

APPELLATE CRIMINAL.

Before Mr. Justice Newsam.

IN RE UNNA MUHAMMAD SAHIB (FIFTH ACCUSED),
 PETITIONER.*

1937,
 September 24.

*Madras Gaming Act (III of 1930), sec. 12—"Place"—
 Meaning of.*

The real offence dealt with in section 12 of the Madras Gaming Act (III of 1930) is obstruction or annoyance to wayfarers and pedestrians. The word "place" occurring in that section means from its context a place akin to a street or thoroughfare, used regularly and necessarily by people going from one place to another.

Held, accordingly, that playing cards for money in a tank-bed at 3-30 p.m. by the petitioner and others did not amount to an offence.

Emperor v. Hussein(1) relied upon.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Ranipet, dated 3rd November 1936 and passed in Criminal Appeal No. 53 of 1936 preferred against the judgment of the Court of the Bench of Magistrates of Wandiwash, dated 21st October 1936 and passed in Bench Case No. 75 of 1936.

V. T. Rangaswami Ayyangar and *K. Ramaswami Ayyangar* for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

ORDER.

Gambling is not a criminal offence in itself. Gambling in a public street, place or thoroughfare is an offence. The facts are that petitioner

* Criminal Revision Case No. 108 of 1937 and Criminal Revision
 Petition No. 100 of 1937.

(1) (1905) I.L.R. 30 Bom. 348.

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(fourth appellant and fifth accused in the case) and others were caught playing cards for money in a tank-bed at 3-30 p.m. I do not think that this amounts to an offence. I agree with the conclusion in *Emperor v. Hussein*(1) that it is not an offence to gamble in every public place. The word "place" in section 12 of the Madras Gaming Act means from its context a place akin to a street or thoroughfare, used regularly and necessarily by people going from one place to another. The real offence dealt with in section 12 is obstruction or annoyance to wayfarers and pedestrians.

I allow this petition and set aside the conviction and sentence on the petitioner.

V.V.C.

APPELLATE CRIMINAL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

IN RE KAMSALA MUNEYYA AND ANOTHER (FIRST AND SECOND ACCUSED), PRISONERS.*

1937,
April 8.

Criminal Rules of Practice—Rule 85 of—Confession—Voluntary, if—Omission of Magistrate to ask accused whether he was aware that it was not intended to make him an approver—Effect of—Retracted confession—Use of, against co-accused—Considerable circumstantial evidence connecting accused with crime—Existence of—Effect of.

The object of putting the questions set out in Rule 85 of the Criminal Rules of Practice is to enable the Magistrate to be quite sure that the statement was a voluntary one; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not

(1) (1905) I.L.R. 30 Bom. 348.

* Referred Trial No. 149 of 1936 and Criminal Appeals Nos. 670 and 671 of 1936.

brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked.

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In every case it is a question of fact whether the Court is satisfied whether the statement made was a voluntary one. There may be cases where the omission to ask the accused whether he was aware that it was not intended to make him an approver might, taken with other circumstances of the case, make the Court strongly suspicious that the confession was not voluntarily made. But there may be other cases in which such an omission might not lead to that conclusion.

Held that in the circumstances of the case the omission of the Magistrate to ask the accused whether he was aware that it was not intended to make him an approver did not render the confession other than voluntary.

Held further that the mere fact that some police officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate was no proof that he was forced to make it.

A retracted confession is of little value against a co-accused and the fullest corroboration is necessary—far more than would be demanded for the sworn testimony of an accomplice on oath. But when there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind as to the guilt of the accused.

TRIAL referred by the Court of Session of the Cuddapah Division for confirmation of the sentences of death passed upon the prisoners in Calendar Case No. 23 of 1936 on 23rd November 1936 and appeals by the prisoners against the said sentences.

The two accused were convicted of the murder of Pedda Konda Reddi, a member of the Cuddapah District Board, at about 7 p.m. on 11th October 1935 at a spot just east of Cuddapah town and within a short distance of the Kondayapalli Kunta, the Government Hospital, the High School and the Cuddapah-Rachinnayapalli Road.

