

APPELLATE CRIMINAL.

Before Derbyshire C. J., Costello and M. C. Ghose JJ.

BADAN ALI

v.

EMPEROR.*

1935

June, 21, 24, 25;
Aug. 28.

Confession—Functions of judge and jury when the voluntariness of a confession is challenged.

In a case, where the voluntariness of a confession which is sought to be put in evidence is called in question, it is the function of the Court to determine, as a condition precedent to its admission, whether it is voluntarily made or not. Having been declared competent and admissible, it is before the jury for consideration. The jury have no authority to reject it as incompetent but they are the sole judges of the truth and weight to be given to a confession. In weighing a confession the jury must take into consideration all the circumstances surrounding it and under which it was made, including those under which the Court declared, as a matter of law, that it was voluntary. The jury are within their province to hold that a confession is untrue on the ground that it was not voluntarily made.

A direction to the jury to the effect that it was no part of their duty to decide whether a confession was made voluntarily or, on the contrary, by reason of any inducement, threat, promise or police torture, was a misdirection.

Burton v. The State (1) referred to.

CRIMINAL APPEAL.

These were appeals preferred by thirteen accused persons, who were convicted and sentenced by the Sessions Judge of Chittagong on charges under ss. 305 and 120B read with s. 395 of the Indian Penal Code. The material portion of the charge to the jury, for the purpose of this decision, is set out in the judgment of his Lordship the Chief Justice.

*Criminal Appeals Nos. 919 and 920 of 1934, against the order of E. S. Simpson, Additional Sessions Judge of Chittagong, dated July 16, 1934.

1935
Badan Ali
 v.
Emperor.

Hamidul Huq Chaudhuri and *Hari Deb Chatterji*
 for the appellant in Criminal Appeal No. 919.

Debendra Narayan Bhattacharjya and *Praphulla Chandra Guha* for the Crown.

DERBYSHIRE C. J. In this case a number of persons convicted of taking part in a dacoity and conspiring to take part in the dacoity were convicted under s. 395 of the Indian Penal Code and s. 395 read with s. 120B of the same Code. They were convicted before the Sessions Judge and a jury at Chittagong. In all, twenty persons were charged and a number of them, seventeen, were convicted. Four of them have not appealed against their convictions and sentences and thirteen of them have appealed. Those who have appealed are as follows:—(1) Bakshu, (2) Abdul Sobhan, (3) Ijjat Ali, (4) Makhalasar Rahaman *alias* Bochaiya, (5) Ansur Ali, (6) Ahmadar Rahaman, (7) Sona Miyâ, (8) Manirajjaman, (9) Badan Ali, (10) Abdul Latif *Chaukidâr*, (11) Abdul Sobhan *Serang*, (12) Abdul Kader *alias* Rabijarbap and (13) Noya Miyâ.

Badan Ali was represented before us by Mr. Hamidul Huq Chaudhuri. The rest were unrepresented. The Crown was represented by Mr. Bhattacharjya.

The ground of the appeal as put forward by Mr. Huq is that the charge to the jury by the Sessions Judge was not a proper charge in law. The passage objected to reads as follows:—

I have told you, gentlemen, that we have also on the record, the confession of one of the accused persons, that is, of Bakshu Miyâ. At this stage I am concerned only with the rules of law relating to the manner in which such a confessional statement should be used. There is, firstly, its use as against the maker, and, secondly, as against his co-accused. In so far as you are concerned, the question which calls for attention is whether the confession is a true statement of facts and what value can be attached to it as a piece of evidence. It is no part of your duty to decide whether the confession was made voluntarily or, on the contrary, by reason of any inducement, threat, promise or police torture. It is for me to decide whether the confession was made voluntarily and once I have admitted it into evidence no person here can urge before you that it was not voluntarily made. As I have said, it is for you to examine the confession closely and carefully and to decide whether truth is to be found in it. In this particular instance, Bakshu has

retracted; he has pleaded not guilty. Furthermore, in his statement before this Court, he has set up an entirely different story. When such is the case, it is a rule of practice not to rely upon such a confession without corroboration and that corroboration must be in respect of material particulars. I have already addressed you when dealing with the evidence of the approver, as to the corroboration necessary. By a substantive rule of evidence, when more persons than one are tried jointly for the same offence and a confession made by one of them affecting himself and his co-accused is proved, you may take into consideration that confession not only as against the maker but as against those implicated by him. In this instance also, gentlemen, around the substantive rule have grown up rules of caution and prudence. I have told you that even as against the maker, a retracted confession requires corroboration. If you seek to use a retracted confession as against persons being tried jointly with the confessing accused the fullest possible corroboration as to material particulars is necessary. You may take it that such a confession carries practically no weight. Once again I refer you to that portion of my address relating to the evidence of an approver and you will remember what I stated as to the nature of corroboration.

