APPELLATE CRIMINAL.

Before S. K. Ghose and Khundkar JJ.

1934
Aug. 21, 22, 24.

KASHIMUDDIN
v.
EMPEROR.*

Confession—Voluntariness of confession, if for the jury—Misdirection—Confession of co-accused, if requires corroboration—Code of Criminal Procedure (Act V of 1898), ss. 298, 299—Indian Evidence Act (I of 1872), s. 30.

In a jury trial, all questions of fact are for the jury and all questions of law are for the judge. By section 298(*1*)(*c*) the judge has to decide the admissibility of the evidence and, in order to enable him to do so, he has to decide the necessary questions of fact.

As regards a confession, the question may arise as to whether it is voluntary and also whether it is true. Both are questions of fact. To the extent of the admissibility of the confession, the judge has to decide whether the confession is voluntary. A confession that is voluntary is not necessarily true and *vice versa*. The two questions, however, are mixed up. Therefore, there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession.

A free and voluntary statement is some guarantee of its truth and, when the consideration of the question as to whether a confession is voluntary or not is taken away entirely from the jury, it amounts to a serious misdirection sufficient to vitiate the verdict.

Emperor v. *Panchkowri Dutt* (1), *Queen* v. *Shahabut Sheikh* (2) and other cases referred to.

Under section 30 of the Indian Evidence Act, the confession of an accused person may be taken into consideration, but this is not tantamount to saying that such confession is to take the place of proof.. It is necessary that the confession of a co-accused should be corroborated and when that confession is retracted it has no value at all as against the co-accused.

Emperor v. *Lalit Mohan Chuckerbutty* (3) referred to.

CRIMINAL APPEAL.

This is an appeal on behalf of five accused persons, who were convicted by the Assistant Sessions Judge

*Criminal Appeal, No. 353 of 1934, against the order of S. S. R. Hattiangadi, Assistant Sessions Judge of Dinajpur, dated Feb. 27, 1934.

(1) (1924) I. L. R. 52 Calc. 67.
(2) (1870) 13 W. R. (Cr.) 42.
(3) (1911) I. L. R. 38 Calc. 559.

of Dinajpur under section 395 of the Indian Penal Code on a unanimous verdict of the jury and sentenced to 5 years' rigorous imprisonment each. The material facts appear from the judgment.

T. P. Das (with him *Himangshuchandra Chaudhuri*) for the appellants. [Discussed the evidence with regard to the first information report, identification of stolen goods and the judge's directions with regard to corroboration.] Another point of great importance is that the appellant, Kashimuddin, made a confession which he subsequently retracted. The judge decided that it was voluntarily made without any inducement and he admitted it in evidence. He, however, did not place before the jury the circumstances on which the defence relied for proving that the confession was extorted. As a matter of fact, the judge wholly withdrew the question of voluntariness from the consideration of the jury. *Emperor* v. *Panchkowri Dutt* (1).

The judge also omitted to direct that the retracted confession of the co-accused has no value as against anyone except the confessing accused himself.

A. Rahim for the Crown. After discussing the evidence : It was the judge's duty to decide the question of voluntariness for the purpose of its admissibility. He having decided this question, it was not open to the jury to consider that aspect of the question. They would merely consider the question of truth or falsity of the confession. If the jury were allowed to consider this question, the effect of the judge's decision as to the admission of the confession would be merely provisional, which would be illegal. *Khiro Mandal* v. *Emperor* (2). Otherwise, if the jury held that the confession was not voluntary but induced, an anomalous position would arise, the judge having admitted it and the jury having held that it was not probably admissible.

(1) (1924) I. L. R. 52 Calc. 67. (2) (1929) I. L. R. 57 Calc. 649.

1934

Kashimuddin
v.
Emperor.

The question of admissibility is entirely for the judge and if any fact has to be decided for that purpose, the judge and not the jury should decide it. Taylor on Evidence, page 25, *Bartlett* v. *Smith* (1), *Cleave* v. *Jones* (2), *Nayeb Shahana* v. *Emperor* (3).

