APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

1884
June 26.

QUEEN EMPRESS *v.* BEPIN BISWAS AND OTHERS.*

Trial by Jury—Jurisdiction of Judge—Evidence of Approver—Corroboration—Confession of one of several prisoners.

It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence; but he should always be careful to add that it is for the jury to form their own opinion.

Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as is ordinarily required to make it safe to convict a particular prisoner.

Confessions of prisoners are not, as against their fellow prisoners who were not present when the confessions were made, such corroborative evidence of the statement of an approver as would justify the conviction of the other prisoners thereon.

Confessions of two of several accused persons made in the absence of the others are of no weight as against the latter.

Such confessions, as well as the statements of approvers, are always regarded as tainted; because, from the position occupied by the persons making them, they are not entitled to the same weight on the evidence of ordinary witnesses.

An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *primâ facie* to convict him of the offence.

IN this case eleven persons, namely, Bepin Biswas, Kunju Mundle, Dukee Ghose, Bidesi Ghose, Dukee Dye, Nadi Ghose, Tincouri, Ram Mundle, Sham Ghose, Gopi Ghose and Sanyasi Ghose, were tried for dacoity before a Sessions Judge and a jury. One of the persons originally accused before the Magistrate turned approver, and two of the above named persons, namely, Bepin Biswas and Kunju Mundle made confessions before the Magistrate which they afterwards retracted and denied. The verdict of the jury is as follows:—

* Criminal Appeal No. 321 of 1884 from the judgment of J. M. Kirkwood, Esq., Sessions Judge of Moorshedabad, dated 17th of May 1884.

"We are unanimously of opinion that Bepin Biswas, Kunju Mundle, Dukee Ghose, and Nadi Ghose are guilty of dacoity under s. 395 of the Indian Penal Code. We would acquit the others, namely, Tincouri, Ram Mundle, Sham Ghose, Gopi Ghose and Sanyasi Ghose. We find that Bepin and Kunju did voluntarily make the confessions imputed to them." The prisoners appealed to the High Court.

The judgment of the High Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

The six appellants have been convicted of dacoity in a trial held by jury. The evidence against them consisted of the evidence of an approver and of certain witnesses who said that they recognised the appellants at the dacoity. It is also in evidence that some "mals," part of the stolen property, were found in the house of Dukee Dye, one of the appellants, and two others, Bepin and Kunju, made confessions before the Magistrate which they have since retracted and denied. In laying before the jury the evidence of the witnesses who speak to having recognised the prisoners, the Judge has very properly pointed out that when the offence was reported to the police, no one was mentioned as having committed the dacoity, which would be extremely unlikely if any of the villagers had recognised any of the dacoits. He has also mentioned the fact, that these witnesses admit that they had previously no acquaintance with those they profess to have recognised in the confusion of the dacoity, and that the night was dark. The Judge has summed up this evidence in the following words :—

"To such identification as this I am unable to attach any weight. It may, possibly, be explained to some extent by a theory that these witnesses that night saw these persons carried away a general impression of their appearance, without being certain as to who they were, found on the arrest of the prisoners that they resembled those impressions, and they were in reality men they had known before.

"At the same time, it appears to me highly probable that the pursuers did get hold of some idea of the men they were pursuing,

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and that, it is in no way improbable that the identifications, at least as regards the men not known to them by name before, were made to the best of their ability, and with every wish to be accurate."

This was not a correct way of placing the evidence before the jury for their consideration. It was certainly open to the Judge to express his own opinion regarding it, and he did do so when he stated that he was "unable to attach any weight to it." He should, however, have been careful to add that it was for the jury to form their own opinion on this evidence. But his subsequent remarks were, certainly, calculated to place this evidence before the jury, in a manner very prejudicial to the prisoners, inasmuch, it would tend to make the jury altogether lose sight of the much more important considerations already mentioned, *viz.*, that the night was dark, and that none of the dacoits were named in the early stage of the police investigation.

But, the Judge's charge to the jury is open to much stronger objection in other respects. The evidence of the witnesses who profess to have recognised the appellants is clearly not the principal evidence in the case, on which the Judge himself, and, as far as we can determine from the character of the charge to the jury, the jury must have relied, with the exception of that relating to the finding of the "muls" in the house of Dukee Dye; that evidence consists of the evidence of an approver, and we have also the two statements or confessions made by Bepin and Kunju before the Magistrate. The Judge has thus directed the jury in this respect: "It is not illegal for you to convict on the unsupported testimony of an accomplice if you fully believe it."

"But, ordinarily, before convicting on such testimony, you should see if that testimony has received strong corroboration. In my opinion, it would not be safe to convict on the statement made in this Court by Heera Lall (the approver), unless that statement receives strong corroboration. Now, it is a corroboration of Heera Lall's statement made before you yesterday, that on two previous dates (the 5th and 2nd April) he made statements in full detail of the events of that night. These statements in all important particulars agree one with the other: the only

discrepancies are one or two very slight ones, as to the parts one or two of the accused played during the plundering of the house, and this may well be, when one considers that the operators were not standing still, but in constant movement and activity. It is important, however, for you to notice, that on each of these three occasions he gives the same version." The Judge then proceeds to mention the points of correspondence, but we do not find that he drew attention to the discrepancies to which he has also generally alluded.

The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognised by s. 157 of the Evidence Act, as some corroboration of the truthfulness of that statemant, but the Judge has lost sight of the fact that, from the position occupied by an approver witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person, that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy.

