suit in the Subordinate Court and the Subordinate Court entertained it no doubt on payment of the appropriate court-fee. It was held by this Court that the appeal lay none the less to the District Court, although the suit had been valued by the Subordinate Court at over Rs. 5,000. This appears to be a direct authority in support of the objection. The decision in *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee*(1), related to a case in which the plaintiff was authorized to make a tentative valuation under section 50 of the Code of Civil Procedure and MOOKERJEE, J., expressly confined his decision to such cases and abstained from expressing any opinion on a case like the present. The objection is allowed with costs, and the appeal will be returned for presentation to the proper Court.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

Re ANNAVI MUTHIRIYAN (PRISONER), APPELLANT.*

1915. February 8, 9 and 11.

Indian Evidence Act (I of 1872), sec. 33—Court's duty before admitting evidence under—Consent or want of objection on the part of the accused to the reception of inadmissible evidence—Duty of prosecution to prove the case—Indian Evidence Act (I of 1872), sec. 58—Hearsay evidence, inadmissibility of.

Before admitting under section 33 of the Evidence Act, a deposition, given on a previous occasion, a Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect; and even consent or want of objection on the part of the accused's pleader to the reception of such evidence will not, in spite of section 58 of the Evidence Act, entitle the Court to admit it under section 33.

Hearsay evidence as to the complicity of the accused in the crime charged and evidence as to the commission of other offences by the accused not relevant for the purpose of the trial are inadmissible.

Where a Sessions Judge convicted the accused relying mainly upon such inadmissible evidence as above described and did not warn the jury against acting on the same, their Lordships set aside the conviction as illegal.

Per SESHAGIRI AYYAR, J.—The Evidence Act is not exhaustive of the rules of Evidence.

(1) (1907) I.L.R., 34 Calc., 954 (F.B.).

* Criminal Appeal No. 641 of 1914.

RE ANNAVI MUTHIRIYAN.

APPEAL against the order of F. H. HAMNETT, the Sessions Judge of the South Arcot, in Calendar Case No. 29 of 1914.

In this case the Sessions Judge who tried the accused with a jury found him guilty of the offence of decoity and convicted him of the same. The accused preferred this appeal.

The other facts appear from the judgment of SESHAGIRI AYYAR, J.

T. Arumanatha Pillai, for the appellant.—The conviction is vitiated by the following illegalities and irregularities and by the misdirection of the Sessions Judge in not warning the jury against accepting inadmissible evidence: (1) The Sessions Judge admitted under section 33 of the Evidence Act the evidence of a person who had given evidence before the committing Magistrate without satisfying himself as to the impracticability of procuring the attendance of the witness, without an unreasonable delay or expense. See *Empress of India* v. *Mulu*(1), *In re Rami Reddi*(2) and *Emperor* v. *Kangal Mali*(3). In spite of the consent on the part of the pleader for the accused the prosecution must prove the circumstances enabling it to get the deposition admitted under section 33; (2) The Sessions Judge erred in admitting hearsay evidence as to the guilt of the accused and evidence as to the complicity of the accused in crimes other than the one charged when such evidence was utterly irrelevant for any other purpose in the case.

The Acting Public Prosecutor for the Crown.—The deposition of the person who gave evidence before the committing Magistrate is relevant under section 33 of the Evidence Act. The Public Prosecutor found it impossible to procure the attendance of the witness and his statement to that effect must be taken to have been accepted by the Judge as in fact he admitted the deposition under section 33. Moreover, the accused's pleader consented to the admission of that evidence. Section 58 of the Evidence Act dispenses with the necessity to prove anything which the other party admits or agrees to admit, and the Evidence Act is self-contained and exhaustive as to the rules of evidence, and rulings either in India or in England which lay down that even when the accused admits certain matters or to a certain mode

(1) (1880) I.L.R., 2 All., 646. (2) (1881) I.L.R., 3 Mad., 48.
(3) (1914) I.L.R., 41 Calc., 601.

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of proof, the prosecution is bound to let in evidence to bring the guilt home to the accused are unsupportable. Moreover there was no prejudice to the accused and there was no misdirection to the jury and even if there was any misdirection it did not affect the merits of the case.

T. Arumanatha Pillai in reply.—This is not a civil case, but a criminal one and the consent of the accused's pleader to the admission of inadmissible evidence will be of no avail and does not relieve the prosecution from the necessity of proving the gap in its evidence. *Mohideen Abdul Kadir* v. *Emperor*(1), *Rangaswami* v. *Emperor*(2), *The Queen* v. *Bholonath Sen*(3) and *King Emperor* v. *Sakhram*(4).

SPENCER, J.