The judge was right in the directions he gave to the jury.

Cur. adv. vult.

S. K. Ghose J. The five appellants were placed on their trial with one Jamir Dai before the Assistant Sessions Judge of Dinajpur, Mr. S. S. R. Hattiangadi, and a jury, on a charge under section 395 of the Indian Penal Code. The jury brought in a unanimous verdict of guilty as against these appellants. The learned judge, agreeing with that verdict, has convicted the appellants as aforesaid and sentenced each of them to rigorous imprisonment for five years.

The prosecution case shortly stated is that, on the 21st November, 1933, there was a dacoity in the house of one Mobarak Ali. The dacoits, about 10 to 15 in number, forced their way into the house, assaulted the inmates, and took away ornaments and money. Some of the appellants were recognised as being among the dacoits. One Jamardi, husband of the sister of Mobarak, went to the *thâná* and lodged the first information. Thereupon, the police investigated and recovered some articles, alleged to have been stolen, from some of the appellants and one of them, Kashimuddin, made a confession, which he retracted at the trial. The defence is a denial.

I may say here that we had some trouble over this simple case because the learned advocate appearing for the appellants thought fit to address us on the merits

(1) (1842) 12 L. J. (N. S.), Pt. II (Exch.) 287.

(2) (1852) 7 Exch. 419; 155 E. R. 1013.

(3) (1934) I. L. R. 61 Calc. 399.

of the case without taking care to provide himself with a copy of the record, so that he was not in a position to refer us to those portions of the evidence on which he relied in his argument. The Crown, however, was represented by Mr. Rahim and we have examined the record for ourselves. The evidence, as set forth in the charge to the jury, may be divided into three classes, namely, (1) the retracted confession of Kashimuddin, (2) the evidence as to the recognition of some of the appellants (by the inmates) and (3) the finding of the stolen property. For the present, we may leave aside the confession and the evidence as to the alleged recognition and take up the case of those accused with whom stolen property is alleged to have been found. These are appellants Samiruddin and Asimuddin. The occurrence had taken place on the 22nd November. On the 9th December following, the houses of these appellants were searched and two gold *korhis*, exhibit 23, and a gold *mâch*, exhibit 24, were found in the house of Samiruddin, and a gold *beshar*, exhibit 22, and a pair of silver *arboukis*, exhibit 25, were found in the house of Asimuddin. The learned judge, while dealing with this part of this case, set out the evidence, which is quite simple, fully and fairly. He at first drew the attention of the jury to the evidence as to the finding of these articles, which, in fact, is not denied. Then he drew attention to the evidence as to the identification of the articles by Mobarak Ali, his mother, and his sister. The first two identified all the four articles. The sister identified only two. Then the learned judge also drew the attention of the jury to the circumstances, under which the identification was made, namely, that there was a test identification carried out in the presence of the president of the Union Board. The sister stated that she saw her mother identifying the ornaments through a window, but the learned judge was quite justified in drawing the attention of the jury to the fact that this sister herself did not identify all the four articles. Samiruddin claimed the two articles found in his house as belonging to his

1934

Kashimuddin v. Emperor.

Ghose J.

aunt and Asimuddin claimed the articles found in his house as belonging to his wife. But there is no evidence in support of this defence. The entire evidence was thus fairly placed before the jury and the learned judge stated quite correctly that, unless the accused could satisfactorily explain the possession of the articles, the jury would be entitled to infer that these two accused were either among the dacoits or had received the properties, knowing that they had been stolen in the course of the dacoity. The jury, believing the evidence, returned a verdict of guilty. In the circumstances, we see no reason to interfere with the conviction of the appellants Samiruddin and Asimuddin.

