APPELLATE CRIMINAL.

Before Rankin C.J. and C. C. Ghose J.

DURLAV NAMASUDRA

v.

EMPEROR.*

1931.

Nov. 27;
Dec. 2.

Confession—Statement by accused person when not in custody of police officer leading to discovery, if admissible—Statements by several persons to same effect, if all admissible—Indian Evidence Act (I of 1872), ss. 24, 25, 26, 27.

An information not received from an accused person in the custody of a police-officer, or received from an accused person not in the custody of a police-officer, even if it leads to the discovery of a fact relating to the crime, is inadmissible in evidence under section 27 of the Evidence Act.

If such information comes from statements made by more than one accused person in custody, the statements of the persons other than the first person who made the statement cannot be used in evidence.

Queen v. *Ram Churn Chung* (1) followed.

Section 27 of the Indian Evidence Act is not a mere proviso to section 26, but it controls and cuts down the operation of sections 24 and 25 as well.

APPEAL by the accused.

The facts of the case have been sufficiently set out in the judgment.

Hemendrakumar Das for the appellants.

The Deputy Legal Remembrancer, Khundkar, for the crown.

Cur. adv. vult.

C. C. GHOSE J. The appellants in this appeal are four persons, named Durlav Namasudra, Kolo Namasudra, Karna Namasudra and Abhay Namasudra. They were charged with having committed offences punishable under sections 302 and 201, Indian Penal Code. The jury found them "not guilty" on the charge under section 302, and the learned judge, agreeing with and accepting this verdict of the jury, acquitted them of that offence.

*Criminal Appeal, No. 345 of 1931, against the order of Kumudkanta Sen, First Addl. Sessions Judge of Sylhet, dated Feb. 10, 1931.

(1) (1875) 24 W. R. Cr. 36.

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The jury, however, by a majority of 5 to 4, were of opinion that the present appellants were guilty under section 201. The learned judge accepted the verdict of the jury as regards this and sentenced each of them to undergo rigorous imprisonment for a period of three years.

One of the points taken in this appeal is that the jury, having acquitted the appellants of the offence under section 302, were not competent to find them guilty under section 201, in other words, the contention is that the jury, having acquitted the appellants under the major charge, were not entitled to convict them under the minor charge. Now, as regards this point, the matter seems to be concluded by authority. First of all, there is the case of *Begu* v. *King-Emperor* (1), where the facts were as follows: Five persons were charged under section 302 with murder and two of them were convicted—the other three being acquitted under section 302. There was a body of evidence on the record which led to the conclusion that the three persons who had been acquitted under section 302 had assisted in removing the body, knowing that a murder had been committed. They were found guilty under section 201 of causing disappearance of the evidence. The judgment of Lord Haldane in that case shows that there was nothing wrong in the conviction under section 201 in the circumstances that had happened. This case has been followed in the case of *Umed Sheikh* v. *King-Emperor* (2),—a decision of Mr. Justice Suhrawardy and Mr. Justice Duval. I need not go over the grounds covered by the judgment; but it is sufficient to observe that, having regard to the two decisions to which I have just called attention, the argument that has been put forward in support of the contention that a conviction under section 201 is not maintainable in the circumstances that have happened cannot be sustained.

(1) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 181.

(2) (1926) 30 C. W. N. 816.

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The next contention that has been put forward is that the evidence of the Sub-Inspector, who conducted the investigation, shows that, on the day when the accused are said to have made certain statements to him, in consequence of which the dead body was discovered, they were not in custody and that that being so, the admission of the statements made to the Sub-Inspector, leading to the discovery of the dead body, is hit by the provisions of section 27 of the Indian Evidence Act. Before I deal with this contention, it may be just as well to set out exactly what the Sub-Inspector stated in the witness box. The Sub-Inspector in question is witness No. 18 in the sessions court and his name is Trailokyanath Gogai. His evidence will be found on page 87 of the record before us. He states definitely in cross-examination that he arrested the four accused Karna, Durlav, Abhay and Kolo at 4 p.m. on 12th December, 1930, on suspicion, but that there was nothing in his diary to show this. Then he adds these words: "I formally arrested these four accused "at 3-30 p.m. on 13th July, 1930." Therefore, it is clear from his evidence that the arrest was not made before 3-30 p.m. on the 13th July 1930. In his evidence, however, he says this :—

> I came to Nabagram at 10 a.m. on 12th July, 1930. An *ejâhâr* was then lodged by Felai before me on that day at 2 p.m. I recorded what he said and I read it over to him. Felai then put his thumb impression on the *ejâhâr*. On reading the *ejâhâr*, I started an investigation. At 4 p.m. on 7th December, 1930, I examined Kolo, Karna, Abhay and Durlav. I arrested them then and there on suspicion after their examination. On the forenoon of 13th July, 1930, I proceeded to Abdua tank with the accused Durlav, Kolo, Karna and Abhay and certain other witnesses. I went to that tank in consequence of the information given to me by all the four accused named above that the dead body of Rai Namasudra was concealed in the tank with stones tied to it. On reaching the tank, a dead body was recovered from it from under water-hyacinths almost in the centre of the tank.

