JURY REFERENCE.

Before Lort-Williams and Jack JJ.

EMPEROR

1935

July 24.

v.

TARAKNATH BAIDYA.*

User—Cross-examination by accused with reference to a document, if user—Written statement of accused, if part of the record—Indian Penal Code (Act XLV of 1860), s. 471.

If a document is produced and put in evidence by the prosecution, and the pleader of the accused cross-examines the witness upon his evidence, including the evidence which he has given about the written document, such cross-examination cannot be held to be user within the meaning of section 471 of the Indian Penal Code.

Mere reference in the written statement of an accused to a document which is produced and put in evidence by the prosecution cannot be held to be user by the accused within the meaning of the section.

There is no provision in the Code of Criminal Procedure for the alleged practice allowing an accused person in a sessions trial to file a written statement. It is no part of the record of the trial and is certainly not evidence.

CRIMINAL REFERENCE.

The material facts and arguments appear from the judgment.

Deeneshchandra Ray and *Biswanath Naskar* for the accused.

The Officiating Deputy Legal Remembrancer, Debendranarayan Bhattacharjya, for the Crown.

LORT-WILLIAMS J. This is a Reference under section 307 of the Code of Criminal Procedure.

The accused Tarak was charged under section 471 and the other accused under section 467 read with

*Jury Reference, No. 15 of 1935, made by B. P. Basu, Assistant Sessions Judge of *24-Parganâs*, dated Feb. 25, 1935.

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section 109 of the Indian Penal Code. The case was heard by a jury of 5 persons who brought in a unanimous verdict of not guilty on all the charges against all the accused. The evidence given was circumstantial. The learned Assistant Sessions Judge considered it so convincing and clear that he regarded it as essential for the ends of justice to refer the case to this Court on the ground that the verdict of the jury was wrong and perverse and against the weight of evidence.

The case for the prosecution was that Akshay and Gobardhan held a plot of land under one Hrishikesh. Hrishikesh sold his interest to the accused Tarak and to one Surendra in equal moieties. Surendra bought his 8 annas share in the name of his minor son Krishna. Akshay and Gobardhan then took a lease of the land for five years from Tarak and Krishna and executed a registered *kabuliyat*. When this lease expired, Tarak proposed a fresh *kabuliyat* to which Akshay and Gobardhan agreed and they all went to the Sub-Registry Office at Alipore on the 11th April, 1932. The *kabuliyat* was executed, but when they were about to register it, Akshay and Gobardhan learnt from Tarak that it was in his favour alone for the whole of the land. On hearing this, Akshay and Gobardhan refused to have the *kabuliyat* registered. They continued in possession of the land and executed a *kabuliyat* in favour of Krishna, the owner of the other moiety on the 2nd July, 1932. In December, 1932, there was a riot, which arose out of the cutting of paddy on the land, and Gobardhan was murdered. Tarak and others were committed to Sessions on a charge of rioting and murder and they were tried in May sessions, 1933.

The learned judge then says in his letter of Reference that Tarak propounded an *istafânâmâ* purporting to have been executed by Akshay and Gobardhan in 1932 and used it as a genuine document in support of his case.

All the accused were acquitted. Subsequently, an enquiry was held under section 476 of the Code of Criminal Procedure and a complaint was preferred against the present accused under sections 471 and 467 of the Indian Penal Code.

According to the evidence in the present case, the signatures of Akshay and Gobardhan on the *istafânâmâ* were not genuine. The learned judge remarks that the handwriting expert called by the prosecution was comparatively a novice and, therefore, he left out of consideration the opinion given by him and his evidence and directed the jury accordingly. But he considered that the guilt of the accused was established, because he thought that the evidence showed that Tarak had begun to devise means for ousting Akshay and Gobardhan from the lands. That was the genesis of the *istafânâmâ*. This was shown by the *kabuliyat* (Exhibit 2) which Tarak had tried to persuade Akshay and Gobardhan to register.