Then as to the appellants Satku and Ujir, the only evidence is that they were recognised at the time of the dacoity by Mobarak and his sister. For the present, we leave aside the confession of Kashimuddin. On this point, the learned judge, no doubt, drew the attention of the jury to the first information report, in which it was stated that Mobarak Ali had recognised one of the dacoits, but that he did not mention his name and stated that he would do so afterwards. But the learned judge did not properly draw the attention of the jury to the probabilities upon this point. The first information report further stated that, from the appearance of the dacoits and from their conversation, they seemed to belong to this part of the country, as if the inmates of the house were not very sure as to their identity. Then their evidence is to the effect that the dacoits wore *gâlpâttâ* and turbans and it was for the jury to consider whether, in these circumstances, as also, having regard to other circumstances, at the time of the dacoity, it was at all possible for the inmates to recognise the appellants correctly. In this state of the evidence, we do not think that the learned judge placed the matter properly before the jury and the omission to do so amounts to a misdirection. Therefore, the two appellants Satku and Ujir are entitled to acquittal. Then comes the case of Kashimuddin

and the only evidence against him is his retracted confession. On this point the learned judge spoke as follows :—

> There is also one point about the law relating to confessions, which I must place before you. In order to decide a question of law, *viz.*, the admissibility of the confession, it is necessary to decide a question of fact, *viz.*, whether the confession was voluntary or extorted. All questions of fact, which are necessary for the decision of a question of law, are for me to decide, and so it is for me to decide whether the confession in the present case is voluntary. I have decided that it was voluntary, that warning was duly given to the accused as required by law, that enough time was given to him to ensure that the confession was really voluntary and that he made it of his own accord without any inducement. You should take all these points as settled and then decide what value should be attached to the confession and whether the accused was telling the truth when he made it.

We consider that the learned judge was not happy in this part of his charge and that, in saying that he had decided that the confession was voluntary that the confessing accused had made it without any inducement and that the jury should take all these points as settled, he committed a serious misdirection, inasmuch as he withdrew from the jury an issue of fact relating to the truth of the confession. The duties of a judge and a jury are prescribed in sections 298 and 299 of the Code of Criminal Procedure. Briefly, the position is that all questions of fact are for the jury and all questions of law are for the judge. By clause (*a*) to sub-section (*1*) of section 298, the judge has to decide the admissibility of the evidence and, in order to enable him to do so, he has to decide the necessary questions of facts. This would appear from illustration (*a*) to section 298, which runs as follows :—

> It is proposed to prove a statement made by a person not being the witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.
>
> It is for the judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

As regards a confession, the question may arise as to whether it was voluntary and also whether it was true. Neither is a question of law, both are questions of fact. But the point that initially arises is whether the confession is admissible in law

1934

Kashimuddin
v.
Emperor.

Ghose J.

and, in order to decide that point, it is necessary to decide *primâ facie* whether the confession was voluntary. In other words to the extent of the admissibility of the confession, the judge has to decide whether the confession is voluntary. Now these two questions of fact, namely, whether the confession is voluntary and whether it is true are in a sense entirely separate from each other. A confession that is voluntary is not necessarily true and *vice versa.* But when we come to the question not of admissibility but of proof, that is to say, proof of the truth of the confession, it is not surprising to find, having regard to the course of human conduct, that the two questions are mixed up; the truth of the confession may to a certain extent be inferred from its voluntariness. Therefore, if the judge has to decide the question of voluntariness in its bearing on admissibility, there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession. Proof, according to the law of evidence, is a matter of reasonable belief amounting to moral certainty and the jury are supposed to be reasonable men and they are, therefore, expected to reason naturally. To ask the jury to accept the voluntariness of a statement as decided and then to consider its truth quite apart from the question of its voluntariness is to ask them to attain a mental detachment which is unpractical and perhaps impossible. Moreover, such a process of reasoning would be faulty and prejudicial to the accused. By way of illustration we may refer to certain common classes of cases, for instance, where the accused makes a confession, and, in the course of it, say "I was not going "to tell but the police compelled me", or where the evidence shows that the confession was made in the presence of a police officer. In such cases it is certainly the duty of the judge to withdraw the confession on the ground that it was not voluntarily made. But take another class of cases, also common, where the accused confesses *primâ facie* voluntarily and then, at the time of the trial, retracts and alleges

torture and tutoring and says "All that is false, I "know nothing. I was tutored by the police", and the police officer deposes and denies the alleged tutoring. In such a case the truth of the confession is mixed up with its voluntariness, and it would be quite correct for the judge to admit the confession for the consideration of the jury and leave it to the jury to decide whether the police officer should be believed or not.