SPENCER, J.—Apart from the question of the improper admission at the trial of the evidence of Akilanda Soma Naik given before the committing Magistrate without proof that it was impossible to procure his attendance before the Sessions Court with which my learned brother has fully dealt, I think that the accused is likely to have been further prejudiced in his trial by the misreception of hearsay evidence and that on this account also, the appeal must succeed. The only evidence to connect the accused with this dacoity is the statements of two witnesses, viz., Akilanda Soma Naik examined in the committing Magistrate's Court and prosecution witness No. 2 examined in the Sessions Court. Both of these persons, on their own admission, are men employed by the police to do private detection work in Kallar villages on behalf of the police and in my opinion, the jury should have been cautioned against acting too readily upon such evidence. Both of these witnesses have given a detailed statement as to the enquiries made by them to obtain a clue to the dacoity in the course of which they employed one Chinnapayal as an agent. The statements of Chinnapayal who has not been examined as a witness in the trial of this accused are not admissible in evidence, but in the depositions of both of these witnesses, the statements as to what Chinnapayal said have been recorded as though it was direct evidence. One of the statements made by Chinnapayal as given by prosecution witness No. 2 is that four persons named

(1) (1904) I.L.R., 27 Mad., 238.
(2) (1908) 18 M.L.J., 330.
(3) (1887) I.L.R., 2 Calc., 232.
(4) (1902) I.L.R., 26 Bom., 50.

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by him had taken part in this dacoity and some others whose names he did not remember: one of those names was that of the accused under trial. What Chinnapayal said was not evidence and should not have been admitted by the Sessions Judge, and it is likely to have prejudiced the jury in deciding whether the accused was guilty or not. There are other statements in these depositions referring to other offences which were irrelevant for the purposes of this trial. If the Sessions Judge found it necessary to admit such evidence for other purposes, he should have cautioned the jury as to its relevancy against the present accused. For these reasons, I agree that the conviction must be set aside and that the accused should be re-tried.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The jury brought in a verdict of "guilty" against the accused in this case and the Sessions Judge convicted them of the offence of dacoity.

It is argued in appeal that there have been misdirections by the Judge and improper admission of evidence which have prejudiced the accused and the verdict of the jury. I do not think it has been proved that there has been any positive misdirection to the jury except it be the failure of the Sessions Judge to draw pointed attention to the fact that they have to rely upon the testimony of an absent witness in the case. He refers in paragraph 7 of his summing up to the fact that the jury are not dependent on the evidence of Akilanda Soma Naik alone. That cannot be regarded as a direction to disregard the evidence of this absent witness. Other points relating to misdirection were mentioned but they all affect the appreciation of the evidence and do not point to any failure on the part of the Sessions Judge to direct the jury aright.

But on the question of improper admission of evidence, I am of opinion that the conviction should be set aside. In the course of the examination of the second witness for the prosecution reference was made to the accused having taken part in another dacoity; this evidence ought not to have been allowed to go in. The nature of the evidence is such that it would have prejudiced the jury against the accused. But the more serious objection relates to the admission of the evidence of one Akilanda Soma Naik who was examined before the trying Magistrate. The Sessions Judge says: "This man has not put in an appearance

in this Court and it does not appear why he has not come." Further on he says that "the Public Prosecutor asked that his deposition in the lower Court might be filed as evidence here, as it seemed that it would be causing unnecessary delay in the disposal of the case if it had to be adjourned for securing his attendance." Again he says that the accused's pleader does not object to the evidence given before the Magistrate being admitted under section 33 of the Evidence Act. Under the Evidence Act, the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect. There must be independent evidence before him before he can exercise the powers given to him under the Evidence Act; further the appellate Court may not be prepared to act upon representations which have satisfied the trial Judge. It is therefore incumbent on the lower Courts to have on record some legal evidence on which he could act. It was held in *Empress of India* v. *Mulu*(1), that it is the duty of the Court acting under section 33 to have reliable evidence regarding the impracticability of procuring the attendance of a witness. In *In the matter of Rami Reddi*(2), this conclusion seems to have found favour with the learned Judges of this High Court. In a recent case in Calcutta in *Emperor* v. *Kangal Mali*(3), under similar circumstances, the learned Judges pointed out the danger of allowing statements made in the Court below to be used as evidence without having taken the necessary steps to ensure the attendance of the witness in the Court. The same view was taken in *Noshai Mistri and Ram Chunder Haldar* v. *Empress*(4) and in *The Queen* v. *Lukhun Santhal*(5). I am therefore of opinion that the procedure of the Sessions Judge in acting upon the statement of the Public Prosecutor was irregular.

