"The other Judges think that the meaning of the phrase 'cotem-"poraneously with and at the same time' is merely that the "agreement alleged in the plea was made at the same time with "the promissory note, not that it was part and parcel of the same "instrument and to be treated and construed as if it was written "on the same paper. We consider it, therefore, to be a collateral "undertaking, perfectly consistent with the existence of a note "containing an absolute promise to pay; and such a collateral "agreement is no answer to the declaration; because it is an "agreement not to sue for a limited time only and a covenant not "to sue for a limited time is no answer to an action." The House of Lords agreed with the view taken by the majority of the Judges as expounded by the learned Baron, and held that the plea set up by the maker was bad in substance.

I am, therefore, of opinion that the ground of defence urged by the defendant is unsustainable, and I refuse to grant leave to defend. The application is dismissed with costs. There will be a decree for the plaintiffs as prayed.

Wilson & King—Attorneys for plaintiffs.

Ramanuja Chariar—Attorney for defendant.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VIRASAMI.*

1896. March 26, 27, 31. August 3.

Witness—Committed for trial for offence under s. 193, *Penal Code—Criminal Procedure Code, ss.* 282, 428, 477, 526-A—*Incompetence of juror—New trial—Application for transfer.*

On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence and was committed under section 477, Criminal Procedure Code, for trial on a charge under section 193, Penal Code. After such committal it was discovered that one of the jurors empannelled in the dacoity case was deaf and partly blind; and thereupon under section 282, Criminal Procedure Code, the case was tried *de novo* before a competent jury.

* Criminal Appeal No. 704 of 1895.

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The trial of the charge under section 193, Penal Code, was fixed for the November sessions, but on the 17th October 1895 on prisoner's application the trial was adjourned to 2nd December 1895. On 20th November the prisoner's vakil put in a petition, alleging that he had moved the High Court for a transfer of the case. On this petition coming on for disposal, the prisoner's vakil moved *orally* for an adjournment under section 526-A, Criminal Procedure Code, which was refused. On the 30th November the prisoner's vakil put in a petition in which he prayed for an adjournment under section 526-A. This petition was refused and the trial began on 2nd December and judgment was written and pronounced on 5th December. In the meantime application had been made to the High Court for a transfer and that petition was disposed of on 4th December granting the transfer prayed, the High Court apparently being not aware that the trial was at that time proceeding before the Sessions Court. On 5th December after the trial in the Sessions Court was concluded and before judgment was delivered, a fresh petition was presented for an adjournment on the ground that a telegram had been received from the High Court transferring the case, but the Sessions Judge refused to act upon it in the absence of orders from the High Court and delivered judgment convicting the prisoner. During the trial before the Sessions Court the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, but the Sessions Judge considering the application was made merely for purposes of delay and to defeat the ends of justice and that their evidence would not be material, refused to adjourn for their evidence to be recorded:

Held, first that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth imposed by section 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors.

Secondly, that section 526-A, Criminal Procedure Code, is imperative, but that the object of sections 344 and 526 when read together is merely to give a party reasonable time to move the High Court and obtain its orders and that in the present case there was sufficient time for such application to have been made, if due diligence had been observed.

Thirdly, that the order for transfer made on 4th December, which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings; and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer.

Fourthly, that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of the two absent witnesses that their evidence was material and must be recorded and certified to the High Court under section 428, Criminal Procedure Code.

APPEAL against conviction and sentence passed on prisoner by F. H. Hamnett, Sessions Judge of Kistna, in sessions case No. 35 of 1895.

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

Sriramulu Sastri for accused.

The Public Prosecutor (Mr. *Powell*) for the Crown.

ORDER.—The accused, G. Virasami, is a police constable. During the trial of a dacoity case, sessions case No. 26 of 1895 of Kistna, he was examined as a witness and made statements which the Sessions Judge considered to be false. The Sessions Judge, therefore, immediately after the evidence was given, committed the accused for trial before his own Court under section 477, Criminal Procedure Code. The trial of sessions case No. 26 then proceeded, and after the Judge had summed up to the jury, but before they gave their verdict, a juror stated that he was deaf and partly blind. The Judge then chose a new jury, and commenced the trial of the dacoits *de novo* under section 282, Criminal Procedure Code, and they were eventually convicted. The present accused was afterwards tried in due course and convicted of an offence punishable under section 193, Indian Penal Code, and was sentenced to two years' rigorous imprisonment.

Against this conviction he now appeals, both on the merits, and on several preliminary grounds.

