APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

RAMAN AND OTHERS.*

1897. July 14.

Confessional statements of accused—Subsequent retractation—Criminal Procedure Code, s. 103—Search by Police of stolen property—Charge to Jury.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true.

Criminal Procedure Code, section 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search.

If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official.

It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examin him on the matter and taking evidence as to whether or not his body was examined, before he began the search.

APPEAL on behalf of Government under section 417 of the Criminal Procedure Code against the acquittal of six persons, who were tried on the charge of dacoity by H. H. O'Farrell, Sessions Judge of South Malabar, and the Jury in Calendar Case No. 40 of 1896.

Evidence was given against all the prisoners to the effect that parts of the property stolen had been found in the possession of each of the prisoners. The first and second prisoners had made and retracted confessional statements, as to which the Judge's charge is quoted in full in the judgment of the High Court. As to the discovery of the property he said *inter alia*:—

"I now go to the discovery of the property. It is certain that "a good deal of property was lost that night, and I see no reason to

* Criminal Appeal No. 169 of 1897.

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"doubt that a list was drawn up next morning embodying the de-
"scription of the property. That fact is spoken to by the Nambudri
"and also by the adigari who went there next morning. There is
"some confusion as to which was the original list, whether the one
"which the adigari now produces or the one that is marked as A.
"The vakil who represents the first and second accused seems to
"suggest that neither of them is the original and there was another
"original which has been suppressed. I do not quite see the point
"of his suggestion, because, even supposing that there was an
"other original besides these two lists A and A_1, there appears to
"be no doubt, that these lists were drawn up long before the
"prisoners were arrested. This offence took place on the 8th of
"March, and the first, second and third prisoners were not arrested
"until 4th June and others later. The accused deny entirely that
"these properties were discovered in their houses or that they
"gave them up in any way. With regard to the first and second
"accused it is said that they gave up two lots of properties which
"you see before you. For this you have the evidence of the Head
"Constable and of an adigari. I must remark with regard to
"many of these searches (if they are to be considered as searches)
"that they do not seem to have been properly conducted at all.
"I shall deal more particularly with that point when I deal with
"the alleged finding of the property in the possession of fourth,
"fifth and sixth accused. I will here tell you that the law requires
"at least two respectable inhabitants of the locality to be witnesses
"of the search. In this case it seems to me very doubtful if any
"of the persons who are named as witnesses are really inhabit-
"ants of the locality. These witnesses should have been selected,
"as it were, perfectly at random, so that there may be no favouritism
"or humbug in the search, and there will be every chance of the
"search being fairly conducted. If, however, the Head Constable or
"the Inspector is permitted to select any persons that he chooses to
"be witnesses for the search, then the whole search becomes a farce.
"There is no certainty of its being properly conducted. It is very
"much the same thing as if the Public Prosecutor were permitted
"to select the Jury in every case that comes before the Session. It
"is not sufficient if the Police get the adigari and two or three
"men of their own selection to witness the search. The law requires
"that two respectable persons living in the neighbourhood shall
"be called upon to witness the search. I cannot say, of course,

"that, if these precautions are not carried out, the evidence would "be inadmissible, but I do say that searches conducted in this "manner—where the Police get their own men to witness the "search—should be looked upon with the greatest possible "suspicion.

"With regard to the first and second accused the statement of the "Head Constable Ramunni Nair is that he arrested the first accused "on the 4th June and that he brought out a locked box and unlocked "it with a key which he had and handed over this first batch of "articles which you see before you. I will deal with the identifi-"cation of them afterwards. The Vellivazhi adigari was present "and it is said some neighbours also. When the Head Constable "was cross-examined as to the neighbours' whereabouts his answers "were extremely vague. As a matter of fact, the whole business "of the searches and the selection of the witnesses seem to have "been arranged by the Inspector. The usual game of hide and "seek is played. The Inspector does not come to this Court to "give evidence. However there is very little to show that there "were really any neighbours present at the search. There is one "Sankunni Nair present at the search; he is said to be a neigh-"bour and lives within a furlong from the accused's house. Even "if that is so, the law requires that there should be at least two "such persons and not merely one.