It has been said that the study of the principles of evidence falls into two distinct parts. One is admissibility and the other is proof in the general sense. These matters have been the subject of consideration by text book writers and I may refer to Wigmore on Evidence, second edition, articles 12, 29, 487, 2550 and 261. The following passage may be quoted. After pointing out that so far as admissibility in law depends on some incidental question of fact it is for the judge to determine before he admits the evidence to the jury, the learned author says :—

> No doubt the judge, after admitting evidence, leaves to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration. But to hand the evidence to them, to be rejected or accepted according to some legal definition, and not according to its intrinsic value to their minds, is to commit a grave blunder.

Again,

> When a confession is ruled to be admissible, the same evidence and all other circumstances affecting the weight of the confession may be introduced for the jury's ultimate consideration.

The distinction between "admissibility" and "proof" is also brought out in "Wigmore's Principles "of Judicial Proof". There the learned author points out that :—

> The procedural rules for admissibility are merely a preliminary aid to the main activity, *viz.*, the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the counsel's duty is focussed.

See page 4, second edition. For a detailed analysis of the confessional psychology it may be

1934

Kashimuddin v. *Emperor.*

Ghose J.

interesting to refer to Chapter 23 of this book where, at page 506, the learned author remarks :—

A consequence affecting the valuation of testimony is that in an ordinary case a confession made voluntarily by a normal person shortly upon arrest is likely to be true.

It may be worthwhile referring to another text book of authority, namely, Taylor on Evidence, second edition, page 27—

In all these cases, however, after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty to consider all the circumstances of the case, including those already proved before the judge, and to give the evidence such credit only as, upon the whole, they may think it deserves. The judge merely decides whether there is, *primâ facie*, any reason for presenting it at all to the jury, and his decision on this point, if erroneous, may be reviewed at the trial.

Again at page 865, while dealing with the question of confession, the learned author remarks as follows :—

Indeed all reflecting men are now generally agreed that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience. Such confessions, therefore, so made by a prisoner to any person at any time, and in any place, are at common law receivable in evidence while the degree of credit due to them must be estimated by the jury according to the particular circumstances of the case.

It is needless to add that these remarks in the text books are fortified by reference to authorities.

Mr. Rahim for the Crown has drawn our attention to Taylor on Evidence, at page 25, and to certain English cases mentioned therein, namely, *Cleave* v. *Jones* (1) and *Bartlett* v. *Smith* (2). These cases, however, were decided on the question of admissibility. I have already stated, and this is also supported by the aforesaid references, that the decision as to the admissibility must be upon a *primâ facie* rule of evidence. I do not mean by this that if

(1) (1852) 7 Exch. 419; 155 E. R. 1013.

(2) (1842) 12 L. J. (N. S.), Pt. II (Exch.) 287.

a confession is once admitted and from subsequent evidence it transpires that the confession is defective according to law and, therefore, not admissible, then it is not open to the judge to withdraw the confession from the jury. It is so open and it would be his duty to withdraw it and I have no quarrel with the remarks of Guha and Nasim Ali J J. in *Nayeb Shahana* v. *Emperor* (1), where the learned Judges observe :—

> We are of opinion that before a judge places the confession of the accused before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding it from evidence.

