APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

SANKAPPA RAI (SIXTH PRISONER) APPELLANT, 1908 February 5.

v.

EMPEROR, RESPONDENT.*

Misdirection to jury—Confession—Evidence Act, ss. 27 and 30—Confession of an accused person, which is not the immediate cause of the discovery of stolen property in the house of another accused cannot, under s. 30 of the Evidence Act, be considered as against such other accused—Statement made by a witness to a Police Inspector or to an investigating Magistrate who is not the Committing Magistrate, though in the presence of the accused, not admissible as evidence.

Under sections 27 and 30 of the Evidence Act, a confession made by one accused can be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against such other accused; and a direction to the jury to take such confession into consideration, when it is not the immediate cause of any such discovery, is a misdirection.

It is also a misdirection to ask the jury to take into consideration against the accused a statement made by a witness before a Police Inspector or before a Magistrate, who though an investigating Magistrate, is not the Committing Magistrate, when such statement is withdrawn before the Committing Magistrate and before the Court of Session.

THE facts of the case are sufficiently set out in the judgment.

K. Naryana Row for appellant.

The Public Prosecutor for respondent.

JUDGMENT.—The sixth accused is the appellant before us: he was charged with abetting a dacoity or receiving stolen property and has been found guilty of the former offence and acquitted of the latter, the veridict of the jury being that "it is doubtful whether he received the stolen property knowing it to be stolen."

The principal contentions in the appeal are that the Sessions Judge has misdirected the jury (1) in regard to a confession said to have been made by the first accused, and (2) in regard to the statements made by the second accused's wife Akku, prosecution witness No. 11.

* Criminal Appeal No. 780 of 1907, presented against the conviction and sentence of H. O. D. Harding, Esq., Sessions Judge of South Canara Division, in cases Nos. 40 and 41 of the Calendar for 1907.

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The confession of the first accused was made to the Police Inspector, and was therefore inadmissible in evidence, but, under section 27 of the Evidence Act, if the first accused was in the custody of the police, so much of the information given by him might be proved as related distinctly to the discovery of the stolen property. The confession was to the following effect: The first accused had obtained a share of the property stolen in the present dacoity and in the other three and he would produce it . . . he had one mura of rice and one kalsige of horse gram, one umbrlla, one piece of white cloth and one rupee. On the night of the dacoities the stolen rice muras were carried to the potel's (sixth accused's) house, and then potel gave three muras, to him, one to Patta (second accused, and one to Malinga He had left the umbrella in the potel's house. The Sessions Judge directed the jury in the following terms: "The law recording confessions in that a confessional statement made by an accused to a public officer is not admissible against him, and it is perfectly just and reasonable because you can hardly believe that a person will voluntarily confess his guilt to a police officer; and if you take such a confession to be evidence against him, no doubt anybody may be convicted on such evidence. But the law says, supposing that, in consequence of such information, property is discovered, then so much of the information is relevant and can be proved against that person. If a person merely says 'yes, I stole the property,' and if he afterwards says he did not say so, you may have reason to believe that his confession was not voluntary and true. But if it is said that he confessed and produced the property as being his share, then you have good reason to believe that the confession is a truthful thing unless the production of the property can be otherwise accounted for; and therefore the law wisely says that unless such corroboration is afforded at confession to the police is not relevant. But if you find corroboration and property is discovered in consequence of such statement, then to that extent it is a relevant matter, and therefore, in my opinion, the statement of the first accused that he had certain stolen property, that the potel gave one mura to him and one each to the second accused and to Maliga, and that the rest of the muras were with the potel is relevant as against first accused himself, and, as the section 30 of the Evidence Act says, such confession may be taken into consideration against such other person, that is against

second and sixth accused." It is first objected to this direction that the first accused was not at the time he gave the information in the custody of the police. The Police Inspector's evidence, however, implies that he was brought to him by a constable to Venkatakrishna Bhatta's house and the Sessions Judge, though he does not say so, might well have accepted this evidence as proving the custody. It was the duty of the Judge, not of the jury, to decide the point as being a matter of fact which it was necessary to prove in order to enable the confession to be admitted in evidence Criminal Procedure Code, section 298, clause (d), and his omission to state to the jury his finding on the point is not a misdirection and could not prejudice the accused. We think the Sessions Judge was wrong in leaving to the jury the consideration of the first accused's confession as against the sixth accused He allowed the jury to take into consideration against the sixth accused the statement by the first accused that he had certain stolen property with him and that the sixth accused gave him one mura of rice and gave one mura of rice to the second accused and one to Malinga. These facts were not the immediate cause of the discovery of stolen property in the Potel's house [vide *Queen-Empress* v. *Commer Sahib*(1)], and it cannot be that a statement which would not have been admissible against the sixth accused if made by himself when in custody is admissible against him when made by a co-accused when in custody. The most that could be taken into consideration as affecting the sixth accused, would be so much of the information (if it amounted to a confession) as was the immediate cause of the discovery of some fact relevant against him. In the present case the fact that he was in possession of stolen rice and as that, in this case, was only the statement that the first accused carried some rice to him, which could not amount to a confession, there is here no confession which could be taken into consideration against the sixth accused.