"The fourth accused was arrested on the 15th June in his own "house. He is said to have gone to a bin which was locked and "which was opened with a key that the prisoner's wife brought at "the prisoner's request. There was a bag found buried in the paddy "and on opening it there were these kindies and other articles which "you see here. As to that, a singular circumstance took place. "The only witness brought to prove the search was the acting "adigari, Venkateswara Pattar, who said before the Magistrate that "he did not see the fourth accused arrested and that when he got "to the house he found these articles spread out in the verandah. "The moment he said that, without hearing anything more the "Inspector, who made arrangements for the searches and who "was prosecuting the case before the Magistrate, at once jumped "up and said that he dispensed with this witness entirely. The "Magistrate, however, insisted on this man's evidence being taken "and he has given evidence here. I think that there is very "little reason to doubt the evidence he has given and that he is a "very honest and truthful witness. There seems no reason why

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"he should come forward and make these statements in favour of "the accused: He seems to have no interest in the prisoners at all "and is of quite a different caste. Moreover the evidence is, to a "certain extent, against his interest, because he had to admit that "he did do an act which was not quite right, viz., to sign the search "list as having been present when the articles were actually found. "Thereupon the Police Inspector seems to have called a supple-"mental witness called Kunhi Komu to prove the search and "corroborate the Head Constable. This Kunhi Komu was a man "who was present at all the three searches. He is not a respectable "inhabitant of the locality called in at the time of the search. "The Inspector seems to have met him casually in the bazaar and "asked him to go with him and witness all the three searches. "You noticed that the Inspector took all these witnesses from one "house to another—from fourth to fifth and from fifth to sixth "just as if they were a theatrical company—to witness the searches. "Proceedings of that kind are open to the utmost suspicion. "When this witness Kunhi Komu was in the witness box he struck "me as an unsatisfactory witness. Of course, it is for you to say "what you think of these witnesses, but I am telling you how they "struck me. Kunhi Komu was a man who had to admit that he "had a larger connection with police cases in the capacity of a "witness than falls to the lot of most people. He was prepared "to corroborate the Head Constable through thick and thin even "to the extent of being able to see through a bamboo ceiling. "I do not suppose that for a moment you can place any reliance "upon witnesses of this description. However his statement and "that of the Head Constable are against the statement of Venka-"teswara Pattar. Both these witnesses swear that Venkateswara "Pattar was present at the time when the fourth accused was "arrested and he actually saw the delivery of the property. If "Venkateswara Pattar is to be believed, then the Head Constable "and Kunhi Komu are lying. It will be for you to choose "between these two stories.

"From the house of the fifth accused they went on to that of "the sixth. The Head Constable says that he got on to the top of "the bamboo ceiling and brought out a bundle which he says he "found among the cocoanut leaves. The witness Venkateswara "Pattar corroborates that story and says that he (Head Constable) "did certainly get on to the ceiling and bring down this bundle, "but that he did not, in fact he could not, see how he found it.

"The witness Kunhi Komu corroborates the Head Constable "through thick and thin and says that he actually saw the bundle "taken out from the cocoanut leaves. In fact his history seems to "be that he was able to see through the ceiling. When I directly "put him the question whether it was on top of the cocoanut "leaves or whether it was buried in them, he at once said he could "not say, that of course shows distinctly that he could not see "anything of the kind that he professes to have seen and that this "witness is prepared to swear to anything that the Head Constable "swears to. The bundle, when opened, was found to contain "these four articles. It has been pointed out that the articles "found in the previous houses were carried about in gunny bags, "and the bundle might very easily be concealed in one of the "bags. The Head Constable when he went to the attom accord-"ing to Venkateswara Patter's story, had a loose shirt on. That "again is directly contrary to the Police Regulations, because the "body of the man who is to search must be examined before he "enters upon the search. It is suggested that this bundle might "have been smuggled by the Head Constable in his loose shirt "when he got up to the attom while the others were busily "engaged in searching the other parts of the room. It will be "for you to say whether you think it possible in some way or "other that this bundle might be smuggled up into the attom at "the time of the search. The prisoner denies having been arrested "at his house. All the witnesses including Venkateswara Patter "say that the accused was arrested at his house."

