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REFERENCE UNDER ACT No. I OF 1879 (INDIAN STAMP ACT), s. 49.

mortgage-deed, as a mortgage-deed is defined in clause 13 of s. 3 of the Indian Stamp Act of 1879. It is an instrument by which, for the purpose of securing a future debt, that is, the rent to be paid, and for securing the performance of an engagement, that is, the engagement to pay the rent and to deliver the other articles yearly, the lessees created in favor of the lessor a right over specified property.

As to the second question, in our opinion the document in question cannot be regarded as an instrument comprising or relating to several distinct matters. The matter to which the instrument relates was the terms upon which the lessors let the land and the lessees took the holding. The mortgage was not a distinct matter from the lease. It was as much the matter of the lease as an ordinary covenant to pay would be part of the matter of the lease. We are consequently of opinion that paragraph 2 of s. 7 of Act No. I of 1879 applies to this case. We are fortified in this opinion by the decision of the Calcutta High Court in *Ex parte Hill* (1). The papers will be returned to the Munsif through the District Judge with this expression of our opinion. There are some independent papers which have been sent up with the document we have expressed our opinion upon, but there is nothing to show whether those papers are relevant or not. The opinion which we express is simply on the document in question.

APPELLATE CRIMINAL.

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November 17.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* TAJ KHAN AND OTHERS.

Criminal Procedure Code, ss. 161, 162 -- *Use at trial in Sessions Court of statements made to Police officer investigating case—Evidence.*

Though, speaking generally, statements, other than dying declarations, made to a Police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may

(1) I. L. R., 8 Calc., 254.

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be shown by the evidence of the Police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the Police officer he would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it) cannot be used as direct evidence of what was stated by the witness to the Police officer.

Such statements as above described made as to the presence of an accused person at the commission of an offence and not being statements to which the second paragraph of s. 162 of the Code of Criminal Procedure applies, cannot legally be used as evidence against the accused.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Satya Chandar Mukerji*, for the appellants.

The Public Prosecutor (Mr. *A. Stracley*), for the Crown.

EDGE, C. J., and BANERJI, J.—Eighteen men were convicted of the offence punishable under s. 302 of the Indian Penal Code by the application of s. 149 of that Code. Those eighteen men have appealed.

The undoubted facts are that there was ill-feeling existing between the Muhammadans of the village of Sewanpur and those of the village of Kanoi. Some time before the date on which the murder in question was committed, one of the Muhammadans of Sewanpur had been killed by Muhammadans from the village of Kanoi. The man who was killed was the uncle of Taj Khan who is one of the men convicted in this case. For that murder some of the Kanoi Muhammadans have been punished. On the 8th of April last, the Muhammadans of the neighbouring villages assembled on the occasion of the *Id-ul-fitr* at the *Idgah* of the mosque at Sahawar. On that occasion about fifteen men from the village of Kanoi and a large number, estimated at from sixty to seventy, of the Muhammadans of Sewanpur also assembled. The evidence shows that of the large crowd of Muhammadans assembled at the mosque the men from Sewanpur were the only men armed with *lathis*. The Kanoi men were unarmed. It is also beyond dispute that on that occasion, and close to the *Idgah*, the men from Sewanpur, or some of them, attacked with their *lathis* the men from Kanoi, and that that attack was made without any provocation. It is

further beyond dispute that Chaddan Khan, one of the Kanoi men, was severely beaten by the Sewanpur men with *láthis* and that he died from the results of the injuries which he received. It is also beyond doubt that several other of the Kanoi Muhammadans received injuries more or less severe from *láthi* blows inflicted by the Sewanpur Muhammadans on that occasion.

There were nineteen men from Sewanpur put on their trial before the Sessions Judge: one was acquitted, the others were convicted. We have now to decide what was or what were the offence or offences committed on that occasion, and which of these eighteen men were proved to have been guilty of committing an offence on that occasion.

Before dealing shortly with the evidence, as we propose to do, it is necessary to refer to some evidence which was made use of against some of these men at the Sessions trial. It so happened that the Sub-Inspector who was in charge of the neighbouring thána was present when the attack on the Kanoi men was made. Immediately after that attack he asked the wounded men for information. Whether it was for information as to the particular men who assaulted them, or whether it was for information as to the Sewanpur men who were taking part in the attack generally, is not very clear. Each of the wounded men made to the Sub-Inspector a statement, and each of those men who happened to be examined at the Sessions trial very considerably enlarged in his evidence at the trial on the statement made to the Sub-Inspector by giving more names of assailants.

The Sessions Judge in convicting these eighteen men appears to have relied, as against some of them at least, on the fact that they had been mentioned to the Sub-Inspector on the 8th April, by the wounded men of Kanoi. Mr. *Satya Chandar Mukerji*, who appeared here for these eighteen appellants, contended, and we think rightly, that the statements, with the exception of that of Chaddan Khan, which were statements other than dying declarations, fell within the prohibition of the first paragraph of s. 162 of the Code of Criminal Procedure. The last paragraph of that section did not apply to these statements. These statements were made to the

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Sub-Inspector by persons in the course of an investigation by him under Chapter XIV of the Code of Criminal Procedure, and, as the second paragraph of s. 162 did not apply to them, we are of opinion that they cannot legally be used as evidence against the accused.