The defence was that Exhibit 2 was fabricated by Akshay and Gobardhan, in order to attempt to nullify the *istafânâmâ*. But the judge did not accept this defence, because of *kabuliyat*, Exhibit 3, which was executed in favour of Krishna. Further, he came to the conclusion that the execution of the *kabuliyat*, Exhibit 3, showed conclusively that the story of surrender was a myth and that Akshay and Gobardhan continued to be in possession of the lands. Further, certain letters were put in evidence showing that Tarak had tried to get the mother of Krishna to join with him in evicting Akshay and Gobardhan.

The learned judge seems to have been impressed very much by the fact that Akshay and Gobardhan continued to be in possession of the lands and considers that evidence conclusive. I find it difficult to understand the learned judge's reasoning. Obviously the evidence cannot be conclusive on this point. It

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may well be that Akshay and Gobardhan continued to be in possession of the lands without any legal right. The mere fact that they had, as alleged, executed the *istafânâmâ* would not necessarily show that they could not subsequently have continued in possession of the lands. It follows, in my opinion, that the facts, which I have stated and which form the basis of the letter of Reference of the learned judge, are not so conclusive that the jury's refusal to accept the story of the prosecution that a forged document was used by the accused in his trial was necessarily perverse and against the weight of evidence. The jury gave the accused the benefit of the doubt and, in my opinion, it cannot be said that their verdict was so unreasonable that it ought to be set aside. After all the jury were the judges of fact in this case. But beyond these considerations, I find that the only evidence of user within the meaning of section 471 of the Indian Penal Code was that at the sessions trial Tarak put in a written statement in his defence in which he referred to certain documents which had been filed and also referred to the *istafânâmâ* in the following words :—

> The witness Akshay and the deceased Gobardhan brought me the *istafânâmâ* and gave up the disputed land.

The *istafânâmâ* was neither filed nor produced nor put in evidence by the accused or on his behalf. It appears that it was produced and put in evidence by one of the witnesses for the prosecution and marked as Exhibit 1. In cross-examination, the *istafânâmâ* was referred to by the pleader appearing on behalf of the accused. In my opinion, this cannot be held to be user within the meaning of section 471 of the Indian Penal Code. In the first place, there is no authority for the alleged practice allowing an accused person in a sessions trial to put in a written statement. There is no provision in the Code of Criminal Procedure for any such practice and in considering this case, we must regard the written statement as something which is no part of the record of the trial of the

accused charged with rioting and murder. But assuming for the purpose of argument that the written statement can be regarded as part of the trial and of the record, in that case it certainly is not evidence, and the mere reference in the written statement to a document which is produced and put in evidence by the prosecution cannot be held to be user by the accused within the meaning of the section. Further, I am of opinion that if a document is produced and put in evidence by the prosecution, and the pleader of the accused cross-examines the witness upon his evidence, including the evidence which he has given about the written document, that cross-examination cannot be held to be user within the meaning of section 471. To hold that such action on the part of a pleader for the accused amounts to user within the meaning of the section would most seriously interfere with the right of the accused and his pleader in putting forward the defence of the accused. For example, the accused cannot be charged with any offence arising out of any verbal statement that he may make from the dock or any answer which he may give in reply to the questions put by the learned judge. Such a statement may be full of inaccuracies and falsehoods. But it is clear that he cannot be charged with perjury in respect of it, because in the first place, the statement is not made on oath or affirmation. Similarly, it would lead to grave interference with the freedom and privileges of the accused, if, because his pleader has cross-examined upon some document produced and put in evidence by the prosecution, the accused by such action makes himself liable to be prosecuted for using a forged document under section 471.

For these reasons, I am of opinion that the Reference of the learned judge must be rejected and the accused are acquitted.

The accused, who are on bail, will be discharged from their bail bonds.

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JACK J. I agree that the use, which was made of the document, cannot be said to bring the accused under the provisions of section 471, inasmuch as the written statement is not, strictly speaking, a part of the record and the reference to the document in cross-examination, the document having been put in by the prosecution, also does not bring the offence within the purview of section 471 of the Indian Penal Code.

Reference rejected; accused acquitted.

A. C. R. C.