APPELLATE CRIMINAL.

1900
July 7.

Before Mr. Justice Blair and Mr. Justice Henderson.

QUEEN-EMPRESS *v.* NIRMAL DAS AND OTHERS.*

Criminal Procedure Code, section 288—*Previous statement to committing Magistrate retracted in Sessions Court—Use of such statement by Sessions Court as substantive evidence—Act No.* I *of* 1872 *(Indian Evidence Act), section* 30—*Confession of co-accused—"Taking into consideration"—Finding of arms and stolen property in joint family house—Evidence—Act No. XLV of* 1860 *(Penal Code), section* 412.

Where a witness who has made a statement before the committing Magistrate subsequently resiles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under section 288 of the Code of Criminal Procedure to contradict the witness; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature.

The words "take into consideration" in section 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress* v. *Khandia* (1) referred to.

The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.

ONLY so much of the judgment is reported as is necessary to the points referred to in the head-note.

The Government Advocate (for whom Mr. *W. K. Porter*), for the Crown.

BLAIR and HENDERSON, JJ.—After setting forth the facts of an ordinary dacoity, continued as follows:—

The police do not appear to have obtained any clue for nearly a fortnight. They then began to make arrests, and upon the 12th February last and the succeeding days confessions were made by three of the present appellants—Nathu, Bhola (of Nagla Gulal) and Darola (of Ratu). The police also, on or before the date mentioned, had got into communication with one Genda, who afterwards appeared under a tender of pardon, and came before the Magistrate to give evidence for the prosecution. Three persons, other than those here as appellants, were committed, and upon trial were acquitted by the Sessions Judge. Upon the hearing in the Sessions Court, Genda, who had appeared before the

* Criminal Appeal No. 409 of 1900.

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Magistrate and given evidence for the prosecution, was called for the prosecution. He then said that he knew nothing about the dacoity, that the Collector did not offer him a pardon, and that he had heard nothing about it. The statement made before the Magistrate was put before him, and he admitted making it, but he said that it was all false, and that he was forced to make it. Upon the hearing in the Sessions Court, the evidence given by him before the Magistrate, which was put in to contradict the statement that he knew nothing about the dacoity, was used as substantive evidence against the appellants here. Against many of them there is no sworn evidence delivered in the Sessions Court at all. * * * * *

The cases of those appellants who have been convicted mainly upon what Genda swore before the Magistrate stand upon an altogether different footing, and the weight to be attached to the evidence of Genda requires careful consideration. He is the person who was called and accredited by the prosecution before the Magistrate. Upon being again called for the prosecution in the Sessions Court he flatly denied that he knew anything about the dacoity, and that he took any part in it. The Sessions Judge then confronted him with the statement he had made before the Magistrate, and he was compelled to admit that he had made such a statement, and alleged that he had done it under compulsion. It is that evidence before the Magistrate so repudiated by him that the prosecution has put forward as evidence to be believed and acted upon in the Sessions Court, and upon that evidence the Sessions Judge has thought it fair to act. As to the admissibility of that evidence to contradict his allegation that he knew nothing whatever about the dacoity, there can be no question; but the use of the allegations made by him before the Magistrate as substantial evidence of the facts alleged by him seems to us fraught with the gravest peril. The terms indeed of section 288 of the Code of Criminal Procedure, which render the evidence of a witness taken before the committing Magistrate capable of being treated as evidence in the discretion of the presiding Judge, are couched in the widest possible language; but we entertain the strongest opinion, in common with Mr. Justice Straight, that it never was the intention of the Legislature that the substance of such a

statement before the Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence if it stood by itself; and indeed as far as what is properly called evidence is concerned, Genda's repudiated statement is all that there is on the record to justify the conviction in several of the cases before us. Taken with this confession upon oath are the confessions made by certain of the appellants which it is our duty not to treat as evidence but to "take into consideration." It is not perhaps necessary or easy to define precisely what is meant by these words "taking into consideration." This, at all events, it must mean, that they are not to have the force of sworn evidence. Indeed it has been most definitely ruled in the Bombay High Court in *Queen-Empress* v. *Khandia* (1), that a conviction resting on such a confession alone cannot be maintained. In our opinion, therefore, no conviction in these cases can be sustained, which rests only upon the repudiated evidence of Genda and the statements made by the co-accused. Among the persons who have been convicted on such evidence are :—Nirmal Das, Darola (of Nagla Gulal) and Sanwalia.

We allow the appeals of these three appellants. We set aside their convictions and order them to be released.

The case against Ram Chandar, Bhao Singh and Jhamman, in so far as it rests upon the statement of Genda, has, in our opinion, no secure foundation, and the discovery of property and arms in the house jointly occupied by them together with Nathu falls, in our opinion, short of evidence of possession. There is nothing to show that they took or dealt in any way with any part of the stolen property, and we think that the bare finding of the property in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. We may add that their brother Nathu has taken upon himself all the responsibility for the possession of the stolen articles; it was he who upon his own admission, took an active part in the dacoity and

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brought the articles there: he expressly denied that his brothers had anything to do with the dacoity, and stated that the things found were his own share of the loot. We do not attach much importance to a statement of this kind, which would tend to exculpate his brothers, but we think that, apart from it, there is no evidence which would justify a conviction.

The Government have appealed against the acquittal of Narayan, the brother of Ram Chandar and Bhao Singh. Inasmuch as the evidence against him is limited to the discovery of property and arms in the family house, it is, in our opinion, impossible to support the appeal.

The appeal therefore against the acquittal of Narayan is dismissed, and the appeals of Ram Chandar, Jhamman and Bhao Singh are allowed. They will be at once discharged.

[WITH reference to section 288 of the Code of Criminal Procedure see further *Queen-Empress* v *Soneju* (1) and *Queen-Empress* v. *Jeochi* (2), and as to section 30 of the Evidence Act, *Empress* v. *Sundra* (3), *Empress* v. *Piria* (4) and an unreported case—Criminal Appeal No. 158 of 1900, decided on the 30th of April 1900—the material portions of the judgment in which are printed below.*—Ed.]

*This case has been submitted by the Sessions Court of Aligarh for confirmation of the sentence of death upon Dammar. There is also an appeal by Dammar. There are further appeals by Salig, Shibcharan, Behari and Param Sukh, who have been convicted of an offence under section 302 of the Indian Penal Code, but senteneed to transportation for life. Dammar is not represented before us. The other four appear by counsel.

On the 30th of September, 1899, Dan Sahai, mahajan, was undoubtedly murdered. The place where the murder happened was a mile distant from the village Lametha, where he lived. The medical evidence is that there were two wounds, one in front of the neck, the other on the back of the neck. Both wounds were caused by some heavy sharp-edged instrument, and could have been inflicted by the chopper produced in Court. There were two other wounds on the right side of the head. The Civil Surgeon states positively that there was no wound on the head, by which we understand on the skull. The police arrived on the spot on the 1st of October, and they lost no time in the investigation. The promptness with which the police action was taken in this case deserves commendation, and adds considerably to the value of the evidence which is the outcome of this investigation. One of the persons whom the police arrested

(1) (1898) I. L. R., 21 All., 175.
(2) (1898) I. L. R., 21 All., 111.
(3) Weekly Notes, 1884, p. 38.
(4) Weekly Notes, 1885, p. 320.