APPELLATE CRIMINAL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. April 8 and 9.

Re ABIBULLA RAVUTHAN *alias* KABIB RAVUTHAN AND THREE OTHERS.*

Criminal Procedure Code (Act V of 1898), sec. 342—Right of the Magistrate or Sessions Judge to put questions or take statements from accused when no evidence given by prosecution to implicate them—Answers taken from accused in contravention of section 342, not admissible in evidence.

If in a criminal case the prosecution had not let in any evidence implicating the accused or some of the accused in the crime charged, the Magistrate is not entitled under section 342 of Criminal Procedure Code to put questions to such accused or to invite them to make a statement; and this rule equally applies to trials before the Sessions Court. Answers to questions received by the committing Magistrate in contravention of section 342 of the Criminal Procedure Code are not admissible in evidence against the accused in the subsequent trial before the Sessions Court.

Mohideen Abdul Kader v. *Emperor* (1904) I.L.R., 27 Mad., 238 and *Reg.* v. *Berriman* (1854) 6 Cox Cr. C., 388, followed.

APPEAL against the conviction and judgment of H. O. D. HARDING, District Judge, Trichinopoly, in Sessions Case No. 7 of 1915, committed by T. PALANIANDI PILLAI, Second Class Magistrate, Aravakurichi, in Police Report No. 13 of 1914.

In this case the accused Nos. 2 and 4 were convicted of forgery of a promissory note and accused Nos. 6 and 7 were convicted of abetting the same.

Against this, accused Nos. 2, 4, 6 and 7 preferred this appeal.

Dr. S. Swaminathan for the appellant.—There was no evidence given by the prosecution against the accused Nos. 2, 6 and 7 before the committing Magistrate and the Magistrate was not therefore entitled to put any questions to them or to take any statements from them. Section 342 of Criminal Procedure Code enables him to do so only if there are circumstances appearing against the accused in the evidence given by the prosecution and the only materials relied on by the Sessions

* Criminal Appeal No. 90 of 1915.

Judge for convicting them are the answers given by them to questions put by him and by the committing Magistrate. Such answers cannot be treated as evidence and the prosecution is not entitled to fill up a gap in its proof by what is improperly elicited from the accused. Reference was made to *Mohideen Abdul Kader* v. *Emperor*(1), *Basantha Kumar Ghattak* v. *Queen-Empress*(2), *Queen-Empress* v. *Hawthorne*(3), *Queen-Empress* v. *Viran*(4), Ratan Lal's Unreported judgments, page 679 and *Reg.* v. *Berriman*(5). As regards the other accused his conviction is based on highly interested evidence.

C. Sidney Smith for the *Public Prosecutor* for the Crown argued that the suspicious appearance of the promissory note justified the action of the lower Court and that as against the fourth accused, there was the evidence of prosecution witnesses Nos. 1 and 2 which, it was submitted, was believed by the lower Court.

The following judgment of the Court was delivered by

COUTTS TROTTER, J.—There was no evidence before the Sessions Court against accused Nos. 2, 6 and 7 other than their own admissions in the Court below and the Sessions Court itself. The admissions in the Court below were made in answer to an invitation from the committing Magistrate to say what they had to say. At the time when these statements were made in the Court of the committing Magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that Court. Section 342 of the Code of Criminal Procedure only gives the Magistrate the right to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the Magistrate has no right under the statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances it is not admissible evidence against the accused on his subsequent trial. This is in agreement with the decision of WHITE, C.J., in *Mohideen Abdul*

(1) (1904) I.L.R., 27 Mad., 283. (2) (1898) I.L.R., 26 Calc., 49.
(3) (1891) I.L.R., 13 All., 345. (4) (1886) I.L.R., 9 Mad., 224.
(5) (1854) 6 Cox Cr.C., 388.

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Kader v. *Emperor*(1) and the same principle was applied by ERLE, J., in *Reg.* v. *Berriman*(2) to a statement elicited from a prisoner improperly questioned by an examining Magistrate in England. The same objection applies to the answers elicited from the accused by the learned Judge at the trial; and we feel constrained to say that the learned Judge subjected the accused to a cross-examination which far outstripped anything enjoined or permitted by section 342 of the Code. We set aside the convictions of accused Nos. 2, 6 and 7.

With regard to the fourth accused, there is some evidence against him, but it is practically the word of prosecution witnesses Nos. 1 and 2 against that of the fourth accused. The surrounding circumstances throw no light on the probabilities of the matter and we do not think it would be safe to convict on the evidence of two interested persons. We set aside this conviction and sentence also.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts Trotter.

1915. March 30 and 31 and April 1, 8 and 29.

RAJAH DAMARA KUMARA VENKATAPPA NAYANIM BAHADUR VARU (LATE A MINOR BUT NOW OF FULL AGE) (PLAINTIFF), APPELLANT IN APPEAL NO. 225 OF 1912 AND RESPONDENT IN APPEAL NO. 136 OF 1912,

v.

DAMARA RENGA RAO (LATE A MINOR BUT NOW OF FULL AGE) (DEFENDANT), RESPONDENT IN APPEAL NO. 225 OF 1912 AND APPELLANT IN APPEAL NO. 136 OF 1912.*

29 M.L.J. 718

Hindu Law—Adoption by junior widow without consulting senior widow but with sapindas' consent, invalidity of—Preferential right of senior widow to adopt.

An adoption made by a junior widow of a deceased Hindu purporting to be made with the consent of the sapindas but without consulting the senior widow is invalid.

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(1) (1904) I.L.R., 27 Mad., 238. (2) (1854) 6 Cox Cr.C., 388.

* Appeals Nos. 225 and 136 of 1912.