APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922, April 27.

VELLIAH KONE (PRISONER), APPELLANT,*

v.

KING-EMPEROR.

Criminal Procedure Code (V of 1898), sec. 164—Statement by witness, recorded by Magistrate—Evidence Act (I of 1872), sec. 157—Relevancy to corroborate statement before Committing Magistrate.

A statement by a witness recorded by a Magistrate under section 164 of the Criminal Procedure Code is admissible in evidence to corroborate the statement made by that witness before the Committing Magistrate and from which statement he resiles in the Sessions Court.

Emperor v. *Akbar Bidoo*, I.L.R., 34 Bom., 399, dissented from; 2 Weir's Cr. Rulings, 821, followed.

TRIAL referred by J. K. LANCASHIRE, Acting Sessions Judge of Tinnevelly, for confirmation of the sentence of death passed on the said prisoner.

The prisoner also appealed against the conviction and sentence. The facts are set out in the judgment of Mr. Justice AYLING.

C. Narasimha Achariyar for prisoner.

The Public Prosecutor for the Crown.

AYLING, J. AYLING, J.—Accused in this case has been convicted of the murder of an old woman named Pichi and sentenced to death.

The prosecution case is as follows:—Deceased was a relation of accused, and on her husband's death came to live in his house, bringing with her a sum of Rs. 200, which she lent him to pay off a mortgage. Subsequently

* Referred Trial No. 16 of 1922 and Criminal Appeal No. 133 of 1922.

disputes arose, and she wanted her money back, and moved into a small hut close to accused where she lived by herself. So far there is no dispute.

According to the defence, accused managed to pay off the debt to deceased by selling his wife's jewels. According to the prosecution, he did not; and the wrangling continued culminating in a furious quarrel on the night of December 29th. Even after bed time, deceased continued to abuse accused from her hut, and at last, the man infuriated beyond endurance went out and throttled her. He then tied her body in a sack with some heavy stones, and at about daybreak carried it to a well about 150 yards away and threw it in. There the body was found four days later, and accused was arrested.

The above facts are practically all contained in two statements recorded by the Sub-Magistrate from accused's wife, Subbammal, prosecution witness 2, the first Exhibit D, under section 164, Criminal Procedure Code, on 4th January 1922, and the second, Exhibit C, in the course of the committal enquiry a week later. These statements, if accepted, leave no possible room for doubt as to the commission of the murder by the accused. Subbammal did not actually see the murder; but she deposes to her husband going to deceased's hut, to hearing the latter's cries and the sounds of blows, to her husband's returning and fetching a gunny bag and rope, and threatening her to make her keep quiet. She subsequently fled to her mother's house, and stayed there. In the Sessions Court, she resiled from the most important part of the above story, and swore that her husband did not leave the house, and that her earlier statements were enforced by police ill-treatment. Her deposition before the Committing Magistrate, Exhibit C, was therefore treated as evidence under section 288,

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Criminal Procedure Code, and the case turns very largely on whether it can safely be accepted as true.

A preliminary point of some importance has been raised as to whether the first statement, Exhibit D, is relevant under section 157, Indian Evidence Act, to corroborate the deposition, Exhibit C. It is not disputed that Exhibit D is a statement which would be admissible under the terms of the section to corroborate a statement to the same effect, if made in the witness-box in the Sessions Court; but it is argued for appellant that deposition before the Committing Magistrate is not testimony within the meaning of section 157, and that the latter section will not apply to the present case.

The authority for this view is the judgment in *Emperor* v. *Akbar Badoo*(1), in which the learned Judges certainly ruled that "previous statements may be used to corroborate or contradict statements made *at the trial*: not to corroborate statements made prior to the trial." In the latter category they included a statement made, as in the present case, in the course of the committal enquiry.

No reasons are given; and no other case has been quoted to us in which the same view has been taken.

With all respect, it seems to me to be wrong. I know of no reason why the word "testimony" in section 157, Indian Evidence Act, should be given this artificial limitation: and the object and effect of section 288, Criminal Procedure Code, seems to me to be to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court; of course such a statement would be accepted with great caution

(1) (1910) I.L.R., 34 Bom., 399.

like every statement of a person who has changed his story at different stages. But it is evidence in the case; and it is equally in the discretion of the Sessions Judge to believe it and act on it in preference to the deposition in his own Court, as it would be to believe and act on the latter, in preference to a contradictory statement before the Committing Magistrate—vide judgment of AIKMAN, J., in *Emperor* v. *Dwarka Kurmi*(1), and also *Queen Empress* v. *Dorasami Ayyar*(2).

If this is so, then the credibility of the statement in the Committing Magistrate's Court must be considered and tested in exactly the same way as one made in the Sessions Court; and it is of the utmost importance to know how it compares with statements made soon after the event, or before a competent authority. No one will deny that apart from any rule of law comparison with a statement recorded in the circumstances in which Exhibit D was taken affords a very valuable test of the truth of any later statement.

My view is not unsupported by authority; vide a case reported in 2 Weir, 821, where COLLINS, C.J., and BENSON, J., held that a statement of a witness made at the inquest could be used to corroborate her statement in the committal enquiry, although she entirely resiled from the latter in the Sessions Court.

I therefore hold that Exhibit D is admissible under section 157, Indian Evidence Act, to corroborate Exhibit C.

