APPELLATE CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Kendall.

1927
June, 15.

EMPEROR *v.* BISHUN DATT AND ANOTHER.*

Criminal Procedure Code, section 164—*Act No. I of* 1872 *(Indian Evidence Act), sections* 145 *and* 155—*Limitations of use of statement made under section* 164.

A previous statement of a witness recorded under section 164 of the Code of Criminal Procedure can be used as provided for by sections 145 and 155 of the Indian Evidence Act, 1872; but it cannot be used as substantive evidence of the facts deposed to therein.

Bomanji Cowasjee v. *The Chief Judge and the Judges of the Chief Court of Lower Burma* (1), and *Emperor* v. *Cherath Choyi Kutti* (2), referred to. *Puttu* v. *King-Emperor* (3), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Kumuda Prasad* and Pandit *M. N. Raina*, for the appellants.

The Government Advocate (Pandit *Uma Shankar Bajpai*), for the Crown.

WALSH and KENDALL, JJ. :—In this case, which is an appeal by two men who have been condemned to death under section 302, Indian Penal Code, a serious question arises as to the admissibility, for the purpose of proving facts against the accused, of certain statements, which were undoubtedly admissible for the purpose of impeaching the credit of some of the witnesses who were called. The matter is of importance and not free from difficulty, and there appears to be no decisive authority in this High Court. It is absolutely necessary for us to decide the point as a point of law, because if, as is the case, we

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*Criminal Appeal No. 445 of 1927, from an order of Piare Lal, Additional Sessions Judge of Kumaun, dated the 15th of April, 1927.

(1) (1906) L.R., 34 I.A., 55. (2) (1902) I.L.R., 26 Mad., 191.

(3) (1914) 17 Oudh Cases, 363.

are of opinion that these statements ought not to be used as evidence of the facts contained in them against the accused, we shall have to decide the appeal upon the other evidence in the case, the learned Sessions Judge having taken these statements into account in deciding to convict the appellants.

The matter arises in this way. A witness was called at sessions by the prosecution for the purpose of proving a particular fact against one of the accused, which could be used to corroborate a confession of his co-accused. The witness said that he knew nothing about it at all. He was then asked if he had not made a statement under section 164 of the Code of Criminal Procedure. He undoubtedly had. Before the case was initiated in the court of the Magistrate who committed it for trial, the witness had been put on oath before a Magistrate and had made a statement of what he alleged to be his knowledge of the relevant facts, containing certain definite allegations against the accused. He admitted at sessions having made the statement—indeed he could hardly do otherwise—as it was made on oath and taken down in writing. He then alleged that it was false and that he had been tutored to make it by the police.

The question is whether these previous statements, and the evidence which they contain against the accused, can be used against the accused.

The two relevant sections appear to be sections 145 and 155 of the Evidence Act. Section 145 permits a witness to be cross-examined as to a previous statement made by him which has been reduced to writing, and to be contradicted by such writing which can be proved for the purpose of contradicting him. Section 155 enables his credit to be impeached in a manner therein provided "by proof" (to quote sub-section 3) "of former statements inconsistent with any part of his evidence which

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is liable to be contradicted." It follows therefore that in this case the statement made under section 164 of the Code of Criminal Procedure was properly admitted and did in fact impeach the credit of the witness. The question is whether its legitimate use can be carried beyond that stage. If it is to be used as the learned Sessions Judge has used it, then it is adding something to what the witness has not said at sessions, and it is not merely impeaching his testimony, but supplementing it. We are of opinion that the sections do not justify this procedure. It is necessary to refer to only three authorities. In the case of *Bomanjee Cowasjee* v. *The Chief Judge and the Judges of the Chief Court of Lower Burma* (1) a barrister was charged with improper conduct as a prosecuting counsel. One of the charges was that he had suggested bribery to somebody connected with the case. The prosecutor denied that the barrister had advised him to bribe. The prosecutor was cross-examined as to whether he had not said to another advocate engaged in the case that the advocate accused had suggested bribery to him. The prosecutor denied it. The barrister was then called to prove that the witness had made a statement to him of that fact. The Privy Council held that that evidence by the barrister was insufficient to prove the facts which had been found by the courts below, and could not avail to contradict the prosecutor's sworn denial. In other words, they held that even though the court believed the barrister and did not believe the prosecutor, there would still be no evidence by the prosecutor that the accused had advised him to bribe. That case is not on all fours with the present case, because in that case that witness, whose credit was impeached, had never given affirmative evidence of the fact which was sought to be proved. The affirmative evidence came from the mouth of the witness who was called to contradict him. In this case the

(1) (1906) I.L.R., 34 Ind. App., 55.

witness admits having made the statement on oath, and therefore this case is stronger, and the decision of the Privy Council is not decisive and, if it stood alone, we might consider that the distinction entitled us to depart from the rule there laid down. But a single Judge in the case of *Emperor* v. *Cherath Choyi Kuti* (1) has held generally that previous statements used under section 155, sub-section 3, for discrediting the evidence of a witness, cannot be used as substantive evidence against the accused. In that case they had been rejected at sessions, and the High Court upheld that rejection on appeal by Government. We adopt and follow the very clear and reasoned decision upon the point by our brother LINDSAY, when sitting as Judicial Commissioner of Oudh, in the case of *Puttu* v. *King-Emperor* (2). With reference to similar statements taken under section 164, he says:

"They were, it is true, admissible under the provisions of sections 145 and 155 of the Indian Evidence Act for the purpose of contradicting the statements made by these witnesses in court, but they were not admissible for any other purpose. They were statements which were made behind the back of the accused, and which he had no opportunity of cross-examining. They were not statements to which the provisions of section 288 of the Code of Criminal Procedure applied. That section enacts a special provision for the admission against the accused at a sessions trial of a statement made by a witness in the court of the Committing Magistrate after the accused has had a proper opportunity for cross-examination."

We agree with these observations and with that decision, and we hold that the Sessions Judge ought not to have relied upon this statement as evidence against the accused, and the appeal must be decided upon the balance of the evidence.

[The judgement then discussed the other evidence and dismissed the appeal.]

(1) (1902) I.L.R., 26 Mad., 191. (2) (1914) 17 Oudh Cases, 363.