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

Accused were not represented.

JUDGMENT.—This is an appeal on behalf of Government against the acquittal of six prisoners tried on a charge of dacoity. The appeal is supported on the ground that the Sessions Judge has in several matters misdirected the Jury. As regards the first two prisoners, the evidence consisted of statements made by them shortly after their arrest and the discovery of things said to be part of the stolen property in the houses or under the control of these prisoners. These two prisoners were both arrested on the 4th of June, and they appear to have been brought before the Second-class Magistrate on the 6th. On the 9th of June they were again brought before him, and each of them made a statement implicating himself in a qualified way in the dacoity. They mention the circumstances of their arrest in their houses and admit that they

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gave over the things produced at the trial to the Police. The usual certificate is appended by the Second-class Magistrate to the statements made by these two prisoners.

On the 8th of July the first prisoner was again brought before the Magistrate and again admitted that he took part in the dacoity, but pleaded that he did so under compulsion. The other prisoner made a statement on the same day to much the same effect. On the 13th August 1896 when the case was committed for trial by another Magistrate, the first prisoner denied that he had ever made a confessional statement before the original Magistrate and denied the search in the house and the discovery of property in it. The other prisoner on the same occasion said that he had made his confessional statement under the belief that he would be taken as an approver, and denied the truth of the allegations made in it.

The Sessions Judge makes the following observations with regard to these confessions. He says "they have been retracted "and I advise you to pay no attention to them unless you think that "they are corroborated by independent evidence. If you find that "it has been satisfactorily proved that the first and second accused "had in their possession property which was stolen on that night, "that, no doubt, would be a corroboration, and you may rely upon "the confessions although they have been retracted." Exception is taken by the Public Prosecutor to this direction on the part of the Judge. We are aware that language of this sort is frequently used by Judges with reference to confessional statements which have been retracted, and there are, no doubt, cases in which the proposition involved is a correct one. But we are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retractation. It is obvious that a confession in itself reasonable and probable must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession. In the present case certainly the circumstances under

which the confessions were originally made and the fact of their repetition a few days later are circumstances which clearly ought to be brought to the attention of the Jury. The question which should have been put to them with regard to the confessions was not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made and the circumstances under which they were retracted—having regard to all the circumstances connected with the confessions, whether it was more probable that the original confessions or the statements made before the Committing Magistrate were true We think that the omission on the part of the Judge to place the circumstances before the Jury and to put this question to them amounts to a misdirection, and the misdirection is the more important, because except in the second paragraph of the summing up—part of which has been quoted—there is no other mention whatever of the confessional statements.

The fourth paragraph of the summing up deals with the subject of the searches, and the Public Prosecutor takes exception to various observations of the Judge made in this and in the fifth, eighth and tenth paragraphs. The Sessions Judge in effect recommends the Jury to regard the evidence respecting these searches with the greatest possible suspicion, being of opinion that the precautions, which the law requires, were not duly observed. The points which he takes are that the persons called upon to witness the searches were selected by the Head Constable and the Inspector, and were not shown to be respectable inhabitants of the locality in which the place of the search was situate. The observations made by the Sessions Judge are, in our opinion, founded on a mistaken view of the law, and were calculated seriously to prejudice the prosecution. Section 103, Criminal Procedure Code, requires the officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place of the search is situate to attend and witness the search. There is nothing in that or in any other section of the Code to justify the notion that the required witnesses are to be selected by any person other than the officer conducting the search. Assuming what is by no means clear that the witnesses to the search of the first and second prisoners' houses were not inhabitants of the locality, we do not think that that circumstance must necessarily expose the conduct of the Police to suspicion, or render the evidence of the search inadmissible.