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P.W. 2 met the deceased at the house of Narasimhareddi, a District Board member, and at about 6 p.m. they both left for Pakirpalli, the village of the deceased, about one and a half miles from Cuddapah. On their way, as they were approaching the spot where the tank bund meets the foot-path, they met two men, one of whom was dressed in the ordinary garb of a Hindu and the other in the tarbush and pyjamas of a Muhammadan. P.W. 2 was then about four yards behind the deceased. Just as these two men passed Pedda Konda Reddi, they turned and attacked him with bill-hooks and hacked him mercilessly to death. The witness remonstrated, but the man in Muhammadan costume advanced to attack him. He pleaded for his life and when the man in Muhammadan dress returned to give some final blows to the deceased, the witness ran away. Some voices from a well near by in the bed of the tank incited the assailants to attack this witness also, but he ran in the direction of the town and, before his pursuers could catch him, others called out enquiring what had happened; and so his pursuers turned back before he actually reached the town. Panic-stricken, the witness ran towards the hospital and gave out his story to P.Ws. 3 and 4. Soon afterwards he made a formal complaint, Exhibit B, to the police. Two days later, this witness was examined under section 164, Criminal Procedure Code, by the Sub-Magistrate to whom he gave a very detailed statement (Exhibit C) of what had occurred. In Exhibits B and C he said that he could identify the two persons who attacked the deceased and threatened him. Search was made for the first accused and he was

eventually arrested on the 21st at the village of Rajampet. An identification parade was held on the 22nd at which P.W. 2 pointed out that accused as the man who was wearing Muhammadan costume and had participated in the murder. A search was then made for the second accused. He was arrested on the 24th in a field on the outskirts of Cuddapah and produced before the Sub-Inspector, P.W. 30. The second accused was at once questioned, and he gave certain information regarding the whereabouts of the clothes worn by the first accused at the time of committing the murder. Panchayatdars were secured and the party proceeded to the tank, where the second accused pointed out the place where these articles had been thrown. A search was made there and two bill-hooks and a tarbush were recovered.

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K. S. Jayarama Ayyar for *G. Gopalaswami* for first accused.

V. L. Ethiraj for *V. Sankaran* for second accused.

Parakat Govinda Menon for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by HORWILL J.—

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[His Lordship after dealing with the facts of the case summarised above proceeded :—]

As the second accused was willing to make a confession, the Sub-Inspector wrote to the Sub-Magistrate and asked him to make arrangements for the confessional statement of the second accused to be recorded, either by himself or by the Sub-Magistrate of Kamalapuram. The second

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accused having in the meanwhile been transferred to his jurisdiction, the Sub-Magistrate of Kamalapuram was ordered to take the confessional statement and he had the second accused brought before him on the 28th. He then informed the second accused that he had received a requisition from the police to record his confessional statement and warned him that he was not bound to make a confession and that, if he did so, any statement that he made might be used in evidence against him. He then sent him back to the sub-jail, telling him that he should think over the matter and that his statement would be recorded on the 30th. On the 30th the second accused was again brought before the Sub-Magistrate and a number of questions were put to him. When the Sub-Magistrate was satisfied that the second accused was prepared to make a confessional statement he recorded it. The second accused made a very detailed statement of the deliberations which led him to take part in the murder. He stated that two persons, who were prominent members of the party in the District Board opposed to the deceased, asked him to give his assistance to the first accused and promised to reward him with a sum of Rs. 100, that after considerable hesitation the temptation to earn Rs. 100 so easily became too much for him and he agreed, and that he and the first accused primed themselves with arrack and came back to the theatre, where final arrangements for the commission of the murder were made. The accused were then promised Rs. 200 each. This incitement began about twenty days before the actual murder was committed, the meeting at the theatre being a day or two

before the murder. At about 3 p.m. on the day of the offence they met at the theatre, and the first accused arranged that the second accused should wait in the choultry while he, the first accused, made final enquiries as to the movements of the victim. At about 6 p.m. the first accused returned with arrack and bill-hooks and with the garb of a Muhammadan for himself. They waited there until they received a signal from the tank bund, the signal being the waving of a cloth. They then proceeded to the well referred to above, as situate in the tank bund, and there waited until the deceased and P.W. 2 came along the path. The first accused accosted the deceased saying, "You have succeeded in remaining alive until now" and struck the deceased with a bill-hook on his face and neck. The second accused also gave a blow with a bill-hook. After the deceased fell down the second accused stabbed the deceased twice on the chest with a dagger, while the first accused cut the throat of the deceased and hacked his face. They ran away along the tank bund, throwing the bill-hooks, the hat, and the pyjamas into the tank. The dagger, the second accused took and kept in his house.