In paragraph 9 of his charge to the jury the Sessions Judge deals with the evidence of the witness Akku, and, after pointing out that she at the trial (and we may remark also in the Committing Magistrate's Court) withdrew the statement which the Inspector alleged that she had made to him, directed the jury that if they believed the story which the witness told the Inspector, and

(1) I. L. R., 12 Mad., 153.

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which was also recorded in a statement made to an investigating Magistrate though not to the Committing Magistrate. "It is a strong case against the sixth accused as also against some other accused"—clearly there is here a serious misdirection.

The Sessions Judge has told the jury that they may use as evidence against the accused a statement made behind their back and not tested by cross-examination. Whether the Judge is referring to the statement made to the Inspector, or to the statement Exhibit G made to the Magistrate Saldanha, the result is the same: neither statement is evidence against the accused: for even if the latter statement was made in the presence of the accused, which does not appear, section 288 of the Criminal Procedure Code will not apply to it, as it was not made before the Committing Magistrate, *i.e.*, the Magistrate holding an enquiry under Chapter XVIII of the Criminal Procedure Code.

The Sessions Judge has thus directed the jury that a statement which is not evidence against the sixth accused (though it might no doubt be used to contradict the witness) is, if believed, strong evidence against him. It is clear that the verdict cannot in these circumstances be sustained. The misdirection is repeated in paragraphs 14 and 15 of the charge and must have misled the jury.

Throughout his charge the Sessions Judge has placed too much stress upon statements made or alleged to have been made to the Inspector of the Police and too little on the evidence given by the witnesses at the trial. The statements made to the police cannot be treated as evidence on which the accused can be convicted when the facts stated in them are not proved by evidence given at the trial. The evidence of the prosecution witness No. 20 seems to be altogether irrelevant, and we think that the jury should not have been told that they were entitled to draw any inference against the sixth accused from that evidance or from the fact that there were three or four dacoities on the same night in the same neighbourhood. We set aside the conviction of the sixth accused and direct his retrial.

The prisoners Nos. 1 to 5 convicted of dacoity have not appealed, and inasmuch as there is clearly evidence against them sufficient to warrant their conviction, and the misdirection on which we have had to set aside the conviction of the sixth accused affect only some of them and affect those to a much slighter extent

than they affect the sixth accused, and further considering the fact that the sentence passed on them is a light sentence for the offence of dacoity, and a sentence, which might be increased on a retrial, we think that we are not called on to interfere on their behalf in revision.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Munro.

NARAYANA MUDALY AND ANOTHER

v.

EMPEROR.*

1907. November 26.

Criminal Procedure Code, Act V of 1898, ss. 257, 537—Refusal of Magistrate to issue process to witnesses where none of the grounds mentioned in s. 257 exist is illegal.

The refusal of a Magistrate to issue process to witnesses named by the accused, when such refusal, in regard to any particular witness, is not based on any of the grounds mentioned in section 257 of the Code of Criminal Procedure, is an illegality which cannot be cured by section 537 of the Code.

A conviction under such circumstances is illegal and will be set aside. *Emperor* v. *Purushottam*, (I.L.R., 26 Bom., 418), followed.

THE accused were tried by the Second-class Magistrate of Gudiyattam on charge of offences under sections 341, 323 and 327 of the Indian Penal Code.

Charges were framed against the accused, who cited 71 persons as witnesses for the defence. The Magistrate refused to issue process for more than 24 of the witnesses. Some of these were examined and the accused insisted on having all the witnesses named by them summoned and examined. This the Magistrate refused to do and convicted the accused. The material portion of his judgment on this point is as follows :—

"It was only after the accused entered on their defence that the accused headed by No. 3 began to display their true spirit of rowdyism as detailed below. They refused on two hearing dates, 6th

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* Criminal Revision Case No. 393 of 1907 presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the decision of J.C. Stodart, Esq., Joint Magistrate of Vellore, in Criminal Appeal No. 57 of 1907 presented against the sentence passed by M.R.Ry. T. S. Venkatarama Ayyar, Second-class Magistrate of Gudiyattam in C C. No. 142 of 1907.