the decisions of this Court in *Queen-Empress v. Bhairab Chunder Chuckerbutty*[7] and King-Emperor v. Rajani Kanto Koer 8 C.W.N. 22 : 1. Cr.L.J. 10(Supra) and of the Madras High Court in *Queen-Empress v. Viran*[9] Apart from the question of legality of the procedure I think I would not be going out of my way if I expressed my concurrence with the views expressed by Prinsep and Geidt, JJ. in the case of Emperor v. Radhe Halwai 7 C.W.N. 220 on the utility and, propriety of such a procedure.

24. It seems to me that such a procedure for purposes of verification, confined as such verification must be to facts already stated in a confession recorded in accordance with law would seldom require the presence of the accused. At any rate it was not required in the present case. The presence of the accused naturally leads to questioning, and to an effort to get out of him incriminating statements which under pressure of circumstances he finds himself compelled to make and as to which it cannot be said that it is voluntary. Even, therefore, if the Deputy Magistrate had in this' case tried to make these statements admissible in evidence by recording them under Section 164, Criminal Procedure Code, after the verification had been completed, I would have found it difficult to hold that the confession was voluntary. I think 'verification' under conditions such as these lends itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him. An accused person should not be placed in a position which necessitates his making incriminating statements and which leads to the creation of evidence against himself. It is the privilege of an accused to say as little as he likes regarding the offence with which he is charged or to say nothing at all, if he is so minded, but it seems to me that the procedure adopted

by the verifying officer is an infringement of the privilege. In this respect the Police are in a position materially different from that of a Magistrate, for whereas a statement made to a Police Officer, unless it falls within the provision of Section 27 of the Evidence Act, can never be used against an accused, a Magistrate may, if he chooses, record these statements in the manner required by law after the verification procedure is over, and thereby give such record an air of validity which in reality does not attach to it.

25. I think, therefore, that there was misdirection to the Jury in so far as the learned Judge admitted as evidence confessional statements made to the Police which were not strictly within the limits laid down by Section 27 of the Evidence Act and also in so far as he allowed the Deputy Magistrate Mr. Abu Ali Chowdhury to depose to statements made by the accused in the course of the procedure adopted by him for verifying the confession of the accused--statements which were at no time recorded by him in accordance with the provisions of Section 164 of the Criminal Procedure Code, and it is highly likely that the admission of such evidence, not legally admissible, has prejudiced the accused in the trial. For these and for other reasons given in the judgment of my learned brother I agree with him in directing a retrial.

Cases Referred.

17 C.W.N. 220
22 C.W.N. 702 at p. 703
38 C.W.N. 22 : 1. Cr.L.J. 10
414 B. 260 (F.B.) : 7 Ind. Dec. (N.S.) 632
525 C. 413 : 2 C.W.N. 257 : 13 Ind. Dec. (N.S.) 274
66 A. 509 : A.W.N. (1884) 229 : 4 Ind. Dec. (N.S.) 155
72 C.W.N. 702 at p. 703
89 M. 224 : 2 Weir 125 : 3 Ind. Dec. (N.S.) 553