Therefore, it is clear from the evidence of the Sub-Inspector that the information, such as it was, which led to the discovery of the dead body, had been given by these four accused on the 12th July, at a time when they were not in custody. This circumstance is, in my opinion, absolutely clear from the evidence of the

Sub-Inspector Trailokyanath Gogai. That being so, we have now to consider whether, under the provisions of section 27 of the Indian Evidence Act, those statements were admissible in evidence. I do not wish to cite many cases; but it is now clear beyond all dispute that section 27 is one of those sections which controls the three earlier sections, namely, sections 24, 25 and 26. In the last mentioned sections, the danger of admitting confessions made to police-officers or when in police custody is clearly pointed out. But although such confessions are inadmissible under the law, that is, under the sections which I have just mentioned, they may, in certain circumstances, lead to the discovery of the facts, *etc.*, in consequence of the information received from the persons in custody. Therefore, the first thing that has got to be ascertained before section 27 of the Evidence Act can be applied, is to find out whether or not the information, such as it was, which led to the discovery of certain other facts came from a person in the custody of a police-officer. If such information has not come from a person in the custody of police-officer or has come from a person not in the custody of a police-officer, then section 27 would hit the admissibility of such statement in evidence and under no circumstances, that I can think of, having regard to the provisions of the law, is such a statement admissible in evidence. It seems to me, therefore, that, if this evidence is ruled out, there is no other circumstance present on the record which would entitle the court to convict the appellants under section 201, Indian Pendal Code. In my opinion, there is no other evidence and, that being so, the irresistible conclusion to which I have been driven to come is that, having regard to the state of the record, there is really no evidence which would entitle the court to convict the accused under section 201.

There is just one other point which I may notice. The statements in question are said to have been made by four persons. Now, apart from the question

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whether these persons were in the custody of the police, it is quite clear that the statements of the persons other than the first person who made the statement cannot be used in evidence. The statement made by the first individual under section 27 and in the circumstances described therein may be treated as evidence against him; but it is not allowable, under the provisions of the law, to treat the evidence of the other persons who may have made statements of the description referred to in section 27 as evidence admissible under the provisions of that section. This question has been the subject of debate in several cases from the days of the Weekly Reporter [See in this connection the case of *the Queen* v. *Ram Churn Chung* (1)]. And it has always been held that the fact discovered should not be treated as having been discovered from the joint information of all the persons who may have made statements under section 27 and in the circumstances stated in the section. It has been laid down that it should be deposed that a particular fact has been discovered from the information of one person and this will let in under section 27 so much of the information as relates distinctly to the fact discovered by reason of the statement made by that one person. So that, from that point of view also, there is a good deal to be said against the course adopted in the sessions court.

On all these consideration, I come to the conclusion that there is really no evidence on the record to the prejudice of the present appellants and that they should be acquitted of the charge framed against them. The appeal is allowed and the appellants must be discharged.

RANKIN C. J. I agree. I would only point out that this case is a very good illustration of the necessity of sections 24 to 27 of the Evidence Act being redrafted. As my learned brother has pointed out, it has been decided by the highest authority that section 27 is not a mere proviso to section 26 but cuts down the

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operation of sections 24 and 25 as well. It is a curious section, because, while it begins with a proviso, it is an independent section and it repeats some of the conditions mentioned in section 26. But though it is now well held that it is an exception to sections 24 and 25, there are elements of paradox in that contention. The first consequence is that a part of the statement may be given in evidence although it is under section 24 induced by threat or promise—if something has been discovered in consequence of that part of the statement. The present case illustrates another matter. What was said in this case was said to the police. It was, therefore, not allowed to go in evidence by section 25 and the consequence of holding that section 27 is not a mere exception to section 26 is this: that in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it. That is the present case. It cannot be admitted in evidence, because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that, if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody. Yet this is the consequence of saying that section 27 is more than a proviso to section 26. It is, however, well held by authority that that is so; and, until the legislature takes the matter in hand, the paradox expressed in the present case will continue to be law. There seems to me to be nothing in section 24 or 25 to prevent evidence being given: "In consequence of something "said by the accused I went to such and such a place "and there found the body of the deceased." In cases under section 27 the witness may go further and give the relevant part of the confession.

Accused acquitted.

A. A.