But what I mean is that admissibility itself is a *primâ facie* consideration. It is only for the purpose of letting in evidence for the consideration of the jury, and when once it is let in then comes the question of proof. In the case of *Khiro Mandal* v. *Emperor* (2) the only evidence against the appellant was his own confession which was subsequently retracted. My learned brother, Mr. Justice Khundkar, who was then at the bar, appearing for the Crown, contended that the judge had to be satisfied with the voluntary character of the confession before admitting it in evidence, but that this would also possibly be a question for the jury to investigate into its truth, and he fortified this latter proposition by a reference to an unreported decision of Newbould and B. B. Ghose JJ. in *Abdul Sarkar* v. *Emperor* (3). With great respect I entirely agree with the proposition thus stated. But the decision in that case, to which I was a party, was on the question of admissibility alone, and so it did not deal with the other point whether the jury were entitled to consider the question of voluntariness in so far as it related to the proof of truth. On the other hand, in the case of the *Queen* v. *Shahabut Sheikh* (4) where the confessions

(1) (1934) I. L. R. 61 Calc. 399, 407.
(2) (1929) I. L. R. 57 Calc. 649.
(3) (1925) Cr. App. 629 of 1924, decided on 24th Feb.
(4) (1870) 13 W. R. (Cr.) 42.

1934

Kashimuddin
v.
Emperor.

Ghose J.

were only links in the chain of evidence Norman C. J. remarked as follows :—

If a prisoner has confessed before a magistrate the attention of the jury should be drawn to the question whether there was any reason to suppose that that confession was made under any undue influence ; and if there is no reason to suppose anything of the kind, the jury should be told so and advise that they may act upon it.

This proposition is considered more recently by Mukerji J. in *Abdul* v. *Emperor* (1). There he points out that a free and voluntary statement is some guarantee of its truth, and that where the consideration of the question as to whether a confession is voluntary or not is taken away entirely from the jury, it amounts to a serious omission sufficient to vitiate the verdict. This is a proposition with which I respectfully agree. In *Emperor* v. *Panchkowri Dutt* (2) the same learned Judge was dealing with the question of admissibility. In the present case, the learned judge was in error in entirely withdrawing from the jury the consideration of the question whether the confession of Kashimuddin was voluntary or not. Had the jury been directed to consider this question in its bearing on the truth of the confession they would have seen that the so-called corroboration was of no material value. If the confession was a tutored one, the sort of corroboration that was sought to be proved in the case was of such a nature as could also be tutored since it did not touch the identity of the criminal with reference to the crime.

Then there is another serious misdirection in the charge and that is that the learned judge drew the attention of the jury to the fact that in the retracted confession, the confessing accused had named the co-accused. In his summary of the evidence the learned judge treated this as evidence against each of the accused. No doubt, under section 30 of the Evidence Act, the confession of an accused person may be taken into consideration, but this is not tantamount to saying that such confession is to take the

(1) (1924) 85 Ind. Cas. 830. (2) (1924) I. L. R. 52 Calc. 67.

place of proof. On the other hand, it must be remembered that the confession of a co-accused is even worse in value than the sworn testimony of an accomplice and, if it is necessary that the latter testimony should be corroborated independently both as to the crime and as to the criminal, it is still more necessary that the confession of a co-accused should be so corroborated, and when that confession is retracted it has no value at all as against the co-accused. This is a proposition which has been laid down in more than one decision of this Court and it will be sufficient to refer to *Emperor* v. *Lalit Mohan Chuckerbutty* (1). The learned judge committed a serious error in not mentioning this to the jury. Therefore, the confession has to be left out of account and, as against the appellant Kashimuddin there is no other evidence, he is entitled to acquittal.

The result is that the appeal of Samiruddin and Asimuddin stands dismissed.

The appeals of the other three appellants are allowed.

In the case of each of them the conviction and the sentence are set aside and they are directed to be set at liberty.

KHUNDKAR J. I agree.

Appeal allowed in part.

A. C. R. C.

(1) (1911) I. L. R. 38 Calc. 559.