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In the fifth paragraph of the summing up after referring to the selection of the witnesses by the Inspector, who was present at the time, the Judge observes: "The usual game of hide and seek is "played. The Inspector does not come to this court to give evi- "dence." We do not quite understand the force of this observation. If the Sessions Judge had, after the examination of the Head Constable, considered that the evidence of the Inspector was necessary, he ought to have intimated his opinion to the Public Prosecutor and given him an opportunity of calling that official. That course would have been the more advisable having regard to what the Sessions Judge observed in the eighth paragraph of the summing up about the conduct of the Inspector and the inquiry before the Magistrate—an observation which does not appear to be founded upon any evidence before the Judge.

Dealing first with the case of the first and second prisoners, we are of opinion that there have been material misdirections to the Jury as well with regard to the confessional statements made by those prisoners, as with regard to the searches made in their houses and the discovery of property said to be part of the stolen property. As regards the other four prisoners, the case stands on rather a different footing, for none of them made anything in the way of a confessional statement. As against the third and fourth prisoners, there is evidence to the effect that they were identified on the night of the dacoity by some of the witnesses. There is no misdirection in the charge with regard to that part of the case. Against all the four prisoners—prisoners 3, 4, 5 and 6—there is evidence that searches were made in their houses, and parts of the stolen property found therein. We have already dealt with the general observations of the Sessions Judge regarding these searches contained in the fourth paragraph of the summing up; dealing with the case of the fourth prisoner, in the eighth paragraph of the summing up, the Sessions Judge makes other observations to which exception is taken. He refers, as already mentioned, to the conduct of the Inspector and the inquiry before the Committing Magistrate. He speaks to one of the witnesses, Kunhi Komu, in language which would be suitable to the counsel for the defence, but certainly not suitable in the mouth of a Judge directing a jury. But the most serious objection taken to the observations in this paragraph is the reflection on the conduct of the Police in taking the witnesses whom they had summoned from the search of one house to that of another. The Sessions Judge says that the Inspector took these

witnesses from one house to another "just as if they were a "theatrical company. Proceedings of that kind are open to the "utmost suspicion." This is an observation which ought never to have been made. The Head Constable testifies to the difficulty of finding respectable persons in the neighbourhood in which the dacoity took place. We can see no reason for supposing that the conduct of the Police in this connection was influenced by any improper motives. In the tenth paragraph of the summing up, the Sessions Judge charges the Head Constable with the direct breach of the Police Regulations in that when he went to the *attom* in the course of the search of the sixth prisoner's house, he had a loose shirt on. It is not apparent even according to Venkateswara Patter's evidence, that there was any breach of the Police Regulations, because he does not say that the Head Constable's body was not examined before he began the search, and that is the effect of the Regulation to which we suppose the Sessions Judge refers. However that may be, the Head Constable was not examined about it, and it was therefore unfair to make this charge against him. We are of opinion that there has been a misdirection by the Sessions Judge with reference to the evidence touching the searches of the houses of the third, fourth, fifth and sixth prisoners, and the misdirection is a material one. We set aside the acquittal of all the prisoners, and direct them to be retried by the Sessions Judge of North Malabar.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ARUNACHALAM CHETTY (PLAINTIFF), APPELLANT,

v.

MEYYAPPA CHETTY AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4), RESPONDENTS.*

1897. October 20, 21, 22. November 16.

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 42, 43, 462—*Sanction to compromise a suit against a minor—Suit to set aside a consent decree for want of sanction —Previous suit to set aside decree on the ground of fraud on guardian* ad litem.

A suit instituted in 1879 against a minor was compromised by the plaintiff and the guardian *ad litem*, and a decree for the plaintiff was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside

* Appeal No. 32 of 1897.