

APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Chief Justice, and
Mr. Justice Sen.

EMPEROR *v.* SHAMBHU AND ANOTHER.*

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November, 2.

Confession—Admissibility against co-accused—Confession heavily implicating co-accused but not himself substantially—Mode of recording confession—Magistrate to record questions and answers whereby he satisfies himself that the confession is voluntary—Criminal Procedure Code, section 164—Manual of Government Orders, volume I, paragraphs 852, 853A—Value of retracted confession.

The incriminating statement of a co-accused is no more than the tainted testimony of an accomplice. The statement is without the safeguards of either oath or cross-examination. When an accused person in his statement or confession imputes the commission of the offence to his co-accused, but does not implicate himself as fully and substantially as he does his co-accused, the said statement or confession cannot be used as evidence against the co-accused.

Where there is nothing in the statement of confession, recorded by a Magistrate under section 164 of the Criminal Procedure Code, to show that besides the usual and stereotyped questions any serious attempt has been made by the Magistrate to find whether the statement was voluntary or otherwise, the court should hesitate to accept his certificate at its face value. Paragraphs 852 and 853A of the Manual of Government Orders, volume I, lay down definite rules for the guidance of Magistrates as to the method in which confessions ought to be recorded; and, as provided there, it is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily; and it is further the imperative duty of the Magistrate to record those questions and answers by means of which he has satisfied himself that the confession is, in fact, voluntary; failure to do so makes it impossible for the court to form any estimate as to the voluntary nature of the confession.

The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence,

*Criminal Appeal No. 374 of 1931, from an order of Muhammad Ziaul Hasan, Second Additional Sessions Judge of Cawnpore, dated the 21st of July, 1931.

that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.

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Mr. S. B. Johri, for the appellant.

The Government Advocate (Mr. U. S. Bajpai),
for the Crown.

MEARS, C. J., and SEN, J. :—This is an appeal by Shambhu Nath and Lalain Brahmans, who have been convicted by the learned Second Additional Sessions Judge of Cawnpore, under section 302 of the Indian Penal Code, for the murder of one Bhola Brahman. Shambhu Nath has been sentenced to death, and Lalain to transportation for life. The accused and the deceased were neighbours, and belonged to a village called Manoh Kalan. Shambhu Nath is aged fifty five and Lalain is about twenty years, and Bhola was about fifty five years of age. Bhola was murdered in his *khalian* or threshing floor on the night between the 4th and the 5th of April. The murder was discovered early in the morning and a report was lodged at the police station by the village *chaukidar*, who stated that the murder had been committed by some person or persons unknown, that there were eight or nine injuries on the body of the deceased, and that the said injuries appeared to have been caused by a *kanta*.

Investigation was commenced by the thana muharrir almost immediately. He sent the corpse to the mortuary. The post mortem examination revealed 12 incised wounds with multiple fractures of bones, including very serious fractures of the skull. The nature of the injuries indicated that these had been caused by some sharp cutting instrument like a *gandasa*.

The investigation was subsequently taken over by the Sub-Inspector, on the 6th of April, 1931. The

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accused were taken into custody almost immediately. The houses of the accused were searched and a *chadar*, to use the language of the police officer who wrote out the chalan, "besmeared with blood", was recovered from the house of Shambhu Nath. There were some stains upon the *chadar*, but the Imperial Serologist could not determine the origin of these stains, as they had disintegrated.

The case for the Crown mainly hinges upon a statement of Lalain, recorded by a Magistrate of the first class on the 7th of April, 1931, under section 164 of the Criminal Procedure Code. Lalain was produced before the Magistrate from the custody of the police. He was allowed to sit near the Magistrate for about three hours before his statement was recorded. The Magistrate has certified that the statement was voluntary.

[A portion of the judgment, not material for the purpose of this report, is omitted here.]

The evidence for the prosecution may be enumerated under these heads: (1) Evidence to prove enmity between the accused and the deceased; (2) Statement of Lalain, which was recorded on the 7th of April, 1931; and (3) Corroborative evidence, consisting of the statement of Mannu *dhobi*. While dealing with the evidence of enmity the learned Additional Sessions Judge observes as follows: "As regards Lalain accused and Bhola, the evidence of Jai Narain (P. W. 7), whom I see no reason to disbelieve, and Lalain's own confession show that about a month before the murder of Bhola, Lalain was severely reprimanded by Bhola on his spreading a scandal about him. Lalain, too, therefore could not have been very friendly towards Bhola, and though the enmity between them may be not so grave as to lead Lalain to think of murdering Bhola, still it was sufficient to prompt him to join Shambhu if the latter wanted to do away with

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Bhola. The motive proved by the prosecution against both the accused would not by itself be sufficient for their conviction, had it not been that the case against them is proved almost conclusively by Lalain's confession."