It is for this reason, that the rule stated in the case of *The Queen* v. *Nawab Jan* (1) has always been accepted. In that case Macpherson, J., pointed out that "there was no corroboration such as adds to the approver's evidence against Nawab Jan; because there is no evidence, apart from that of the accomplice, which identifies the prisoner with the commission of the offence with which he is charged. Nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offences. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged, are no corroboration, in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the

(1) 8 W. R. Cr. 19 (26.)

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"accomplices say is true," he would also refer the Judge to the cases of the *Queen* v. *Baikunthanath Banerjee* (1) and *Queen* v. *Mohesh Biswas* (2), as well as to *Reg.* v. *Malapabin Kapana* (3). In the last case the Bombay High Court refused to accept as evidence corroborative of that of the approver, statements made by him on different occasions to his parents shortly after the murder, pointing out that his statement, whether made at "the trial, or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not improve by repetition." "It is not necessary for us to consider whether the rule should be extended as far as to exclude a statement made before arrest; but we have no doubt at all, that the exact correspondence in details of several statements made by an approver in the course of a trial, is not corroborative evidence such as we ordinarily require to make it safe to convict any particular prisoner.

The Judge has further misdirected the jury in telling them to regard as evidence in corroboration of the approver, the statements made by the prisoners Bepin and Kunju when examined by the Magistrate. Such statements are no legal corroboration of the tainted evidence of the approver. See *Reg.* v. *Malapabin Kapana* (3), *Queen* v. *Budhu Nanku* (4), *Queen* v. *Jaffer Ali* (5). Statements so made are certainly of no higher value than that of an approver. It should also be remembered that a prisoner under trial would have the advantage of cross-examining an approver, whereas the statement of a fellow prisoner, which would be as much tainted as that of an approver, would be subject to no such test. See *Queen* v. *Naga* (6). In the case now before us, we would further point out that the fact, that the statements made by Bepin and Kunju before the Magistrate, were made in the absence of the other

(1) 3 B. L. R., 3 (F. B.)
(2) 19 W. R. Cr., 18.
(3) 11 Bom. H. C. R., 196.
(4) I L. R., 1 Bom., 475.
(5) 19 W. R., Cr., 57.
(6) 23 W. R., Cr., 24.

prisoners whom it is intended to implicate thereby, should alone have induced the Sessions Judge to caution the jury against attaching any weight to them at all, except as against those who made them.

Next, the Sessions Judge should not have told the jury that "In the absence of anything whatever to show enmity, or why the other prisoners should have been falsely named by the approver, and the two confessing prisoners, there is sufficient material on which to convict them legally, but, that at the same time, it is desirable, that, if possible, the jury should have independent evidence of the identity of the accused."

In thus directing the jury, the Judge has put the evidence of the approver and the statements of the two prisoners before the Magistrate on the same footing as the evidence given by any ordinary witness. He has altogether overlooked the fact that one invariable practice is to regard such statements as tainted, because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of an independent witness.

We next find that the Sessions Judge has commented on the fact that one of the appellants was absent from home on the night of the dacoity, and that he has adduced no evidence to contradict this, or to show that he was "innocently engaged." This is an observation that should not have been made, and cannot but have seriously prejudiced the prisoner Bedesi, for his own absence from home would be no legal corroboration of the evidence of the approver, unless there was *primâ facie* sufficient legal evidence to convict him of the offence, he would not be bound to account for his movements.

We have, therefore, no hesitation in holding that the Sessions Judge has misdirected the jury in such a manner as to demand a new trial. Having regard to the special terms of the verdict of the jury convicting Bepin and Kunju, we should ordinarily have affirmed their convictions, but we find ourselves unable to hold that they too have not been seriously prejudiced by the Judge's charge. For instance, the Sessions Judge told the jury, "as regards Kunju and Bepin, I may say that the evidence I have discussed is in any case ample for their conviction." Again: "But

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Bepin likewise has not been mentioned by any of the villagers, yet the evidence can have no doubt of his guilt." It is true that the Sessions Judge at the close of his charge said: "If you feel yourselves able to rely implicitly on the statements made by Kunju and Bepin, you should convict them notwithstanding the absence of further corroboration;" but it is impossible to say how far the observations previously made and just quoted, did not have such effect on the minds of the jury, as to determine their verdict independently of all other considerations.

Under such circumstances we think that they also should be retried.

New trial ordered.

PRIVY COUNCIL.

P. C.* 1884 *March* 13, 14.

ABDUL RAZZAK (DEFENDANT) *v.* AMIR HAIDAR (PLAINTIFF.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

"Oudh Estates' Act," I of 1869, *s.* 13—*Compulsory registration of will devising taluq—Deposit of will distinct from registration under Act VIII of* 1871.

A will devising a taluq to a sister's son of a taluqdar, in the lifetime of the taluqdar's brother, is not excepted from the necessity of being registered under s. 13 of the Oudh Estates' Act, I of 1869, such sister's son not being one of those who, in the event of the taluqdar's having died intestate, would have succeeded to an interest in his estate, within the meaning of the exceptions made in s. 13, sub-s. 1, of that Act.

It may be doubted whether the mere title to maintenance would be such an "interest" as would come within the meaning of the exceptions.

The deposit of a will under part IX of Act VIII of 1871 does not amount to the registration required by the above section of Act I of 1869.

APPEAL from a decree of the Judicial Commissioner of Oudh (22nd March 1882), modifying a decree of the District Judge of Lucknow (2nd September 1881.)

This appeal related to the effect of a will made by the taluqdar of a taluq entered in the lists 1 and 3, prepared under the Oudh Estates' Act, I of 1869. The question was whether a bequest of a taluq in a will, not registered in conformity with

* Present: LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.