This confession is the most important evidence in the case and has been attacked principally on two grounds : (i) that it was not a voluntary confession and (ii) that in any case it is not true. With regard to the first argument the principal point made is that the Sub-Magistrate, P.W. 25, did not ask the second accused whether he was aware that it was not intended to take him as an approver. This is unfortunately true and the Sub-Magistrate's excuse is that he did not know the Telugu word

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for approver. This does not seem to be either a true or a proper explanation. Obviously, the Sub-Magistrate had forgotten to ask the question. There is no single word in Telugu for approver and if there were, the word would probably be so technical that the second accused, who is a cooly, would not have understood it. It would have been easy enough for the Sub-Magistrate, if he had really remembered that that question should have been asked, to have conveyed to the accused the purport of the question laid down in the Criminal Rules of Practice. However, the question is whether the omission to ask this question invalidates the confession. The object of putting the questions set out in Rule 85 of the Criminal Rules of Practice is to enable the Sub-Magistrate to be quite sure that the statement was a voluntary one ; and if one can be sure from the other questions and statements made by the accused that the confession was voluntary and was not brought about by coercion and inducement, then the confession cannot be rejected merely because a formal question was not asked. There is no evidence that there was ever any intention to take the second accused as an approver. P.W. 30, the Sub-Inspector in charge of this case, states, on the contrary, that no attempt was made to take this accused as an approver while he had anything to do with the case. It has already been mentioned that on the 28th, two days before the confession was recorded, the Sub-Magistrate warned the accused that if he made a statement it would be used in evidence against him and advised him to think over the matter before making his confession. On the 30th, P.W. 25 first ascertained from the second

accused how long he had been in police custody, when the police first questioned him, and how many times the police had questioned him about this case. He was then asked if he had been forced to make a confession, to which he replied that he was making it of his own free will. In answer to a question, the second accused also stated that he knew that the statement would be used in evidence against him and he assured the Sub-Magistrate that during the five days that he had been in the sub-jail nobody had asked him to make any statement and that he was making the statement of his own free will and not on account of any fear that he would be beaten. The Sub-Magistrate then gave his reasons for believing that the statement was a voluntary one and asked the accused to state what he knew about the murder. After the confession had been recorded he appended the usual certificate that the second accused was told that he was not bound to make a confession, that if he did so it would be used against him, and that he believed the statement of the accused to be a voluntary one. In his evidence he states that he told the accused that he need have no hope that he would escape by making such a statement and indicated to him that he would be hanged as a result of making the statement. The questions put by the Sub-Magistrate make it quite clear to us that he did explain carefully to the accused that, far from his confession having the effect of getting him off, it would get him hanged ; and if the accused knew this he also knew that being taken as an approver would not help him. We have been referred to the cases.

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reported as *Subbaramayya v. Emperor*(1) and *Nazir Ahmad v. The King-Emperor*(2), but these cases do not help us as in every case it is a question of fact whether the Court is satisfied that the statement made was a voluntary one. There may be cases, such as *Subbaramayya v. Emperor*(1), where the omission to ask the accused whether he was aware that it was not intended to make him an approver might, taken with other circumstances of the case, make one strongly suspicious that the confession was not voluntarily made. But there may be other cases, such as the present one, in which such an omission might not lead to that conclusion. One question and answer in Exhibit M has been brought to our notice, as suggesting that this accused was forced to make this statement. The question was : " Did the police force you to make a confessional statement? ", to which the answer was, " head constable Venkatayya asked me to make a confessional statement ". The Sub-Magistrate followed this up, of course, with another question : " Are you giving the statement which you are now going to make voluntarily, or is it as a result of any one beating you and forcing you to make such a statement? ", the reply to which was, " I am going to make (it) of my own free will ". The question and the first answer of the accused show of course that the police suggested to the accused that he should make a formal confession ; but presumably this is so in every case. It is most unlikely that any accused person of his own accord would ask that his confessional statement should be recorded by a Magistrate. When an accused person makes a

(1) (1937) 45 L.W. 93.