The first ground is that, as the trial of sessions case No. 26 had to be commenced *de novo*, it must be regarded as null and void for all purposes, and any statement made therein by a witness, cannot be the subject of offence under sections 191 or 193, Indian Penal Code. We cannot admit this contention. The accused was legally affirmed, and was bound under section 14 of the Indian Oaths Act X of 1873 to speak the truth. The Sessions Judge was a Court, and had jurisdiction to try the case in the course of which the accused gave the evidence that is said to be false. The fact that one of the jurors was afterwards found to be deaf, and, therefore, incapable of doing his duty as a juror, necessitated the examination of the witnesses *de novo* before a competent jury. This was in fairness to the persons then accused, but it did not and could not, in any degree, diminish the obligation which lay on the present accused, as a witness in the case, to speak the truth. Can it be contended that if, owing to the death of a juror during the trial, the witnesses had to be examined *de novo*, their prior statements, if false, could not be made the subject of a prosecution for giving false evidence? Again, if, in the cases under consideration, a witness, having been duly examined, should die in the interval between his examination and the retrial necessitated by the death

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or incapacity of a juror, can it be contended that his evidence could not be used in the retrial under section 33 of the Indian Evidence Act? We apprehend that these questions must be answered in the negative. It follows, we think, that there was nothing in the retrial of sessions case No. 26 to absolve the present accused from the obligation under which he lay to speak the truth when examined as a witness in the first trial.

The next preliminary objection is that when the accused made an application under section 526-A, Criminal Procedure Code, on the 30th November 1895 for the adjournment of the case in order that an application might be made to the High Court to transfer it, the Sessions Judge illegally refused any adjournment, though he was absolutely bound by law to grant an adjournment. In support of this view, attention is drawn to the words of the section and to the decision of the Calcutta High Court in *Queen-Empress* v. *Gayitri Prosunno Ghosal*(1). Under this section, which was added to the law by Act III of 1884, the complainant or the accused has the right, before the commencement of the hearing, to notify to the Court his intention to make an application to the High Court for transfer of the case; and, if he does so, the section goes on to provide "the Court shall exercise the powers of postponement or adjournment given by section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon before the accused is called on for his defence." These words the Calcutta High Court held to be obligatory, and, in the case before it, it held that the Magistrate's refusal to grant the adjournment asked for was illegal, and it consequently set aside all the proceedings which followed that illegal refusal. We are asked to follow that decision, and to set aside the present trial in consequence of the Sessions Judge's refusal to grant the adjournment asked for on the 30th November. The trial of the case was fixed for the 2nd December, and if the application of the 30th November was the first application made under section 526-A, we think that the Sessions Judge would have been bound to have granted an adjournment, since it would not have been possible to have made an application to the High Court and obtained its order, in the interval between the 30th November and the 2nd December.

(1) I.L.R., 15 Calc., 455.

We find, however, that on the 20th November the accused put in a petition stating that he had applied to the High Court for a transfer of the case, and a verbal application was then made for an adjournment of the trial on that account, but was refused on the ground that the case had already been adjourned, on the accused's application, from the November sessions to the December sessions, and that a further adjournment was unnecessary. The contention that is pressed upon us by the accused's vakil is that the Sessions Judge had no discretion in the matter, and that the words of the section "shall exercise the powers of postponement" simply mean "shall postpone" and rendered some postponement, were it only for a day, absolutely necessary, in order to comply with the provisions of the section; and this, whether, when the application was made, there was, or was not, time enough, before the trial, to make the application to the High Court and obtain its orders. We cannot admit this interpretation of the section, nor do we think that the ruling of the Calcutta High Court can be taken as necessarily sanctioning such an interpretation. No doubt the words "shall exercise," &c., are obligatory, but the obligation is not, necessarily and under all circumstances, to grant a postponement, but only to give the party a reasonable time for obtaining the orders of the High Court. The postponement is no part of the essence of the obligation. By itself a postponement might be either useless, if it were for too short a time, or superfluous, if there was sufficient time without any postponement. The essence of the obligation is that the party should have a reasonable time to move the High Court and obtain its orders. If he has such reasonable time when the application is made, there is no obligation to grant any further time. We think that this is clear not only from a common sense appreciation of the object which the Legislature had in view, but also from a consideration of the language of the section and the reference to section 344. This section gives the Court power to postpone a trial, with certain formalities, if, for certain reasons, "it becomes necessary or advisable" to do so. Thus the necessity, or at least the advisability, of granting a postponement, is, under section 344, a condition precedent to the existence of the power of postponement. When, therefore, section 526-A says that, under certain circumstances, the Court shall exercise the powers of postponement given by section 344, it carries with it the limitation contained in that