The words objected to are:—

It is no part of your duty to decide whether the confession was made voluntarily or, on the contrary, by reason of any inducement, threat, promise or police torture. It is for me to decide whether the confession was made voluntarily and once I have admitted it into evidence no person here can urge before you that it was not voluntarily made.

In my view those words do not correctly set out the position of the law with regard to the functions of the judge and of the jury in dealing with confessions, which, it is alleged, were not voluntarily obtained. What the legal position is, I will deal with in a moment. We have, however, been through the evidence against each of the appellants in this case and there is as regards each of the appellants such evidence independent of this confession and quite apart from it as would entitle a jury to come to the conclusion that each of them was guilty of the offences of which he has been convicted. More than that, there is evidence independently of this confession which is called in question, on which the jury must have come to the conclusion, in my view, that each of the appellants was guilty of the offences of which he was charged. We could, therefore, have dismissed this appeal on that ground, but we were asked by the learned advocate on each side to deal with the question of the functions of the judge and the jury in cases where the voluntariness of confession is called in question. As I have said previously

1935

Badan Ali

v.

*Emperor.**Derbyshire C. J.*

1935
 ———
Badan Ali
 v.
Emperor.
 ———
Derbyshire C. J.

I am of opinion that the charge given by the learned Judge in the words that I have quoted is not the correct one. In my view the correct position of the law as regards confession whose voluntariness is challenged, with regard to the functions of the judge and the jury respectively, is set out in a judgment in an American case delivered by Mr. Justice Coleman in the case of *Burton v. The State* (1). There is no English case which deals with such a question. This case, however, in my view, states the position with such accuracy that I do not think that we could do better than cite it as an authority in a case of this kind. It reads as follows:—

Whether voluntarily made or not, we hold, 's a question of law, to be determined by the Court from the facts, as a condition precedent to their admission. Having been declared competent and admissible, they are before the jury for consideration. The jury have no authority to reject them as incompetent. But the jury are the sole judges of the truth and weight to be given to confessions, as they are of any other fact. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them and under which they were made, including those under which the Court declared, as matter of law, they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confessions, as being incompetent, there is no power in the Court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue, or not entitled to any weight, upon the grounds that they were not voluntarily made. The Court passes upon (that is considers) the facts merely for the purpose of determining their competency and admissibility. The jury passes upon (that is considers) the same facts and in connection with other facts, if there are other facts in determining whether the confessions are true and entitle to any, and how much, weight. The Court and jury each have a well-defined and separate province.

In my view that is a correct statement of the law with regard to the functions of the judge and the jury in cases where the voluntariness of a confession which is sought to be put in evidence is called in question. As I have said in this case the evidence is such that the jury, in any event, must have come to the same conclusion that they did.

Therefore the appeals are dismissed.

(1) 107 Ala 108.

COSTELLO J. I agree.

1935

Badan Ali
v.
Emperor.

M. C. GHOSE J. In this case the learned advocate for the appellant is in my opinion right when he takes objection to this sentence in the charge, namely, "it is no part of your duty to decide whether "the confession was made voluntarily or, by reason of "any inducement, threat, promise or police torture". The learned Session Judge, in directing the jury not to consider whether the confession was made voluntarily or not, committed an error of law. It is the function of the judge to decide whether there is *prima facie* evidence for admitting the confession. When the confession has been admitted by the judge, it is the function of the jury to consider its credibility and weight and in considering the credibility and weight the jury are at liberty to consider all the circumstances of the case including those circumstances already proved before the judge and to give the evidence such credibility as they think it deserves. See Taylor on Evidence, s. 24, p. 27.

I agree with the learned Chief Justice that on the facts and circumstances of this case, although the point of law is decided in favour of the appellants, the convictions and sentences must stand.

Appeals dismissed

A. C. R. C.