

APPELLATE CRIMINAL.

Before Cuming and S. K. Ghose JJ.

KHIRO MANDAL

v.

THE EMPEROR.*

1929

June 12.

Confession—Voluntariness—Admissibility—Duty of judge and jury as regards voluntariness—Onus—Misdirection—Indian Penal Code (Act XLV of 1860), s. 395—Indian Evidence Act (I of 1872), s. 24.

It is for the judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false.

Where the judge left it to the jury to determine whether the confession was or was not voluntarily made, or, in other words, whether it was admissible he is guilty of a serious error of law.

Where the judge told the jury "when an accused alleges he made a confession under inducement and threat from persons in authority, the *onus* is on him to prove the allegation. It is not of course possible to prove such allegations, even if they were true,"

held that the judge committed error in directing the jury.

Whether the *onus* of proving that a confession is voluntary is on the accused or the prosecution is not free from controversy.

Supposing the burden was on the accused, it was a clear misdirection to tell the jury that the accused could not possibly discharge this *onus*.

The expression "If it appears" in section 24, Evidence Act, is not so strong as the expression "proved."

CRIMINAL APPEAL by the accused.

The appellant, Khiro Mandal, was convicted under section 395, Indian Penal Code, and sentenced to 3 years' rigorous imprisonment by the District and Sessions Judge of Rajshahi. The dacoity took place on the 27th July, 1927, but no clue was obtained, though usual police investigation took place. Some time thereafter, in connection with the investigation of another dacoity, Khiro Mandal made some statements to the police, in consequence of which he was taken before the Deputy Magistrate, before whom he made a certain statement. This was the basis of

*Criminal Appeal, No. 969 of 1928, against the order of T. I. M. Nuranabi Chaudhuri, Sessions Judge of Rajshahi, dated Nov. 17, 1928.

1929
 KHIRO MANDAL
 v.
 THE EMPEROR.

the present prosecution. Khiro and another person, Sabur, were committed to the Sessions. At the Sessions trial, Sabur was acquitted and Khiro was convicted, the only evidence against Khiro being his own confession subsequently retracted.

Mr. Mrityunjay Chattopadhyay, for the appellant. The Judge should have held that the confession was not voluntary and, therefore, not admissible in evidence. Further, certain formalities not having been complied with, the confession was inadmissible. Confession was also retracted by the accused. As that was the only evidence against the accused, the Judge should have told the jury that there being no evidence against the accused they should return a verdict of not guilty. It is for the judge to determine the question of voluntariness of the confession. The judge was wrong in throwing the onus of proving confession not voluntary on the accused.

The Deputy Legal Remembrancer, Mr. Khundkar, and *Mr. Nirmalchandra Chakravarti*, for the Crown. The Magistrate who recorded the confession was examined as a witness. From his evidence, as well as from the record of the confession, it appears that all the necessary warnings were substantially given. This being so, the prosecution had discharged its onus by doing all that lay in its power to establish the voluntary character of the confession, and it was for the defence to prove that the confession was not voluntary. *Queen-Empress v. Basvanta* (1). The Judge had to be satisfied of the voluntary character of the confession before admitting it in evidence. *Emperor v. Panchkouri Dutt* (2). But this would also be a possible question for the jury investigating its truth (3). No attempt having been made by the defence to show that the confession was any thing but voluntary, the Judge's observations, that the accused 'could not possibly prove it to be otherwise, did not occasion any prejudice.

(1) (1900) I. L. R. 25 Bom. 168.

(2) (1924) I. L. R. 52 Calc. 67.

(3) (1925) Crim. App. No. 629-1924,
 decided by Newbould and B. B.
 Ghose JJ. on Feb. 24.

CUMING J. This is an appeal by one Khiro against the order of the learned District Judge of Rajshahi, convicting the appellant under section 395, Indian Penal Code, and sentencing him to 3 years' rigorous imprisonment. The appellant was tried jointly with another man Sabur Sheikh. Sabur Sheikh was acquitted. The dacoity with which we are concerned took place in the house of one Prasanna-chandra Mandal, on the 27th July, 1927. The usual investigation followed, but no clue was obtained.

Then later, in connection with the investigation of another dacoity, the present accused Khiro made some statements to the police, as the result of which he was taken before a Deputy Magistrate, where he made a statement which forms the basis of the present case. Khiro and Sabur were committed to the Sessions with the result already noted. It will be seen and it is admitted that the only evidence against the present appellant is his own confession, which was subsequently retracted.