(2) (1936) 71 M.L.J. 476 (P.C.).

statement to the police, one would expect the police, as a general rule, to suggest to the accused person that he should make that statement before a Magistrate, and it is only after he expresses his willingness to make a statement before a Magistrate that a request is made by the police to the Magistrate to record the confession. It is then the duty of the Magistrate to remove the accused person from all police influence, to warn him that his statement will be used against him, to give him time to think over the consequences of such a confession, and to satisfy himself that the statement made was a voluntary one. We think that that was done in this case ; and the mere fact that some police officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate is no proof that he was forced to make the statement. It is noteworthy that not a single question was put to the head constable with regard to the circumstances under which he told the second accused to make a confession to the Magistrate. The second accused was arrested on the 24th and transferred to the Kamalapuram sub-jail on the 26th. Certainly from that date onwards he was free from police influence and the Magistrate had given him two whole days to think over the matter, after warning him of the consequences of his confession, before the confession was actually recorded. We are therefore satisfied that the confession was a voluntary one.

[His Lordship found that the confession was also true, discussed the evidence against the second and first accused separately and proceeded :—]

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There remains for consideration the effect of the confessional statement of the second accused against the first accused. It is contended that the value of this piece of evidence is so little that it should not be taken into consideration at all ; but if that were so, section 30 of the Indian Evidence Act would have no practical application whatever. Confessional statements are invariably retracted as soon as the accused is represented, which in this particular case was very soon after the confession was made. The strongest case quoted on behalf of the accused is *Sher Muhammad v. Emperor*(1) where it is said :

“ The rule is now firmly established that ordinarily it is improper to use the retracted confession of an accused person against his co-accused.”

The whole legal aspect of the case is summed up in this terse statement, the rest of the judgment discussing the facts of that particular case. The learned Judges do not say how that rule has been firmly established and what tribunals have laid down that rule. In *Giddigadu v. Emperor*(2) there was no evidence at all except the confession of the co-accused. Under such circumstances no co-accused could of course be convicted ; for section 30 says only that the confession *may be taken into account*, which pre-supposes the existence of other evidence. *In re Periyaswami Moopan*(3) has no application to the point now under consideration, for the question there was whether the confession of an offence other than that for which the accused was tried could be considered against the co-accused. In *Yasin v. King-Emperor*(4) it is

(1) (1927) 104 I.C. 630.

(3) (1930) I.L.R. 54 Mad. 75.

(2) (1909) I.L.R. 33 Mad. 46.

(4) (1901) I.L.R. 28 Cal. 689.

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pointed out that a retracted confession is of little value against a co-accused and the fullest corroboration is necessary—far more than would be demanded for the sworn testimony of an accomplice on oath. With this statement we of course agree. Obviously, a retracted confession has little evidentiary value against a co-accused when compared with the evidence of an accomplice given on oath, which can be tested by cross-examination; but when, as in the present case, there is considerable circumstantial evidence connecting the accused with the murder, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind whether, in spite of the fact that the accused has been identified, that he was seen both before and after the offence under suspicious circumstances, yet by some chance he may not have taken part in the murder. If we doubted the other evidence, which we do not, the confessional statement of the second accused would assure us that we were not mistaken in accepting the identification of the first accused by P.W. 2, that the first accused not merely stood in Muslim dress a few yards away from the path when seen by P.W. 3, but that he soon afterwards took part in the murder; and that when P.Ws. 5 and 6 say that they met the accused coming from Nabikote just after the murder was committed they were speaking the truth.

[In conclusion, his Lordship found that the accused were guilty of a shocking and cold-blooded murder and confirmed the convictions and sentences on both the accused.]