Does the fact that the accused's pleader consented to the course make any difference in the matter? This question is not altogether free from difficulty. It is true, as pointed out in *Imperatrix* v. *Pitamber Jina*(6) that the provisions of the Evidence Act relating to the admissibility of evidence are as applicable to

(1) (1880) I.L.R., 2 All., 646.
(2) (1881) I.L.R., 3 Mad., 48.
(3) (1914) I.L.R., 41 Calc., 601.
(4) (1880) I.L.R., 5 Calc., 958.
(5) (1874) 21 W.R. 56. (Cr.R.).
(6) (1878) I.L.R., 2 Bom., 61.

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criminal trials as to civil trials. There can be no doubt upon this matter as section 1 of the Evidence Act says that "the Act extends to all Judicial proceedings in or before any Court including Courts-martial." Therefore Section 167 of the Evidence Act governs trials before the sessions Court. The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether we can invoke the aid of the principles of jurisprudence or of English law as supplementing and explaining the rules of evidence given in the Act. The high authority of EDGE, C.J., in *The Collector of Gorakhpur* v. *Palakdhari Singh*(1), can be cited for the position that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act is self-contained; such a practice has the authority of every eminent Judges in India and I am not prepared to depart from it. Section 58 of the Evidence Act lays down that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing. The learned Public Prosecutor argues from this that as the pleader for the accused dispensed with the personal appearance of Akilanda Soma Naik in the Sessions Court, the accused is bound by such an admission. The rules of evidence are subject to the general principles of jurisprudence, that it is the duty of the prosecution to establish the case against the accused, and that they should not rely upon admissions made by him in the course of the trial for convicting him. In *Reg* v. *Bertrand*(2), the Judicial Committee of the Privy Council in a very elaborate judgment point out the inadvisability of basing a conviction upon evidence which but for the consent of the accused's counsel should not have been admitted. The principle of the decision was accepted in *The Queen* v. *Bholanath Sen*(3) where the learned Judges pointed out that no conviction should be based against the accused upon anything that he said or consented in the course of the trial. *The Queen* v. *Bishonoth Pal*(4), *Jungi Khan* v. *Hur Chunder Rai*(5) and *The Queen* v. *Rughoonath Dass*(6), are to the same effect. I may cite

(1) (1890) I.L.R., 12 All., 1.
(2) (1867) L.R., I.P.C., Appl., 520.
(3) (1877) I.L.R., 2 Calc., 23.
(4) (1869) 12 W.R., 3 (Cr.R.).
(5) (1871) 16 W.R., 69 (Cr.R.).
(6) (1875) 23 W.R., 59 (Cr. R.).

Rangaswami v. *Emperor*(1) a decision of the learned Chief Justice in favour of the same position. It may be argued that in most of these cases the consent of the accused or of his counsel was given for an infraction of the rules of procedure contained in the Code of Criminal Procedure. I do not think any difference can be made between the violation of a rule of procedure and the violation of a rule of evidence. *King-Emperor* v. *Sakharam*(2) is strongly in favour of the contention of the Vakil for the appellant. In *Subba* v. *Queen-Empress*(3), the learned Judges of this Court, while holding that the improper admission of evidence was illegal, came to the conclusion that the accused was not prejudiced by such evidence being admitted and that therefore it was not necessary to order a re-trial. The same view has been taken in *Purmessur Singh* v. *Soroop Audhikaree*(4) and *In the matter of the petition of Jhubboo Mahton*(5). I understand these judgments to lay down that *prima facie* the consent of the accused or of his counsel is presumptive evidence of the absence of prejudice. I do not take these rulings to lay down anything more than that. I do not think it was intended to rule that, because an irregular procedure or improper admission of evidence has been consented to by the accused, it precludes the Judges hearing the case from deciding whether, notwithstanding the consent of the accused, his case has been prejudiced by the irregularity. In the present case, the Sessions Judge pointed out distinctly "that unless you believe the story told by the first prosecution witness and Akilanda Soma there is no case against the accused." If I am right in my conclusion that the evidence of Akilanda Soma should not have been admitted in evidence, it is impossible to argue that the jury were not prejudiced by its inclusion, seeing that there was only one other witness on whose testimony they had to rely for basing the conviction against the accused. I have already drawn attention to the reception of another piece of evidence which ought not to have been allowed to be given in the case. As was pointed out in *Emperor* v. *Waman*(6) such a course amounts to misdirection. In my opinion, the verdict of the jury and the conviction by the Sessions Judge should be set aside.

N.R.

(1) (1908) 18 M.L.J., 330.
(2) (1902) I.L.R., 26 Bom., 50.
(3) (1886) I.L.R., 9 Mad., 83.
(4) (1870) 13 W.R., 40 (Cr.R.).
(5) (1882) I.L.R., 8 Calc., 739.
(6) (1903) I.L.R., 27 Bom., 626.