The appellant has contended that for certain reasons the Judge should have held that the confession was not voluntary and so inadmissible in evidence and that being so the Judge should have told the jury that, there being no evidence against the accused, they should return a verdict of not guilty. Further, that certain formalities not having been complied with, the confession for that reason was inadmissible. The admissibility of evidence is a question for the judge. Section 24, Indian Evidence Act, provides that a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, *etc.* In other words, whether the confession is a voluntary one. It is for the judge to determine whether the confession is voluntary and for the jury to determine whether it is true or false. I do not think it is open to the judge to ask the jury to determine whether it is voluntary or not, even though that is a question of fact, for the result would be that the jury would have had put

1929
 KHIRO MANDAL.
 v.
 THE EMPEROR.
 CUMING J.

1929

KHIRO MANDAL

v.

THE EMPEROR.

CUMING J.

before them evidence which was inadmissible in evidence and the difficulty of removing the effect of the inadmissible evidence from the jury's mind is obvious.

In dealing with this point, the learned Judge charged the jury as follows: "So far as the accused "Khiro is concerned, the only evidence against him is "his retracted confession (the confession Ex. 4 read). "Khiro has alleged that the confession was not "voluntarily made and he was tutored to make the "statements. Confession which is not voluntary is not "admissible in evidence. With regard to the "confession, two main points have to be considered,—

"(1) Whether it was voluntarily made.

"(2) Whether it is true.

"The Subdivisional Magistrate, who recorded the "confession, has deposed to the effect that he gave "warning to the confessing accused before recording "the confession. He was satisfied that it was "voluntarily made. I have, therefore, admitted the "confession and provisionally answered the first "question. It is for you to determine whether the "confession is true or not. You will have to consider "the circumstance in which it was made. You will "also have to consider the suggestion and allegation "made by the accused. You must remember that when "an accused alleges he made a confession under "inducement and threat from persons in authority, the "onus is on him to prove the allegation. It is not of "course possible to prove such allegations, even if they "were true."

The first difficulty is to determine what is the meaning of the word "provisionally." As far as I can see, the learned Judge has not himself determined whether the confession was voluntary or not. He says the Magistrate has found it so and so he admits it provisionally. Reading the whole of the paragraph beginning with "I have, therefore, admitted the "confession in evidence and have provisionally "answered the first question. It is for you to "determine whether the confession is true or

“not. You will have to consider the circumstances
 “in which it was made. You will also have
 “to consider the suggestions and allegations made
 “by the accused. You must remember that
 “when an accused alleges that he made a confession
 “under inducement and threat from persons in
 “authority, the onus is upon him to prove the allega-
 “tions. It is not of course possible to prove such
 “allegations, even if they were true,” the conclusion to
 which I have come is that the learned Judge left it to
 the jury to determine whether it was or was not
 voluntarily made and in other word was it admissible.
 This is the only way in which I can attach any
 meaning to the expression “provisionally.” If that
 is so, the Judge has been guilty of a serious error of
 law, for it was for him and not for the jury to
 determine its admissibility. The Judge has com-
 mitted a further error in directing the jury. He has
 told them that the accused must prove any threat or
 inducement, but that it is impossible to prove such
 allegation even if true. In other words, that the law
 places on the accused a burden which it is impossible
 for him to discharge. In other words, that an accused
 person can never prove that a confession is not
 voluntary. The proposition requires only to be stated
 to be rejected.

It is not necessary for me, in dealing with this
 point, to decide whether the onus of proving that a
 confession is voluntary is on the accused or the
 prosecution. The point is not free from controversy.
 Supposing, however, for the sake of argument, that
 the burden was on the accused, it was a clear
 misdirection to tell the jury that the accused could
 not possibly discharge this onus. It might no doubt
 be difficult, in some cases very difficult, but it is not
 always impossible and to tell the jury so is a grave
 misdirection. It has been suggested that in this case
 the accused never attempted to substantiate the
 allegation by evidence. Perhaps he did not, but it
 would be still open to him to show that the
 circumstance under which it was made would justify

1929
 KHIRO MANDAL
 v.
 THE EMPEROR.
 CUMING J.

1929

KHIRO MANDAL

v.

THE EMPEROR.

CUMING J.

the inference that it was obtained by threat or inducement.

It is to be remembered that the expression used in section 24, Evidence Act, is not "proved," but "if it appears," which is not as strong an expression as proved. Bearing in mind that this confession is the sole evidence against the accused, I must hold that there have been such serious misdirection in dealing with it as would be fatal to the trial. If the Judge had determined that it was not voluntary, his duty was to tell the jury that there was no evidence against the accused and direct a verdict of not guilty.

We must, therefore, set aside the verdict of the jury and the order of the Judge. Whether the appellant should be retried we leave to the decision of the local authorities.

GHOSE J. I agree.

THE COURT. Pending the decision of the local authorities as to whether the appellant will be retried or not, he will continue on bail.

S. R.