APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

1892. March 30.

QUEEN-EMPRESS

v.

RAMA TEVAN AND OTHERS.*

Criminal Procedure Code, ss. 193, 287, 288, 339, 349—*Conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused.*

Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements; afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate, but not their confessional statements, to be read to the jury:

Held, that the trial of the two persons, who had not been committed to the Sessions Court, was *ultra vires*.

Per curiam: the Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused.

It is unfair to put an approver, whose conditional pardon has been cancelled on trial, along with other prisoners, in the course of whose trial such approver has given evidence.

APPEAL against a conviction and sentence by T. Weir, Sessions Judge of Madura, in calendar case No. 116 of 1891.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The appellants were not represented.

Mr. *Wedderburn* for the Crown.

JUDGMENT.—The procedure of the Sessions Judge in the disposal of this case was extremely irregular. Certain persons were charged with having committed dacoity. During the pendency of the case before the Magistrate, two of these persons, viz., M. Peryakaruppan and Ocha Tevan, made confessional statements on the 3rd and 27th October. On the 19th November the District Magistrate tendered a conditional pardon to these two persons,

* Criminal Appeal No. 31 of 1892.

who were thereupon examined by the Magistrate as witnesses on the 22nd November. They were not committed to the Sessions Court, but were sent up as witnesses. At the trial in the Sessions Court they were examined on behalf of the prosecution as witnesses 1 and 2, and denied that they had been taken as approvers. This statement was undoubtedly false. The Sessions Judge thereupon placed them in the dock along with the other accused and called upon them to plead. The trial then proceeded. After the evidence for the prosecution and the statements of the prisoners 1–21 had been recorded, the Public Prosecutor proposed to put in the statements made by Peryakaruppan and Ocha Tevan before the Magistrate on the 3rd and 27th October. The Sessions Judge refused to admit these statements on the record, but admitted and had read out to the jury the depositions given by these persons as approvers. They are marked Y and Z.

The Government Pleader admits that the Sessions Judge has no power to try these two persons, inasmuch as they had not been committed to the Court by any Magistrate competent to commit (section 193). He also points out that the course which the Sessions Judge should have adopted was to have treated the evidence given by these two persons before the committing Magistrate as evidence in the case (section 288), and have allowed the accused 1–21 to cross examine them.

We are of opinion that this is so and that the trial of these two persons, who had not been duly committed to the Court was altogether *ultra vires*.

The Sessions Judge also committed another irregularity in refusing, contrary to the provisions of section 287, to place on the record the confessional statements of persons whom he treated as accused. It is not optional with the prosecution to put in such statements.

We do not understand the remark of the Sessions Judge in paragraph 8 of his charge to the jury that these two persons (Peryakaruppan and Ocha Tevan) have fallen back into their original position of accused persons, as they, on the face of the record, did not fulfil the condition on which they were pardoned. The Sessions Judge seems to have taken an erroneous view of the case and the law.

By section 349, Act X of 1872, a Sessions Judge was empowered to commit or direct the commitment of any person who,

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having accepted an offer of pardon, did not conform to the conditions under which the pardon was tendered, but the present Code contains no such provision, and in section 339 it is merely laid down that such a person may be tried for the offence in respect of which the pardon was tendered; but section 193 provides that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered.

It is impossible to say that the jury were not influenced by the inclusion of these two persons in the trial and by the admission of their depositions on the record. The other twenty-one accused were not allowed the opportunity of cross-examining them as to the truth or otherwise of their depositions. This was an irregularity which cannot but have prejudiced the accused persons.

Even supposing that the Sessions Judge had had power to try the two approvers, we concur with the learned Judges of Calcutta Court—*The Queen* v. *Petumber Dhoobee*(1) and *The Queen* v. *Bipro Dass*(2) that it is unfair to put an approver, whose conditional pardon has been cancelled, on trial along with the other prisoners, in the course of whose trial such approver has given evidence, and that the proper course is to defer taking action against the approver until the conclusion of the trial then proceeding.

We observe that the jury were not unanimous, the foreman finding only prisoners 1 and 2 and the approvers guilty.

We consider that there has been such misdirection as led to a serious miscarriage of justice, and we, therefore, set aside the conviction and sentence of all the accused 1–23, and direct the retrial by the Sessions Judge of prisoners 1–21.

Ordered accordingly.

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(1) 14 W.R., Cr. Rul., 10. (2) 19 W.R., Cr. Rul., 43.