The statement of Lalain is the main plank in the case for the Crown, and if the said statement be eliminated on the ground of being inadmissible against either accused or both, or be disbelieved or be rejected for want of corroboration, in any of these events the case for the Crown must fail.

It should be borne in mind that the existence of hostility as a motive for a criminal act is no more than a piece of circumstantial evidence and falls short of proving the participation of the accused in the offence which is sought to be fastened upon him. As was said in *Emperor v. Kalwa* (1), "Corroboration must point indubitably to the identification of the person charged with the particular act with which the direct evidence connects him."

The statement of Lalain may be classified under two heads: (1) Recital of facts and incidents relating to enmity with the deceased; and (2) the specific part played by each of the accused persons in the commission of the murder. The story may be reproduced as told by Lalain himself: "Now eight or ten days ago, Shambhu went to Shyam's widow. At that time Bhola was inside the house. Shambhu made off with his shoes which were placed outside. Bhola rushed at him with his *danda*. Shambhu ran back to his house. Shambhu then said to me 'He dishonours everybody, but nobody does anything to him. Let us go and cut him'. I replied that I feared I would be convicted. He asked me to accompany him. I went with him at 11 p.m. At that time, Bhola was sleeping in the threshing floor. Shambhu had with him a

(1) (1926) I.L.R., 48 All., 409.

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kanta, which he struck on Bhola's head and mouth several times. He died then and there. I remained standing close to him."

It would appear from this (1) that Shambhu felt grievously insulted by the conduct of Bhola; (2) that he expressed his intention to avenge the wrong by cutting Bhola to pieces; (3) that Shambhu Nath went to Bhola's threshing floor, where the latter was sleeping; (4) that Shambhu Nath was armed with a *kanta*; and (5) that he killed him by striking with the *kanta* several times on the head and mouth.

Lalain does not assign to himself any active part in this transaction. When asked to join Shambhu Nath, he demurred "I fear I shall be convicted". He, however, accompanies Shambhu Nath who is armed with a fatal weapon and he knows the object of the mission to a lonely *khalian* at the dead hour of night. He stands close by, when blow after blow is inflicted upon Bhola; and Bhola is finished. These statements cannot be considered as self-exculpatory. They are self-incriminating in the sense that they amount either to a direct admission of constructive guilt or at least to statements from which constructive guilt may be inferred. It is patently clear, however, that Lalain assigns to himself a minor or subordinate part in the transaction. He is not the active murderer. He is merely a passive spectator of the murder. He does not implicate himself substantially and to the same extent as he implicates Shambhu Nath. The incriminating statement of a co-accused is no more than the tainted testimony of an accomplice. The statement is without the safeguards of either oath or cross-examination. When an accused person in his statement or confession imputes the commission of the offence to his co-accused but does not implicate himself as fully and substantially as he does his co-accused; the said statement cannot be used as evidence against the co-accused: vide *Queen*

v. *Belat Ali Moonshee* (1), *Empress of India v. Ganraj* (2), *Empress of India v. Mulu* (3) and *In re petition of Kapur Singh* (4). A similar view appears to have been taken by a Division Bench of this Court in Criminal Appeal No. 754 of 1910, *Chheddu Khan*, decided on the 22nd of April, 1911. One of the questions in issue was as to whether the statement of Kheoraj approver could be accepted and acted upon. The following observations occur in the judgment: "A still more important fact in connection with his evidence is this, that in every dacoity of which he gives an account he takes care to keep himself free from any direct act of violence. He assigns to himself positions either outside the house dacoited or away from those who were committing these acts of violence. To use an expression which Mr. Justice STRAIGHT on a similar occasion used very happily, 'while tarring others he takes care not to tar himself with the same brush'."