For this purpose it is not without importance that the two statements substantially agree; and perusal of either leaves in my mind a strong impression of naturalness and truth. I should be prepared to accept Exhibit C without Exhibit D; but I am confirmed in this view by

(1) (1906) I.L.R., 28 All., 683. (2) (1901) I.L.R., 24 Mad., 414.

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the fact that the young woman told the same story at the earliest opportunity. Exhibit D was of course taken on the day after the inquest; but she herself admits, and it is not disputed, that she gave the same story at the inquest itself.

She now seeks to explain that these statements were enforced and tutored. At one passage she says that the police took her to the choultry, took off her clothes and ill-treated her. At another she says that they threatened to take off her cloth and disgrace her. I do not wish to emphasize this discrepancy; but there is nothing to support the idea that anything of the kind occurred, and it is impossible to believe that the very detailed and natural story which the witness told was obtained in this way. I may also refer to the evidence of one of the panchayatdars, prosecution witness 6, a respectable and disinterested man worth half a lakh of rupees.

I do not believe the story of ill-treatment, and on the other hand the action of the witness in resiling to save her husband is quite natural.

I think in the circumstances, a sentence of transportation for life is sufficient, and I would commute the sentence accordingly.

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ODGERS, J.—I have had the advantage of perusing the judgment just now delivered in which the facts are fully set out. There is no doubt to my mind that the conviction of the accused is right, if the statements of Subbammal, the wife of the accused, and Chinnammal, in the Magistrate's Court can be accepted in preference to their statements before the Sessions Judge, and this is the only point with which I purpose to deal. Subbammal, in Exhibits C and C-1 before the Sub-Magistrate, clearly speaks to the abuse of her husband by *Pichi* and to the fact that he went inside her house, dealt her two

blows and she cried out "He has caught hold of the throat and is killing," and she also speaks to the fact of the gunny bag in which the corpse was tied up as belonging to her house. Subbammal said exactly the same thing in Exhibit D before the investigating officer. She adds that her husband actually went towards the west carrying a gunny bag on his head, which is corroborated by a witness, prosecution witness 4, against whom nothing has been suggested. The statements of Chinnammal are not quite so consistent. In her statement before the investigating officer she says that the deceased went inside the house of Pichi whom she heard crying out at midnight; "He is pressing my throat and killing me." Before the Committing Magistrate she repeats that statement, but there seems to be some doubt as to whether she was in or outside the house when she heard the cry. The question is: Can the statements before the Committing Magistrate be accepted in preference to those before the Sessions Judge from the fact that the former are corroborated by statements made before the investigating officer? Section 288 of the Criminal Procedure Code clearly says that the evidence taken before the Committing Magistrate may, in the discretion of the Judge, be treated as evidence in the case, if such witness is examined, and there is abundant authority, it seems to me, for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case; see *Reg.* v. *Arjun Megha* and *Mana Jeesa*(1), *Emperor* v. *Dwarka Kurmi*(2) and *Queen-Empress* v. *Duraiswami Ayyar*(3). It was not argued before us that the Sessions Judge had exercised his discretion wrongly, or that he should not have admitted in evidence the statements made before

(1) (1874) 11 Bom. H.C.R., 281. (2) (1906) I.L.R., 28 All., 683.
(3) (1901) I.L.R., 24 Mad., 414.

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the Committing Magistrate. Further, the police were examined to disprove any allegation of pressure by them.

Section 157 of the Evidence Act says that

"in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before *any authority legally competent to investigate the fact, may be proved.*"

There is an authority in *Emperor* v. *Akbar Badoo*(1) to the effect that only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 ; previous statements might be used to corroborate or contradict the statements made at the trial, not to corroborate statements made prior to the trial. With all respect, it seems to me that under section 288, Criminal Procedure Code, and the authorities quoted above to the effect that once admitted evidence before the Committing Magistrate stands exactly on the same level as any other evidence in the case, it cannot be said that any previous statement taken before the competent investigating authority cannot be used to corroborate the statements made before the Committing Magistrate which is made by section 288 part of the evidence at the trial. No authority is quoted for the proposition laid down by the Bombay High Court; and in view of the fact that the object of enacting section 157 of the Evidence Act proceeded upon the principle that consistency is a ground for belief in the witness's veracity, contrary to the English rule, this statement of the law cannot be supported. The view I venture to take finds support in a case reported in 2 Weir's Criminal Rulings, 821, of our own Court, where COLLINS, C.J., and BENSON, J., held that a statement

(1) (1910) I.L.R., 34 Bom., 399.

made at the inquest could only be used to corroborate or to contradict a subsequent statement of the witness admissible as evidence. They go on :

"The only use the prosecution could make of her statement at the inquest would be to partially corroborate her statement to the Magistrate ; but when that statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it."

The learned Judges would therefore appear to be clearly of opinion that the statement made at the inquest might be used to corroborate the subsequent statement of the witness admissible as evidence, such as a deposition before the Committing Magistrate which is admissible as evidence under the circumstances detailed in section 288, Criminal Procedure Code. I, therefore, think that the statements, Exhibits C and C-1 and F, corroborated as they are by their previous statements before the investigating officer, are to be preferred to the evidence given by the witnesses before the Sessions Court, especially when we reflect that one of the witnesses is the accused's own wife. As to the other considerations arising on the facts of this case I have had the advantage of considering the judgment just pronounced, and I agree with the conclusions arrived at and with the reduction of the sentence.

M.H.H.