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section to cases in which it is necessary, or at least advisable, to grant the postponement, in order to attain the object which section 526-A has in view, viz., to obtain the orders of the High Court on the application for transfer. In the Calcutta case the application for transfer was made on the 19th November, and the case was heard, and judgment given on the 21st idem. Evidently in that case the interval was insufficient to move the High Court and obtain its orders, and the Magistrate, in refusing the adjournment, neglected the essential obligation laid on him by the section. In the present case, if the application of the 30th November were the first application, we should hold that the Sessions Judge was legally bound to have granted an adjournment, inasmuch as the interval between that date and the 2nd December (the date fixed for the trial) was insufficient to admit of an application to the High Court. But as a fact, the application for postponement under section 526-A was first made on the 20th November, and the interval between that and the 2nd December was, in our opinion, a time reasonably sufficient for the accused, with due diligence, to have moved the High Court for a transfer, and to have obtained its orders thereon. The Sessions Judge was, therefore, justified in refusing an adjournment on the application of the 20th November, and nothing occurred subsequently to render it necessary for him to grant on the 30th the application which he refused on the 20th, for we must hold that the accused's act in making his first application to the High Court with an insufficient affidavit was want of diligence on his part. The result is that, under the circumstances, the refusal of the Sessions Judge to grant an adjournment was not illegal, and the second preliminary objection fails.

A third preliminary objection is that the Sessions Judge, having, before he pronounced judgment, learned that the High Court had transferred the case, ought to have adjourned the case, instead of pronouncing judgment. This objection is untenable. The trial began on the 2nd December, and the judgment was written and pronounced on the 5th December. The order of the High Court was made on the 4th December in ignorance, apparently, that the trial had commenced two days previously, but the order did not reach the Sessions Judge until after the judgment was pronounced. We cannot say that he was wrong in refusing to adjourn the case, at so late a stage, on the strength of a

telegram said to have been received by the accused's vakil to the effect that the High Court had passed an order to transfer the case.

The fourth preliminary objection is that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of two absent witnesses. One of these witnesses was proved to be too ill to travel, and the other was not served with a summons. The Sessions Judge held that the witnesses were "persons of very ordinary status, whose evidence would in no case carry much weight," and added "The accused wishes to call them to speak to the same facts as other witnesses of just as much respectability whom I have discredited. I rule that the witnesses are not material witnesses." For this reason, and because he thought that the application was made "to delay the case and defeat the ends of justice," the Sessions Judge refused the adjournment. We cannot agree with the Sessions Judge that the witnesses were not material witnesses. From the accused's statement on the 3rd December 1895 it appears that one of the witnesses, Subbarayadu, was to prove that Appi Reddi took food with him at Prattipadu on the night of the 5th June, and the other witness, Kotayya, was to prove that he saw Appi Reddi at the police station and at the search of Pichanna's house on that day. If those statements are true, the whole case against the accused must fail, for the whole question at issue is whether Appi Reddi was, or was not, taken to Prattipadu on the 5th June. The matters as to which the witnesses were to speak were, therefore, the very matters on which the guilt or innocence of the accused depended, and were obviously material. It was not open to the Sessions Judge to decide on the credit to be attached to their evidence before he had an opportunity of hearing it. The Sessions Judge, therefore, exceeded the discretion given to him by section 216, Criminal Procedure Code, and it is obvious that the accused has been prejudiced in his defence by the Sessions Judge's refusal to obtain the evidence of these witnesses. We do not, however, think it necessary on this account to set the trial aside; but we resolve under section 428 to direct the Sessions Judge to now take the evidence of these two witnesses and certify the same to this Court. We also resolve to direct the Sessions Judge to take the evidence of the station-house officer of Prattipadu, as he, of all others, must be in a position to say with certainty whether Appi Reddi was or was not kept in his station on the 5th June, as

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alleged by the accused. The fact that this witness was absent from the district is no sufficient reason for neglecting to obtain his evidence. As a public servant he might have been departmentally required to return to the jurisdiction of the Court, or a commission under section 503, Criminal Procedure Code, might have been issued for his examination.

It is not clear whether the evidence expected of the police writer of Kakiman referred to in paragraph 10 of the judgment is relevant. If the Judge finds that it is so, his evidence should also be taken. The evidence now called for may be taken by the Judge himself, or, if there is sufficient reason, on commission under section 503.

It must be certified to this Court within three weeks from this date.

This case coming on for re-hearing this day after the receipt of the fresh evidence called for in the order of this Court, dated the 31st March 1896, the Court delivered the following

JUDGMENT.—The further evidence now recorded makes it certain that the finding of the Sessions Judge that Appi Reddi was never taken to Prattipadu is correct. It follows that the three statements specified in the charge are false and that the appellant was rightly convicted. We agree with the Sessions Judge that a police officer who gives false evidence in a dacoity case deserves exemplary punishment. We confirm the conviction and sentence and dismiss the appeal.

Ordered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896. January 15, 17.

NARANAPPA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

SAMACHARLU (PLAINTIFF), RESPONDENT.*

Suit to set aside a sale effected by a mortgagee prior to Transfer of Property Act—Act IV of 1882, ss. 2, 99.

In a suit brought to set aside a sale effected by a mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force:

* Second Appeal No. 112 of 1895.