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We are of opinion that the statement of Lalain, apart from its value on the merits, is not admissible in evidence against Shambhu Nath. If this evidence be eliminated, the statement of Mannu *dhobi* falls short of proving any offence committed by Shambhu Nath. According to this statement Shambhu Nath and Lalain were seen under a *bargad* tree on the fateful night, close to the scene of murder, and that Lalain, and not Shambhu Nath, had a *kanta* in his hand. This does not carry the matter very far. The deponent himself was seen at the identical spot close to the *khalian*. Further, it is in evidence that the accused have got their *khalian* or threshing floor close to the *bargad* tree.

We hold that no case has been made out against Shambhu Nath and he is entitled to an acquittal.

(1) (1873) 19 W.R., (Cr.), 67.

(2) 1879 I.L.R., 2 All., 444.

(3) (1880) I.L.R., 2 All., 646.

(4) Weekly Notes, 1881, p. 20.

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We have already found that portions of Lalain's statement are of a self-incriminating character and that the inference of constructive guilt may be drawn therefrom. There are no intrinsic indications in the statement to prove that the statement was voluntary. Safeguards have been provided for against errors and abuses in the matter of recording confessions under section 164 of the Code of Criminal Procedure. Where there is nothing in the statement to show that besides the usual and stereotyped questions any serious attempt has been made by the Magistrate to find whether the statement was voluntary or otherwise, we should hesitate to accept his certificate at its face value. We would refer to the following observations of the Chief Court of Oudh in *Prag v. King-Emperor* (1): "It is with regret, with stern regret, that we note that Babu Bhagwati Prasad Sinha, the Deputy Magistrate who recorded these confessions, has completely disregarded the standing orders of Government as to the method in which confessions ought to be recorded. Paragraphs 852, 853 and 853A of the Manual of Government Orders, Vol. I, lay down definite rules in this matter for the guidance of all Magistrates throughout British India. These standing orders of the Government are based upon instructions issued by the Government of India and embodied in G. G. O., Home Department (Police) No. 36-C., dated the 5th of January, 1916. In the record of the confessions of Prag and Mst. Bishna (not to speak of the confessions of Mst. Naraini and Ram Bali) in the present case there is nothing to show that Babu Bhagwati Prasad Sinha informed any of these confessing prisoners that he was a Magistrate of the first class, empowered under the law to record a confession which could subsequently be utilised in the court of session and be sufficient to base a conviction of the confessing prisoner on the capital charge of murder. Had he done so, one of the

(1) (1930) I.L.R., 6 Luck., 385.

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confessing accused could not subsequently, with any show of reason or decency, have urged (as did Mst. Naraini afterwards) that the person recording the confession was understood by the prisoner to be a police officer and not a Magistrate."

"As pointed out by Government in paragraph 853A of the Manual of Government Orders quoted above, it is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily; and it is further the imperative duty of the Magistrate to record those questions and answers by means of which he has satisfied himself that the confession is, in fact, voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the court of session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come, as regards the voluntary nature of the confession. Without supplying these data or materials, it is impossible for the trial court (i.e., the court of session) or for this Court to form any estimate as to the voluntary nature of these confessions. The court of session or this Court cannot merely accept the *ipse dixit* of the Deputy Magistrate recording the confession as to its being voluntary. The genuineness and truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the court of session and of this Court, and neither the court of session nor this Court can blindly accept the ready-made opinion of the recording Magistrate on these points, without having before it materials from which it could arrive at an independent opinion on these crucial questions on which the fate of the accused hangs." The remarks made here have our concurrence and approval.

There appears to be considerable confusion and apparently some discrepancy about the sequence of

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events chronicled by Lalain. A feature like this ought not to have appeared in a confession which is genuine and *bona fide*.

Lalain did not adhere to this statement either in the court of the committing Magistrate or in the court of session. The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.

The material portions of the confession affecting Lalain himself are (1) Shambhu Nath told him "let us go and cut up Bhola"; (2) Shambhu Nath and Lalain went to the *khalian* and Shambhu Nath was armed with a *kanta*; (3) Shambhu Nath assaulted Bhola with the *kanta* and Lalain stood by. There is absolutely no corroborative evidence on any of these points excepting on point No. 2, on which we have the statement of Mannu *dhobi*. We have already discussed the nature and scope of Mannu *dhobi's* evidence. Considering the case for the prosecution from every standpoint, we hold that no case has been made out against Lalain beyond any reasonable doubt. We accordingly allow the appeal, set aside the convictions and sentences passed upon Shambhu Nath and Lalain and direct that they be released forthwith.