Mr. *Satya Chandar Mukerji* also contended, and we think rightly, that the first paragraph of that section does not prohibit using in favor of an accused person the statements to which that paragraph relates. Generally, we agree with that contention, but the statements can only be used in favor of an accused person when the statements are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may be shown by the evidence of the Police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at that time reduced into writing by the Police officer, the officer would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it), cannot be used as direct evidence of what was stated by the witness to the Police officer. We mention this, as Mr. *Satya Chandar Mukerji* has relied upon the fact that with regard to some of these men the evidence given by them at the trial varied from their statements made to the Sub-Inspector or went considerably beyond them. He has asked us not to attach credit to the evidence of those witnesses.

The first case with which we propose to deal is that of Ewaz Khan. It appears that the only one of the Kanoi men who mentioned to the Sub-Inspector at the time that Ewaz Khan was one of the attacking party was Fajju Khan. Fajju Khan was examined before the Magistrate, but does not appear to have been examined at the Sessions trial, and further, his deposition before the Magistrate does not appear to have been made part of the record of the Sessions trial Owing to that omission we are of opinion that it is safer to give Ewaz Khan the benefit of the doubt and to acquit him, although he was spoken to by some of the witnesses at the Sessions trial.

We set aside the conviction and sentence passed upon Ewaz Khan, and acquit him of the charge of which he was convicted, and direct that he be forthwith released.

One of the witnesses examined at the Sessions trial who had made a statement to the Sub-Inspector was Nur Khan. He mentioned to the Sub-Inspector, on the 8th of April, the names of seven men as having been engaged in the attack. At the Sessions trial he swore positively that the whole nineteen men then on trial were engaged in the attack. It seems to us that Nur Khan, by the time the Sessions trial arrived, had made up his mind to swear to men having been present on the 8th of April, whom, on the 8th of April, he had not seen in the attack. Three of the convicted men, *viz.*, Naim Khan, Bhure Khan and Asad Khan, were named on the 8th of April by Nur Khan only to the Sub-Inspector. At the Sessions trial other men of the Kanoi witnesses, who had not mentioned those men's names to the Sub-Inspector, swore to them as having been of the attacking party.

There was another witness examined at the Sessions trial who had made a statement to the Sub-Inspector on the 8th of April, to whom we shall now refer. This witness was Man Khan. He was the only one of the Kanoi men who, on the 8th of April, mentioned the convict Sallu Khan as one of the attacking party. Man Khan told the Sub-Inspector that four men had attacked him with *láthis* and that the first blow was given by Taj Khan. At the Sessions trial he mentioned the names of two men as having attacked him with *láthis*, and he did not suggest that Taj Khan had struck him at all, or had ever been nearer to him than a distance of eight or ten yards. We do not think that it would be safe to rely on the evidence of Man Khan or Nur Khan, and, as the four men last named by us, *viz.*, Naim Khan, Bhure Khan, Asad Khan and Sallu Khan, were at the time mentioned only by one or another of those two witnesses, we give them the benefit of the doubt, and, acquitting them of the offences of which they have been convicted, we set aside the convictions and sentences, and direct that they be forthwith released.

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We have now to deal with the case of Taj Khan, Muhammad Ali Khan, Nazar Mnhammad Khan and Jangi Khan.

It is proved to our satisfaction that Taj Khan was the man who gave the order to his fellow-villagers to attack the Kanoi men, and that he, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi attacked Chaddan Khan of Kanoi with their *láthis* and inflicted on him such serious injuries as to result in his death. We have no doubt that these four men were properly convicted of murder and sentenced under s. 302 of the Indian Penal Code. We dismiss the appeals of Taj Khan, Muhammad Ali Khan, Nazar Muhammad Khan and Jangi Khan.

There remain nine men whose cases have to be disposed of. We do not believe that the common object of the Muhammadans of Sewanpur was to commit murder, nor do we think that any one of these nine men knew that murder was likely to be committed in the attack on the men of Kanoi. We believe that the common object was to attack the Kanoi men with *láthis* and to inflict on them serious injury, such bodily injury as might be likely to cause death, but we do not think that common object was to commit the offence of murder as defined in s. 302 of the Indian Penal Code.

We alter the convictions of these men to convictions under s. 304, read with s. 149 of the Indian Penal Code. Although we do not believe that the common object of this unlawful assembly was to commit murder, we believe the undoubted object was to inflict serious injury on the Kanoi men. The Sewanpur men took their opportunity of having their revenge. The Sewanpur men came to the *Idgah* armed with *láthis*, probably knowing that the Kanoi men would be unarmed. They obeyed the order of their leader and joined in the attack which resulted in the offence committed by these nine men.

We think, however, that it is not necessary that these men should be transported for life, and altering their convictions we also alter their sentences, and sentence Daraz Khan, Badulla Khan, Shahamat Khan, Amanat Khan, Badal Khan, Chunni Khan, Dilawar Khan, Ghafur Khan and Man Khan to be rigorously imprisoned for seven years.